



Canadian Anti-Fraud Practice

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By:

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Foreword – Canadian Anti-Fraud Practice

This book is never ending yet is very short. It contains only approx. 250 pages now, but it will be expanded as time goes by. The reason it is not complete, and I hope you can accept my apologies for this, is that there is an entire world of anti-fraud resources out there, many of which are compiled with more expertise than this, so it's a bit difficult to offer **unique material** that a reader cannot find in other sources. Also, as the title says, this free-book is about ***Practice, rather than theory***, and I hope that it helps in giving you a sense of where you're going in an anti-fraud mandate you may have. They're merely tips to complement to Fraud Manual.

I chose to write something like this after obtaining the coveted CFE designation and I was sensitive to the International Version of the Fraud Manual which I followed but found it slightly less direct than what it could be for Canada¹. While that is absolutely no fault of the ACFE, since they have to compile material for a global base of CFE designates, I merely wanted to add some points that I could not find hardly anywhere else, indigenous to Canada. **In this author's opinion, the ACFE Fraud Manual is *the best source of material on anti-fraud and this merely seeks to compliment it to be applicable to Canada.***

Given the very broad scope of fraud and anti-fraud procedures to rectify, in Canada, this mere "250" pages doesn't come close to scratching the surface, and as said, over time it will be added to.

This will send you into numerous focussed fields with a mass of resources, from the ACFE with professional studies *en masse*, to the IIA, to the numerous Canadian regulatory sites such as the OSC, IIROC, CSA, OSIB, all having their in-depth practice guides and papers.

What you get out of the study of their material depends on what you put into it, in terms of time and study. This compendium results from study, analysis and mainly elaboration on numerous sources that you can yourself study, however, presenting them here allows me to ensure that *more pertinent issues are sensitized to*, that a source may not have allowed. *Numerous points are unique, and I've tried to concern this with points that are not considered in other manuals/texts on the subject. You're certainly encouraged to acquire and digest those, however this compendium seeks to dwell on issues not in those others.*

As a consonant fraud professional, you have it in your career to be ever-interested in other areas of practice that you may not have thought of when acquiring the CFE designation. *Also, through practice and reflection thereon, you will learn.*

These are issues that are not in any *one manual* that you may have started your professional undertaking with that reflect the *de facto* Canadian environment.

In this edition I have expanded the mechanics of using CANLII.org to do legal research on, generally, criminal fraud law (as well as others) a well as reproduced head notes of principal cases with the encouragement to learn how to do your own study of case to assist you in relationships with counsel in your career.

I will also talk, generally, about

- the general characteristics of occupational and white-collar fraud of course, but also
- major and hard to investigate areas of fraud: financial statement fraud and bribery/collusion/economic extortion,
- how to look through the "variably-finite" world of a company's financial records and how to find where things "happen",
- interview issues and techniques,
- asset-tracing for a civil cause,
- the Canadian bankruptcy and creditor collection environment and processes involved in it,
- Canadian income and sales tax enforcement, introductory, ,

¹ The Manual had a very broad amount of fraud aspects to cover so it's no wonder that it simply not get into detail of those covered. This is one of the reason's I wrote this.

- Canadian securities law enforcement, introductory, and
- how CFE's knit in with Internal Audit functions.

In this August 2018 Edition, I have excluded issues that should be covered here such as AML and software but this is again an early edition so come back occasionally to find later. Safe to say I have some writing ahead of me.

It should be noted that the 2016 Report to Nations for Canada² surveyed that a little over 60% of fraud losses are not recovered/recoverable in totality even when the perpetrator is ascertained, while just over 7% of cases result in full recovery³. These are dismal statistics as collected through survey of the ACFE's Cdn. practitioners. While no cause is opined for these results it is strongly suspected that high litigation costs compared to values to recover, latent discovery outside Limitations periods, and general fees charged by practicing CFE's could have something to do with the situation. ***Perhaps it's the fact that fraud sentences are too lenient in Canada and for a fraud-orientated employee/shareholder they believe they would rather be imprisoned than not defraud thus there is no incentive to not defraud as per criminal sentencing in Canada.*** It is hoped that the Canadian industry can respond to this, generally, each practitioner at a time, through more expertise and learned coverage of fraud techniques, w/ integration with well-honed efficient counsel, through more engagement with the business community ***with greater development in restitution enforcement, either as provided under the Criminal Code or civilly***⁴.

With respect to professional ethics I hope you can find following supportive of how you've decided to live your life as a CFE. I started living life decades ago with the phrase "*Live every day as if you're in front of a judge.*" As the CFE Manual explains to you if you have pursued this designation or are contemplating it, as a CFE works on the premise that every instance, and consequently everything you do, will be evaluated in court on a civil or criminal matter that you are studying and are involved with. If you "*keep your house and motives clean, you will be beyond reproach no matter how many variables you have to deal with and no matter how many dispute you*": any counsel will tell you that, those who specialize in the re-creation of "*the*" reality (*there's only one of them*) in judges' minds and 'the law', civil or criminal, that we can only rely on to bring that thing we call "justice", where fact "*meets*" statute law or case jurisprudence. As *there's no better place for the truth than in a court-room, - cleanses the World - and you should be ever-so unsettled by those who don't want to go near one.*

Hope you like.

Lyndon Maither, CFE, B.Comm

² Authored by the ACFE

³ It's to be noted that in the last 5 years criminal restitution orders have occurred in only 2.3-2.5% of all criminal convictions in Canada, per Statistics Canada: there is clearly a need for improvement.

⁴ Take the incentive out of financial crime by going after the money stolen.

An Appropriate Dedication and Some Words...

For Kimberley Edith, “‘A Rock’ of the Highest Quality”, who explained that “Al Capone went to jail for tax evasion” in 1987, while an FBI poster explained that “it took an accountant to put him there”. Who came out of Winnipeg, a de facto independent eshet chayil, and who ended up piercing the sky with integrity and effort in New York. And Who set this humble cog in history in motion in 1987, with the butterfly effect, embodying supreme dignity, honest curiosity, clear cleanliness, and high rational. Who gave me “nuclear fuel”, and “a compass” to use it. With the decency of her herculean tolerances... ... and who never slowed down “with [her] chrome heart shining in the sun”...

~ ~ ~ ~ ~

“Rather than love, than money, than fame, give me truth.”

Henry David Thoreau, Walden

“Right is right, even if everyone is against it, and wrong is wrong even if everyone is for it.”

William Penn

“Intent?”

The author, proving a first-class, class-idiot, (who was reading criminal cases that early)
responding to a Cda ITA Deemed Residency Question
fielded by Kim Scott Neufeld, JD, in her Tax I class

“fraud unravels all: fraus omnia corrumpit”

HIH Casualty & General Insurance Ltd & Ors v Chase Manhattan Bank & Ors, [2003] UKHL 6

“Men may be without restraints upon their liberty; they may pass to and fro at pleasure: but if their steps are tracked by spies and informers, their words noted down for crimination, their associates watched as conspirators - who shall say that they are free?”

T. May, Constitutional History of England (1863), 275.

“A Good Man is Hard to Find, but a Hard Man is Good to Find.”

Mae West... (a good phrase for those exercising responsive dominion and control over *tainted* “hard men”)

“Can you sell me an invoice for a bank loan?”

Convicted Extortionist and Tax Evader, Gerald Falovitch, a.k.a. Yank Barry,
“Pipe-line”, Used, “Blind”, (and surprisingly stupid) Bookkeeping Client
June, 1993, Montreal

“I do not like That Man: I must get to Know Him Better.”

Abraham Lincoln

“Venire, Videre, Vincere”

...a rice-paper-walking Glimmerman

“The wicked flee when no man pursueth: but the righteous are bold as a lion.”

Proverbs 28:1

~ ~ ~ ~ ~

The Association of Certified Fraud Examiners and Their Fraud Tree

The below is the ACFE “Fraud Tree”, reproduced with their permission, which puts into perspective generally all the types of fraud that can occur in a commercial environment.

The ACFE presently has 80,000+ members globally active in the fight against fraud and produces global and national annual Reports to Nations of surveyed data they’ve collected from their members on what type of fraud they are encountering in the field. These reports you can read for free as available on their web-site.

ACFE members also author numerous papers on fraud and they should be one of your first sources for detailed inquiry into a matter. This book attempts to qualify what the practicalities of Canadian anti-fraud practice are, which I have not seen in other material.

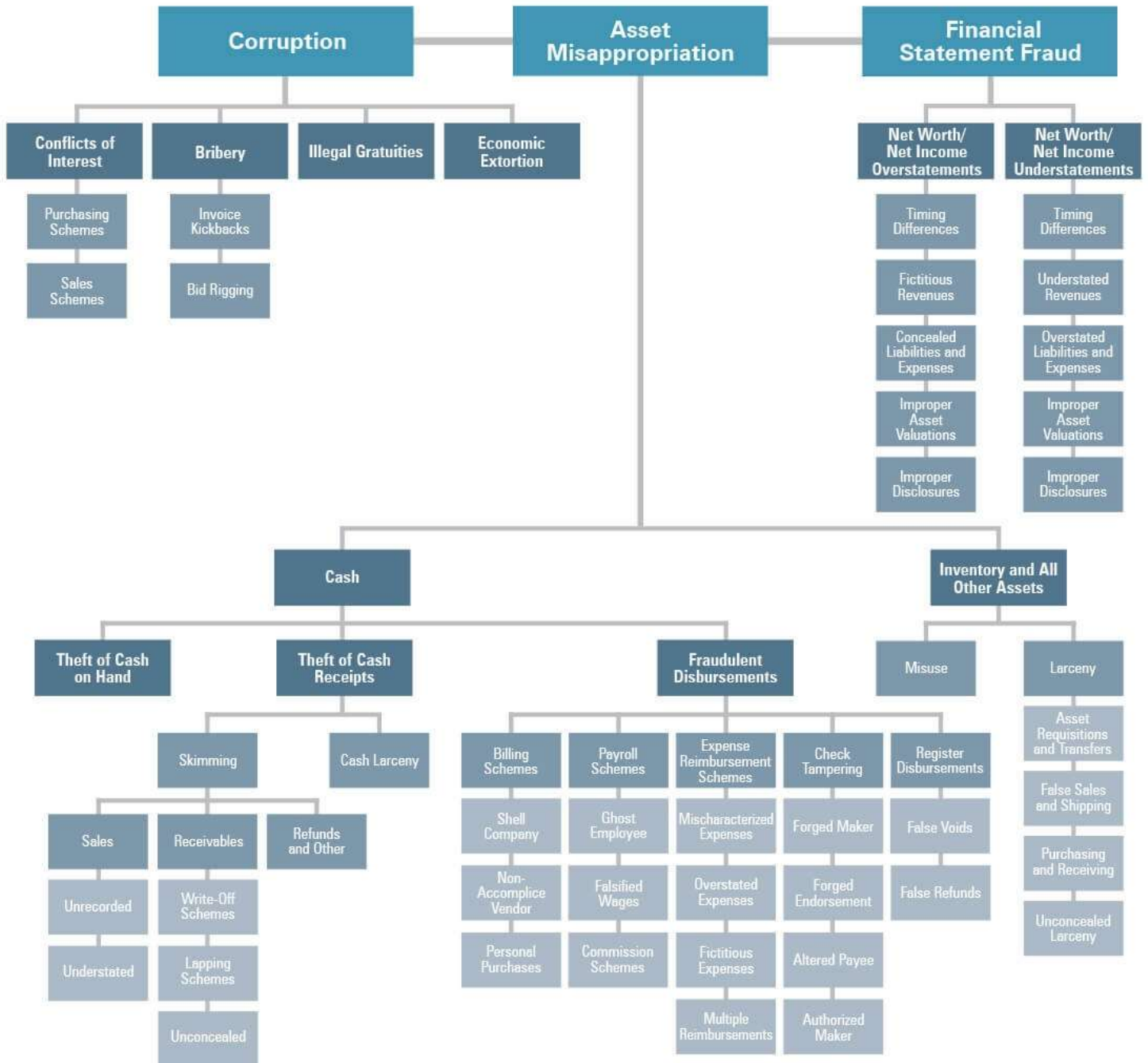
The Need to Study the ACFE Fraud Manual

Rather than list off all the types of fraud and red-flags to look for this author simply highly encourages the reader to acquire a current copy of the ACFE Fraud Manual.⁵ If you’re a recent CFE then I did not wish to go over material therein, while if you’re not a CFE you should certainly look into obtaining the designation through study. As far as this author is concerned it is the sole path to obtain the professional training you should have in the anti-fraud profession.

⁵ It’s currently available for a maximum of \$339 USD on the ACFE web-site.

THE FRAUD TREE

OCCUPATIONAL FRAUD AND ABUSE CLASSIFICATION SYSTEM



Ever-Critical *Limitations Acts* Implications on Every Action Towards Resolution Taken

Surprisingly this author thinks that a free source on Canadian anti-fraud techniques should start off with a comment about provincial Limitations Acts implications on all actions taken in the investigation and recovery from a fraudulent act. This implies that a criminal case is not being pursued, or at least in tandem, which do not suffer from civil prescription periods to commence legal actions⁶.

In every province of Canada there is a provincial Limitations Act, generally except for Quebec, which governs how quickly a claimant must proceed with an action based on whatever the foundation is against any party. For purposes of this book all fraudulent actions that do not involve criminal investigation by a police force, include:

- Breach of contract
- Breach of fiduciary duty
- Tort
- Damages to reputation
- Conversion
- Fraud
- Etc.

which are grounds for civil recoveries for damages sustained.

Basically, almost all Acts state that an action must be commenced within 2 years of the date of occurrence of the event that prompted the action. If the actions prompting for the court's adjudication are going on and have done so for some time, as in the case of on-going financial fraud, then the latest when it is discovered will be the measurement date⁷.

The Ontario Limitations Act, 2002, provides:

Basic limitation period

4. Unless this Act provides otherwise, a proceeding shall not be commenced in respect of a claim after the second anniversary of the day on which the claim was discovered.

Discovery

5. (1) A claim is discovered on the earlier of,

- (a) the day on which the person with the claim first knew,*
 - (i) that the injury, loss or damage had occurred,*
 - (ii) that the injury, loss or damage was caused by or contributed to by an act or omission,*
 - (iii) that the act or omission was that of the person against whom the claim is made, and*
 - (iv) that, having regard to the nature of the injury, loss or damage, a proceeding would be an appropriate means to seek to remedy it; and*
- (b) the day on which a reasonable person with the abilities and in the circumstances of the person with the claim first ought to have known of the matters referred to in clause (a).*

⁶ Which depends on whether the CC offence is to be proceeded via summary or indictment.

⁷ This must be qualified with the recognition that it depends on what the cause of the claim was – some actions can prompt for a much later discovered date than others, depending on their nature and what was done in the interlude. It is not expected that fraud discovered as perpetrated by a previous employee who is now **more than 2 years** unemployed by the client would be actionable, since the 2 year limit has passed. However, if that employee remained employed that non-break in the employment contract would still be actionable since it has not become stale-dated. (Makes it important to have adequate review of past employee's/rotating employee's work by fresh eyes as soon as practical.)

Presumption

(2) A person with a claim shall be presumed to have known of the matters referred to in clause (1) (a) on the day the act or omission on which the claim is based took place, unless the contrary is proved.

“Discoverability” and It’s Impediment to Recovery Actions

There has been some litigation involving the “discoverability” of the premise for the claim which you the reader should definitely look into; however, it is key to understand that all instances of a fraud investigation are constrained by this rule. **Basically, it states that if you had an ability to discover the fraud perpetrated, and you did not through your normal business steps, the limitation period starts at the time that you should have discovered it.**

Most provincial Acts also ultimately limit actions to 10-15 years after the occurrence of the actionable event.

In *De Shazo v. Nations Energy Company Ltd*⁸ the Appeal Court held with respect to the issue of “discoverability” that:

[24] As noted previously, there are several pieces of correspondence, all written before July 2002, in which De Shazo threatened to bring proceedings against the defendants for essentially the same claims set out in the statement of claim. This is where the main dispute in the evidence arises, as the parties differ as to the inferences to be drawn from this correspondence. The defendants argue that all the evidence makes it clear that De Shazo was aware of his claim well before July 2002. **De Shazo claims in his affidavit that the correspondence were attempts on his part to gain more information to support his suspicions.** However, it is possible to dispose of this appeal without reference to the disputed correspondence, on the basis of the undisputed facts alone.

[25] The relevant provision of the Limitations Act is section 3(1), which provides:

3(1) Subject to section 11 [not applicable here], if a claimant does not seek a remedial order within

(a) 2 years after the date on which the claimant first knew, or in the circumstances ought to have known,

(i) that the injury for which the claimant seeks a remedial order had occurred,

(ii) that the injury was attributable to conduct of the defendant, and

(iii) that the injury, assuming liability on the part of the defendant, warrants bringing a proceeding,

... the defendant, on pleading this Act as a defence, is entitled to immunity from liability in respect of the claim.

[26] This provision codifies the common law discoverability rule and applies it to all actions for remedial orders. The common law rule was described by the Supreme Court of Canada in **Central Trust Co. v. Rafuse**, 1986 CanLII 29 (SCC), [1986] 2 S.C.R. 147 at 224:

“[A] cause of action arises for purposes of a limitation period when the material facts on which it [the cause of action] is based have been discovered or ought to have been discovered by the plaintiff by the exercise of reasonable diligence.”

[27] The Supreme Court revisited the common law discoverability rule in **Peixeiro v. Haberman**, 1997 CanLII 325 (SCC), [1997] 3 S.C.R. 549, confirming that since the decisions in **Kamloops (City of) v. Nielsen**, 1984 CanLII 21 (SCC), [1984] 2 S.C.R. 2 and **Central**

⁸ 2005 ABCA 241 (CanLII)

Trust, discoverability is a “general rule applied to avoid the injustice of precluding an action before the person is able to raise it.”: **Peixeiro** at 563. The court emphasized the concept of **reasonable** discoverability:

“In balancing the defendant’s legitimate interest in respecting limitations periods and the interest of the plaintiffs, the fundamental unfairness of requiring a plaintiff to bring a cause of action before he could reasonably have discovered that he had a cause of action is a compelling consideration”: **Peixeiro** at 565.

[28] The appellants submit that the same principles pertain whether the common law discoverability rule or the provisions of the new Limitations Act apply, relying on **Mahan v. Hindes**, 2001 ABQB 831 (CanLII), 308 A.R. 1 at para. 25. The common law statement of the discoverability principle will inform the application of section 3(1)(a), but courts must also be mindful of the three criteria listed in that section: **J.N. v. G.J.K.**, 2004 ABCA 394 (CanLII), 248 D.L.R. (4th) 245; **Owners: Condominium Plan 9421549 v. Main Street Developments Ltd.**, 2004 ABQB 962 (CanLII). **The statute specifies the type of knowledge that must have been available to the claimant in order to trigger the running of the limitation period. The claimant must know or have been reasonably able to discover that: (i) the injury occurred; (ii) the injury was attributable to the conduct of the defendant; and (iii) the injury warrants bringing a proceeding.**

[29] **De Shazo asserts that his “knowledge” of the material facts amounted only to “suspicion” or “speculation” until July 2002, and that his speculation cannot start the limitation clock running. He relies on this court’s decision in Photinopoulos v. Photinopoulos (1988), 1988 ABCA 352 (CanLII), 54 D.L.R. (4th) 372 (Alta. C.A.). In that case, it was held that suspicion is not sufficient to trigger the running of a limitation period; the plaintiff can be said to have “known” of the claim only when he has some support for his suspicion.**

[30] But here De Shazo had more than suspicion of his claim. He had support for his suspicions as early as February 2000. At that point he had been told of Thomas’s concerns and the basis for them, and he had received documentary evidence in the form of the Thomas Report. He knew that Thomas claimed to have additional information implicating O’Mara in the suspected scheme. At the same time, he was aware that O’Mara was connected to, and probably owned or controlled, Aequitas when the loan agreement with Nations was proposed, a proposal De Shazo reviewed and commented on. He knew that Wilson was on the Nations’s board at the relevant times and that he would have been a party to any decisions not to investigate O’Mara and to allow Aequitas to continue marketing KBM’s oil.

[31] **The principle of discoverability does not require perfect knowledge.** As this court noted in **Hill v. Alberta (South Alberta Land Registration District)** (1993), 1993 ABCA 75 (CanLII), 100 D.L.R. (4th) 331 at 336 (Alta. C.A.) (leave to appeal to S.C.C. denied):

Even if the discoverability rule of limitations applies to this case (which I need not decide), it does not call for perfect certainty. It does not require discovery at all: it says something else will do instead. It suffices that “the material facts on which [the cause of action] is based ... ought to have been discovered by the plaintiff by the exercise of reasonable diligence...”: Central Trust v. Rafuse... . If the plaintiff is told a fact by someone who is likely to know, surely that makes the fact known or discoverable, even if someone else disputes the fact. Very few people who sue have perfect certainty.

[32] The same point is made in **Owners: Condominium Plan 9421549 v. Main Street Developments Ltd.**, supra, where Clackson J. summarily dismissed the plaintiff’s claim on the basis of undisputed facts. He said at paras. 55-56:

I am satisfied that these facts establish, beyond a reasonable doubt, that the Plaintiff knew that the buildings suffered from moisture problems and knew of

the potential sequella if the problems were not rectified. This knowledge existed well before May 25, 1999. **While I accept that it is possible the Plaintiff did not have perfect knowledge of the injury, that level of knowledge is not required: Peixeiro v. Haberman**, 1997 CanLII 325 (SCC), [1997] 3 S.C.R. 549; **Hill v. Alberta (South Alberta Land Registration District)**, (1993) 1993 ABCA 75 (CanLII), 135 A.R. 266 (C.A.), leave to appeal to S.C.C. refused [1994] 1 S.C.R. viii; **Ward v. Taubner**, 2004 ABQB 565 (CanLII), 9 E.T.R. (3d) 275 (QB).

What was obvious was that there was a problem and that there was damage or at least the real potential for damage if the problem was not addressed. In my view, that is enough. (Emphasis added)

[33] De Shazo says he was lacking proof that O'Mara owned or controlled NovoMundo. He says that in July 2002 he received, for the first time, "credible factual information from the defendants that O'Mara owned NovoMundo" in the form of the statement from Wilson that NovoMundo was, as far as Wilson and others knew, owned by O'Mara. This, De Shazo says, was the missing piece of the puzzle that he needed to put his claim together. However, that statement did not add significantly to the picture De Shazo already had in February 2000.

[34] In our view, the information in De Shazo's hands in February 2000 was sufficient for him to bring a claim against the appellants for an oppression remedy and in fraud, and to resist a summary judgment application to dismiss such a claim. Further, in June 2001 De Shazo went so far as to obtain a legal opinion about the availability of an oppression remedy from Alberta counsel, and then changed that legal opinion and sent the doctored version to O'Mara in March 2002 to bolster his threat of litigation. As counsel for the appellants noted in argument, if this is not an appropriate case for summary judgment it is difficult to imagine what is.

[35] Further, De Shazo would have been aware that he was signing away his right to sue the appellants in September 2001, when he released Nations and its board members from claims arising from actions taken by them as members of the Nations and Ecolo boards.

[36] As this court noted in **Hill v. Alberta**, supra, very few people who sue have perfect certainty. **The main issues of De Shazo's claims against Nations and Wilson, as set out in his statement of claim, are that they participated in and countenanced the fraudulent scheme, that they failed to investigate the alleged non-arm's length oil sales, that they failed to properly account to the shareholders of Nations and Ecolo with respect to the financial condition of Nations, and that they failed to take reasonable steps to determine if the Aequitas loan was commercially reasonable. These actions of the appellants, De Shazo claims, contributed to the devaluation of his Ecolo shares, thus causing injury when he sold those shares. De Shazo had, in February 2000, nearly all the information about his alleged injury and the participation of the appellants in causing that injury that he had when he filed his statement of claim. He had sufficient knowledge of the material facts to engage the discoverability principle codified in section 3(1)(a) of the Limitations Act.**

[37] It is plain and obvious, on the basis of the undisputed facts before the court, that De Shazo's claim against the appellants is statute barred. The appeal from the chambers judge's decision is allowed, as is the appellants' application for summary judgment.

Your chosen counsel would be better poised to advise on the aspects of this legal issue than this compendium.

Time is very Much of the Essence so Act Promptly

In other words, from the minute an instance of fraud perpetrated by an employee is discovered, the counsel with CFE investigated support has 2 years to file proceedings so time is very much an issue in the proper resolution of a fraudulent act. The victim's counsel will be able to advise on issues of Limitations. The CFE/forensic accountant must be able to establish all the presentable acts that warrant a filing of a proceeding within 2 years.

Don't "Loiter" in an Investigation to Create a Defence

Equally, time is of the issue since if steps are not diligently pursued with all proper resources available to establish a claim, letting it linger through further adjournment on request to the initial filing may give defence argument that the claim wasn't taken seriously enough to litigate through investigation, for example.

Don't "Loiter" in an Investigation to Lose Memories

Memory fades with time: everyone knows that, so if a situation warrants an investigation it is important to start one and get to the interviews as soon as possible. By delaying interviews, the examiner can open the door to defence's questions of clarity of witness memory which can defeat an action. It can be said that it's important to try and have a witness recreate as much of their memory as possible, perhaps with walking through the events, after they have been ascertained to be needed at a trial.

Criminal Investigation: "Keeps the Door Open for A Latent Grasp-back", through CC Restitution Provisions

Pursuant to the below coverage of Canada's Victim Bill of Rights and relevant provisions in the Criminal Code it's to be noted that fraud and other similar offences are **investigated and can proceed via indictment. Indictable offences do not have a Limitations Act limitation on them: they may be pursued years or decades later after occurrence**⁹.

In this regard, if otherwise Limitations Act implications prevent the victim corporation from obtaining civil redress for the fraud it has suffered, it's entirely possible to have it criminally pursued via proper complaint to law enforcement, *and if a conviction is obtained*, petition the court for criminal restitution giving exactly what could have been done save for Limitations Act limitation.¹⁰

⁹ R. v. Dudley, 2009 SCC 58, [2009] 3 S.C.R. 570

¹⁰ This was exactly the case in Atlas Copco Canada Inc. v. David Hillier 2018 ONSC 1558 when an employer brought conspiracy and other civil fraud allegations against their former employee, while also obtaining a criminal conviction restitution on a smaller amount. While certain allegations were not proven, the Justice did find that on certain footings the findings did support additional civil restitution though not to include the criminal restitution already decreed. The case readily shows that both avenues can be pursued and that a criminal finding will not limit a larger civil finding.

A Warning of Opinion-Shoppers of CFE's/Forensic Accountants

Like in practically any profession it's a regular occurrence that CFE's/Forensic Accountants are approached through initial preliminary problems by potential clients.

Unfortunately, in some instances the potential client is merely opinion-shopping, looking for a professional opinion that can be used against the other predecessors' or in some legal fashion and extreme care should be taken to ensure that, as a professional, the CFE not grant any **actionable opinion**¹¹ until they have actually been contracted with the potential to commit themselves to the instance.

In many instances the potential will refuse to divulge all the aspects of their instance, and this happens frequently enough for this author to advise to, again, ensure that your communications with a potential do not draw you into a legal exposure that the reader did not conceive of, based on the preliminary facts that the "client" has stated. Thus, there is a paramount need to aspect the both the broadest and detailed based questions, and have on record all the pertinent answers before starting an engagement of any nature.

In the era of smart-phones which can readily serve as audio-records it's crucial to conduct yourself with regard to professional ethics and conduct at all times.

The ACFE Code of Ethics also requires that the investigator be qualified to actually take on the engagement. This can be done with ancillary assistance such as learned counsel or practicing CFE's that have been approached for support. It is prudent to have these lines of support qualify their area of expertise.

And, the reader should never feel compelled to take on a task that they wouldn't feel comfortable to resolve on a full disclosure of the facts, before the engagement starts. Never be uncomfortable in simply saying "No, I do not want to be associated here." to a potential if they start supplying seemingly vague answers to simple questions that are relevant, or information becomes apparent that the case is one you wouldn't want to be associated with.

In this regard, for sole or partnership practicing CFE's/Forensic Accountants, measuring the sincerity of a potential client should prompt you to ask for a written agreement on exactly what your role is right from the start, which includes provision of a retainer with agreement on fees to measure the sincerity of the potential client.

Better safe than sorry.

¹¹ Capable of being subpoenaed to testify on, regardless of agreement

Canadian Law

The Need to Know Both since Both Have Impact

It's very important to know what recourses are available to a defrauded party since it determines what aspects of recoupment/justice can be engaged. This definitely includes knowing the aspects of the Canadian Criminal Code, which if the defrauded has suffered as a victim, will prompt for a police complaint, and civil law that prompts for litigation based on investigation for recoupment of the loss sustained.

While there is criminal restitution law in Canada that warrants return of value to a victim if successfully criminally convicted, that depends on whether a conviction can be successfully obtained. Equally, the wheels of justice may be slow to proceed here in comparison with civil law actions that can be initiated in tandem with criminal complaints. It is always wise to initiate both at the same time in this author's opinion since while the police may not have the resources to most diligently pursue an investigation, a victim-controlled civil process can be much faster. Also, criminal restitution law may not reward recoupment of the loss in its entirety so swift action civilly has considerable value in the recoupment, before there is purposeful dissipation of value in the fraudster's hands.

Equally, you should always consider placing compliant with a police force since many fidelity insurance policies require formalizing complaints as a trigger for reimbursement, regardless of what a criminal investigation causes. While criminal restitution may not occur to the magnitude of loss, civil litigation may, but the insurance policy (fidelity insurance) may also require subordination of rights with hand-off to their anti-fraud investigator.

Criminal Law Applicable

The principle criminal statute applicable to fraudulent behaviour in Canada is the Canadian Criminal code which contains approx. 850 sections which covers a significant portion of the punishable criminal acts in Canada. The "CC" applies across the country with enforcement jurisdiction retained by provincial crown counsel operating through the Public Prosecution Service of Canada (PPSC) where courts of first instance are generally the lower provincial courts in each province.¹²

The CC contains numerous procedural issues, as well as the substantive violations, that determine how trials are to be conducted and in 1982 the Cdn Charter of Rights and Freedoms became governing law of Canada against all "public" statute law must be measured which considerably altered the criminal justice system. This **does not include** application to the employment work-place for private companies carrying on fraud investigations for a civil cause since the investigator in this scenario is **not a public actor (law enforcement)**¹³¹⁴.

¹² CANLII.org, the Canadian Legal Information Institute's web-site has a great breadth of data on this area, with the relevant Acts, with the cases that have been dealt with for your, thousands of hours of, study.

¹³ The application of the Charter is to public law officials and government actors:

Application of Charter

32. (1) This Charter applies

- (a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and*
- (b) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.*

It has no application to private scenarios thus is not an impediment to interrogation by CFE's.

¹⁴ Per employment contract law the employee must answer questions on everything related to their employment, and if they do not then there may be developing grounds for their discharge.

In Canada criminal courts may also order restitution and disgorgement¹⁵ of ill-gotten gains.

The Overriding Charter of Rights and Freedoms

Starting with the Charter, as a thumb-nail which can only be done since one could read whole books on its application, there are provisions which ensure fair trials. They are:

Life, liberty and security of person

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

Search or seizure

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

Detention or imprisonment

9. Everyone has the right not to be arbitrarily detained or imprisoned.

Arrest or detention

10. Everyone has the right on arrest or detention

- (a) to be informed promptly of the reasons therefor;
- (b) to retain and instruct counsel without delay and to be informed of that right; and
- (c) to have the validity of the detention determined by way of habeas corpus and to be released if the detention is not lawful.

Proceedings in criminal and penal matters

11. Any person charged with an offence has the right

- (a) to be informed without unreasonable delay of the specific offence;
- (b) to be tried within a reasonable time;
- (c) not to be compelled to be a witness in proceedings against that person in respect of the offence;
- (d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal;
- (e) not to be denied reasonable bail without just cause;
- (f) except in the case of an offence under military law tried before a military tribunal, to the benefit of trial by jury where the maximum punishment for the offence is imprisonment for five years or a more severe punishment;
- (g) not to be found guilty on account of any act or omission unless, at the time of the act or omission, it constituted an offence under Canadian or international law or was criminal according to the general principles of law recognized by the community of nations;
- (h) if finally acquitted of the offence, not to be tried for it again and, if finally found guilty and punished for the offence, not to be tried or punished for it again; and
- (i) if found guilty of the offence and if the punishment for the offence has been varied between the time of commission and the time of sentencing, to the benefit of the lesser punishment.

Treatment or punishment

12. Everyone has the right not to be subjected to any cruel and unusual treatment or punishment.

¹⁵ Though some Restitution law doesn't necessarily mean the victim will get back all that they lost since resolved years down the road the defrauder may have systematically dissipated their wealth.

Self-crimination

13. A witness who testifies in any proceedings has the right not to have any incriminating evidence so given used to incriminate that witness in any other proceedings, except in a prosecution for perjury or for the giving of contradictory evidence.

Interpreter

14. A party or witness in any proceedings who does not understand or speak the language in which the proceedings are conducted or who is deaf has the right to the assistance of an interpreter.

...

Enforcement of guaranteed rights and freedoms

24. (1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

Exclusion of evidence bringing administration of justice into disrepute

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

Without elaborating more on it than that, The Charter ensures fair collection of evidence, fair arrests, etc. that can undermine all criminal actions and its case law, **realized through CANLII.org cannot be studied enough** since this is of paramount importance since the Charter applies to all applications of “public” enforcement law in Canada.

Principal Criminal Code Provisions – Substantive

There are quite a few principal provisions under the CC that can apply to fraudulent behaviour, depending of course on what has been perpetrated.

They include:

Frauds on the Government, s. 121

121 (1) Every one commits an offence who

(a) directly or indirectly

(i) gives, offers or agrees to give or offer to an official or to any member of his family, or to any one for the benefit of an official, or

(ii) being an official, demands, accepts or offers or agrees to accept from any person for himself or another person,

a loan, reward, advantage or benefit of any kind as consideration for cooperation, assistance, exercise of influence or an act or omission in connection with

(iii) the transaction of business with or any matter of business relating to the government, or

(iv) a claim against Her Majesty or any benefit that Her Majesty is authorized or is entitled to bestow,

whether or not, in fact, the official is able to cooperate, render assistance, exercise influence or do or omit to do what is proposed, as the case may be;

- (b) having dealings of any kind with the government, directly or indirectly pays a commission or reward to or confers an advantage or benefit of any kind on an employee or official of the government with which the dealings take place, or to any member of the employee's or official's family, or to anyone for the benefit of the employee or official, with respect to those dealings, unless the person has the consent in writing of the head of the branch of government with which the dealings take place;*
- (c) being an official or employee of the government, directly or indirectly demands, accepts or offers or agrees to accept from a person who has dealings with the government a commission, reward, advantage or benefit of any kind for themselves or another person, unless they have the consent in writing of the head of the branch of government that employs them or of which they are an official;*
- (d) having or pretending to have influence with the government or with a minister of the government or an official, directly or indirectly demands, accepts or offers or agrees to accept, for themselves or another person, a reward, advantage or benefit of any kind as consideration for cooperation, assistance, exercise of influence or an act or omission in connection with*
 - (i) anything mentioned in subparagraph (a)(iii) or (iv), or*
 - (ii) the appointment of any person, including themselves, to an office;*
- (e) directly or indirectly gives or offers, or agrees to give or offer, to a minister of the government or an official, or to anyone for the benefit of a minister or an official, a reward, advantage or benefit of any kind as consideration for cooperation, assistance, exercise of influence, or an act or omission, by that minister or official, in connection with*
 - (i) anything mentioned in subparagraph (a)(iii) or (iv), or*
 - (ii) the appointment of any person, including themselves, to an office; or*
- (f) having made a tender to obtain a contract with the government,*
 - (i) directly or indirectly gives or offers, or agrees to give or offer, to another person who has made a tender, to a member of that person's family or to another person for the benefit of that person, a reward, advantage or benefit of any kind as consideration for the withdrawal of the tender of that person, or*
 - (ii) directly or indirectly demands, accepts or offers or agrees to accept from another person who has made a tender a reward, advantage or benefit of any kind for themselves or another person as consideration for the withdrawal of their own tender.*

Contractor subscribing to election fund

- (2) Every one commits an offence who, in order to obtain or retain a contract with the government, or as a term of any such contract, whether express or implied, directly or indirectly subscribes or gives, or agrees to subscribe or give, to any person any valuable consideration*
 - (a) for the purpose of promoting the election of a candidate or a class or party of candidates to Parliament or the legislature of a province; or*
 - (b) with intent to influence or affect in any way the result of an election conducted for the purpose of electing persons to serve in Parliament or the legislature of a province.*

Punishment

- (3) Every one who commits an offence under this section is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years.*

Breach of Trust by Public Officer, s. 122

122. Every official who, in connection with the duties of his office, commits fraud or a breach of trust is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years, whether or not the fraud or breach of trust would be an offence if it were committed in relation to a private person.

Destroying documents of title, s. 340

340 Every one who, for a fraudulent purpose, destroys, cancels, conceals or obliterates

- *(a) a document of title to goods or lands,*
- *(b) a valuable security or testamentary instrument, or*
- *(c) a judicial or official document,*

is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years.

Fraudulent concealment, s. 341

341 Every one who, for a fraudulent purpose, takes, obtains, removes or conceals anything is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years.

Fraud, s. 380

380 (1) Every one who, by deceit, falsehood or other fraudulent means, whether or not it is a false pretence within the meaning of this Act, defrauds the public or any person, whether ascertained or not, of any property, money or valuable security or any service,

(a) is guilty of an indictable offence and liable to a term of imprisonment not exceeding fourteen years, where the subject-matter of the offence is a testamentary instrument or the value of the subject-matter of the offence exceeds five thousand dollars; or

(b) is guilty

(i) of an indictable offence and is liable to imprisonment for a term not exceeding two years, or

(ii) of an offence punishable on summary conviction,

where the value of the subject-matter of the offence does not exceed five thousand dollars.

Minimum punishment

(1.1) When a person is prosecuted on indictment and convicted of one or more offences referred to in subsection (1), the court that imposes the sentence shall impose a minimum punishment of imprisonment for a term of two years if the total value of the subject-matter of the offences exceeds one million dollars.

Affecting public market

(2) Every one who, by deceit, falsehood or other fraudulent means, whether or not it is a false pretence within the meaning of this Act, with intent to defraud, affects the public market price of stocks, shares, merchandise or anything that is offered for sale to the public is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years.

Sentencing — aggravating circumstances

380.1 (1) Without limiting the generality of section 718.2, where a court imposes a sentence for an offence referred to in section 380, 382, 382.1 or 400, it shall consider the following as aggravating circumstances:

- (a) the magnitude, complexity, duration or degree of planning of the fraud committed was significant;*

- (b) the offence adversely affected, or had the potential to adversely affect, the stability of the Canadian economy or financial system or any financial market in Canada or investor confidence in such a financial market;
- (c) the offence involved a large number of victims;
- (c.1) the offence had a significant impact on the victims given their personal circumstances including their age, health and financial situation;
- (d) in committing the offence, the offender took advantage of the high regard in which the offender was held in the community;
- (e) the offender did not comply with a licensing requirement, or professional standard, that is normally applicable to the activity or conduct that forms the subject-matter of the offence; and
- (f) the offender concealed or destroyed records related to the fraud or to the disbursement of the proceeds of the fraud.

Aggravating circumstance — value of the fraud

(1.1) Without limiting the generality of section 718.2, when a court imposes a sentence for an offence referred to in section 382, 382.1 or 400, it shall also consider as an aggravating circumstance the fact that the value of the fraud committed exceeded one million dollars.

Non-mitigating factors

(2) When a court imposes a sentence for an offence referred to in section 380, 382, 382.1 or 400, it shall not consider as mitigating circumstances the offender's employment, employment skills or status or reputation in the community if those circumstances were relevant to, contributed to, or were used in the commission of the offence.

Record of proceedings

(3) The court shall cause to be stated in the record the aggravating and mitigating circumstances it took into account when determining the sentence.

Fraudulent manipulation of stock exchange transactions, s. 382

382 Every one who, through the facility of a stock exchange, curb market or other market, with intent to create a false or misleading appearance of active public trading in a security or with intent to create a false or misleading appearance with respect to the market price of a security,

- (a) effects a transaction in the security that involves no change in the beneficial ownership thereof,
- (b) enters an order for the purchase of the security, knowing that an order of substantially the same size at substantially the same time and at substantially the same price for the sale of the security has been or will be entered by or for the same or different persons, or
- (c) enters an order for the sale of the security, knowing that an order of substantially the same size at substantially the same time and at substantially the same price for the purchase of the security has been or will be entered by or for the same or different persons,

is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years.

Prohibited Insider trading, s. 382.1

382.1 (1) A person is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years who, directly or indirectly, buys or sells a security, knowingly using inside information that they

- (a) possess by virtue of being a shareholder of the issuer of that security;*
- (b) possess by virtue of, or obtained in the course of, their business or professional relationship with that issuer;*
- (c) possess by virtue of, or obtained in the course of, a proposed takeover or reorganization of, or amalgamation, merger or similar business combination with, that issuer;*
- (d) possess by virtue of, or obtained in the course of, their employment, office, duties or occupation with that issuer or with a person referred to in paragraphs (a) to (c); or*
- (e) obtained from a person who possesses or obtained the information in a manner referred to in paragraphs (a) to (d).*

Tipping

(2) Except when necessary in the course of business, a person who knowingly conveys inside information that they possess or obtained in a manner referred to in subsection (1) to another person, knowing that there is a risk that the person will use the information to buy or sell, directly or indirectly, a security to which the information relates, or that they may convey the information to another person who may buy or sell such a security, is guilty of

- (a) an indictable offence and liable to imprisonment for a term not exceeding five years;*
- or*
- (b) an offence punishable on summary conviction.*

Saving

(3) For greater certainty, an act is not an offence under this section if it is authorized or required, or is not prohibited, by any federal or provincial Act or regulation applicable to it.

Definition of inside information

(4) In this section, inside information means information relating to or affecting the issuer of a security or a security that they have issued, or are about to issue, that

- (a) has not been generally disclosed; and*
- (b) could reasonably be expected to significantly affect the market price or value of a security of the issuer.*

Gaming in stocks or merchandise, s. 383

383 (1) Every one is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years who, with intent to make gain or profit by the rise or fall in price of the stock of an incorporated or unincorporated company or undertaking, whether in or outside Canada, or of any goods, wares or merchandise,

- (a) makes or signs, or authorizes to be made or signed, any contract or agreement, oral or written, purporting to be for the purchase or sale of shares of stock or goods, wares or merchandise, without the bona fide intention of acquiring the shares, goods, wares or merchandise or of selling them, as the case may be, or*
- (b) makes or signs, or authorizes to be made or signed, any contract or agreement, oral or written, purporting to be for the sale or purchase of shares of stock or goods, wares*

or merchandise in respect of which no delivery of the thing sold or purchased is made or received, and without the bona fide intention of making or receiving delivery thereof, as the case may be,

but this section does not apply where a broker, on behalf of a purchaser, receives delivery, notwithstanding that the broker retains or pledges what is delivered as security for the advance of the purchase money or any part thereof.

Onus

(2) Where, in proceedings under this section, it is established that the accused made or signed a contract or an agreement for the sale or purchase of shares of stock or goods, wares or merchandise, or acted, aided or abetted in the making or signing thereof, the burden of proof of a bona fide intention to acquire or to sell the shares, goods, wares or merchandise or to deliver or to receive delivery thereof, as the case may be, lies on the accused.

Broker reducing stock by selling for his own account, s. 384

384 Every one is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years who, being an individual, or a member or an employee of a partnership, or a director, an officer or an employee of a corporation, where he or the partnership or corporation is employed as a broker by any customer to buy and carry on margin any shares of an incorporated or unincorporated company or undertaking, whether in or out of Canada, thereafter sells or causes to be sold shares of the company or undertaking for any account in which

(a) he or his firm or a partner thereof, or

(b) the corporation or a director thereof,

has a direct or indirect interest, if the effect of the sale is, otherwise than unintentionally, to reduce the amount of those shares in the hands of the broker or under his control in the ordinary course of business below the amount of those shares that the broker should be carrying for all customers.

Fraudulent concealment of title documents, s. 385

385 (1) Every one who, being a vendor or mortgagor of property or of a chose in action or being a solicitor for or agent of a vendor or mortgagor of property or a chose in action, is served with a written demand for an abstract of title by or on behalf of the purchaser or mortgagee before the completion of the purchase or mortgage, and who

(a) with intent to defraud and for the purpose of inducing the purchaser or mortgagee to accept the title offered or produced to him, conceals from him any settlement, deed, will or other instrument material to the title, or any encumbrance on the title, or

(b) falsifies any pedigree on which the title depends,

is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years.

Consent required

(2) No proceedings shall be instituted under this section without the consent of the Attorney General.

Fraudulent registration of title, s. 386

386 Every one who, as principal or agent, in a proceeding to register title to real property, or in a transaction relating to real property that is or is proposed to be registered, knowingly and with intent to deceive,

(a) makes a material false statement or representation,

(b) suppresses or conceals from a judge or registrar, or any person employed by or assisting the registrar, any material document, fact, matter or information, or

*(c) is privy to anything mentioned in paragraph (a) or (b),
is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years.*

Misleading receipt, s. 388

388 Every one who wilfully

- (a) with intent to mislead, injure or defraud any person, whether or not that person is known to him, gives to a person anything in writing that purports to be a receipt for or an acknowledgment of property that has been delivered to or received by him, before the property referred to in the purported receipt or acknowledgment has been delivered to or received by him, or*
- (b) accepts, transmits or uses a purported receipt or acknowledgment to which paragraph (a) applies,*

is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years.

Fraudulent receipts under the Bank Act, s. 390

390 Every one is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years who

(a) wilfully makes a false statement in any receipt, certificate or acknowledgment for anything that may be used for a purpose mentioned in the Bank Act; or

(b) wilfully,

(i) after giving to another person,

(ii) after a person employed by him has, to his knowledge, given to another person, or

(iii) after obtaining and endorsing or assigning to another person,

any receipt, certificate or acknowledgment for anything that may be used for a purpose mentioned in the Bank Act, without the consent in writing of the holder or endorsee or the production and delivery of the receipt, certificate or acknowledgment, alienates or parts with, or does not deliver to the holder or owner the property mentioned in the receipt, certificate or acknowledgment.

Disposal of property to defraud creditors, s. 392

392 Every one who,

(a) with intent to defraud his creditors,

(i) makes or causes to be made any gift, conveyance, assignment, sale, transfer or delivery of his property, or

(ii) removes, conceals or disposes of any of his property, or

(b) with intent that any one should defraud his creditors, receives any property by means of or in relation to which an offence has been committed under paragraph (a),

is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years.

Theft, s. 322

322 (1) Every one commits theft who fraudulently and without colour of right takes, or fraudulently and without colour of right converts to his use or to the use of another person, anything, whether animate or inanimate, with intent

(a) to deprive, temporarily or absolutely, the owner of it, or a person who has a special property or interest in it, of the thing or of his property or interest in it;

(b) to pledge it or deposit it as security;

(c) to part with it under a condition with respect to its return that the person who parts with it may be unable to perform; or

(d) to deal with it in such a manner that it cannot be restored in the condition in which it was at the time it was taken or converted.

Time when theft completed

(2) A person commits theft when, with intent to steal anything, he moves it or causes it to move or to be moved, or begins to cause it to become movable.

Secrecy

(3) A taking or conversion of anything may be fraudulent notwithstanding that it is effected without secrecy or attempt at concealment.

Purpose of taking

(4) For the purposes of this Act, the question whether anything that is converted is taken for the purpose of conversion, or whether it is, at the time it is converted, in the lawful possession of the person who converts it is not material.

Punishment for theft, sec. 334

334 Except where otherwise provided by law, every one who commits theft

(a) is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years, where the property stolen is a testamentary instrument or the value of what is stolen exceeds five thousand dollars; or

(b) is guilty

(i) of an indictable offence and is liable to imprisonment for a term not exceeding two years, or

(ii) of an offence punishable on summary conviction,

where the value of what is stolen does not exceed five thousand dollars.

Theft by person holding power of attorney, s. 331

331 Every one commits theft who, being entrusted, whether solely or jointly with another person, with a power of attorney for the sale, mortgage, pledge or other disposition of real or personal property, fraudulently sells, mortgages, pledges or otherwise disposes of the property or any part of it, or fraudulently converts the proceeds of a sale, mortgage, pledge or other disposition of the property, or any part of the proceeds, to a purpose other than that for which he was entrusted by the power of attorney.

Misappropriation of money under direction, s. 332

332 (1) Every one commits theft who, having received, either solely or jointly with another person, money or valuable security or a power of attorney for the sale of real or personal property, with a direction that the money or a part of it, or the proceeds or a part of the proceeds of the security or the property shall be applied to a purpose or paid to a person specified in the direction, fraudulently and contrary to the direction applies to any other purpose or pays to any other person the money or proceeds or any part of it.

Effect of entry in account

(2) This section does not apply where a person who receives anything mentioned in subsection (1) and the person from whom he receives it deal with each other on such terms that all money paid to the former would, in the absence of any such direction, be properly treated as an item in a debtor and creditor account between them, unless the direction is in writing.

False statement or false pretenses, s. 361

361 (1) A false pretence is a representation of a matter of fact either present or past, made by words or otherwise, that is known by the person who makes it to be false and that is made with a fraudulent intent to induce the person to whom it is made to act on it.

Exaggeration

(2) Exaggerated commendation or depreciation of the quality of anything is not a false pretence unless it is carried to such an extent that it amounts to a fraudulent misrepresentation of fact.

Question of fact

(3) For the purposes of subsection (2), it is a question of fact whether commendation or depreciation amounts to a fraudulent misrepresentation of fact.

False pretence or false statement, s.362

362 (1) Every one commits an offence who

(a) by a false pretence, whether directly or through the medium of a contract obtained by a false pretence, obtains anything in respect of which the offence of theft may be committed or causes it to be delivered to another person;

(b) obtains credit by a false pretence or by fraud;

(c) knowingly makes or causes to be made, directly or indirectly, a false statement in writing with intent that it should be relied on, with respect to the financial condition or means or ability to pay of himself or herself or any person or organization that he or she is interested in or that he or she acts for, for the purpose of procuring, in any form whatever, whether for his or her benefit or the benefit of that person or organization,

(i) the delivery of personal property,

(ii) the payment of money,

(iii) the making of a loan,

(iv) the grant or extension of credit,

(v) the discount of an account receivable, or

(vi) the making, accepting, discounting or endorsing of a bill of exchange, cheque, draft or promissory note; or

(d) knowing that a false statement in writing has been made with respect to the financial condition or means or ability to pay of himself or herself or another person or organization that he or she is interested in or that he or she acts for, procures on the faith of that statement, whether for his or her benefit or for the benefit of that person or organization, anything mentioned in subparagraphs (c)(i) to (vi).

Forgery, s. 366

366 (1) Every one commits forgery who makes a false document, knowing it to be false, with intent

(a) that it should in any way be used or acted on as genuine, to the prejudice of any one whether within Canada or not; or

(b) that a person should be induced, by the belief that it is genuine, to do or to refrain from doing anything, whether within Canada or not.

Making false document

(2) Making a false document includes

(a) altering a genuine document in any material part;

(b) making a material addition to a genuine document or adding to it a false date, attestation, seal or other thing that is material; or

(c) making a material alteration in a genuine document by erasure, obliteration, removal or in any other way.

When forgery complete

(3) Forgery is complete as soon as a document is made with the knowledge and intent referred to in subsection (1), notwithstanding that the person who makes it does not intend that any particular person should use or act on it as genuine or be induced, by the belief that it is genuine, to do or refrain from doing anything.

Forgery complete though document incomplete

(4) Forgery is complete notwithstanding that the false document is incomplete or does not purport to be a document that is binding in law, if it is such as to indicate that it was intended to be acted on as genuine.

Exception

(5) No person commits forgery by reason only that the person, in good faith, makes a false document at the request of a police force, the Canadian Forces or a department or agency of the federal government or of a provincial government.

Uttering a forged document, s. 368

Use, trafficking or possession of forged document

368 (1) Everyone commits an offence who, knowing or believing that a document is forged,

(a) uses, deals with or acts on it as if it were genuine;

(b) causes or attempts to cause any person to use, deal with or act on it as if it were genuine;

(c) transfers, sells or offers to sell it or makes it available, to any person, knowing that or being reckless as to whether an offence will be committed under paragraph (a) or (b); or

(d) possesses it with intent to commit an offence under any of paragraphs (a) to (c).

False prospectus, s. 400

400 (1) Every one who makes, circulates or publishes a prospectus, a statement or an account, whether written or oral, that he knows is false in a material particular, with intent

(a) to induce persons, whether ascertained or not, to become shareholders or partners in a company,

(b) to deceive or defraud the members, shareholders or creditors, whether ascertained or not, of a company, or

(c) to induce any person to

(i) entrust or advance anything to a company, or

(ii) enter into any security for the benefit of a company,

(d) [Repealed, 1994, c. 44, s. 26]

is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years.

Definition of “company”

(2) In this section, company means a syndicate, body corporate or company, whether existing or proposed to be created.

Secret commissions, s. 426 (commercial bribery)

426 (1) *Every one commits an offence who*

- (a) directly or indirectly, corruptly gives, offers or agrees to give or offer to an agent or to anyone for the benefit of the agent — or, being an agent, directly or indirectly, corruptly demands, accepts or offers or agrees to accept from any person, for themselves or another person — any reward, advantage or benefit of any kind as consideration for doing or not doing, or for having done or not done, any act relating to the affairs or business of the agent's principal, or for showing or not showing favour or disfavour to any person with relation to the affairs or business of the agent's principal; or*
- (b) with intent to deceive a principal, gives to an agent of that principal, or, being an agent, uses with intent to deceive his principal, a receipt, an account or other writing*
 - (i) in which the principal has an interest,*
 - (ii) that contains any statement that is false or erroneous or defective in any material particular, and*
 - (iii) that is intended to mislead the principal.*

Privity to offence

(2) Every one commits an offence who is knowingly privy to the commission of an offence under subsection (1).

Punishment

(3) A person who commits an offence under this section is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years.

Definition of agent and principal

(4) In this section, agent includes an employee, and principal includes an employer.

Parties to offence, s. 21 (*"Aiding and Abetting"*)

21 (1) *Every one is a party to an offence who*

- (a) actually commits it;*
- (b) does or omits to do anything for the purpose of aiding any person to commit it; or*
- (c) abets any person in committing it.*

Common intention

(2) Where two or more persons form an intention in common to carry out an unlawful purpose and to assist each other therein and any one of them, in carrying out the common purpose, commits an offence, each of them who knew or ought to have known that the commission of the offence would be a probable consequence of carrying out the common purpose is a party to that offence.

R.S., c. C-34, s. 21.

Person counselling offence

22 (1) Where a person counsels another person to be a party to an offence and that other person is afterwards a party to that offence, the person who counselled is a party to that offence, notwithstanding that the offence was committed in a way different from that which was counselled.

Idem

(2) Every one who counsels another person to be a party to an offence is a party to every offence that the other commits in consequence of the counselling that the person who counselled knew or ought to have known was likely to be committed in consequence of the counselling.

These are what this author considers the primary applicable CC provisions that as a CFE you may encounter in your practice: they are certainly not an all-encompassing list and the CC should be read in its length to determine others that may affect.

Some Significant Jurisprudence, and Where to Find More

The following are some principal case *head notes* realized from CanLII.org, your go-to web-site for substantially all court cases (criminal and civil) occurring in Canada.

This is certainly not an all-encompassing listing since there are thousands of cases and whole books have been written on Canadian criminal law.

These do, however, represent senior court pronouncement on the material issues and you are certainly encouraged to spend time researching CanLII.org case: *it should be one of your past-times as a CFE since a wide array of case issues are brought up and decided.*

R. v. Lifchus, An Explanation of Reasonable Doubt

R. v. Lifchus, [1997] 3 S.C.R. 320

Her Majesty The Queen

Appellant

v.

William Lifchus

Respondent

Indexed as: R. v. Lifchus

File No.: 25404.

*1997: May 29; 1997: September 18.**

Present: Lamer C.J. and La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin, Iacobucci and Major JJ.

on appeal from the court of appeal for Manitoba

Criminal law -- Charge to jury -- Reasonable doubt -- Whether trial judge must provide jury with explanation of "reasonable doubt" -- If so, how concept should be explained to jury -- Suggested charge on "reasonable doubt".

Criminal law -- Charge to jury -- Reasonable doubt -- Whether trial judge misdirected jury on meaning of reasonable doubt -- If so, whether curative proviso applicable -- Criminal Code, R.S.C., 1985, c. C-46, s. 686(1)(b)(iii).

The accused, a stockbroker, was charged with fraud. The trial judge told the jury in her charge on the burden of proof that she used the words “‘proof beyond a reasonable doubt’ . . . in their ordinary, natural every day sense”, and that the words “doubt” and “reasonable” are “ordinary, every day words that . . . you understand”. The accused was convicted of fraud. On appeal, he contended that the trial judge had erred in instructing the jury on the meaning of the expression “proof beyond a reasonable doubt”. The Court of Appeal allowed the appeal and ordered a new trial.

Held: The appeal should be dismissed.

Per Lamer C.J. and Sopinka, Cory, McLachlin, Iacobucci and Major JJ.: A jury must be provided with an explanation of the expression “reasonable doubt”. This expression, which is composed of words commonly used in everyday speech, has a specific meaning in the legal context. The trial judge must explain to the jury that the standard of proof beyond a reasonable doubt is inextricably intertwined with the presumption of innocence, the basic premise which is fundamental to all criminal trials, and that the burden of proof rests on the prosecution throughout the trial and never shifts to the accused. The jury should be instructed that a reasonable doubt is not an imaginary or frivolous doubt, nor is it based upon sympathy or prejudice. A reasonable doubt is a doubt based on reason and common sense which must logically be derived from the evidence or absence of evidence. While more is required than proof that the accused is probably guilty, a reasonable doubt does not involve proof to an absolute certainty. Such a standard of proof is impossibly high. Certain references to the required standard of proof should be avoided. A reasonable doubt should not be described as an ordinary expression which has no special meaning in the criminal law context, and jurors should not be invited to apply to the determination of guilt in a criminal trial the same standard of proof that they would apply to the decisions they are required to make in their everyday lives, or even to the most important of these decisions. Nor is it helpful to describe proof beyond a reasonable doubt simply as proof to a “moral certainty”. As well, the word “doubt” should not be qualified other than by way of the adjective “reasonable”. To instruct a jury that a “reasonable doubt” is a “haunting” doubt, a “substantial” doubt or a “serious” doubt may have the effect of misleading the jury. Lastly, it is only after proper instructions have been given as to the meaning of the expression “beyond a reasonable doubt” that jurors may be advised that they can convict if they are “certain” or “sure” that the accused is guilty. The model charge set out in the reasons may be useful but any charge which is consistent with these principles will suffice regardless of the particular words used by the trial judge.

Here, the trial judge failed to explain the standard of proof fully and properly to the jury. He did not provide a definition of “reasonable doubt” and told the jurors to evaluate the concept of reasonable doubt as if these were “ordinary, every day words”. This is an unacceptable direction. In the context of a criminal trial, the words “reasonable” and “doubt” have a specific meaning. Since the trial judge did not provide any further guidance to the jury concerning the meaning of proof beyond a reasonable doubt, this serious error was not saved by further instructions and gave rise to the reasonable likelihood that the jury misapprehended the burden of proof which they were required to apply. Section 686(1)(b)(iii) of the Criminal Code is not applicable. The correct explanation of the requisite burden of proof is essential to ensure a fair criminal trial and a serious error was made on this fundamental principle of criminal law. It cannot be said that, had the trial judge not erred, the verdict would necessarily have been the same.

Per La Forest, L'Heureux-Dubé and Gonthier JJ.: Cory J.'s approach and result on the question of reasonable doubt are agreed with. Section 686(1)(b)(iii) of the Criminal Code is an inappropriate remedy in this case. Given that the full trial record was not before the Court, and that the submissions on the "miscarriage of justice" aspect of the provision were insufficient, the Crown has failed to discharge its burden to satisfy the Court "that the verdict would necessarily have been the same if the error had not been made".

R. v. Théroux, The Classic Predominantly Referenced Fraud Case

R. v. Théroux, [1993] 2 S.C.R. 5

Robert Théroux Appellant

v.

Her Majesty The Queen Respondent

Indexed as: R. v. Théroux

File No.: 22249.

1992: November 3; 1993: April 8.

Present: Lamer C.J. and La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory and McLachlin JJ.

on appeal from the court of appeal for quebec

Criminal law -- Fraud -- Elements of offence -- Mens rea -- Accused directing mind of company involved in residential construction -- Deposits taken from potential purchasers on false representation that deposits were insured -- Project not completed following company's insolvency -- Accused honestly believing that project would be completed and deposits not lost -- Whether accused guilty of fraud -- Criminal Code, R.S.C., 1985, c. C-46, s. 380(1).

The accused, the directing mind of a company involved in residential construction, was charged with fraud. The company entered into agreements with a number of individuals for the purchase of residences. The contracts were made and the deposits taken on the basis of a false representation by the company that the deposits were insured. The representation was made orally and backed up by a certificate of participation in the insurance program. In addition, a brochure describing the program was distributed to most of the depositors. In fact, the company never paid the premiums due on a first application for participation in the insurance program and a second application was never completed. The company became insolvent, the project was not completed and most of the depositors lost their money. The trial judge found that the accused, as directing mind of the company, was responsible for the misrepresentations. The accused knew at the time that the deposits were not guaranteed but nevertheless made misrepresentations to induce potential home purchasers to sign a contract and give a deposit. The trial judge also found that the accused sincerely believed that the residential project would be completed and hence that the deposits would not be lost. The accused was convicted of fraud pursuant to s. 380(1)(a) of the Criminal Code and the Court of Appeal upheld the

conviction. The issue in this appeal is whether the fact that the accused honestly believed that the project would be completed negates the mens rea of the offence of fraud.

Held: The appeal should be dismissed.

Per La Forest, Gonthier, Cory and McLachlin JJ.: **The actus reus of fraud is established by proof of a prohibited act, be it an act of deceit, falsehood or other fraudulent means, and by proof of deprivation caused by the prohibited act (which may consist in actual loss or the placing of the victim's pecuniary interests at risk).** Just as what constitutes a falsehood or a deceitful act for the purpose of the actus reus is judged on **the objective facts**, the actus reus of fraud by "other fraudulent means" is determined **objectively, by reference to what a reasonable person would consider to be a dishonest act.** Correspondingly, the mens rea of fraud is established by proof of subjective knowledge of the prohibited act, and by proof of subjective knowledge that the performance of the prohibited act could have as a consequence the deprivation of another (which deprivation may consist in knowledge that the victim's pecuniary interests are put at risk). In certain cases, the subjective knowledge of the risk of deprivation may be inferred from the act itself, barring some explanation casting doubt on such inference. Where the conduct and knowledge required by these definitions are established, the accused is guilty whether he actually intended the deprivation or was reckless as to whether it would occur. **The accused's belief that the conduct is not wrong or that no one will in the end be hurt affords no defence to a charge of fraud.** While the scope of the offence may encompass a broad range of dishonest commercial dealings, the proposed definition of mens rea will not catch conduct which does not warrant criminalization. Only the deliberately practised fraudulent acts which, in the knowledge of the accused, actually put the property of others at risk will constitute fraud. **The requirement of intentional fraudulent action excludes mere negligent misrepresentation, or sharp business practice.**

In this case, it is clear from the trial judge's findings that the offence of fraud is made out. **The actus reus is established: the accused committed deliberate falsehoods which caused or gave rise to deprivation.** First, the depositors did not get the insurance protection they were told they would get and, second, the money they gave to the accused's company was put at risk, a risk which in most cases materialized. **The mens rea too is established: the accused told the depositors that they had insurance protection when he knew this to be false. By this act he was knowingly depriving the depositors of something they thought they had, namely insurance protection. It may also be inferred from his knowledge that insurance protection was not in place that the accused knew that he was subjecting the depositors' money to risk.** The fact that he sincerely believed that the houses would be built, and that the deposits would not be lost, was no defence to the crime.

Per Lamer C.J. and Sopinka J.: Subject to the following reservations, McLachlin J.'s analysis of the law of fraud was generally agreed with. First, while the accused's belief that an act is honest will not avail if it is objectively dishonest as determined by reasonable persons, **it is critical to distinguish this from the accused's belief in facts that, if true, would deprive the act of its dishonest character.** Secondly, mens rea is not typically concerned with the consequences of the prohibited actus reus. The actus reus often includes the consequences, and, frequently, more serious offences are distinguished from less serious offences by the consequences without any additional mental element. **Thirdly, the general proposition that "[r]ecklessness presupposes knowledge of the likelihood of the prohibited consequences" is applicable in the case of fraud but not necessarily for other offences.**

In this case, the trial judge's finding that the accused deliberately lied to his customers determines both the *actus reus* and *mens rea* of deceit. If the sole issue were whether the accused's conduct created a risk that the depositors might be deprived of their deposits by reason of the non-completion of the project, the appeal should be allowed. **Where the risk of deprivation is dependent on some future event not happening but the accused honestly believes that the future event will happen and there will be no deprivation, a trial judge who accepts this evidence should acquit.** Here, the trial judge found there was no insurance in place, however, and therefore even if the project were eventually completed, **there would have been a deprivation or risk thereof during the uninsured period.** The trial judge, having made all the findings of fact which constitute a deprivation, ought to have found that this element had been made out. Failure to make such a determination would be an error of law and would entitle this Court to affirm the conviction and dispose of the case on this basis.

Per L'Heureux-Dubé J.: Subject to the second and third reservations expressed by Sopinka J., the reasons of McLachlin J. were generally agreed with.

R. v. Zlatic, Fraud Is 'Substantive', not Just Technical

R. v. Zlatic, [1993] 2 S.C.R. 29

Zoran Zlatic Appellant

v.

Her Majesty The Queen

Respondent

Indexed as: *R. v. Zlatic*

File No.: 22342.

1992: November 6; 1993: April 8.

Present: Lamer C.J. and L'Heureux-Dubé, Sopinka, Cory and McLachlin JJ.

on appeal from the court of appeal for quebec

Criminal law -- Fraud -- Elements of offence -- Accused accepting goods from suppliers in return for post-dated cheques or on credit and using money obtained from sale of goods for gambling -- Accused believing that his gambling system would allow him to repay suppliers -- Trial judge finding that accused was not concerned with paying goods received by suppliers -- Whether accused guilty of fraud -- Criminal Code, R.S.C., 1985, c. C-46, s. 380(1).

The accused, a businessman, was charged with several offences, including four counts of fraud pursuant to s. 380(1) of the Criminal Code. Between mid-November 1983 and mid-January 1984, the accused received goods worth more than \$375,000 from his suppliers in return for post-dated cheques or on credit. During the same period, he used the money obtained from the sale of the goods for gambling and eventually went bankrupt. At trial, the accused testified that he had a system which,

he believed, would increase his odds of winning and allow him to pay back his suppliers. The trial judge appears to have held that the speculative use of the funds constituted fraud by "other fraudulent means" and exposed the pecuniary interests of the suppliers to risk, and found that the accused was not concerned with paying for the goods he received from his suppliers. The accused was convicted on the four counts of fraud and the majority of the Court of Appeal upheld his conviction. This appeal is to determine whether a businessman who diverts the proceeds of goods received for resale to a gambling scheme may be found guilty of fraud.

Held (Lamer C.J. and Sopinka J. dissenting): The appeal should be dismissed.

*Per L'Heureux-Dubé, Cory and McLachlin JJ.: The elements of the offence of fraud, as defined in Théroux, were made out. **With respect to the actus reus, the combined act of taking the goods without concern for payment and gambling away the value they represented constituted dishonest conduct amounting to "other fraudulent means" within the meaning of s. 380(1) of the Code, and the accused's fraudulent scheme put the suppliers' pecuniary interest at risk.** While most frauds involve either deceit or falsehood, fraud by "other fraudulent means" encompasses all other means which can properly be stigmatized as dishonest. Dishonesty is, for the purposes of the actus reus, **determined objectively, by reference to what a reasonable person would consider to be a dishonest act. The dishonesty of "other fraudulent means" has, at its heart, the wrongful use of something in which another person has an interest, in such a manner that this other's interest is extinguished or put at risk.** Here, the funds which the accused used to gamble represented the means by which his suppliers could be repaid. They had, to this extent, a pecuniary interest in the monies. **While the accused had the legal right to use the funds he obtained from the sale of the goods, he did not have an unrestricted right to use them as he pleased. In accepting these goods with no concern for payment and in diverting the funds to a non-business, notoriously risky enterprise, he put these funds to a wrongful use. A reasonable person would regard such a scheme as dishonest. The fact that the accused had legal right to the monies he gambled is no defence. Fraud looks to the substance of the matter.** It is not a person's right, but how he has obtained it and what he does with it that is important.*

*With respect to the mens rea, fraud by "other fraudulent means" does not require that the accused subjectively appreciate the dishonesty of his acts. **The accused must knowingly, i.e. subjectively, undertake the conduct which constitutes the dishonest act, and must subjectively appreciate that the consequences of such conduct could be deprivation, in the sense of causing another to lose his pecuniary interest in certain property or in placing that interest at risk.** Here, although the trial judge made no explicit finding that the accused subjectively appreciated that in gambling he was subjecting the interests of others to the risk of deprivation, the accused's cross-examination shows that he did and there is nothing in the evidence which negates the natural inference that when a person gambles with funds in which others have a pecuniary interest he knowingly subjects that interest to risk. **In convicting, the trial judge must have concluded that the necessary mens rea was present. It is no defence that the accused believed he would win at the casinos and be able to pay his suppliers.***

Per Lamer C.J. and Sopinka J. (dissenting): The accused's suppliers do not have a pecuniary interest in a proprietary sense in the monies which the accused used for gambling. They had the same interest as all creditors, that is, an interest in being paid. The wrongful appropriation of that interest is not fraud unless, in certain circumstances, non-payment of a debt can amount to fraud.

In this case, the trial judge did not make the necessary findings to support a conviction for fraud. Although there was evidence which, if accepted, would have resulted in a finding that the accused accepted the goods from his suppliers with no intention to pay, thereby satisfying the first element of the definition of fraud on the ground of either deceit or falsehood, there was also evidence tending the other way and this Court should not make original findings of fact on disputed evidence. The trial judge's statement that the accused had no concern, desire or preoccupation as regards payment of his suppliers should not be taken as a finding that there was no intention to pay when the goods were supplied. **As for a conviction for fraud by "other fraudulent means", while the accused's belief that an act is honest will not avail if it is objectively dishonest as determined by reasonable persons, it is important to distinguish between a belief in the honesty of one's actions and an honest belief in facts which would make the actus reus non-culpable. Where a person uses his own funds in a way which jeopardizes his ability to repay his creditors, the conduct can only be stigmatized as dishonest if he does so knowingly.**

The honest belief of the accused is relevant at three stages in assessing whether the offence of fraud is established. The application of the objective test for dishonesty requires the reasonable person to take into account the state of mind of the accused. This is implicit in the term "dishonest". The honest belief of the accused is also relevant when dealing with the requirement of mens rea for dishonesty and for deprivation. In the latter case, knowledge of deprivation (or risk thereof) or recklessness must be proved.

Here, there was no finding by the trial judge that the accused subjectively appreciated that his gambling created an unreasonable risk of being unable to pay his creditors. Rather, the trial judge seems to accept that the accused believed that his gambling system would allow him to repay them. He did not squarely address the question of whether the accused knew or was reckless about the unreasonable risk which his gambling created. This is a finding which, on the evidence, he could have made, but he did not err in law in failing to make it. In the absence of a finding of fact on an essential element of the offence, this Court ought not to confirm a conviction simply because, in its view, there is evidence which establishes the mens rea. As long as there is evidence capable of raising a reasonable doubt, this Court should not make findings of fact.

R. v. Olan et al., A Measure of Need of Deceit, or "by other means"

R. v. Olan et al., [1978] 2 S.C.R. 1175

Date: 1978-05-30

Her Majesty The Queen (Plaintiff) Appellant;

and

Samuel L. Olan, William H. Hudson and Thomas R. Hartnett III (Defendants) Respondents.

1978: January 30, 31; 1978: May 30.

Present: Laskin C.J. and Martland, Ritchie, Spence, Pigeon, Dickson, Beetz, Estey and Pratte JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Criminal law—Fraud—Elements of fraud—Directors' actions re assets of company—Absence of quid pro quo—Basis of evidence of fraud to go to jury—Criminal Code, R.S.C. 1970, c. C-34, s. 338(1).

*In late 1971 Langley's Limited, a long-established dry-cleaning enterprise in Toronto, owned a substantial portfolio of "blue-chip" securities valued at \$1,443,460. The control of the company, some 90 per cent of the common shares, was held by two estates and an individual represented by a chartered accountant, Leonard Johnston. Mr. Johnston was approached by one of the accused, Olan, President of First Montreal City Corporation Limited, to discuss the purchase of the controlling shares. It was agreed that the controlling common shares and certain preferred shares of Langley's would be acquired by First Montreal for approximately \$1,485,000 payable in cash. Toward the end of the negotiations Mr. Johnston also met the other accused Hudson, President and Director of Beauport Holdings, and Hartnett, Vice-President and Director of Beauport Holdings and legal adviser to Hudson. Before closing First Montreal assigned its rights under the agreement to Beauport. Thereafter Hudson and Hartnett played the dominant roles aided by Olan who was to receive a finder's fee of approximately \$67,000 for negotiating the sale. As at November 30, 1971 the total current assets of Beauport Holdings were \$149,968.30 and the total assets \$738,966.87. The closing date for the purchase of the Langley's shares was to have been December 2, 1971, but, as the purchasers did not have the necessary money, was postponed. A series of financial manœuvres followed. **A bank account had been opened in name of Beauport Holdings on December 8, 1971, and the accused met with the bank manager concerning the certification of a cheque for \$1,025,000 to be drawn on the account. There were no funds in the account but the manager was advised that a deposit of \$488,000 was available and would be deposited later the same day.** At a second meeting the manager agreed to the certification but only on conditions—he was to be present at the closing and retain possession of the cheque until the purchase of Langley's was completed, when the accused would take possession of Langley's portfolio, sell the securities and with the proceeds cause Langley's to buy another company owned by them. On December 10, 1971, the accused completed through Beauport Holdings the purchase of approximately 90 per cent of Langley's common shares; the preferred shares were purchased later. The vendors received the certified cheque for \$1,025,000 drawn on the account of Beauport Holdings plus \$246,545 being the proceeds of a loan to Beauport Holdings.*

*Another company, Beauport Financial Corporation Limited, had been incorporated by Hudson and Hartnett on November 23, 1971. Immediately after the purchase of the Langley's shares a meeting of the new Board of Directors of Langley's was convened which authorized the sale of all securities owned by Langley's, the purchase of 11,000 shares of Gibraltar Mines Ltd. for \$49,500, the purchase from First Montreal of the outstanding shares of a Quebec company, Advertising Associates, for \$400,000, and the subscription by Langley's for 10,000 shares in Beauport Financial at \$10 per share. Further steps were taken and as a result Beauport Financial received from Langley's \$790,000 which it loaned to Beauport Holdings to complete by Beauport Holdings the purchase of Langley's. **The issues were whether the \$790,000 was expended in furtherance of the bona fide business interests of Langley's, or merely in advancing the personal interests of the accused, and whether Langley's suffered deprivation as a result of this action. The accused were tried and convicted of defrauding Langley's of money and valuable securities to a value of \$1,190,000 contrary to s. 338 of the Criminal Code, however the Court of Appeal set aside the conviction. Leave was granted to appeal to the Supreme Court on the question as to whether the Court of Appeal had erred in holding that there was no evidence of fraud to go to***

the jury and in its consideration of the applicability and scope of the principles of law in Cox and Paton v. The Queen, 1963 CanLII 78 (SCC), [1963] S.C.R. 500, as they related to each accused.

Held: The appeal should be allowed.

From Cox and Paton it is apparent that proof of deceit is not essential to support a conviction under s. 338(1). Where it is alleged that a corporation has been defrauded by its directors deception is not an essential element of the offence. The words “other fraudulent means” in s. 338(1) include means which are not in the nature of a falsehood or a deceit and they encompass all other means which can properly be stigmatized as dishonest. While the courts have been loath to attempt an exhaustive definition of “defraud” one can say that two elements are essential, “dishonesty” and “deprivation”. Using the assets of the corporation for personal purposes rather than bona fide for the benefit of the corporation can constitute dishonesty in a case of alleged fraud by directors of the corporation. Deprivation is satisfied on proof of detriment, prejudice or risk of prejudice; it is not essential that there be actual loss. On the facts it was here open to the jury to find that the exchange of the Langley portfolio for a loan was something other than a quid pro quo. The Court of Appeal erred in its consideration of the applicability and scope of the principles of law in Cox and Paton v. The Queen as they related to each accused and in holding that there was no evidence of fraud to go to the jury.

R. v. Riesberry, Another Case of Fraud “by other means”

R. v. RIESBERRY, 2015 SCC 65, [2015] 3 S.C.R. 1167

Derek Riesberry

Appellant

v.

Her Majesty The Queen

Respondent

Indexed as: R. v. Riesberry

2015 SCC 65

File No.: 36179.

Hearing and judgment: October 13, 2015.

Reasons delivered: December 18, 2015.

Present: Cromwell, Moldaver, Karakatsanis, Wagner, Gascon, Côté and Brown JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Criminal law — Offences — Elements of offence — Cheating at play — Fraud — Accused attempted to rig horse races by drugging horses — Whether horse race constituted a game for purposes of offence of cheating at play — Whether accused's conduct constituted cheating at play or fraud — Criminal Code, R.S.C. 1985, c. C-46, ss. 197(1) "game", 209, 380(1).

R tried to rig two horse races. He was caught drugging one horse and trying to sneak syringes with drugs into the track for the purpose of doing the same thing to another. Bets in excess of \$5,000 had been placed on both races. R was charged with cheating while playing a game, defrauding the public, and attempting to commit the same offences. At trial, he was acquitted. The Court of Appeal allowed an appeal and set aside the acquittals. It ordered a new trial on the cheating counts and entered convictions on the fraud counts.

Held: The appeal should be dismissed.

The Court of Appeal was correct to order a new trial on the charges of cheating while playing a game. "Game" is defined as "a game of chance or mixed chance and skill" in s. 197(1) of the Criminal Code. The Crown had to establish that a horse race is a game with a systematic resort to chance to determine outcomes. There was evidence that post position is determined at random and that certain post positions are more advantageous than others. The trial judge failed to consider this evidence upon which a trier of fact could find that there was systematic resort to chance which made the race a game of mixed chance and skill. Whether the evidence actually establishes this will be for the trier of fact at the new trial to determine.

Fraud consists of dishonest conduct that results in at least a risk of deprivation to the victim. Fraudulent conduct for the purposes of a fraud prosecution is not limited to deception, such as misrepresentations of fact. Rather, fraud requires proof of deceit, falsehood or other fraudulent means. The term "other fraudulent means" encompasses all other means which can properly be stigmatized as dishonest. Where the alleged fraudulent act is not in the nature of deceit or falsehood, the causal link between the dishonest conduct and the deprivation may not depend on showing that the victim relied on or was induced to act by the fraudulent act. R's conduct constituted other fraudulent means because it can properly be stigmatized as dishonest conduct that caused a risk of deprivation to the betting public. There is a direct causal relationship between R's conduct and a risk of financial deprivation to the betting public. The trial judge erred in law

by finding that the betting public was not put at risk of deprivation and that any risk of deprivation was too remote.

The trial judge made the necessary findings of fact to support the fraud convictions entered by the Court of Appeal, including in relation to both required aspects of the required mens rea of fraud. The trial judge found that R knew that his acts were dishonest and, in the context of the cheating while playing a game charges, that he knew that his dishonest conduct put bettors at risk of deprivation. That, after all, is what cheating is.

R. v. Peters, a Classic Case of Employee Abuse of the Credit Card

R. v. Peters, 2002 BCPC 294 (CanLII)

Date: 2002-07-24

File number: 126387

Citation: *R. v. Peters, 2002 BCPC 294 (CanLII), <<http://canlii.ca/t/5t12>>, retrieved on 2018-07-25*

Citation: *Regina v. Peters*
2002 BCPC 0294

File No:
Registry:

Date: 20020724
126387
Vancouver

IN THE PROVINCIAL COURT OF BRITISH COLUMBIA

REGINA

v.

JOHN RICHARD PETERS

**REASONS FOR JUDGMENT
OF THE
HONOURABLE JUDGE C. J. BRUCE**

Counsel for the Crown:
 Counsel for the Accused:
 Place of Hearing:
 Date of Hearing:
 Date of Judgment:

R. MacIntosh
 S. Ross
 Vancouver, B.C.
 July 9, 10, 2002
 July 24, 2002

INTRODUCTION

[1] The accused is charged with one count of fraud contrary to Section 380(1)(a) of the Criminal Code. The charge alleges that between January 19, 2001 and February 20, 2001, in the City of Vancouver, Province of British Columbia, the accused did by deceit, falsehood or other fraudulent means, defraud Veterans Affairs Canada of money, of a value in excess of \$5000.

[2] The accused elected trial by Provincial Court Judge and entered a plea of not guilty to the charge.

[3] The evidence of the two officers involved in the accused's arrest was heard in a voir dire to address the accused's application to exclude evidence of his statement to the police based on a breach of Section 10(b) of the **Charter**. The accused also gave evidence in the voir dire. At the conclusion of the voir dire, I found that the accused's right to counsel had been violated by the officers' failure to comply with the informational component of the tests set out in **Regina v. Bartle** 1994 CanLII 64 (SCC), [1994] 3 S.C.R. 173. Further, I found that, as conscripted evidence, admission of the statement would have an impact on the fairness of the trial and, in all the circumstances, would bring the administration of justice into disrepute. Accordingly, I ruled that the evidence should be excluded pursuant to Section 24(2) of the **Charter**.

[4] By admissions pursuant to Section 655 of the Code, the following facts were entered as evidence:

1. The accused, while an employee of Veterans Affairs of Canada, was issued a government of Canada Mastercard No. 5550-0700=0038=2107 for the purpose of making purchases for Veterans Affairs Canada in the course of his employment, with a credit card limit of \$15,000.00.
2. On January 12, 2001 and January 17, 2001 the accused made two purchases using the said credit card.
3. On January 20, 2001 the accused made a purchase of a carton of cigarettes for a sum of \$49.53 using the said credit card at London Drugs in Vancouver, British Columbia.
4. On January 21, 2001 the accused made a purchase of two cartons of cigarettes for a sum of \$99.98 using the said credit card at a 7-11 store in Vancouver, British Columbia.
5. On January 31, 2001, having obtained the credit card statement from the office mail, the accused made a \$400 payment to Mastercard, leaving an unpaid balance for transactions of \$508.42. The minimum payment was to be \$416.22.
6. In the month of February 2001 the accused made a total of 106 transactions for a total value of \$12,795.12 and six purchases for a value of \$592.62, all using the said credit card

at various locations in Vancouver, British Columbia, including London Drugs stores, 7-11 Stores, a travel agency, a securities exchange, particulars of which have been provided.

7. On February 18, 2001 the accused failed to appear for work and on February 20, 2001, his employment was terminated.
8. After deducting the \$400 payment by the accused, the total sum accumulated by making the purchases with the credit card is \$13,703.54.

EVIDENCE

[5] Rosalyn Milner, Manager of Administrative Services for Veterans Affairs Canada, hired the accused to work in the Vancouver office as an acquisitions/purchasing clerk on December 20, 2000. It was casual employment on a maximum 90 day term. The accused's job was to make low value purchases of good and services used by the 200 Veterans Affairs employees throughout British Columbia in the course of their employment. There are six purchasing clerks assigned to these tasks and the annual purchasing budget for the entire department is approximately \$112,000.

[6] There are a number of different means used by the clerks to make purchases for Veterans Affairs staff. One means used for the last ten years is a credit card issued to the employee by the Federal Government in the employee's name. The employee is to make only pre-authorized employment related purchases with the credit card. Each month the credit card statement is forwarded to the employee through the house mail system for reconciliation and the attachment of supporting documentation. Once reconciled the employee's supervisor approves the statement for payment by the Finance Department. Normally the employee signs an acquisition statement on receipt of the card. Further, the procedures for the use of the card, as well as the limits on its use, are explained to the employee by his or her immediate supervisor.

[7] The accused's first day of work was January 2, 2001 and his last day of work was February 16, 2001. Shortly after the accused began work he developed an absenteeism problem. The accused regularly called in sick and often did not complete a full day's work. On February 20, 2001 the accused neither called nor attended work. In view of his past behaviour, Ms. Milner became concerned about the accused's use of his Mastercard. An investigation revealed that the accused had made a large number of unauthorized purchases on the card.

[8] The accused did not return to work after February 16, 2001 and a decision was made by Veterans Affairs Canada to withhold release of his pay cheques. The accused continued to telephone the employer about his pay cheques and finally a meeting was arranged for March 8, 2001 to discuss the matter. Ms. Milner and the Manager of the Pacific Region for Veterans Affairs were present.

[9] The accused was advised that he was terminated for cause; that is, for failing to report for duty without notice and for unauthorized use of his Mastercard. The letter of termination only refers to the former reason. A discussion ensued concerning the withholding of the accused's pay cheques. The accused was advised that the pay cheques would not be released until he had made full restitution of the monies expended on unauthorized purchases. The accused maintained the credit card and his pay cheques were two different matters and raised the issue of his lawyer taking action. This issue was discussed at length during meeting. Although Ms. Milner does not recall saying that full restitution would bring an end to the whole matter involving the accused, she

admits that the discussion certainly implied that there would be no police involvement if the accused repaid the full amount on the credit card.

[10] There is no evidence that the accused signed off for receipt of the Mastercard; however, Jerry Lui, Veterans Affairs Accounting and Finance officer testified that he gave the credit card to the accused and asked him to speak to his supervisor about the proper use of the card. Daniel Mewhort, the accused's direct supervisor, testified that on or about January 16, 2001 he went by the accused's work station and casually asked him if he had received his credit card yet. While Mr. Mewhort testified in direct examination that he told the accused all purchases must be pre-authorized, and that only government related purchases could be made with the credit card, on cross-examination he admitted his memory of this part of the discussion was vague.

[11] Mr. Mewhort did have a clear recollection that the accused acknowledged he had received the Mastercard and asked Mr. Mewhort what would happen if he used the credit card for personal purchases. Mr. Mewhort responded that the accused would be fired and the government would institute a collection process, similar to that employed for employment insurance fraud, to recover the money spent. Beyond this brief conversation with Mr. Mewhort there is no evidence that anyone explained to the accused in any further detail the procedures for using the credit card or the limits on the use of the card.

[12] Mr. Mewhort testified that he authorized about \$400 of the total expenditures on the accused's credit card; however, he had been out of the office in January and February 2001 and could not say how much, if any, had been authorized by other supervisors acting in his place. Mr. Mewhort also testified that the accused was not authorized to purchase items such as cigarettes with the credit card. Nor was the accused authorized to obtain cash advances from currency exchanges or purchase airline tickets with the credit card.

[13] Because Mr. Mewhort was out of the office in January and February 2001, he did not review the accused's first credit card statement until February 21, 2001.

[14] From the receipts entered as evidence, the following purchases on the credit card can be identified:

- 1. An airline ticket from Vancouver to Mazatlan at a cost of \$700.*
- 2. Cash advances from a currency exchange in the amount of \$787.00, \$500, \$496.65, \$190.00 and \$496.65.*

[15] The balance of the receipts are only identifiable by the payee and the amount of the purchase. There is nothing in evidence to indicate what was purchased. There are a number of purchases from London Drugs in various amounts; however, there is no description of the items purchased by the accused.

[16] There are also entries representing purchases from establishments or businesses where the goods or services acquired are obvious. For example, White Spot \$11.63, \$40.78, Blue Horizon \$24.51, \$45.00, \$55.00, \$49.50, \$50.00, \$44.00, \$47.00, \$57.07, \$42.00, and \$4.50, Century Plaza \$49.10, \$44.98, York Pizza \$45.00, \$45.50, \$45.50, \$45.50, \$47.85, \$51.50, \$65.00, and \$80.00, Dover Arms \$43.90, \$34.00, \$60.35, \$50.00, \$13.70, \$36.20, \$61.50, and \$72.90, Dominion Hotel \$48.50, \$51.30, Sands Hotel \$8.55, \$17.95, Yellow Cab Co. \$7.00, \$6.30, \$20.00, \$8.00, \$20.00,

\$10.00, Black Top Cabs \$13.00, \$7.20, \$14.00, \$8.00, \$15.10, \$7.00, Domino's Pizza \$20.62, \$20.27, Liquor Distribution Branch \$20.30, Olympia Pizza \$29.00, and Denny's Restaurant \$40.18.

[17] Lastly, there are purchases from businesses that are not obvious from the entries on the statement. For example, there are purchases from 7-11 and Mac's Convenience stores, The Bay, and the International Securities Exchange.

[18] Including the cigarettes purchased from London Drugs and 7-11 in the amount of \$149.51 (as per the admissions), the total amount of identified purchases is \$5175.55. These purchases were made between January 20, 2001 and February 20, 2001.

ARGUMENT

[19] The accused argues that to prove the elements of fraud, the Crown must establish beyond a reasonable doubt that the employer set down limits on the use of the card, that the accused knew of these limits, and that he intentionally disregarded these limits and used the credit card for unauthorized purchases. The accused says the Crown has failed to prove these elements, and in particular, says the credit card was given to him without a specific restriction on personal purchases. Further, there is no evidence the accused was aware he would be acting fraudulently if he made personal purchases with the card.

[20] The accused also argues there is only minimal evidence that he used the credit card for unauthorized purchases. While the two amounts paid for cigarettes on January 20 and 21st are admitted, there is no evidence any of the other purchases were unauthorized. The Crown did not specifically canvass each purchase with its witnesses and Mr. Mewhort acknowledged that he was not the only supervisor who could have authorized purchases by the accused.

[21] The accused argues that it can be inferred from the fact that he paid off \$400 of the personal purchases prior to being discovered by the Employer that he believed the only liability would be a civil one. This belief is consistent with the advice given to him by Mr. Mewhort and the Employer's indication that the matter would be settled if the accused repaid the money spent on unauthorized purchases. Further, from this payment the Court may infer the accused believed that he could repay the amounts used for personal purchases.

[22] The Crown argues it need only show dishonest conduct that deprives the victim or places a financial interest in jeopardy. The accused was aware from his question to Mr. Mewhort that he was not entitled to use the credit card for personal purchases and despite this knowledge the accused continued to make such purchases. Further, the Crown says that it is apparent from the nature of the purchases that the money was spend on unauthorized items and there is thus no need to call witnesses to establish this fact. The Crown points to the airline ticket and large cash advances as well as the cigarette purchases.

[23] In regard to mens rea, the Crown says it is unreasonable to believe that an employee, even a short-term employee, could think that it was acceptable to buy airline tickets and cigarettes with government funds. Thus the Crown says the accused acted intentionally and dishonestly.

[24] Further, the fact the accused paid some of the money back does not deprive his act of its criminal nature. Even if there is no actual loss, a risk of loss constitutes a deprivation.

DISCUSSION AND CONCLUSIONS

[25] In **Regina v. Olan** (1978), C.C.C. (2d) 145, 1978 CanLII 9 (SCC), [1978] 2 S.C.R. 1175, the Supreme Court of Canada provided a comprehensive definition of the actus reus of fraud. Dickson J. (as he then was) set down the following principles at p. 150:

- (i) the offence has two elements: a dishonest act and deprivation;
- (ii) the dishonest act is established by proof of deceit, falsehood, or "other fraudulent means";
- (iii) the element of deprivation is established by proof of detriment, prejudice, or risk of prejudice to the economic interests of the victim, caused by the dishonest act.

[26] Further elaboration on these elements is found in the following passages from the judgement of McLachlin J. (as she then was) in **Theroux v. The Queen**, (1993) 1993 CanLII 134 (SCC), 79 C.C.C. (3d) 449 (S.C.C.) at p. 456-7:

Olan marked a broadening of the law of fraud in two respects. First, it overruled previous authority which suggested that deceit was an essential element of the offence. Instead, it posited the general concept of dishonesty, which might manifest itself in deceit, falsehood, or some other form of dishonesty. Just as what constitutes a lie or deceitful act for the purpose of the actus reus is judged on the objective facts, so the "other fraudulent means" in the third category is determined by reference to what a reasonable person would consider to be a dishonest act. ...

[27] Madame Justice McLachlin also addresses the mens rea required for the offence of fraud in **Theroux v. The Queen**, *supra* at pp. 459-60:

The mens rea would then consist in the subjective awareness that one was undertaking a prohibited act (the deceit, falsehood or other dishonest act) which could cause deprivation in the sense of depriving another of property or putting that property at risk. If this is shown, the crime is complete. The fact the accused may have hoped the deprivation would not take place, or may have felt there was nothing wrong with what he or she was doing, provides no defence. ... the proper focus in determining the mens rea of fraud is to ask whether the accused intentionally committed the prohibited acts (deceit, falsehood or other dishonest act) knowing or desiring the consequences proscribed by the offence (deprivation including the risk of deprivation). The personal feeling of the accused about the morality or honesty of the act or its consequences is no more relevant to the analysis than is the accused's awareness that the particular acts undertaken constitute a criminal offence.

... Although other fraudulent means have been broadly defined as means which are "dishonest", it is not necessary that the accused personally consider these means to be dishonest in order that he or she be convicted of fraud for having undertaken them. The "dishonesty" of the means is relevant to the determination of whether the conduct falls within the type of conduct caught by the offence of fraud; what reasonable people consider dishonest assists in the determination whether the actus reus of the offence can be made out on particular facts. That established, it need only be

determined that an accused knowingly undertook the acts in question, aware that deprivation or risk of deprivation, could follow as a likely consequence.

... There appears to be no reason, however, why recklessness as to consequences might not also attract criminal responsibility.

[28] In constructing the mens rea of fraud in this fashion, McLachlin J. rejects the English approach, which requires the Crown to prove the accused subjectively appreciated his acts were dishonest. In this regard, McLachlin J. cites with approval the following passage from **Regina v. Long** (1990), 1990 CanLII 5405 (BC CA), 61 C.C.C. (3d) 156 (B.C.C.A.) at p. 174:

... the mental element of the offence of fraud must not be based on what the accused thought about the honesty or otherwise of his conduct and its consequences. Rather, it must be based on what the accused knew were the facts of the transaction, the circumstances in which it was undertaken and what the consequences might be of carrying it to a conclusion.

[29] Thus the accused's belief that his actions were not wrong or that no one would be hurt in the end does not constitute a defence to a charge of fraud.

[30] Applying the law to the case before me, it is apparent the Crown relies on a fraud committed by "other fraudulent means". There is no allegation that the accused employed a deceit or falsehood to carry out a fraudulent act. In that regard, I must examine all the relevant circumstances to determine whether, based on an objective standard, using the credit card issued to the accused by his employer, Veterans Affairs, for his own personal purchases constituted a dishonest act. Of assistance in determining this issue is the following passage from **Regina v. Zlatic** (1993), 79 C.C.C. (3d) 466 where McLachlin J. (as she then was) says at p. 744-8:

The fundamental question in determining the actus reus of fraud within the third head of the offence of fraud is whether the means to the alleged fraud can properly be stigmatized as dishonest. ... Would the reasonable person stigmatize what was done as dishonest? Dishonesty is, of course, difficult to define with precision. It does, however, connote an underhanded design which has the effect, or which engenders the risk, of depriving others of what is theirs. J. D. Ewart, in his *Criminal Fraud* (1986), defines dishonest conduct as that "which ordinary, decent people would feel was discreditable as being clearly at variance with straightforward or honourable dealings" (p. 99). Negligence does not suffice. Nor does taking advantage of an opportunity to someone else's detriment, where that taking has not been occasioned by unscrupulous conduct, regardless of whether such conduct was willful or reckless. The dishonesty of "other fraudulent means" has, at its heart, the wrongful use of something in which another has an interest, in such manner that this other's interest is extinguished or put at risk. A use is "wrongful" in this context if it constitutes conduct which reasonable decent persons would consider dishonest and unscrupulous.

[31] The accused was issued the credit card in the course of his employment with Veterans Affairs. While Mr. Mewhort was unable to testify with complete certainty that he advised the accused the credit card was exclusively for business purchases, he told the accused that he would be fired if he used the card for personal purchases and that the employer would institute some form of process to recover the monies so spent. This information was provided as a result of a question directed to Mr. Mewhort by the accused. As a consequence, I must infer that the accused had addressed his mind to the issue of personal purchases as well as to how his employer might regard

this conduct. Notwithstanding the accused failed to receive the employer's detailed description of the restrictions on the use of the credit card, I am satisfied beyond a reasonable doubt that, based on the information the accused did have, a reasonable person would have perceived use of the credit card for personal purchases was unauthorized and wrongful.

[32] The accused was hired to make low value purchases of work-related items for the staff employed by Veterans Affairs Canada. The credit card was one of a number of ways in which these purchases could be made. From the advice that the employer would fire him if he used the card for his own purposes, it must be inferred that the accused knew the employer would not condone use of the credit card for personal purchases. Any reasonable person would know that dismissal would follow because use of the employer's property for one's own personal benefit was improper.

[33] Further, I am satisfied that a reasonable person would regard these unauthorized purchases as a dishonest diversion of property belonging to Veterans Affairs Canada for the personal use of the accused. The accused's actions were clearly at variance from what a reasonable person would regard as straightforward or honourable dealings. In note here that in **Regina v. Currie; Regina v. Bruce** (1984), 5 O.A.C. 280 the Ontario Court of Appeal held that a finding that the accused invested corporate funds in an unauthorized manner was sufficient to conclude the accused acted dishonestly. Finally, both the volume of unauthorized purchases, and the nature of the personal items acquired with the credit card, underscores the dishonourable nature of the accused's conduct.

[34] The evidence establishes beyond a reasonable doubt that the accused made over \$5000 worth of unauthorized purchases with the credit card. The Crown did not have witnesses identify each purchase recorded on the credit card as work-related or for the personal use of the accused. Nevertheless, from the nature of the purchases themselves, I find the Court can infer the unauthorized purpose. In this regard, the cash advances, the airline ticket, the taxi fares, the hotel expenses, the pizza expenses, the restaurant purchases and the liquor store entries are clearly not work-related purchases made by the accused in the course of his employment. Absent any explanation for these purchases that might dispel this inference, the Court can only conclude that the items purchased from these businesses were not related to the accused's employment as a purchasing clerk for Veterans Affairs Canada.

[35] The fact these personal purchases were made by the accused on a credit card belonging to Veterans Affairs Canada constitutes proof of a detriment to the interests of the victim or at the very least a risk of detriment. Even if the accused thought he could repay the credit card company prior to the due date, the risk of deprivation remains. The act would still have constituted fraud had the accused paid for all the personal purchases prior to the due date on the credit card. See **Theroux v. The Queen, supra** at p. 458.

[36] Turning to the mens rea of fraud, I am satisfied the accused intentionally committed the dishonest act of making personal purchases with the credit card knowing that by doing so he would likely cause his employer to be deprived of funds or, at the very least, knowing that his actions would likely put the employer's financial interests at risk. The fact the accused may have believed his actions would attract only civil liability, as a result of Mr. Mewhort's reference to the use of the government's collection procedure, is irrelevant in the determination of mens rea. The question is whether the accused subjectively appreciated that certain consequences would follow from his actions, not whether he believed his actions were moral or otherwise legal.

[37] Moreover, it is not necessary for the Crown to prove exactly what was in the accused's mind at the time he committed the dishonest acts. An inference of the subjective knowledge of the risk can be drawn from the facts as the accused knew them to be: **The Queen v. Theroux, supra** at p. 460. In this case, I do not think there is any doubt that the accused knew that the employer would be liable to repay Mastercard for the purchases he made with the credit card. At the very least the accused was aware there was a risk that the employer would be unable to obtain reimbursement for the purchases from him or any other source.

[38] Having concluded the Crown has established the mens rea and the actus reus of the offence charged, in ordinary circumstances I would be registering a conviction. However, before taking this step, I invite Crown and defence to make submissions concerning the conduct of the employer, as a government agency, during the accused's termination interview. It appears that there is an issue here with respect to whether the government's actions amount to an abuse of process and whether a judicial stay of proceedings is the appropriate remedy.

Judge C.J. Bruce

Provincial Court Judge

McKinley v. BC Tel, The SCC on “Wrongful Dismissal”

McKinley v. BC Tel, [2001] 2 S.C.R. 161, 2001 SCC 38

Martin Richard McKinley

Appellant

v.

BC Tel, British Columbia Telephone Company, BC Telecom Inc., BC Tel Services Inc., BC Tel Systems Support Inc., B.C. Mobile Ltd., BC Tel Properties Inc., Canadian Telephones and Supplies Ltd., and TSI Telecommunications Services International Inc.

Respondents

Indexed as: McKinley v. BC Tel

Neutral citation: 2001 SCC 38.

File No.: 27410.

2001: January 24; 2001: June 28.

Present: McLachlin C.J. and L’Heureux-Dubé, Iacobucci, Major, Bastarache, Binnie and Arbour JJ.

on appeal from the court of appeal for british columbia

Employment law – Wrongful dismissal – Dishonest conduct – Whether employee’s dishonesty, in and of itself, necessarily gives rise to just cause for summary dismissal – Whether nature and context of such dishonesty must be considered – Whether trial judge erred in instructing jury that employee’s dishonesty would merit termination only if it was of “a degree that was incompatible with the employment relationship” – Applicable standard for assessing whether and in what circumstances dishonesty provides just cause.

Employment law – Wrongful dismissal – Jury’s verdict – Dishonest conduct – Jury finding that just cause for summary dismissal did not exist – Whether jury’s verdict reasonable.

Damages – Wrongful dismissal – Extended period of notice – Whether trial judge erred by putting issue of extended notice period before jury – Whether jury award for damages representing extended notice period reasonable.

Damages – Wrongful dismissal – Aggravated damages – Whether criteria for allowing issue of aggravated damages to go to jury met.

Damages – Wrongful dismissal – Punitive damages – Whether issue of punitive damages should have been put to jury.

The appellant is a chartered accountant who was employed by the respondents (“BC Tel”). In 1993, he began to experience high blood pressure as a result of hypertension. By June 1994 his blood pressure was rising on a daily basis and following his physician’s advice he took a leave of absence from work. The appellant had indicated to his employer that he wished to return to work, but in a position that carried less responsibility. He was advised that BC Tel would attempt to find another suitable position for him within its corporate structure. On August 31, 1994 BC Tel terminated the appellant’s employment. By that time, the appellant had worked for BC Tel for almost 17 years and was 48 years of age. The appellant rejected BC Tel’s severance offer and took the position that his employment was terminated without just cause and without reasonable notice or pay in lieu of reasonable notice. He brought a wrongful dismissal action in the British Columbia Supreme Court. B.C. Tel took the position that they had just cause for the appellant’s summary dismissal, alleging that he had been dishonest about his medical condition, and the treatments available for it.

The trial judge held that there was sufficient evidence to put the question of just cause for dismissal to the jury. In instructing the jury on this point, he stated that in order for just cause to exist, the jury must find (a) that the appellant’s conduct was dishonest in fact, and (b) that “the dishonesty was of a degree that was incompatible with the employment relationship”. The trial judge also held that the jury could consider whether aggravated damages as well as damages for bad faith in the conduct or manner of the dismissal were warranted. On the other hand, he held that there was no evidence upon which a claim for punitive damages could be based, and thus, this question was not put to the jury. The jury found in favour of the appellant, awarding him general damages, special damages, aggravated damages, and pension contributions. The Court of Appeal set aside the jury award and ordered a new trial, finding that the trial judge committed a reversible error in instructing the jury that the appellant’s dishonesty would merit termination only if it was of a degree that was “incompatible with the employment relationship”. The appellant appealed to this Court and BC Tel cross-appealed, submitting that, if the Court dismissed the appeal, it ought to dismiss the appellant’s wrongful dismissal action outright rather than order a new trial.

Held: The appeal should be allowed. The cross-appeal should be dismissed.

*Whether an employer is justified in dismissing an employee on the grounds of dishonesty is a question that requires an assessment of the context of the alleged misconduct. **More specifically, the test is whether the employee's dishonesty gave rise to a breakdown in the employment relationship. Just cause for dismissal exists where the dishonesty violates an essential condition of the employment contract, breaches the faith inherent to the work relationship, or is fundamentally or directly inconsistent with the employee's obligations to his or her employer. In accordance with this test, a trial judge must instruct the jury to determine: (1) whether the evidence established the employee's deceitful conduct on a balance of probabilities; and (2) if so, whether the nature and degree of the dishonesty warranted dismissal. The second branch of the test does not blend questions of fact and law. Rather, assessing the seriousness of the misconduct requires the facts established at trial to be carefully considered and balanced. As such, it is a factual inquiry for the jury to undertake. In certain contexts, the contextual approach might lead to a strict outcome: cause for termination exists where theft, misappropriation or serious fraud is found. However, lesser sanctions may be applied for less serious types of misconduct. An effective balance must be struck between the severity of an employee's misconduct and the sanction imposed.***

*The approach endorsed by the Court of Appeal would entitle an employer to dismiss an employee for just cause for a single act of dishonesty, however minor. The consequences of dishonesty would remain the same, irrespective of whether the impugned behaviour was sufficiently egregious to violate or undermine the obligations and faith inherent to the employment relationship. Such an approach could foster results that are both unreasonable and unjust. **Absent an analysis of the surrounding circumstances of the alleged misconduct, its level of seriousness, and the extent to which it impacted upon the employment relationship, dismissal on a ground as morally disreputable as "dishonesty" might well have an overly harsh and far-reaching impact for employees. In addition, allowing termination for cause wherever an employee's conduct can be labelled "dishonest" would further unjustly augment the power employers wield within the employment relationship.*** An analytical framework that examines each case on its own particular facts and circumstances, and considers the nature and seriousness of the dishonesty in order to assess whether it is reconcilable with sustaining the employment relationship, is favoured. The trial judge's instructions were entirely consistent with the contextual approach and cannot serve as a basis for setting aside the jury verdict.

An appellate court is entitled to set aside a jury's verdict where it is found that the evidence did not permit a jury acting judicially to reach the conclusion that it did. In the present case, while there may not have been a full disclosure of all material facts by the appellant concerning his treatment and medication, an analysis of the record as a whole leads to the conclusion that the jury could have reasonably and judicially found that the appellant did not engage in dishonest conduct of a degree incompatible with his employment relationship. There is therefore no basis upon which to interfere with the jury's verdict that B.C. Tel had not proven just cause warranting dismissal.

There is also no basis for interfering with the trial decision on the issue of the extended notice period. Where a dismissal is accompanied by bad faith or unfair dealing on the part of the employer, Wallace establishes that such conduct merits compensation by way of an extension to the

notice period. This remedy is not triggered by the dismissal itself, but by the exacerbating factors that, in and of themselves, inflict injury upon the employee. The trial judge's analysis and jury charge adhered to the principles set out by this Court in *Wallace*, and the jury could, based on the evidence, reasonably find that the notice period should be extended. Although the appellant may have agreed to terminate his employment contract, this did not necessarily imply a waiver of his right to be treated fairly and in good faith by his employer, nor did it preclude the protection that *Wallace* intended to confer by recognizing an award for extended notice.

The order for aggravated damages must be set aside since the criteria for allowing the question of aggravated damages to go to the jury were not met. The proper threshold for allowing the issue of aggravated damages to be determined by a jury is whether sufficient evidence exists. The standard set out by the trial judge fell short of that test by suggesting, in effect, that any evidence, even a mere scintilla thereof, would suffice to put the matter of aggravated damages to the jury for its consideration. Applying the correct standard to the present case, there was not sufficient evidence before the trial judge to allow the jury to deliberate on the question of aggravated damages.

Finally, the trial judge's ruling that the question of punitive damages should be withheld from the jury was sound and should be left undisturbed. The evidence did not support a finding of an "independent wrong", including discrimination, and B.C. Tel's conduct was not sufficiently harsh, vindictive, reprehensible, malicious or extreme in nature to warrant punishment.

R. v. Kelly, The SCC on Secret Commissions (Commercial Bribery)

R. v. Kelly, [1992] 2 S.C.R. 170

William Thomas Kelly Appellant

v.

Her Majesty The Queen

Respondent

Indexed as: *R. v. Kelly*

File No.: 21719.

1991: October 31; 1992: June 11.

Present: L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin, Stevenson* and Iacobucci JJ.

on appeal from the court of appeal for british columbia

Criminal law -- Secret commissions -- Elements of offence -- Accused acting as financial investment advisor selling housing units to his clients -- Commissions paid to accused by development company for sale of units not disclosed to clients -- Whether accused guilty of corruptly accepting a reward or benefit under s. 426(1)(a) of Criminal Code -- Whether Crown required to prove existence of corrupt bargain between giver and taker -- Meaning of word "corruptly" -- Criminal Code, R.S.C., 1985, c. C-46, s. 426(1)(a).

The accused was charged with four counts of corruptly accepting a reward or benefit contrary to s. 426(1)(a) of the Criminal Code. He was one of the principals of a company ("KPA") which offers, for a fee, financial planning services, including advice respecting investment in real estate and tax planning strategies. In 1980, the accused persuaded a property development company to give KPA the exclusive right to sell the units of its MURB project. KPA sold all the units, mainly to its clients, within the relatively short time prescribed in the agreement and received a commission from the development company for each unit sold. These commissions were the same as those which the development company would have paid to any salesman. **At trial, the evidence indicated that KPA's clients were unaware of the commissions paid by the development company to KPA. At their initial meeting with new clients, KPA only gave vague and general information as to its sources of remuneration on a "white board". The accused himself later advised his associates that, with respect to the MURB project, he did not want further disclosures in writing. In defence, the accused testified that the clients purchasing the MURB units should have known of the commissions to be paid to KPA from two small references in the Offering Memoranda on the "Issuing and Sales Costs". The accused was convicted on all four counts.** The trial judge found that he had an obligation to make full, frank and fair disclosure of the sales commission. The majority of the Court of Appeal affirmed the conviction. The question raised on this appeal is what the Crown must prove in order to obtain a conviction pursuant to s. 426(1)(a) of the Criminal Code. In particular, this Court must determine whether s. 426 has any application where the party making the payments was not part of a corrupt bargain with the taker.

Held (Sopinka J. dissenting): The appeal should be dismissed.

Per L'Heureux-Dubé, Gonthier, Cory and Iacobucci JJ.: In preserving the integrity of the agency relationship and protecting the vulnerable principals, s. 426 of the Code acknowledges the importance of that relationship in our society. **There are three elements to the actus reus of the offence set out in s. 426(1)(a)(ii) as they apply to an accused agent/taker with regard to the acceptance of a commission: (1) the existence of an agency relationship; (2) the accepting by the agent of a benefit as consideration for doing or forbearing to do any act in relation to the affairs of the agent's principal; and (3) the failure by the agent to make adequate and timely disclosure of the source, amount and nature of the benefit.** The word "corruptly" adds that third element to the actus reus of the offence. This word in the context of secret commissions means secretly or without the requisite disclosure. **The Crown is not required to prove the existence of a corrupt bargain between the giver and the taker of the reward or benefit. It is thus possible to convict a taker despite the innocence of the giver.**

The requisite mens rea must also be established for each element of the actus reus. **Pursuant to s. 426(1)(a)(ii), an accused agent/taker (1) must be aware of the agency relationship, (2) must knowingly accept the benefit as consideration for an act to be undertaken in relation to the affairs of the principal, and (3) must be aware of the extent of the disclosure to the principal or lack thereof. When an accused is aware that some disclosure was made, the court must determine whether, in all the circumstances of the particular case, the disclosure was in fact adequate and timely.**

Here, the Crown has established all the elements requisite for conviction under s. 426. **It is clear that an agency relationship existed between the accused and his clients and that he was aware of the existence of that relationship. It is also clear that the nature of the commission paid by the development company was to encourage the accused to influence his clients to purchase the MURB units and that he was aware of this intention. He accepted the commission secretly and influenced the affairs of his principals. Finally, the payment of the commission was not disclosed in an adequate**

and timely manner. At the time of the sales, KPA's clients were not aware that KPA would receive a sales commission from the development company for each MURB unit sold to KPA clients. KPA disclosure of its sources of remuneration was vague and general and did not meet the objectives of s. 426. **The accused himself made a conscious decision to limit the extent of the disclosure.** While the Offering Memoranda for the MURB units contained two one-line references to "Issuing and Sales Costs" for the projects, there was no specific reference to the fact that it was the accused who was to receive these costs as a commission.

Per McLachlin J.: **Lack of disclosure is an element of the actus reus of the offence of taking a secret commission under s. 426(1)(a)(ii) of the Code, and awareness of that lack of disclosure is an element of its mens rea. No corrupt bargain is required.** However, since criminal law must be certain and definitive, the time and the degree of disclosure must be clearly defined. Agents must be given fair notice in advance whether a proposed course of conduct is criminal. **With respect to the timing of disclosure, certainty requires that where the gravamen of the offence is the taking of a secret commission disclosure to the principal must be made by the time the commission is accepted. If the agent accepts a commission without beforehand (or simultaneously) advising the principal of the fact, the offence is established. With respect to the degree of disclosure, it is not enough to state at the beginning of a relationship between an agent and his principal that commissions may from time to time be taken. The requirements of s. 426(1)(a)(ii) will only be satisfied if the agent discloses to the principal that he will receive a commission with respect to the transaction in question. The amount of the commission is secondary and need not be disclosed in order to escape liability. The communication that the agent will receive a commission with respect to the particular transaction in issue will put the principal on notice that the agent is in a potential conflict of interest. Here, since there was no disclosure of the particular commission to the principals involved, the offence is made out.**

Per Sopinka J. (dissenting): When an agent is charged with accepting a benefit under s. 426(1)(a)(ii) of the Code, it must be established that he accepted the benefit as a quid pro quo to influence him. To secure a conviction, the Crown must prove two essentials of the mental element of the offence: (1) that the benefit was so accepted with the agent's knowledge or belief that it was given for the purpose of influencing him; and (2) that the agent entered into the transaction mala fide. The first requirement looks to the state of mind of the agent at the time of the transaction. The corruption in this action is the belief that the valuable consideration is intended to influence the agent to show favour to some person in relation to the affairs of his principal. The taker is thus caught even if he was mistaken as to the true intention of the giver. The offence is complete without the necessity of showing that the agent was in fact influenced in his actions. It is his state of mind in accepting the consideration that is crucial. The second requirement is most easily satisfied through proof of dishonesty. Non-disclosure by the taker is not synonymous with the terms "corruptly" or mala fides, although it may be a strong indicator that the agent has acted in bad faith. In some situations disclosure or the intent to disclose will be highly relevant.

In this case, the accused should be acquitted. While he sold most of the units to his clients, that was not because he was influenced by the development company to do so nor because he believed that this was the intended purpose of either the agreement with that company or the payments. The agreement was entered into at arm's length, the commissions were the same amount as was paid to any other salesmen and they were to be paid regardless of to whom the units were sold. The decision to sell to his clients was one that the accused made unilaterally. His failure to make full disclosure amounted to a breach of his duty but he is not guilty of the offence charged.

Cement LaFarge v. B.C. Lightweight Aggregate: Conspiracy Requires Intent to Injure

Cement LaFarge v. B.C. Lightweight Aggregate, [1983] 1 S.C.R. 452

Date: 1983-04-26

Canada Cement LaFarge Ltd./Ciments Canada LaFarge Ltée, LaFarge Canada Ltd., LaFarge Concrete Ltd./LaFarge Béton Ltée, and Deeks-LaFarge Ltd. (the "LaFarge Group") Appellants;

and

Ocean Construction Supplies Limited, Construction Aggregates Ltd., and Metro Concrete Ltd. (the "Ocean Group") Appellants;

and

British Columbia Lightweight Aggregate Ltd. Respondent;

and

Rockcrete Ready-Mix Ltd., Deeks Sand & Gravel Co. Ltd., Deeks-McBride Holdings Ltd., Deeks Concrete Brick Ltd., Deeks Block Ltd., Lorraine Ready-Mix Ltd., T.G. McBride & Co. Ltd., Island Ready-Mix, Ltd., Holmes & Wilson Limited, Holmes & Wilson Trucking Company Limited, Fraser Valley Concrete Products Ltd., Butler-LaFarge Ltd., Friday Harbor Sand & Gravel Co., Evans Coleman & Gilley Brothers Limited, Ocean Cement Limited, Ocean Cement & Supplies Ltd., Ocean Construction Supplies Northern Limited, Ocean Construction Supplies (Victoria) Limited, Ocean Cement Trading Limited, Pacific Brick & Block Limited, British Columbia Cement Company Limited, Genstar Limited/Genstar Limitée, Metro Concrete Western Ltd., Inland Cement Industries Limited, Con-Force Products Ltd. Defendants;

and

British Columbia Lightweight Aggregate Ltd. Appellant on Cross appeal;

and

Canada Cement LaFarge Ltd./Ciments Canada LaFarge Ltée, and others Respondents on Cross appeal.

File Nos.: 16608 and 16704.

[page 453]

1982: November 29 and 30; 1983: April 26.

Present: Laskin C. J. and Ritchie, Estey, McIntyre and Wilson JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Torts — Combines — Conspiracy to injure by unlawful means — Whether or not deliberate intention to injure necessary — Whether or not breach of Combines Investigation Act an "unlawful means" required to establish this tort — Combines Investigation Act, R.S.C. 1970, c. C-23, s. 32.

*Respondent, a supplier of lightweight aggregate, ceased business and was awarded damages for the tort of conspiracy to injure after its client, a manufacturer, began using another aggregate to produce its light-weight concrete. The action by appellants, who had earlier pleaded guilty to a charge of conspiring to prevent or unduly lessen competition in the production of cement contrary to s. 32(1) (c) of the Combines Investigation Act, made it impossible for respondent to improve its market position. **It was found at trial and on appeal that, while appellants did intend to eliminate competition, they did not deliberately conspire to drive respondent out of business. Both courts also concluded that the tort of conspiracy to injure did not include an intent to injure the plaintiff, as a prerequisite, where the defendants had acted unlawfully to effect the ends of their conspiracy.** The appellants appealed that finding and further argued that the "wrongful means" required for the tort of conspiracy could not consist of (1) a breach of s. 32(1) (c) of the Combines Investigation Act, (2) fictitious tenders to third parties or fraud or deceit with respect to such third parties, or (3) injury to the purported right not to be deprived of the benefits flowing from a free and competitive market.*

Held: The appeals should be allowed and the cross-appeal dismissed.

The tort of conspiracy exists: (1) if the predominant purpose of defendant's conduct is to cause plaintiff injury, whether or not defendants' means were lawful; or (2) where defendants' conduct is unlawful and directed towards the plaintiff (alone or with others) and in circumstances that the defendants should know that injury to the plaintiff is likely to, and does, result— notwithstanding the fact that the predominant purpose of' defendants' conduct be not necessary to cause injury to the plaintiff.

*Respondent was not entitled to claim for damages under this tort **because the necessary intention to injure did not exist here.** Appellants discontinued their use of respondent's product for solid business reasons and not because of any plan calculated to damage it: **the unlawful market-sharing agreements were neither directed against nor intended to injure respondent.** Further, because respondent tried to share in the benefits accruing to appellants from those agreements it could not validly argue that it had been unlawfully deprived of its right to the benefits of a free market.*

Hunt v. Carey Canada Inc.: Tort of Conspiracy should not be Barred When Proof of Such Distant to Prove

Hunt v. Carey Canada Inc., [1990] 2 S.C.R. 959

Carey Canada Inc., formerly known as Carey-Canadian Mines Ltd., National Gypsum Co., Atlas Turner Inc., Asbestos Corporation Limited, Bell Asbestos Mines Limited and Lac d'amiante du Québec Ltée,

formerly known as Lake Asbestos Company Ltd.

Appellants

v.

George Ernest Hunt Respondent

and

T & N, P.L.C. and Flintkote Mines Limited

Respondents

and between

*Flintkote Mines Limited, National
Gypsum Co., Atlas Turner Inc., Asbestos
Corporation Limited, Bell Asbestos Mines
Limited and Lac d'amiante du Québec Ltée,
formerly known as Lake Asbestos Company Ltd.*

Appellants

v.

George Ernest Hunt Respondent

and

*T & N, P.L.C. and Carey Canada Inc.,
formerly known as Carey-Canadian Mines Ltd.*

Respondents

indexed as: hunt v. carey canada inc.

File Nos.: 21508, 21536.

1990: February 22; 1990: October 4.

Present: Lamer C.J. and Wilson, La Forest, L'Heureux-Dubé, Sopinka, Gonthier and Cory JJ.*

on appeal from the court of appeal for british columbia

Practice -- Motion to strike -- Action brought by person suffering from disease allegedly caused by exposure to asbestos fibres -- Allegation of conspiracy to withhold information of potential health risks -- Allegations of other nominate torts -- Circumstances in which a statement of claim (or portions of it) could be struck out -- Whether allegations based on the tort of conspiracy should be struck out -- Rules of Court [British Columbia], Rule 19(24).

Respondent Hunt, a retired electrician, brought an action alleging that he had contracted mesothelioma because of exposure to asbestos fibres over the course of his employment. The defendants

had been involved in the mining of asbestos and the production and supply of a variety of asbestos products between 1940 and 1967. It was alleged that they knew from 1934 that asbestos fibres could cause disease in those exposed to the fibres. **Atlas Turner, Babcock, Caposite, Holmes, Johns-Manville and T & N, P.L.C. were sued not only in negligence but also for their alleged conspiracy to withhold information about the dangers associated with asbestos which ultimately resulted in Mr. Hunt's contracting mesothelioma.** Flintkote Mines Limited and T & N, P.L.C. were named as respondents to the appeal in the Court of Appeal by order of the British Columbia Court of Appeal.

Carey Canada Inc. successfully applied to have the action against it struck for want of a reasonable claim. (The action had been based solely on allegations of conspiracy.) The Court of Appeal allowed an appeal from that decision. The issues here dealt with the circumstances in which a statement of claim (or portions of it) could be struck out, and whether the allegations based on the tort of conspiracy should be struck out.

Held: The appeals should be dismissed.

The test to be applied is whether it is "plain and obvious" that the plaintiff's statement of claim discloses no reasonable claim. Only if the action is certain to fail because it contains a radical defect ranking with the others listed in Rule 19(24) should the relevant portions of a plaintiff's statement of claim be struck out under Rule 19(24)(a).

Here, it was not "plain and obvious" that the plaintiff's statement of claim failed to disclose a reasonable claim, given this Court's most recent pronouncement on the circumstances in which the law of torts will recognize such a claim of conspiracy. Nor was it plain and obvious that allowing this action to proceed would amount to an abuse of process. Whether or not there is good reason to extend the tort to the present context is for the trial judge to consider in light of the evidence.

It is not for this Court on a motion to strike to reach a decision as to the plaintiff's chances of success. It is enough that the plaintiff has some chance of success. Whether or not a predominant purpose had been established and whether or not Quebec's Business Concerns Records Act limited the range of information that the defendants could produce at trial was not relevant to whether the plaintiff's statement of claim disclosed a reasonable claim. **Striking out cannot be justified because a pleading reveals "an arguable, difficult or important point of law". On the contrary, it may well be critical that the action be allowed to proceed.**

Alleging the tort of conspiracy is not precluded by the allegation of another tort. While it may be arguable that if one succeeds under a distinct nominate tort against an individual defendant, then an action in conspiracy should not be available against that defendant, it is far from clear that the mere fact that a plaintiff alleges that a defendant committed other torts is a bar to pleading the tort of conspiracy. Whether the plaintiff should be barred from recovery under the tort of conspiracy can only be determined when the question of whether it has established that the defendant did in fact commit the other alleged torts has been decided.

671122 Ontario Ltd. v. Sagaz Industries Canada Inc., [2001] 2 S.C.R. 983, 2001 SCC 59

Sagaz Industries Canada Inc., Sagaz Industries Inc. and
Joseph Kavana

Appellants

v.

671122 Ontario Limited, formerly Design Dynamics Limited

Respondent

Indexed as: 671122 Ontario Ltd. v. Sagaz Industries Canada Inc.

Neutral citation: 2001 SCC 59.

File No.: 27820.

2001: June 19; 2001: September 28.

Present: McLachlin C.J. and Iacobucci, Major, Bastarache, Binnie, Arbour and LeBel JJ.

on appeal from the court of appeal for ontario

Torts -- Vicarious liability -- Employee versus independent contractor -- Original supplier suffering substantial losses when it was replaced as supplier because of bribery scheme in large commercial transaction -- Whether rival supplier vicariously liable to original supplier for tortious conduct of its consultant.

Trial -- Evidence -- Re-opening of trial to admit fresh evidence -- Trial judge declining to reopen trial to admit fresh evidence on a motion brought after release of reasons but before formal judgment entered -- Whether Court of Appeal erred in substituting its discretion for that of trial judge in decision to reopen trial.

*The respondent (“Design”) was Canadian Tire’s principal supplier of synthetic sheepskin car seat covers for 30 years. In 1984, Design was advised by S, the head of Canadian Tire’s automotive division, that the corporate appellants (“Sagaz”) would be replacing Design as Canadian Tire’s seat cover supplier. **S terminated Canadian Tire’s supply relationship with Design in favour of Sagaz because of bribery in the form of a “kickback” scheme.** Sagaz retained American Independent Marketing Inc. (“AIM”), which was owned and controlled by L, to assist in marketing Sagaz’s seat covers. S was to receive two percent of all sales from L and AIM and incorporated a sham corporation to receive this money. S’s wrongdoing was discovered and his employment was terminated. New management at Canadian Tire determined it preferred the seat cover products of Sagaz to those of Design and retained Sagaz as its supplier. Having lost its major customer, Design’s manufacturing business went into a steep decline and, in 1989, Design brought an action alleging that AIM, L, Sagaz and K, Sagaz’s president, had bribed S and, but for the bribes, Design would have continued as supplier to Canadian Tire. At trial, damages were assessed against L and AIM, jointly and severally, including punitive damages. The action was dismissed as against Sagaz and K. After the trial judge’s reasons for judgment were released, but before formal judgement was entered, L, who did not testify at trial, gave Design an affidavit admitting to the conspiracy to bribe S and implicating K in it. On the basis of the affidavit, Design brought a*

motion to have the trial reopened to hear L's fresh evidence. The trial judge dismissed the motion. The Court of Appeal reversed the decisions of the trial judge, finding that Sagaz was vicariously liable to Design and therefore jointly and severally liable with L and AIM for the damages awarded, with the exception of punitive damages. A new trial was ordered with respect to the liability of K on the basis that the trial judge should have reopened the trial to hear L's evidence.

Held: The appeal should be allowed and the order of the trial judge restored.

The Court of Appeal erred in holding Sagaz vicariously liable to Design. Although the categories of relationships in law that attract vicarious liability are neither exhaustively defined nor closed, the most common one to give rise to vicarious liability is the relationship between master and servant, now more commonly called employer and employee. This is distinguished from the relationship of an employer and independent contractor which, subject to certain limited exceptions, typically does not give rise to a claim for vicarious liability. The main policy concerns justifying vicarious liability are to provide a just and practical remedy for the plaintiff's harm and to encourage the deterrence of future harm. Vicarious liability is fair in principle because the hazards of the business should be borne by the business itself; thus, it does not make sense to anchor liability on an employer for acts of an independent contractor, someone who was in business on his or her own account. In addition, the employer does not have the same control over an independent contractor as over an employee to reduce accidents and intentional wrongs by efficient organization and supervision. There is no one conclusive test which can be universally applied to determine whether a person is an employee or an independent contractor. What must always occur is a search for the total relationship of the parties. The central question is whether the person who has been engaged to perform the services is performing them as a person in business on his own account. In making this determination, the level of control the employer has over the worker's activities will always be a factor. However, other factors to consider include whether the worker provides his or her own equipment, whether the worker hires his or her own helpers, the degree of financial risk taken by the worker, the degree of responsibility for investment and management held by the worker, and the worker's opportunity for profit in the performance of his or her tasks. Although the contract designated AIM as an "independent contractor", this classification is not always determinative for the purposes of vicarious liability. Looking at the non-exhaustive list of factors set out in Market Investigations, it is clear, based on the total relationship of the parties, that AIM was an independent contractor. On the totality of the evidence, AIM was in business on its own account. Absent exceptional circumstances which are not present in this case, it follows that the relationship between Sagaz and AIM, as employer and independent contractor, is not one which attracts vicarious liability.

The Court of Appeal erred in substituting its discretion for that of the trial judge in deciding to reopen the trial. Absent an error of law, an appellate court should not interfere with the exercise by a trial judge of his or her discretion in the conduct of a trial. Appellate courts should defer to the trial judge, who is in the best position to decide whether fairness dictates that the trial be reopened. The case law dictates that the trial judge must exercise his discretion to reopen the trial "sparingly and with the greatest care" so that "fraud and abuse of the Court's processes" do not result. In this case, the trial judge decided not to exercise his discretion to reopen the trial because neither of the two steps of the test in Scott was met to his satisfaction. First, he could not say that the new evidence, if presented at trial, would probably have changed the result, only that it may have changed the result. Second, the trial judge found that L's evidence could have been obtained before trial. L's affidavit evidence contradicts his sworn evidence on discovery,

particularly with respect to the existence of the bribery scheme which L avoids acknowledging on discovery. Evidence which is not presumptively credible may fail to probably change the result under the first branch of the test in Scott. This is how the trial judge dealt with the affidavit evidence, and he was correct in so doing.

R. v. Boulanger, The SCC on Abuse of Public Trust

R. v. Boulanger, [2006] 2 S.C.R. 49, 2006 SCC 32

Denis Boulanger

Appellant

v.

Her Majesty The Queen

Respondent

Indexed as: R. v. Boulanger

Neutral citation: 2006 SCC 32.

File No.: 30853.

2005: December 16; 2006: July 13.

Present: McLachlin C.J. and Bastarache, Binnie, LeBel, Deschamps, Abella and Charron JJ.

on appeal from the court of appeal for quebec

Criminal law — Breach of trust by public officer — Elements of offence — Whether accused's actions rose to level of seriousness required to establish actus reus of offence — Whether accused intended to use public office for purpose other than public good — Criminal Code, R.S.C. 1985, c. C-46, s. 122.

Following a car accident involving his daughter, the accused, the director of public security, asked the officer in charge of the case to prepare a second, more complete accident report. The supplementary report led to the conclusion that his daughter was not at fault, with the result that the accused did not have to pay the insurance deductible of \$250. He was charged with the offence of breach of trust by a public officer under s. 122 of the Criminal Code. The trial judge convicted the accused on the basis that he had used his office to obtain a personal benefit. A majority of the Court of Appeal upheld the conviction.

Held: The appeal should be allowed and an acquittal entered.

The offence of breach of trust by a public officer is established where the Crown proves beyond a reasonable doubt that: (1) the accused is an official; (2) the accused was acting in connection with the duties of his or her office; (3) the accused breached the standard of responsibility and conduct demanded of him or her by the nature of the office; (4) the accused's conduct represented a serious and marked departure from the standards expected of an individual

in the accused's position of public trust; and (5) the accused acted with the intention to use his or her public office for a purpose other than the public good, for example, a dishonest, partial, corrupt, or oppressive purpose. [58]

*Here, the offence was not made out. The accused is an official and, in asking a subordinate officer to prepare a supplementary report, he was acting in connection with the duties of his office. He was also pursuing a personal interest contrary to the Code of ethics of Québec police officers, which requires him to perform his duties disinterestedly. While this may be enough to bring the accused within the ambit of disciplinary action, it does not necessarily establish the criminal offence of breach of trust by a public officer. The facts, as found by the trial judge, raise a reasonable doubt that the accused had the mens rea necessary for conviction under s. 122. **The trial judge found that the officer's report accorded with the preponderance of evidence relating to the accident, that it was not falsified, and that the accused did not ask or obtain a supplementary report with the intent of misleading the insurance company. Although the accused knew he would benefit from the officer's report, this alone does not establish a culpable state of mind. The accused's intention was to have the officer make a complete report, not to skew it in one direction or another. In addition, it is clear that the actus reus was not made out.** While the proper course of conduct would have been for the accused to have his insurer communicate directly with the officer, the accused's course of action does not represent a marked departure from the course of action he should have taken. Rather, as the trial judge put it, his conduct was simply an error in judgment. In view of all the circumstances, the accused's actions do not rise to the level of seriousness required to establish the actus reus of the offence. [61-67]*

No Misprision in Canada but Circumstances May Dictate Partial or Full Co-ordination with Law Enforcement

Unlike in the USA there is no liability law concerning failing to properly inform law enforcement that a crime has occurred: *misprision*. In the USA there is substantial jurisprudence to that effect but in Canada there is no practiced *stare decisis* that compels an investigator/company employing one to inform police promptly upon discovery of fraud¹⁶.

In some cases, it may not be conducive to do so promptly since it may complicate the evidence discovery/civil recovery process. Keep in mind that while there is criminal restitution law in Canada, it doesn't always work in the plaintiff's favour for the entire loss: civil action through the private use of a CFE does lead towards that. If law enforcement is called first, their criminal discovery process may considerably complicate the civil one since witnesses may be interviewed by law enforcement and may be asked not to divulge further to any one in effort to maintain a quality of criminal investigation: this inhibits the civil process of interviewing these same employees to further that civil cause. Law enforcement is under no duty to pass on material issues to victims that they have found through their investigation¹⁷ – thus the need to pursue a civil process in tandem at least, if not before hand. It is obviously best practice to inquire of either in-house counsel or a lawyer specializing in fraud as to best courses of action regarding when to bring law enforcement “in”. Equally, with some fidelity insurance policies informing law enforcement may be required to trigger the mitigation process.

¹⁶ This should be a concern of course with CFE's that do investigations in both the USA and Canada, or Canadian investigations that lead into the USA where that common-law applies.

¹⁷ And that doesn't depend on whether a CC charge is ever laid.

Certain practices however should be followed with any law enforcement officer such as securing the company's hard-copy evidence and offering only testimony to authenticate. (There have been instances where critical evidence has gone missing in trials in Canada at the fault of the PPSC and law enforcement.) Don't let your originals of supporting evidence go – have them notarized if possible and supply notarized copies since the investigator and corporate counsel must have best-copy to present at civil trial.

*It is, however, if police have been informed, to be as fully and frankly clear and truthful of what has occurred, what evidence has been secured, and especially what witnesses have said. In this regard it's also important, when conducting interviews¹⁸, not to state anything that either law enforcement or insurance underwriters could construe as witness tampering. **Certainly, do not hold back copies of documents, nor witnesses since that could lead to a foundation of obstruction of justice/witness tampering against the corporation or CFE.***

Equal Criminal Acts at Both the federal and provincial level

There are numerous other Acts that have implication on varying fraud mandates that can occur. They include at the federal level:

- The Canada Evidence Act, that governs admissibility of evidence
- Proceeds of Crime (Money Laundering) and Terrorist Financing Act, regarding proceeds of crime and money laundering those proceeds
- Controlled Drugs and Substances Act, which deal with controlled drugs and narcotics
- The Canada Extradition Act, regarding extradition of fugitives to other countries

Equally there may be also provincial criminal provisions within Acts that can become part of a mandate such as, for example not being a conclusive list:

- The Ontario and other provincial Securities Act
- Provincial sales tax/income tax Acts

Small Claims Court and Your Expertise: Affordable Recuperation

In each province/territory there is a Small Claims Court which adjudicates varying limits of financial and other contested amounts¹⁹ which should not be overlooked by the CFE in ensuring that the client has access to **affordable recuperation** of amounts stolen. It's important to note that each of these Courts have varying limits on the amount that can be contested in it, before, with increasing size, the matter must be attended to in a higher provincial Superior/Queens Bench/Supreme Court. *At higher courts the contestant **must generally have legal representation** where rules of procedure must be adhered to. Small Claims courts are less formal not requiring them.*

Equally, Small Claims Court decisions are *not appealable to a higher court*: once decided there, they stay there.

*The 2016 Report to Nations, Canadian Edition noted substantially high percentages of no proceeds being recouped in an instance of internal fraud and this author believes that part of the reason is that the high legal costs associated with recovery are to blame. One advantage Small Claims Court has that avoids this is that the contestants need not be aided by counsel **in court** and this is where the CFE can materially aid their client by producing accurate reporting of how a fraud was perpetrated by that employee and serving as an expertise witness.*

Small Claims are a very attractive solution in the face of that fact that for the amount stolen may not draw all the resources of law enforcement to **eventually** end in a restitution order in the victim's favour, a

¹⁸ Thus the need/encouragement to have recorded interviews to ensure valid evidence.

¹⁹ Amounts vary between \$10,000 to \$50,000 and they can be effortlessly looked up on the net

substantial period later²⁰: Small Claims is faster, less expensive, and a very viable option, again, depending on the amount contested. While it only requires only proof on the balance of probabilities. Once a favourable decision has been rendered it may be that the successful contestant must approach the Court to get an enforcement order to garnish bank accounts/salary, place liens on land, etc.²¹, again, **with small filing costs like the originating contest.**

Each province's Small Claims mechanics can be investigated on the web.

Some relevant Court telephone numbers are, with limit amount, are:

Province	Telephone	Limit
Ontario	613-432-3193	\$25,000
Quebec	514-393-2721	\$15,000
Manitoba	204-945-3138	\$10,000
Alberta	855-738-4747	\$50,000
BC	604-660-8989	\$35,000
NB	506-658-2568	\$20,000
NS	902-245-4567	\$25,000

Civil Actionable Torts of Fraud

While criminal instances of types of fraud or its associated types of malicious conduct perpetrated by employees and owners require proving their aspects beyond a reasonable doubt and it is the State that acts on its prerogatives to investigate and prosecute, civil actions can be litigated for the same actions on behalf of the victim (corporate/shareholder, etc.) which are won when the actions prove merely on a *preponderance of probabilities* that the actions occurred that caused the harm.

Civil actions are needed since it is not the motive of the state in a criminal investigation/action to remedy the harm to the victim: criminal action is carried on by the state since **the state** has been the victim. Civil action for economic damages does “look after” **the private interests** of the victim corporation / shareholder.

There is criminal restitution statute in Canada based on provisions in the Criminal Code and the Cdn. Victims Bill of Rights that allow a criminal victim to petition the criminal court to be “put back where they were” compensated by the perpetrator, *but that applies only if a conviction occurs, with higher standard of proof*. Civil actions do not depend on that and **do not depend on law enforcement's efforts²² or findings that may or may not lead to a criminal trial, in some instances taking years²³.**

The below are common civil actions based on/related to fraudulent actions by varying parties.

Breach of Employment Contract

This is probably the most common and easiest action that can be taken against a fraudulent employee. In Canada it has been described in *Molloy v. EPCOR Utilities Inc.*²⁴ that some issues regarding employee misconduct and loss of trust in the employment contract/relationship that:

More significantly, [the discovery of employee dishonesty] undermined the trust which was an essential ingredient of [the employee]'s relationship with [the employer]. Dismissal is justified where an employee's dishonesty violates an essential condition of the employment contract, breaches the faith inherent in the work relationship, or is fundamentally or directly inconsistent with the employee's obligations to his or her employer ...

²⁰ If law enforcement can generate a “beyond reasonable doubt” conviction on the matter

²¹ Again, info investigated by a CFE

²² Sometimes taking years, if law enforcement has the resources to investigate the incidents, the latter being a critical issue

²³ Giving the perpetrator plenty of time perhaps to dissipate assets to realize from

²⁴ 2015 ABQB 356

Employers are entitled to hold high expectations regarding the trustworthiness of their senior or managerial employees. When a senior employee's conduct reveals character traits that undermine the employer's trust in the employee, summary dismissal may be warranted ...

This has been described as "revelation of a character flaw" ... In Jewitt, Smith J. expressed the view that dishonest conduct will almost always justify dismissal, and the more serious and responsible the position held, the more that honesty must not only be inherent, but patent.

Theft, embezzlement, action on conflicts of interest, collusion are all actions covered by breach in employment contract that are actionable however it's important to understand that in the instance that the employee is to be terminated immediately upon sound discovery of authorship/participation that they may mount counter-claim for wrongful dismissal one of the few guards against is a soundly put together non-tunnel-vision investigation that points at them. **Thus, it's very important to conduct an investigation that does not tailor the findings to point to the employee, but follows the mass of indicative evidence instead.**

With employees it is important to have grounds for termination and the following issues may be thought of by their counsel if they have perpetrated fraud as a cause to be terminated:

- Did the employee know their conduct was wrong pursuant to established and known company conduct/rules?
- Was the conduct the employee followed related to the safe and orderly conduct of the business, or not?
- Did the company pursue an unbiased investigation of what transpired with the employee's conduct?
- Was there sufficient evidence of wrong-doing, objectively collected?
- Was the company's decision non-discretionary regarding the punishment?
- Was that decision reflective of the past functioning of the employee and seriousness of the offence?
- Was that decision in line with company ethics policy?

And, it need not be necessary or advisable to terminate the employee's contract even though they have wronged their employer: it may be possible to continue if they make speedy restitution and are rotated away from being in a position to do same again. This is certainly to be measured as a possible option when the employee has generally been a stellar employee and while such actions can never be condoned if they emerge publicly, when full restitution is offered, and that employee's otherwise impeccable contributions are considered civil actions need not be commenced to collect, with all their mechanics, nor does the employment contract have to be terminated²⁵.

The Tort of Fraud

The Supreme Court of Canada has provided that there are 4 elements to the civil tort of fraud and they all have to be proven to find for the case. They are:

- a false representation made by the defendant;
- some level of knowledge of the falsehood of the representation on the part of the defendant (whether through knowledge or recklessness);
- there existed a proof of inducement;
- the false representation caused the plaintiff to act; and
- the plaintiff's actions resulted in a loss.²⁶

²⁵ It's to be noted that in the 2016 ACFE Report to Nations, Canadian Version, that no punishment was the 3rd highest result in Canada with respect to fraudsters, though globally the ACFE confirmed that that result was well near the bottom in other areas of the World. Canada seems to be softer on fraudsters.

²⁶ Bruno Appliance and Furniture, Inc. v. Hryniak, 2014 SCC 8

Conversion

This action may be brought where property rights have wrongly been interfered with by another person without direction from the true owner. This would include instances where cash/inventory/or any asset has been embezzled by an employee from her employer.

In *Charbonneau v. Mundie's Towing*²⁷ it was described as:

[7] *Conversion is one of a number of nominate torts having to do with wrongful interference with goods and chattels and the protection of proprietary interests in the same. Text-writers and legal scholars have offered up various contemporary definitions, or summary statements, of what constitutes "conversion". I provide two examples below.*

[8] *G.H.L. Fridman in The Law of Torts in Canada, 2nd ed. (Toronto: Carswell, 2002) states, at page 136, the following:*

"... [T]he essential features of the tort of conversion [are]: (i) a wrongful act; (ii) involving a chattel; (iii) consisting of handling, disposing or destruction of the chattel; (iv) with the intention or effect of denying or negating the title of another person to such chattel."

[9] *P.H. Osborne in The Law of Torts, 3^d ed. (Toronto: Irwin Law, 2007) says this at page 292:*

"There are three central elements to the tort of conversion. First, it protects persons who are in possession of chattels or who have a right to the immediate possession of chattels. Second it is restricted to the intentional interference and dealing with chattels. Conversion is not, for example, available for the negligent damage or destruction of chattels. Third, an act of conversion is one that so seriously interferes with the plaintiff's rights to the chattel that the defendant may, in fairness, be required to pay its full value."

In the recent Supreme Court of Canada case of *Teva Canada Ltd. v TD Canada Trust*²⁸ it was held that a bank could be held, under conversion, liable for a fraudulent employees supplier cheques made by the employer to his phatom companies. In this case the employee deposited 63 fraudulent cheques totalling \$5,483,249.40.

The Tort of Conspiracy

Equally there is a civil recourse to the tort of unlawful conspiracy as provided at the Provincial Appeal Ct. level in Canada which provided that:

- Two or more people acted in concert, by agreement, or with a common design or intention;
- The co-conspirators engaged in conduct that was unlawful, which can include the breach of a statute, the violation of a contract, or the carrying out of an underlying tort, such as misrepresentation or fraud;
- The conduct was directed towards the plaintiff;
- Given the circumstances, the defendants should have known that injury was likely to result; and
- Injury or harm did result.²⁹

²⁷ 2008 BCPC 239 (CanLII)

²⁸ 2017 SCC 51

²⁹ *Agribrands Purina Canada Inc. v. Kasamekas*, 2011 ONCA 460 (CanLII).

Duty of Care

In some Canadian Corporations Acts there are provisions that state that directors and officers of a corporation owe a duty of care to their employer. Such is the case with OBCA which provides:

Sec. 134(1) Every director and officer of a corporation in exercising his or her powers and discharging his or her duties to the corporation shall,

- a) act honestly and in good faith with a view to the best interests of the corporation; and
- b) exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances.

There is also a common-law duty of care that is described in *Central Trust Co. v. Rafuse*³⁰ whereby it was held:

The common law duty of care that is created by a relationship of sufficient proximity, in accordance with the general principle affirmed by Lord Wilberforce in Anns v. Merton London Borough Council, is not confined to relationships that arise apart from contract. Although the relationships in Donoghue v. Stevenson, Hedley Burne and Anns were all of a non-contractual nature and there was necessarily reference in the judgments to a duty of care that exists apart from or independently of contract, nothing in the statements of general principle in those cases suggests that the principle was to be confined to relationships that arise apart from contract. The question is whether there is a relationship of sufficient proximity, not how it arose. The principle of tortious liability is a general one for reasons of public policy. A common law duty of care may be created by a relationship of proximity that would not have arisen but for a contract.

What is undertaken by the contract will indicate the nature of the relationship that gives rise to the common law duty of care, but the nature and scope of the duty of care that is asserted as the foundation of the tortious liability must not depend on specific obligations or duties created by the express terms of the contract. It is in that sense that the common law duty of care must be independent of the contract. The distinction, in so far as the terms of the contract are concerned, is, broadly speaking, between what is to be done and how it is to be done. A claim cannot be said to be in tort if it depends for the nature and scope of the asserted duty of care on the manner in which an obligation or duty has been expressly and specifically defined by a contract. Where the common law duty of care is co-extensive with that which arises as an implied term of the contract it does not depend on the terms of the contract, and there is nothing flowing from contractual intention which should preclude reliance on a concurrent or alternative liability in tort. The same is also true of reliance on a common law duty of care that falls short of a specific obligation or duty imposed by the express terms of a contract.

Tort of Knowing Assistance

This actionable cause exists if there has been a break in a fiduciary position and the party who knew of the break, assisted the fiduciary in doing so, either before or after the fact.

- 1) assistance by the defendant of a nominated trustee³¹;

³⁰ [1986] 2 SCR 147, 1986 CanLII 29 (SCC)

³¹ It should be noted that there need not be a formal trust in order for this remedy to apply: merely a fiduciary duty owed by one to the other. The fiduciary is such that:

- (1) The fiduciary has scope for the exercise of some discretion or power,
- (2) The fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary's legal or practical interests,
- (3) The beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power.

2) with actual knowledge of fraud;

3) in a dishonest and fraudulent design on the part of the nominated trustee,

were held by the Supreme Court in *Gold v. Rosenberg*³² to be the elements that a plaintiff must prove to have an action passed. It did point out the need for more than mere receipt of the proceeds: *the participant defendant assisting must know of the fraudulent behaviour*.

This action greatly helps the defrauded in that if more than one party is involved, individual just actions can be levied against both, plus, with greater asset pools from which to possibly recoup³³. The liability is joint and several, if the liability exists, each individually can be fully held to account for the full sums, whereafter they sort out their portions between themselves.

In *Martin v. Goldfarb*³⁴ it was held:

The latter point may be quickly addressed. The knowledge requirement for this type of liability is actual knowledge; recklessness or wilful blindness will also suffice. See [Belmont Finance Corp. v. Williams Furniture Ltd. (No. 1), [1979] 1 All E.R. 118] at pp. 130, 136; In re Montagu's Settlement Trusts, [[1987] Ch. 274] at pp. 271-72, 285; Carl- Zeiss-Stiftung v. Herbert Smith & Co. (No. 2), [1969] 2 All E.R. 367 (C.A.), at p. 379. In the latter case, Sachs L.J. stated that to be held liable the stranger must have had "both actual knowledge of the trust's existence and actual knowledge that what is being done is improperly in breach of that trust -- though, of course, in both cases a person wilfully shutting his eyes to the obvious is in no different position than if he had kept them open." Whether the trust is created by statute or by contract may have an impact on the question of the stranger's knowledge of the trust. If the trust was imposed by statute, then he or she will be deemed to have known of it. If the trust was contractually created, then whether the stranger knew of the trust will depend on his or her familiarity or involvement with the contract.

Negligent Misrepresentation

A principal Supreme Court case that adjudicates this cause of action consists of *Queen v. Cognos Inc.*³⁵

There are five general requirements for a successful claim:

- (1) there must be a duty of care based on a "special relationship" between the representor and the representee;
- (2) the representation in question must be untrue, inaccurate, or misleading;
- (3) the representor must have acted negligently in making the misrepresentation;
- (4) the representee must have relied, in a reasonable manner, on the negligent misrepresentation; and
- (5) the reliance must have been detrimental to the representee in the sense that damages resulted.

Unjust Enrichment/Constructive Trust

This is the realm of the constructive trust where monies are received resulting in an enrichment and corresponding deprivation without a juristic reason, claims for unjust enrichment may be brought. Such does not depend on through knowledge that the participants are in a group unjustly enriching themselves. The remedy for this action, whereby a party(s) receive value that they are not legally entitled to, to the detriment of that who is entitled to them, can be judicially recognized as a constructive trust emanating from the point of time when the unjust enrichment occurs, regardless of actions subsequently.

See *Frame v. Smith*, 1987 CanLII 74 (SCC), [1987] 2 S.C.R. 99 at p. 136, 42 D.L.R. (4th) 81 applied at issue in *Martin v. Goldfarb* 1998 CanLII 4150 (ON CA) for this.

³² [1997] 3 SCR 767, 1997 CanLII 333 (SCC)

³³ As well as more parties to pressure with freeze orders which can speed up recovery

³⁴ 1998 CanLII 4150 (ON CA)

³⁵ [1993] 1 SCR 87

Statutory Restitution to C.C. Recognized Victims

Canada, through the Criminal Code and The Canadian Victims Bill of Rights³⁶ offers a judicially enforced restitution mechanism, **when and only when a criminal conviction has been obtained**³⁷.

It provides that the judge on delivery of verdict can impose payment to the victim of the crime, costs for the loss incurred, payable by the perpetrator.

It's important to know that these costs of losses must be provided by the victim to the court, and it is at the judge's discretion as to what will be ruled as payable by the perpetrator.

While some provinces do have well refined collection methods to accomplish this, some lag and some don't. It's pertinent to become aware of each province's administrative service for the enforcement of these orders since all are a bit different.

One important aspect of these orders is that the perpetrator's ability to pay is **not a consideration**, and if payments are not made then the judgement can be entered as a civil judgement allowing rapid seizing of property to satisfy it³⁸.

Unfortunately, restitution has not been used that much per Statistics Canada the data from which state that during the years 2011 to 2016 only approx. 2.3-2.5% per year of criminal convictions resulted in a restitution order³⁹.

Statutory restitution is a last step this author believes the client should rely on since the criminal investigation and adjudication process can **take so long** while **the onus to satisfy to trigger the qualifier – a guilty verdict – is far higher than that in a civil court – preponderance**⁴⁰. For this reason, this author highly recommends **proceeding civilly as soon as practical** with a proper investigation of the incident to be awarded that civil success that much more quickly: in the face of a perpetrator who may start to dissipate property to take it out of common estate where it can be seized. Don't wait for the criminal process to favour you years down the road, act in civil court immediately and possibly benefit from the host of liens that can be placed on the perpetrator's property allowing value when the judgement comes in your favour. These liens can also be beneficial when a guilty verdict has occurred since they allow for immediate realization.

Equally, it's important to carry out an asset-focussed investigation to know what assets can be seized if the perpetrator simply refuses to pay and for this reason it may be apparent that by putting a civil recovery effort first the victim is that much farther ahead if restitution orders are not enforceable: the victim will be at the same place.

But, one advantage to criminal court restitution orders have over civil actions is that the victim merely has to supply the court with their losses and the judge will rule and pronounce the magnitude: there are no costs of litigation to the victim like in a civil trial and for these reasons this author recommends always laying criminal complaint against a perpetrator, if ascertained, since at the end of a longer process, *if civil action hasn't been economical to pursue*⁴¹, a rendered favourable judgement may result that is fairly inexpensive.

³⁶ Both provisions of which are reproduced below

³⁷ Or Sec. 730 discharge, again decreed by the judge

³⁸ In this regard, the victim needs to have the knowledge of the existing assets of the perpetrator to seize, thus the need to carry on a civil approach regardless.

³⁹ Table 252-0056: Adult criminal courts, guilty cases by type of sentence. Actual figures for restitution imposed for the **offence of fraud** were: 2011-2012, 1413 cases, 2012-2013, 1357 cases, 2013-2014, 1321 cases, 2014-2015, 1120 cases, 2015-2016, 1215 cases

⁴⁰ Not only that, but law enforcement resources may be so taken up that they can't process your complaint as quickly as favourable.

⁴¹ In particular, for smaller losses sustained that cannot be feasibly litigated.

Criminal Code: The Activating Provisions:

Court to consider restitution order

737.1 (1) If an offender is convicted or is discharged under section 730 of an offence, the court that sentences or discharges the offender, in addition to any other measure imposed on the offender, shall consider making a restitution order under section 738 or 739.

Inquiry by court

(2) As soon as feasible after a finding of guilt and in any event before imposing the sentence, the court shall inquire of the prosecutor if reasonable steps have been taken to provide the victims with an opportunity to indicate whether they are seeking restitution for their losses and damages, the amount of which must be readily ascertainable.

Adjournment

(3) On application of the prosecutor or on its own motion, the court may adjourn the proceedings to permit the victims to indicate whether they are seeking restitution or to establish their losses and damages, if the court is satisfied that the adjournment would not interfere with the proper administration of justice.

Form

(4) Victims and other persons may indicate whether they are seeking restitution by completing Form 34.1 in Part XXVIII or a form approved for that purpose by the lieutenant governor in council of the province in which the court is exercising its jurisdiction or by using any other method approved by the court, and, if they are seeking restitution, shall establish their losses and damages, the amount of which must be readily ascertainable, in the same manner.

Reasons

(5) If a victim seeks restitution and the court does not make a restitution order, it shall include in the record a statement of the court's reasons for not doing so.
2015, c. 13, s. 29.

Restitution to victims of offences

738 (1) Where an offender is convicted or discharged under section 730 of an offence, the court imposing sentence on or discharging the offender may, on application of the Attorney General or on its own motion, in addition to any other measure imposed on the offender, order that the offender make restitution to another person as follows:

(a) in the case of damage to, or the loss or destruction of, the property of any person as a result of the commission of the offence or the arrest or attempted arrest of the offender, by paying to the person an amount not exceeding the replacement value of the property as of the date the order is imposed, less the value of any part of the property that is returned to that person as of the date it is returned, where the amount is readily ascertainable;

(b) in the case of bodily or psychological harm to any person as a result of the commission of the offence or the arrest or attempted arrest of the offender, by paying

to the person an amount not exceeding all pecuniary damages incurred as a result of the harm, including loss of income or support, if the amount is readily ascertainable;

(c) in the case of bodily harm or threat of bodily harm to the offender's spouse or common-law partner or child, or any other person, as a result of the commission of the offence or the arrest or attempted arrest of the offender, where the spouse or common-law partner, child or other person was a member of the offender's household at the relevant time, by paying to the person in question, independently of any amount ordered to be paid under paragraphs (a) and (b), an amount not exceeding actual and reasonable expenses incurred by that person, as a result of moving out of the offender's household, for temporary housing, food, child care and transportation, where the amount is readily ascertainable;

(d) in the case of an offence under section 402.2 or 403, by paying to a person who, as a result of the offence, incurs expenses to re-establish their identity, including expenses to replace their identity documents and to correct their credit history and credit rating, an amount that is not more than the amount of those expenses, to the extent that they are reasonable, if the amount is readily ascertainable; and

(e) in the case of an offence under subsection 162.1(1), by paying to a person who, as a result of the offence, incurs expenses to remove the intimate image from the Internet or other digital network, an amount that is not more than the amount of those expenses, to the extent that they are reasonable, if the amount is readily ascertainable.

Regulations

(2) The lieutenant governor in council of a province may make regulations precluding the inclusion of provisions on enforcement of restitution orders as an optional condition of a probation order or of a conditional sentence order.

Restitution to persons acting in good faith

739 Where an offender is convicted or discharged under section 730 of an offence and

(a) any property obtained as a result of the commission of the offence has been conveyed or transferred for valuable consideration to a person acting in good faith and without notice, or

(b) the offender has borrowed money on the security of that property from a person acting in good faith and without notice,

the court may, where that property has been returned to the lawful owner or the person who had lawful possession of that property at the time the offence was committed, order the offender to pay as restitution to the person referred to in paragraph (a) or (b) an amount not exceeding the amount of consideration for that property or the total amount outstanding in respect of the loan, as the case may be.

R.S., 1985, c. C-46, s. 739;

R.S., 1985, c. 27 (1st Supp.), s. 163, c. 1 (4th Supp.), s. 18(F);

1995, c. 22, s. 6.

Ability to pay

739.1 The offender's financial means or ability to pay does not prevent the court from making an order under section 738 or 739.

2015, c. 13, s. 30.

Payment under order

739.2 In making an order under section 738 or 739, the court shall require the offender to pay the full amount specified in the order by the day specified in the order, unless the court is of the opinion that the amount should be paid in instalments, in which case the court shall set out a periodic payment scheme in the order.
2015, c. 13, s. 30.

More than one person

739.3 An order under section 738 or 739 may be made in respect of more than one person, in which case the order must specify the amount that is payable to each person. The order may also specify the order of priority in which those persons are to be paid.
2015, c. 13, s. 30.

Public authority

739.4 (1) On the request of a person in whose favour an order under section 738 or 739 would be made, the court may make the order in favour of a public authority, designated by the regulations, who is to be responsible for enforcing the order and remitting to the person making the request all amounts received under it.

Orders

(2) The lieutenant governor in council of a province may, by order, designate any person or body as a public authority for the purpose of subsection (1).
2015, c. 13, s. 30.

Priority to restitution

740 Where the court finds it applicable and appropriate in the circumstances of a case to make, in relation to an offender, an order of restitution under section 738 or 739, and
(a) an order of forfeiture under this or any other Act of Parliament may be made in respect of property that is the same as property in respect of which the order of restitution may be made, or
(b) the court is considering ordering the offender to pay a fine and it appears to the court that the offender would not have the means or ability to comply with both the order of restitution and the order to pay the fine,
the court shall first make the order of restitution and shall then consider whether and to what extent an order of forfeiture or an order to pay a fine is appropriate in the circumstances.

R.S., 1985, c. C-46, s. 740;
1995, c. 22, s. 6.

Enforcing restitution order

741 (1) An offender who fails to pay all of the amount that is ordered to be paid under section 732.1, 738, 739 or 742.3 by the day specified in the order or who fails to make a periodic payment required under the order is in default of the order and the person to whom the amount, or the periodic payment, as the case may be, was to be made may, by filing the order, enter as a judgment any amount ordered to be paid that remains unpaid under the order in any civil court in Canada that has jurisdiction to enter a judgment for

that amount, and that judgment is enforceable against the offender in the same manner as if it were a judgment rendered against the offender in that court in civil proceedings.

Moneys found on offender

(2) All or any part of an amount that is ordered to be paid under section 738 or 739 may be taken out of moneys found in the possession of the offender at the time of the arrest of the offender if the court making the order, on being satisfied that ownership of or right to possession of those moneys is not disputed by claimants other than the offender, so directs.

R.S., 1985, c. C-46, s. 741;

R.S., 1985, c. 27 (1st Supp.), s. 164;

1995, c. 22, s. 6;

2004, c. 12, s. 13;

2015, c. 13, s. 31.

Notice of orders of restitution

741.1 If a court makes an order of restitution under section 738 or 739, it shall cause notice of the content of the order, or a copy of the order, to be given to the person to whom the restitution is ordered to be paid, and if it is to be paid to a public authority designated by regulations made under subsection 739.4(2), to the public authority and the person to whom the public authority is to remit amounts received under the order.

R.S., 1985, c. 24 (2nd Supp.), s. 47;

1992, c. 11, s. 14, c. 20, s. 202;

1995, c. 19, s. 37, c. 22, s. 6;

2015, c. 13, s. 32.

Civil remedy not affected

741.2 A civil remedy for an act or omission is not affected by reason only that an order for restitution under section 738 or 739 has been made in respect of that act or omission.

Canadian Victims Bill of Rights

S.C. 2015, c. 13, s. 2

Assented to 2015-04-23

An Act for the Recognition of Victims Rights

[Enacted by section 2 of chapter 13 of the Statutes of Canada, 2015, in force July 23, 2015.]

Preamble

Whereas crime has a harmful impact on victims and on society;

Whereas victims of crime and their families deserve to be treated with courtesy, compassion and respect, including respect for their dignity;

Whereas it is important that victims' rights be considered throughout the criminal justice system;

Whereas victims of crime have rights that are guaranteed by the Canadian Charter of Rights and Freedoms;

Whereas consideration of the rights of victims of crime is in the interest of the proper administration of justice;

Whereas the federal, provincial and territorial governments share responsibility for criminal justice;

Whereas, in 1988, the federal, provincial and territorial governments endorsed the Canadian Statement of Basic Principles of Justice for Victims of Crime and, in 2003, the Canadian Statement of Basic Principles of Justice for Victims of Crime, 2003;

Now, therefore, Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:

Short Title

Short title

1 This Act may be cited as the Canadian Victims Bill of Rights.

Interpretation

Definitions

2 The following definitions apply in this Act.

offence means an offence under the Criminal Code, the Youth Criminal Justice Act or the Crimes Against Humanity and War Crimes Act, a designated substance offence as defined in subsection 2(1) of the Controlled Drugs and Substances Act or an offence under section 91 or Part 3 of the Immigration and Refugee Protection Act. (infraction)

victim means an individual who has suffered physical or emotional harm, property damage or economic loss as the result of the commission or alleged commission of an offence. (victime)

Acting on victim's behalf

3 Any of the following individuals may exercise a victim's rights under this Act if the victim is dead or incapable of acting on their own behalf:

(a) the victim's spouse or the individual who was at the time of the victim's death their spouse;

- (b) the individual who is or was at the time of the victim's death, cohabiting with them in a conjugal relationship, having so cohabited for a period of at least one year;*
- (c) a relative or dependant of the victim;*
- (d) an individual who has in law or fact custody, or is responsible for the care or support, of the victim;*
- (e) an individual who has in law or fact custody, or is responsible for the care or support, of a dependant of the victim.*

Exception

4 An individual is not a victim in relation to an offence, or entitled to exercise a victim's rights under this Act, if the individual is charged with the offence, found guilty of the offence or found not criminally responsible on account of mental disorder or unfit to stand trial in respect of the offence.

Criminal justice system

5 For the purpose of this Act, the criminal justice system consists of

- (a) the investigation and prosecution of offences in Canada;*
- (b) the corrections process and the conditional release process in Canada; and*
- (c) the proceedings of courts and Review Boards, as those terms are defined in subsection 672.1(1) of the Criminal Code, in respect of accused who are found not criminally responsible on account of mental disorder or unfit to stand trial.*

Rights

Information

General information

6 Every victim has the right, on request, to information about

- (a) the criminal justice system and the role of victims in it;*
- (b) the services and programs available to them as a victim, including restorative justice programs; and*
- (c) their right to file a complaint for an infringement or denial of any of their rights under this Act.*

Investigation and proceedings

7 Every victim has the right, on request, to information about

- (a) the status and outcome of the investigation into the offence; and***
- (b) the location of proceedings in relation to the offence, when they will take place and their progress and outcome.***

Information about offender or accused

8 Every victim has the right, on request, to information about

- (a) reviews under the Corrections and Conditional Release Act relating to the offender's conditional release and the timing and conditions of that release; and*
- (b) hearings held for the purpose of making dispositions, as defined in subsection 672.1(1) of the Criminal Code, in relation to the accused, if the accused is found not criminally responsible on account of mental disorder or unfit to stand trial, and the dispositions made at those hearings.*

*Protection**Security*

9 Every victim has the right to have their security considered by the appropriate authorities in the criminal justice system.

Protection from intimidation and retaliation

10 Every victim has the right to have reasonable and necessary measures taken by the appropriate authorities in the criminal justice system to protect the victim from intimidation and retaliation.

Privacy

11 Every victim has the right to have their privacy considered by the appropriate authorities in the criminal justice system.

Identity protection

12 Every victim has the right to request that their identity be protected if they are a complainant to the offence or a witness in proceedings relating to the offence.

Testimonial aids

13 Every victim has the right to request testimonial aids when appearing as a witness in proceedings relating to the offence.

*Participation**Views to be considered*

14 Every victim has the right to convey their views about decisions to be made by appropriate authorities in the criminal justice system that affect the victim's rights under this Act and to have those views considered.

Victim impact statement

15 Every victim has the right to present a victim impact statement to the appropriate authorities in the criminal justice system and to have it considered.

Restitution***Restitution order***

16 Every victim has the right to have the court consider making a restitution order against the offender.

Enforcement

17 Every victim in whose favour a restitution order is made has the right, if they are not paid, to have the order entered as a civil court judgment that is enforceable against the offender.

General Provisions

Application

- 18 (1) This Act applies in respect of a victim of an offence in their interactions with the criminal justice system*
- (a) while the offence is investigated or prosecuted;*
 - (b) while the offender is subject to the corrections process or the conditional release process in relation to the offence; and*
 - (c) while the accused is, in relation to the offence, under the jurisdiction of a court or a Review Board, as those terms are defined in subsection 672.1(1) of the Criminal Code, if they are found not criminally responsible on account of mental disorder or unfit to stand trial.*

Reporting of offence

- (2) For the purpose of subsection (1), if an offence is reported to the appropriate authorities in the criminal justice system, the investigation of the offence is deemed to begin at the time of the reporting.*

National Defence Act

- (3) This Act does not apply in respect of offences that are service offences, as defined in subsection 2(1) of the National Defence Act, that are investigated or proceeded with under that Act.*

Exercise of rights

- 19 (1) The rights of victims under this Act are to be exercised through the mechanisms provided by law.*

Connection to Canada

- (2) A victim is entitled to exercise their rights under this Act only if they are present in Canada or they are a Canadian citizen or a permanent resident within the meaning of subsection 2(1) of the Immigration and Refugee Protection Act.*

Interpretation of this Act

- 20 This Act is to be construed and applied in a manner that is reasonable in the circumstances, and in a manner that is not likely to*
- (a) interfere with the proper administration of justice, including*
 - (i) by causing interference with police discretion or causing excessive delay in, or compromising or hindering, the investigation of any offence, and*
 - (ii) by causing interference with prosecutorial discretion or causing excessive delay in, or compromising or hindering, the prosecution of any offence;*
 - (b) interfere with ministerial discretion;*
 - (c) interfere with the discretion that may be exercised by any person or body authorized to release an offender into the community;*
 - (d) endanger the life or safety of any individual; or*
 - (e) cause injury to international relations or national defence or national security.*

Counter-claims if the Investigation Doesn't Find Support from the Judge

While every fraud investigation manual will explain that **it is a professional obligation to objectively follow all the evidence ascertained to find a conclusion** there may be instances upon the conclusion of an investigation that not enough persuasive evidence exists to make it over the preponderance to award damages to the victim.

In short, there are 4 outcomes that an investigation can produce:

- Not enough evidence to prove a party(ies) responsible
- Not enough evidence to prove the value of the fraud
- Border-line support to warrant an attempt in civil action
- Seemingly clearly enough evidence to almost guarantee a successful award in civil action.

And it is with respect to the first 3 that an examiner should be most concerned since if an action cannot be commenced that allows the known perpetrator to successfully defraud the company and either remain employed or move on, or, if a legal action is commenced, and in the end on judgement the outcome is that the preponderance has not been overcome, that would allow a very disgruntled former employee to bring action for the attempts of the victim employer.

In Canada there are possible actions that the former employee can attempt and they should always be at the forefront of an examiner's mind to encourage her to understand that "she's hunting bear here": if she mishaps an investigation and allows a civil judge to side for the perpetrator the unproven perpetrator may come right back with their own cause against the corporate victim.

Wrongful termination

On termination of an employee that has not been found to have committed some form of fraud in the company the employee may be entitled to any form of severance pay or notice of termination if they have been asked to leave or their employer severs the employment contract. When the employee has been found to have defrauded on separate civil trial pursued by the purported victim company she may not be allowed any severance for termination since that wasn't the case, the employer did have valid cause to terminate them and *severance is only award for non-fraud predicated requirements to resign*.

The most common types of actions an employee takes that warrant termination with cause include, theft, dishonesty, collusion and conflict of interest. In Canada an employer:

- Need not supply a reason for a termination at any time
- Need not supply a just cause for a termination
- Can limit the severance rights of the employee through the employment contract so it should be studied

but in most cases, it's very important to pay severance immediately to a discharged employee when they do not receive working notice. All employees are eligible for severance on being asked to leave, the quantum of which is determined by such Acts as the Ontario Employment Standards Act for instance. When the examiner has come to a proper conclusion of who the author of a corporate fraud is, it's extremely important to first pay severance first to not need to give working notice, just to immediately get the employee off the premises to prevent further damage. Almost all "wrongful dismissal" cases in Canada deal with level of severance pay while some do draw in punitive damages for how the severance was done, by a reasonable person being the objective. Again, the employee's rights need not be governed by just the provincial Employment Standards Act but they also may have common law rights that come along with them. **And, an employment contract on the initiation of the posting can serve as a valid way to actually limit all these rights so before any action is contemplated it's very important to scrutinize the fraudulent employee's contract.**

Depending on how concrete the findings of who perpetrated the fraud and costs to realize civil recovery it could be advantageous to without that magnitude of severance to compensate for the loss. It is doubted in some cases that the fraudster would start a wrongful termination action if her in-fact behaviour that led to it would conclude her own action in court.

Malicious prosecution

While there has been very extensive *stare decisis* on malicious prosecution cases involved state actors such as the police and the Crown, in Canada there has been at least a few cases involving the defendant being a private party whose actions initiated the proceedings and the case law is developing here. In both characteristics of defendants, the points necessary to award an action based on malicious prosecution are the same being:

- the prosecution has to have been initiated by the defendant,
- the proceeding must have gone in the plaintiff's favour,
- the plaintiff has to demonstrate there was an absence of probable cause, and
- the plaintiff has to show malice on the part of the defendant.

As stated, this action is now becoming available in civil actions as indicated in at least four common law cases⁴².

This would be of concern when there may not be enough evidence to overcome the preponderance in civil yet the proceeding was punitively carried out against the employee regardless.

Defamation

In Canada defamation is the act of either publishing or vocalizing an issue regarding a person's reputation to another party that goes more than merely hurting their feelings: it must act to hurt the person's reputation. Libel defamation is when the issue is published while slander is when the issue is non-written conveyance of the same.

It's very important, during and at the end of a fraud investigation to keep as much of the prejudicial facts about an employee as private as possible to eliminate this action from arising since if "rumour" is spread about an employee through a company's rank and file, for example, the defamation may have occurred. The possible defences to defamation include:

⁴² Especially *Arsenovski v. Bodin*, 2016 BCSC 359, but also *Drainville v. Vilchez*, 2014 ONSC 4060 (CanLII), [Crawford Adjusters v. Sagicor General Insurance \(Cayman\) Ltd. et al.](#), 2013 UKPC17, *MacDonald v. Deutsche Bank AG*, 2016 NSSC 284 where it was opined on the action:

[65] In *Kvello Charron J.* referred to the history of the tort. In paragraph 87 she said:

[87] As noted above, the tort of malicious prosecution was **born in the context of prosecutions between private parties**, and the malice component of the tort developed accordingly. In many of the historical cases, the parties in a malicious prosecution action had a pre-existing relationship, and the surrounding circumstances were such that it was possible to infer an improper motive from the groundlessness of the prosecution alone: see, e.g., *Jewhurst* (prosecution initiated to collect a pre-existing debt); *Gabler* (prosecutor sought to take physical possession of an office); and *Love* (prosecution commenced to procure the value or return of a cow)...

[66] Although *Kvello* was a case alleging the tort against a crown prosecutor, *Charron J.*'s comments on improper purpose are generally applicable. She said in paragraph 89:

[89] In summary, the malice element of the test for malicious prosecution will be made out when a court is satisfied on a balance of probabilities, that the defendant Crown prosecutor commenced or continued the impugned prosecution with a purpose inconsistent with his or her role as a "minister of justice". The plaintiff must demonstrate on the totality of the evidence that the prosecutor deliberately intended to subvert or abuse the office of the Attorney General or the process of criminal justice such that he or she exceeded the boundaries of the office of the Attorney General. While the absence of a subjective belief in reasonable and probable cause is relevant to the malice inquiry, it does not dispense with the requirement of proof of an improper purpose.

1. truth (known as “justification”)⁴³
2. absolute privilege⁴⁴
3. qualified privilege⁴⁵
4. fair comment⁴⁶
5. responsible communication on matters of public interest⁴⁷
6. innocent dissemination⁴⁸.

An examiner cannot be sued for testifying to highly insidious findings in court, but if not true, and they do not qualify for any of the other above defences, they can be sued for allowing the information to be disseminated through a company if they do not take steps to limit such.

Such would prevent an assessment or admission seeking interview from being carried out with more than one employee in the room at the time, regardless of number of examiners/company officials. It would also require the examiner’s report being authored for certain interested parties only which would include fidelity insurance, law enforcement, company or exterior acting counsel, and the executives in charge.

Equally, on a immediate termination on findings it’s extremely important not to allow continuing employees to know the reason why an employee was discharged: they have no interest and in this author’s opinion, until resolution through civil/criminal proceedings, it’s important not to open the defamation door with how the instance was handled: better a deferred statement on how fraud is handled, than an immediate actionable instance where matters have not been settled through civil/criminal proceedings and have been made public.

Emotional duress

Intentional infliction of emotional distress, IIED, occurs when:

- Defendant acted intentionally or recklessly with regard to the subject matter,
- Defendant's conduct was extreme and outrageous when measured against a reasonable person,
- Defendant's act was the cause of the distress, regardless of the mental state of the plaintiff, and
- Plaintiff suffers severe emotional distress as a result of defendant's conduct.

Such can certainly occur in the instance of an admission-seeking interview of a suspect when more than one examiner is in the immediate environment on behalf of management. It’s very important to “not lose your cool” when dealing with fraud suspects while also audio-recording the interview, after explaining to the suspect that they are being recorded, so that there can be a lesser chance of emotional duress response. Care should be exercised to ensure that the tone of the questioning or other assertions is not too forcefully administered, regardless of the personality of the suspect. Clearly the ACFE’s interview guidelines on admission-seeking interviews should be followed and if, by chance, the employee may be recording the session on their initiative the examiner should state that they are not giving approval to be audio-recorded explicitly.

⁴³ More likely true than not is the standard of defence

⁴⁴ Absolute privilege occurs in the case of court testimony and other quasi-official fact findings such as also in Parliament

⁴⁵ Exists where the public has an interest in the information and a reasonable person would find it a duty to state

⁴⁶ These are expressed in a way that shows they are opinion, not fact, based on facts that can be proven and those facts are either stated or otherwise known to readers or listeners and not made maliciously.

⁴⁷ If the information is of public interest it can be published, with SCC support

⁴⁸ This defence argues that the party did not know that they were distributing a defamatory statement and were not negligent in not knowing, and immediately removed it from their website or from distribution when they learned of the defamatory statement.

CANLII.org -Your Go-To Source- Current Copies of Acts/Cases Dealing with Them, Civil or Criminal

Also, commentary, case that reflects on the CC and all the rest and the most up-to-date copies of these Acts can all be found on CANLII.org for your free use.

You will equally find civil actions that have resulted in a judgement that were not pursued criminally.

This database of all judgements occurring in Canada can be used on a “Most relevant” and “Most cited” basis to allow you to drill down to weight/explanation that you may be focused on.

Management Fraud in Financial Statements and Ratio Analysis – The Need and Ease

According to the ACFE financial statement fraud is the highest in cost of fraud whereby management perpetrates a fraud through its FS disclosures. This has been the trend for longer than anyone can remember since FS fraud impacts many users of the FS directly since they are relied on by many stakeholders. This also applies to instances where business segments that are separately measured are susceptible to fraud by their over-riding management.

While public cases are pronounced consistently in the press taking the tone of "restatement of earnings", "write down of assets", etc., of publicly traded companies pursuant to securities commission discovery, the issue is certainly not isolated there but also enters instances where debt financing is being arranged, or when a private company does an IPO.

In many instances management and Board are able to manipulate the disclosures to enhance their personal interests in the form of IPO stock issuances, bonuses for results, stock options, etc.

And in many cases the management manipulation isn't global across all C-chairs but instead localized in one head or group or another.

Ratio analysis of the company's financial data is a very powerful tool to monitor for and investigate possible incidents of fraudulent transactions leading to that manipulation.

The ACFE has collected data for years now that Financial Statement manipulation results in the largest fraudulent losses that can occur in an enterprise's environment, with middle/upper management override of the internal control environment that cost the public huge losses, all for their relative systematic simplicity.

In this author's opinion, this should be the primary focus of professional and in-industry concern since, as per above pursuant to ACFE surveyed results, it forms the most major fraud threat in the commercial world.

Ratio analysis of a set of FS can reveal acute detail of where to plan targeted fact-finding leading to detecting this type of fraud.

Equally, ratio analysis of all subcomponents of the FS can also quickly reveal where lower level employees have perpetrated fraud within their component.

The below is put together both for fraud examiners who are not familiar with all the aspects of using ratios, attempting to elaborate on how to easily and regularly start investigations with them, as well as CFOs/Senior Accounting segment management who should be advised in risk assessment/anti-fraud training on how to incorporate them into their routines to prevent fraud and detect it if it has started.

There are hundreds of ratios that you can learn of from the internet but they all are subject to the same strengths and limitations as described in the below. It can be worth your time to search out as many as you feel feasible to function with and consider them in your routine, either investigative or monitoring.

The AICPA "Consideration of Fraud in a Financial Statement Audit"⁴⁹, details CPA's responsibility towards FS fraud and is reproduced below:

*"Misstatements arising from fraudulent financial reporting are intentional misstatements or omissions of amounts or disclosures in financial statements designed to deceive financial statement users where the effect causes the financial statements not to be presented, in all material respects, in conformity with generally accepted accounting principles (GAAP).
Fraudulent financial reporting may be accomplished by the following:*

⁴⁹ <https://www.aicpa.org/Research/Standards/AuditAttest/DownloadableDocuments/AU-00316.pdf>

- *Manipulation, falsification, or alteration of accounting records or supporting documents from which financial statements are prepared*
- *Misrepresentation in or intentional omission from the financial statements of events, transactions, or other significant information*
- *Intentional misapplication of accounting principles relating to amounts, classification, manner of presentation, or disclosure*

... ”

Building Ratios into Your First Investigative Step or Your Monitoring Routine

With the use of Excel or OpenOffice Calc it is entirely possible to formalize the monitoring of weekly/monthly financial reports to flag ratios that should warrant attention, on an on-going basis. It can effortlessly be built into a supervisor’s routine to maintain complete oversight control on the results of the accounting steps taken during the previous period. And, once it is established once into the routine, through use it will quickly be easily accommodated. It’s as simply as copy and pasting a rendering of the trial balance of the segment/company at the time.

If you are coming into an engagement for fraud examination/assessment seek to start with conforming that the FS are actually created with the authentic account balances/working papers etc since they may not be depending on where the fraud was perpetrated. In this regard, it’s a first step to secure copies of audit working papers and period end BS and IS to confirm balances.

The Need for Management Interview

Before starting a ratio analysis work-down the management of the company should be interviewed at length about what the company has been doing over the last period for which the ratios are done. The investigator should certainly get a detailed described idea of where management has brought the company to in terms of what accounts will be touched and how so that when the ratio work is performed the investigator can confirm how much management is knowledgeable of the company’s performance over the periods examined. This will facilitate the investigator’s knowledge of whether the company is in control by the management or whether there are weaknesses in the knowledge of the management.

Global Weekly/Monthly Trial Balances and Ease of “One-size Fits All” Excel Processing File

Processing ratios going from engagement to engagement can be effortlessly accomplished with some forethought of what ratios you will be processing for and the type of trial balances you will be encountering. This author recommends, by default, looking at the last **2 years** of a company after fraud has been discovered to understand just how pervasive it may have been and when it started⁵⁰.

With Excel it’s possible to effortlessly cut weekly/monthly trial balances to paste into a tabular worksheet from which, in following worksheets, one can actually do the math for the ratios in those worksheets⁵¹. Understandably, not all trial balances will have the same accounts in particular but they will all have several common characteristics: by summing within the tabular format, and by adding cell rows to differentiate to confine the TBs into format, it is possible to handle 104 weeks⁵² of TBs easily and have calculation sheets hard-reference the lead-sheet’s contents.

Once the tabularization has been settled on it’s possible to simply create calculation sheets that immediately reflect, and graph, results for immediate inspection as the tabular format is filled.

⁵⁰ The ACFE has studied through its members that **an average fraud runs 24 months before it is discovered**, thus the need to study all those periods.

⁵¹ There is no stated limit to number of worksheets that can be in an Excel file but it can certainly handle up to 50.

⁵² You should also perform ratios on a **weekly basis** since they will more readily reveal where the start of a trend starts, to focus where you should. The time it takes to cut 104 TBs compared to 24 isn’t that much longer, for the benefit of the result.

One size, can fit all, considerably reducing time to recreate for every engagement, with pre-thought or very nominal processing.

Industry Comparative Data Sources

When performing ratio analysis on a set of FS you should compare them against a benchmark of same from companies in the industry that are publicly traded to obtain instances where the client may have peculiarities that warrant attention. These companies should have, generally across a dataset, similar results on all ratios since they are operating within that industry thus their ratios should approximate each others'. The source of this data in Canada is SEDAR, the listing of FS for all publicly-traded companies (in the USA it's EDGAR), available as a free resource on the internet, which allows you to compile all into a spreadsheet make ready comparisons with the client⁵³.

A Draw-back in Sensitivity

Ratio analysis consists of comparing various accounts against each other to gain perspective of how unusually strong or weak a company may be to take corrective steps if they arose through either improper business practice or improper accounting treatment. They also will show, if properly sensitized, outliers of fraud transactions that have been booked through the company's financial records: *the key here is how much they can be sensitized to alert the user*. Depending on the magnitude of numbers being considered, and the guile of a potential perpetrator, it may or may not be possible to have red flags appear when analyzing ratios. It depends on the sensitivity with which they can be measured and meaningfully considered. One transaction that is fraudulent can be "smurfed" across multiple accounts to prevent significant affect per account however when there is a trend across accounts with lower control, or when a few of them show the same direction of result something may be revealed.

Graph It

People, unless they're really number-orientated, see substantial deviation greater with visual data so it can be helpful to graph out both the raw data that is used in the ratios from the FS **and** the ratios that result. With graphs of all data, in conjunction with industry data, it may be far easier to pin-point outliers and anomalies that draw further investigation. Equally, by feeding the data through logarithmic, squaring, or raised to a power of, routines it's possible to note anomalies.

Period Account Smurfing

While small transactions may be made across multiple accounts to allow larger amounts to be smurfed across a set of accounts, (in order for the books of account to balance), it can almost be presumed that all these small transactions will occur in the same period of time, (weekly/mthly) otherwise the set accounts will be out on the next closing arousing suspicion. Consequently, the data to be analyzed reveal them can be very small given that it covers a smaller period.

Period to Period and Intra-Company Statistically Benchmarked Comparatives

There are two basis' of analysis in using ratio analysis: comparing period to periods, and comparing intra-company. Bench-marks can be obtained from EDGAR/SEDAC listed public company financial reports available for download and inspection (that have undergone more rigorous third-party audit) for companies of similar size. It's important, when considering companies of same industry character, to

⁵³ Understandably there should be concern for differences in accounting treat with such things as accruals and estimates that the two parties may not have in common. Also, data from public companies' FS may be stated differently than private companies per established accounting rules.

certainly consider their size since no two will have the same cost structure, but one method that could be used is to amalgamate a sample of 10 such FS to obtain benchmark data as an analytic comparison to measure with.

Consistent, Period to Period Comparisons

The most powerful use of ratio analysis however is to compare period to period within the company by drawing down financial reports at the ends, or consistent near ends⁵⁴, of the reporting periods to compare between each other. Again, once the template in Excel or Calc has been customized and set-up for such, this can take no time at all to gain valuable insight to what has happened in the period.

Responsive Ratios and Sensitivity

There are principal ratios that form the bed-rock of industry standard however if the company knows that there is a weakness in internal controls that it cannot correct it may be advisable to try and form a ratio that reflects what could happen in those areas. It is important to note that ratio analysis will again only find **material misstatement** to be investigated and it is up to the Examiner to determine how sensitive she can make her ratios to find if any material activity has occurred. Again, how sensitive can an Examiner make her ratio analysis⁵⁵?

Further Refinement on the Direction of the Ratios Used

These ratios can also then be on-processed to generate ever-more sensitive indicators so that when coupled they reveal issues that do not appear on their face if used singularly: once combined they can become very powerful indicators. Such can occur when statement of comprehensive financial position (balance sheet) ratios are knit together with comprehensive statement of income (P&L) results that produce them. The two combined sets of parameters can provide for meaningful use depending on how they are coupled.

They should certainly measure percentage changes in the ratio (movement in one direction or another, consistently or not) over periods measured.

Standard Reasons for Outliers

When using ratio analysis and some anomaly is found the question to be asked of course is why did it occur? In some instances, there has been a significant occurrence in the period that caused the ratio to go to an outlier position such as

- the sale of an asset,
- the sale of a business line,
- the significant pay-off/down of a long-term loan,
- a large purchase with cash outlay
- a sharp peak or decline in revenue
- inventory build up for a season

⁵⁴ You should definitely draw down and analyze trial balances for a few days immediately before the period ending to ascertain if any “funny business” happened just before period end in effort to hide transactions within a period. **You can, in fact, run analysis for the full 52 previous weeks of the cycle, or further back, to be even more sure that something wasn’t posted months ago.** These ratios should be compared against those that result at the true period end to determine if everything is properly accumulated and if any stand out then they should be investigated.

⁵⁵ It’s possible to feed the numbers through *power-of* processing to generate more evident changes. Using statistical processing on the numbers both before and after the ratio creates is one way to bring out material differences. Equally, its possible to percentage process the numbers both before and after a ratio results that will bring out materiality. Using *power-of* you can simply do the indicator to be $5^{\text{Ratio Result}}$ or $10^{\text{Ratio result}}$ to make significant differentiations.

- ***any use of the true economic substance of assets/liabilities that changed them from current to long-term or vice versa***

to name a few so it's important to be cognizant of other significant transactions or business conditions that have affected the balance sheet/P&L accounts as the ratios are used. If these did not occur, then red-flags may result if anomalies cannot be explained and warrant further insight.

Period-to-period ratios are something that a malicious employee finds harder to manipulate to cover his activity since various accounts are touched over which the party may have no access⁵⁶.

Go Through the, at Least Double, Chains if a Ratio Doesn't Make Sense

If a ratio stands out you have to probably go through two chains of informatics to get to the reason why it doesn't since all ratios deal with two accounts or more so while one may seem to be in line with previous, the two together do not so both can be wrong. Thus, until you establish reasons for both balances you will be in the dark. It's your job to dig through the balance/account flows to get to the point where a striking incident may have arisen. By starting at 104 weeks back it's possible to find exactly where fraudulent postings etc. started, but will take time to analyze each period's weekly transactions.

Ratio only the Change that Happened Within the Period, Not Total Period-Ending Balances, May Give Better Results

An equally feasible activity that can be pursued is to systematically create ratios for the activity that **only occurred in a period, as net changes, as compared to what the total balances are**⁵⁷. *There may be some weakness with this when the ratio refers to a multitude of accounts since it may lead to not being able to differentiate out where the significant problem exists.*

Again, this data can be realized the same way and again, it can be compared period to period and to previous periods in quarter/seasons or last year's to determine if anything happened within that smaller period's events.

In fact, it may be advisable to ascribe more importance to this since once done for all the periods leading up to the totals there may be periods that stand-out substantially which warrant in-depth investigation.

These would not be readily discernable in a simple global total period simple ratio, and as they are compiled will show which period contained a material change which can help you narrow your inquiries⁵⁸. **And, it is advisable to make them for weekly/monthly increments to speed up your work faster, allowing for quicker insight.**

The same reasons may apply for divergences in outcomes.

While there may be oscillations of the resulting ratios around a certain number, back and forth as the periods go by, one would want to be very curious of any considerable movements *consistently in one direction or another, or short-term spikes or deep valleys that denote unusual activity.*

That unusual activity would not be readily discernable from sets of large account balances on period-end normal ratio work.

“Lower Employee” Ratios

The below are “lower level” ratios that should be used to expose instances where those rank-and-file lower accountants/bookkeepers have gone astray. All these ratios touch accounts where the company's assets that the employees have access to can be subject to dissipation/misappropriation or theft.

⁵⁶ Unless through collusion with another employee dealing with the other accounts

⁵⁷ This can be accomplished by simply calling for successive trial balances for weekly/monthly periods and processing them in Excel to yield period changes to work with. Once you build the spreadsheet it can be used for all clients, with adjustments.

⁵⁸ To process this data and make it pronounced it's advisable to graph this data to make it clearly visible.

This is not to say however that senior management will not have access to and use these accounts to override internal control processes in posting entries to them to cover up their own type of fraud. In so doing upper staff may run the problem of having an underling become aware of them, always a problem, however, if studied in minute detail their character may reveal escalating red-flags.

Current Ratio

Current assets (cash and equivalents, receivables and inventories)

Current liabilities (payables, accruals, taxes and debt due within 1 years)

The current ratio indicates generally how liquid the company is and allows comparison of completely separate accounting functions that generally have mutually exclusive staff to be established: while there may be a problem in the receivables side of the company, generally there is also not a problem in the payables side. This ratio allows for problems to stand out if cash is dwindling while payable are rising since a question may arise as to why the payables are not being paid when the cash balances, period to period, are going down.

Embezzlement will cause this ratio to decrease, since cash is in existence, while non-disclosure of hidden liabilities will cause it to rise.

Quick Ratio

Cash and equivalents + receivables

Current payables

The quick asset ratio excludes some asset accounts and focusses also on the trade payables to bring out how liquid the company is, on-the-drop-of-a-hat. How much liquid assets does it have to pay off its liquid payables, immediately realizable?

Again, period to period comparisons can reveal escalating payables or declining cash when all things are otherwise kept the same for the period leading up to the end of the reporting.

A decline in this ratio will come as possibly two results: less cash is available which means that collections are being written off or sales have declined or that there may be an artificial billing scheme being carried on whereby the sales may be consistent but the cash and receivables are not increasing.

Working Capital

Current assets – Current Liabilities

This number represents the amount of funds that a company has in excess of its liabilities, all current. It is not a ratio but an absolute dollar amount that will reveal the cushion of resources and how safe it is, cash-flow wise.

When compared period to period it will reveal if there has been cash embezzlement.

Receivable Turnover

Net sales on Account

Average Receivables

This ratio, period to period, may decrease substantially if there are being fictitious sales booked and written off since the sales figure will increase but the balance sheet account will stay constant after write off.

Collection Ratio

$$\frac{365}{\text{Receivable Turnover}}$$

Significant changes in this ratio, period to period, may indicate that there are inefficiencies in the collection which may reveal fictitious sales or fictitious write-offs of receivables.

Inventory Turn-over

$$\frac{\text{Cost of Goods Sold}}{\text{Average Inventory over the year}}$$

This ratio, period to period, will show whether there are efficiencies in purchasing, by being quite high, again when compared with other periods, however if it is very high for some periods it may indicate stolen inventory.

Average Number of Days Inventory

$$\frac{365}{\text{Average Inventory Turnover}}$$

Significant changes in this ratio, period to period, may indicate inventory theft or purchasing fraud.

The above are the principal ratios that a fraud auditor should use since they represent those related to effects that can occur as they relate to subaccounts where one or more lower-end employees have control and are under the administration of those lower-end employees. These groups of employees do not have access to senior accounting functions and cannot “cover their tracks” with senior off-sets⁵⁹.

“Middle-Upper Level Management” Ratios

The above are all ratios that will indicate when lower level employees have attempted to perpetrate acts against the employer however medium-upper level management may/will have different motives in perpetrating such as financial statement misrepresentation due to measurements imposed on them to perform. Such pressures include, for instance, business segment costs/revenues, net income/loss, general balance sheet health for bond covenants and borrowing power, as well as reflections of such in share prices and perceptions of going-concern health.

While the above ratios can also be of utility to root these motives out, since they may reveal management override of controls on lower level employees, the below ratios will be useful since they cut directly to the instances where only medium-upper level management have access to journal entries/adjustments that they can post which affect the financial statements on a global basis.

⁵⁹ Unless there is collusion between those touching “both sides of the ratio”

Again, like all ratios, it's important to obtain sets of trial balances from varying days before the end of the financial period to see any possible spikes in the entries that may warrant investigation.

Profit Margin

$$\frac{\text{Net income before extraordinary items}}{\text{Sales}}$$

This ratio denotes on-going percentage of net income in each \$1 in sale and can generally be set askew if there has been unusual incurrence of fixed costs for the period studied. To better refine this if there has been unusual incurrence of certain costs out of the normal flow of business over the period the net income figure should be adjusted for this, so as to bring out exactly if there has been a substantive unexplained variation in variable costs and other direct costs.

If there are spikes with this ratio, especially when considering varying period endings leading up to the close there may be a significant possibility of management adjustment, perhaps unwarranted, through artificial entries.

Interest Coverage

$$\frac{\text{Income before interest and taxes}}{\text{Fixed charges}}$$

This ratio indicates the amount by which the fixed costs of the company (which can either include or exclude accruals for depreciation/amortization) are covered by the net income of the enterprise. The ratio is called "Interest coverage" however similar can be formulated for additional specific fixed costs. This ratio will bring out the efficiencies with which management is incurring fixed overhead in relation to its revenues and variable costs.

As part of management review by the C-chairs this may as well be subject to abuse by medium-upper level management to give artificially better outcome so again, varying ending periods ratios should be analyzed.

Margin of Safety

$$\frac{\text{Income after fixed charges and before income taxes}}{\text{Sales}}$$

This ratio indicates how much disposal income, out of every sales dollar, the enterprise has to satisfy any possible contingencies and at what rate.

Again, this ratio may be used by C-chair to measure medium-level management performance on controlling costs.

Debt-to-Equity

$$\frac{\text{Total current and long-term debt plus capitalized leases}}{\text{Total shareholder's equity}}$$

This ratio indicates whether there has been a proper mix of equity and debt to opportunize on business possibilities and need to restructure the liability side of the balance sheet. If it is too low or too high

depends on the industry bench-mark⁶⁰ and may indicate pending bottle-necks in financing through additional debt or unnecessary demands for equity dividends. Where a good mix resides is the subject of C-chair input, not to be artificially adjusted with segment chair artificial adjustments.

Years to Debt Repayment on Internal Cash-flows

Total fixed obligations

Operating cash flows

This ratio reveals just how long it will take the company to pay-off its existing debt obligations through its normal cash-flows. The cash-flows must be net of both that coming in and those being expended in day-to-day operations.

This ratio reveals how top heavy on debt the enterprise may be turning and bench-marks can be compared to publicly listed company data⁶¹.

Return on Assets (ROA) / Return on Equity (ROE)

Net Income

Average Total Assets

Net Income

Average Common Equity

These two ratios reveal the rate of returns on assets used in the business and equity that shareholders have invested. Note that both refer to “average”, being daily/weekly/monthly weighted average of values over the year.

All three balances can be manually adjusted by medium-upper level management over the year through artificial entries so, again, you’ll find far more insight into what could have possibly happen if weekly / monthly trials balance data is used.

Some Web-illustrated Number of Ratios

The below is a well put-together coverage of financial ratios and you’re certainly able to find others.

<http://www.myaccountingcourse.com/financial-ratios/>

Past Ratios and Larger Public Cases

In the past, US accounting scandals that have rocked public perceptions ratios such as the below worked well to reveal recording and reporting problems and all-round general poorer financial performance:

1. Gross margins
2. Sales Growth
3. PTB and PE ratios
4. Profit margin
5. Top and bottom-line growth
6. ROE and ROA
7. Current ratio

Perceptions of financial misrepresentation that are to be measured qualitatively include:

1. Changes in accounting methods

⁶⁰ Available from similar companies’ fs available through EDGAR or SEDAR

⁶¹ Available from similar companies’ fs available through EDGAR or SEDAR

2. Affects to stock prices
3. Management resignation or alteration
4. CEO outlook on financial analysts' opinions

Other key indicators of earnings manipulators

In 1999 M.D. Beneish⁶² formulated 5 statistically important ratios that can be used to evaluate potential for earnings management by medium-upper level staff. They consist of periodic comparisons of certain ratios that are indexed and compared year-to-year across a period where “t” is the current period data and “t-1” is that from the exact same period previous. They are:

Day's Sales in Receivables

$$\frac{(A/R_t / Sales_t)}{(A/R_{t-1} / Sales_{t-1})}$$

A ratio for this would be between 1.5 to 1 for earnings manipulators.

Gross Margin

$$\frac{[(Sales_t - Cost\ of\ Sales_t)/Sales_t]}{[(Sales_{t-1} - Cost\ of\ Sales_{t-1})/Sales_{t-1}]}$$

A ratio for this would be between 1.2 to 1 for earnings manipulators.

Asset Quality

$$\frac{1 - [(Current\ Assets_t + Net\ Fixed\ Assets_t)/Total\ Assets_t]}{1 - [(Current\ Assets_{t-1} + Net\ Fixed\ Assets_{t-1})/Total\ Assets_{t-1}]}$$

A ratio for this would be between 1.25 to 1 for earnings manipulators.

Sales Growth

$$\frac{Sales_t}{Sales_{t-1}}$$

A ratio for this would be between 10 to 60% for earnings manipulators.

Total Accruals to Total Assets

$$\Delta Working\ Capital_t - \Delta Cash_t - \Delta Current\ Taxes\ Payable_t - \Delta Current\ portion\ of\ LTD\ Debt_t - \Delta (Acc\ Dep.\ \&\ Amort._t) / Total\ Assets_t$$

TATA for manipulators: higher than lower for bench-mark

The above indices should be used with caution and should also be bench-marked against others available for the industry through EDGAR or SEDAR.

The Full Integrated M.D. Beneish Model for Manipulators

The full model that Beneish proposed was

⁶² Beneish, “The Detection of Earnings Manipulation”, Financial Analyst Journal, Sept/Oct, 1999

$$M = -4.84 + 0.92*DSRI + 0.528*GMI + 0.404*AQI + 0.892*SGI + 0.115*DEPI - 0.172*SGAI + 4.679*TATA - .327*LGVI.3$$

Beneish based the formula on a weighted average of these components:

- ❖ DSRI: days sales in receivable index (CY AR/sales)/(PY AR/sales),
- ❖ GMI: gross margin index ((PY sales – PY cost of sales) / PY sales) / ((CY sales – CY cost of sales) / CY sales),
- ❖ AQI: asset quality index (1 – (CY CA + CY Net FA)/CY TA)) / (1 – (PY CA + PY Net FA) / PY TA)),
- ❖ SGI: sales growth index (CY Sales/PY Sales),
- ❖ DEPI: depreciation index (PY DE / (PY DE + PY Net PPE)) / (CY DE/(CY DE + CY Net PPE)),
- ❖ SGAI: selling, general and admin expenses index (CY SG&A/CY Sales) / (PY SG&A/PY Sales),
- ❖ LI: leverage index ((CY LTD + CY CL) / CY TA)) / ((PY LTD + PY CL)/PY TA)),
- ❖ TATA: total accruals to total assets index ((CY WC – PY WC) - (CY Cash – PY Cash) + (CY Income Tax payable – PY Income Tax payable) + (CY Current LTD – PY Current LTD) – CY DE)) / CY TA

Where:

- ❖ CA = current assets
- ❖ CY = current year
- ❖ DE = depreciation expense
- ❖ FA = fixed assets
- ❖ GM = gross margin
- ❖ LTD = long-term debt
- ❖ PPE = property, plant and equipment
- ❖ PY = prior year or prior period
- ❖ SG&A = selling, general and administrative
- ❖ TA = total assets
- ❖ WC = working capital

Beneish determined through his study that the greater the result of the number above -2.22 the stronger indication that there had been manipulation of the FS.

Again, this data can be integrated in tables/graphs, across numerous previous periods, into a ratio sheet like above ratios, in accompaniment with industry data to determine red-flags of manipulation.

Vertical and Horizontal Analysis – All, a Few Days Before and After – With Reason

This author has chosen to include vertical and horizontal analysis in this chapter on ratio analysis since it presents part of the numeric ratio analysis that an examiner should pursue as part of their routine in an

investigation. As anyone knows, horizontal and vertical analysis consists of comparing account balances against each other for, in the case of horizontal, changes across periods in each account, or in the case of vertical, changes across comparisons of accounts within the period with those of previous periods. Each is a very routine step to accomplish and the ACFE Fraud Manual explains both in detail and the internet also contains many examples.

All of the above issues related to ratio analysis also apply to vertical and horizontal analysis.

This author however encourages that data can be gleaned for questionable transactions that **affect just prior to or immediately subsequent to the period end and consequently the examiner should have it built into their routine the calling of trial balances for a few days before and after the period end** to run said ratio and vertical/horizontal analysis. *In many instances, a fraudster may attempt to issue an off-set anomaly in those few days before and after to not have it affect the TB and by cutting TB's for those periods separately it's possible to root them out.*

Understandably this requires some preparation of an Excel spread-sheet formatting to capture and easily manipulate volumes of data possibly across 52-104 weeks **PLUS the days before and after** but once the spreadsheet is established to accommodate diverse TB's, as it can be, processing what seems to be a lot of data can be easily done⁶³.

Once the spreadsheet is tailored, with resulting embedded ratio and horizontal/vertical analysis formulae in place it's possible to effortlessly examine all these periods' transactional movement.

Spend the time once, pre-thinking what data you'll be processing, and simply reuse the same spreadsheet with ease.

Correlate Management Compensation with Substance of 3rd Party Transactions and Accounting Assumptions

A very worthwhile exercise is to try to correlate how management is compensated with the character of 3rd party transactions over items entering and exiting the FS as well as accounting assumptions that management has made. 3rd party transactions⁶⁴, **at off-market rates**, may be one means by which management has circumvented their stewardship responsibilities. Depending on how management earns its compensation may relate to how they perform these transactions, as well as make estimates in the accounting records.

Knowing how management is rewarded may focus attention on where they could skirt the process and, either with 3rd parties or by themselves, generate FS that do not reflect the reality they live in.

Some Key Qualitative Issues When Considering, Globally

Subjectively, you may, when considering the above ratio analysis also seek to get a very good grasp of the environment wherein the entity functions. This will explain pressures to falsify elements on the FS and would also explain possible trends that you may not be sensitive to. Such would include:

- Taking a look at where the company's history has been and where its management seeks to go in terms of markets and products, relationship with customers/suppliers (which will carry what pressures that exist to alter FS data)

⁶³ The data need not be overly analyzed, only by simply cutting a few days before and after and testing each period's, and then go on to the next few days before and after to see if anything existed there. This is simply copy and paste work with an Excel tailored for this.

⁶⁴ Which requires that you know the true identity of those 3rd parties and how they relate to mgmt

- Is there consistent tone-from-the-top on anti-fraud behaviour and has it filtered all the way to rank and file, does the company have an anti-fraud program, has it had a fraud assessment, and does it have fidelity insurance
- Is there appropriate reporting to the Directors and how are any issues resolved
- Is the Board clearly independent of management
- Has there been a history of restatements of the FS through discovery of errors/changes in estimates/policies/issues of materiality
- Is there any interest in a sale of the company in the near/medium future
- Has there been recent acquisitions of soft assets where estimates were used such as goodwill on new corporate purchases, licences, etc.
- Is there any possibility of “economic extortion” on the external auditors (through related parties), how consistent is their relationship, have their audits over the periods been consistent in their areas or has there been auditor-shopping
- Has there ever been instances of management responsibility for legal infractions such as income/sales tax violations, workers compensation claims, human resource legal actions
- Who (stakeholders) the FS are used by and what they look for in terms of growth against industry / market / ROI / dividend need
- Is there a preoccupation of ensuring share price increases or concern of analyst’s opinions
- Has there been consistent correlation between earnings projections and projected dividends with actual
- Has there been consistent meeting of date-authenticated budgets
- Related parties within the corporate group that may have transferred assets/liabilities at non-fmv/soft disclosed values
- Are there non-descript inter-party balances
- Are estimates used in disclosures conservative, consistent and appropriate over the periods or have they been changed from period to period without change in business operations/model
- Examining their banking relationships such as payment history and loan covenant compliance and any possible, projected, need for exterior debt financing in the future
- Owner draws and, in particular, executive bonus plans,
- New senior accounting staff hires and their history, and reason why they were hired (perhaps reason why previous were released)
- Is there a truly independent and strong Internal Audit department
- Analyzing, of course, vertical and horizontal analysis, seasonalized if such is the case, and against industry bench-marks
- Other issues that reflect where values came to the FS and how they could have been manipulated.

The AICPA Fraud Elements

The AICPA has determined that further qualitative issues should be considered in addressing FS fraud contained in their “AU 316 - *Consideration of Fraud in a Financial Statement Audit*”⁶⁵:

“a. *Financial stability or profitability is threatened by economic, industry, or entity operating conditions, such as (or as indicated by):*

- *High degree of competition or market saturation, accompanied by declining margins*
- *High vulnerability to rapid changes, such as changes in technology, product obsolescence, or interest rates*

⁶⁵ <https://www.aicpa.org/Research/Standards/AuditAttest/DownloadableDocuments/AU-00316.pdf>

- Significant declines in customer demand and increasing business failures in either the industry or overall economy
- Operating losses making the threat of bankruptcy, foreclosure, or hostile takeover imminent
- Recurring negative cash flows from operations and an inability to generate cash flows from operations while reporting earnings and earnings growth
- Rapid growth or unusual profitability, especially compared to that of other companies in the same industry
- New accounting, statutory, or regulatory requirements

b. Excessive pressure exists for management to meet the requirements or expectations of third parties due to the following:

- Profitability or trend level expectations of investment analysts, institutional investors, significant creditors, or other external parties (particularly expectations that are unduly aggressive or unrealistic), including expectations created by management in, for example, overly optimistic press releases or annual report messages
- Need to obtain additional debt or equity financing to stay competitive—including financing of major research and development or capital expenditures
- Marginal ability to meet exchange listing requirements or debt repayment or other debt covenant requirements
- Perceived or real adverse effects of reporting poor financial results on significant pending transactions, such as business combinations or contract awards

c. Information available indicates that management's or those charged with governance's personal financial situation is threatened by the entity's financial performance arising from the following:

- Significant financial interests in the entity
- Significant portions of their compensation (for example, bonuses, stock options, and earn-out arrangements) being contingent upon achieving aggressive targets for stock price, operating results, financial position, or cash flow¹
- Personal guarantees of debts of the entity

d. There is excessive pressure on management or operating personnel to meet financial targets set up by those charged with governance or management, including sales or profitability incentive goals.

Opportunities

a. The nature of the industry or the entity's operations provides opportunities to engage in fraudulent financial reporting that can arise from the following:

- Significant related-party transactions not in the ordinary course of business or with related entities not audited or audited by another firm
- A strong financial presence or ability to dominate a certain industry sector that allows the entity to dictate terms or conditions to suppliers or customers that may result in inappropriate or non-arm's-length transactions
- Assets, liabilities, revenues, or expenses based on significant estimates that involve subjective judgments or uncertainties that are difficult to corroborate
- Significant, unusual, or highly complex transactions, especially those close to period end that pose difficult "substance over form" questions

- Significant operations located or conducted across international borders in jurisdictions where differing business environments and cultures exist
- Significant bank accounts or subsidiary or branch operations in tax-haven jurisdictions for which there appears to be no clear business justification
- Management incentive plans may be contingent upon achieving targets relating only to certain accounts or selected activities of the entity, even though the related accounts or activities may not be material to the entity as a whole.

b. There is ineffective monitoring of management as a result of the following:

- Domination of management by a single person or small group (in a nonowner-managed business) without compensating controls
- Ineffective oversight over the financial reporting process and internal control by those charged with governance

c. There is a complex or unstable organizational structure, as evidenced by the following:

- Difficulty in determining the organization or individuals that have controlling interest in the entity
- Overly complex organizational structure involving unusual legal entities or managerial lines of authority
- High turnover of senior management, counsel, or board members

d. Internal control components are deficient as a result of the following:

- Inadequate monitoring of controls, including automated controls and controls over interim financial reporting (where external reporting is required)
- High turnover rates or employment of ineffective accounting, internal audit, or information technology staff
- Ineffective accounting and information systems, including situations involving significant deficiencies or material weaknesses in internal control

... ”

“AU Section 316 - Consideration of Fraud in a Financial Statement Audit” should be studied in its entirety though the above serves as mere indicators.

Purchasing Bribery, Collusion, Economic Extortion

These 3 types of fraud that can occur in any organization are the most difficult to prove since the transactions that support them happen off the company's set of books and can ***generally only be proven through circumstantial evidence.***

The Environment and The Chain of Processes Where It Can be Cheated

These types of fraud can occur in any of the 5 phases of contracting a service or product:

- A. The **Needs Generation Phase** (creating the requirements through conversation with users, obtaining funding through the Finance official/CFO/Budgetary Officer, etc.)
- B. The **Selection of Procurement Method Phase** (competitive bid whereby numerous suppliers are approached, sole-source, sealed bid, all of which can go through iterations.)
- C. The **Solicitation Phase** (drafting of the solicitation and determining who to approach, announcing/posting publicly through press releases/advertising for bids, etc.)
- D. The **Evaluation/Selection Phase** (determining the winner usually should be determined by those other than who control where the solicitation was sent/opened to, etc.)
- E. The **Performance/Delivery/Monitoring Phase** (obtaining the goods and/or services, should be confirmed through dialogue with user, etc.)
- F. The **Payment/Closeout Phase** (consisting of reconciliation of deliveries with payments, final dialogue on confirmation of close-out)

It's very clear that this function can be compromised by a single individual involved in the process unless there is very sound segregation of duties and considerable buttressing of documentation layers between the parties to allow each to see what others involved in the chain have done.

The stronger the documentation of the process, **with oversight by an appropriate party (senior operations staff, GM, etc.)**, determines how much integrity it has. In this case, all steps taken in the process are documented as to who did what and there is fall-back to confirm if an element of the process went off the tracks.

It should be noted that not all procurement situations can be interpreted as compromised merely because a red-flag/cost overrun resulted. Various reasons causing this outside the enterprise include:

- exaggerate costs,
- overstate performance,
- supply defective workmanship,
- supply inferior equipment/service,
- engage so-called experts who aren't and
- provide inadequate services/studies that do not fulfill requirements
- etc.

to name a few so when something seems to go wrong in the procurement function, it need not always be an employee who caused it.

Reasons for failures can be ascertained per the docket of the steps taken and narrative with the supplier.

Bribery, Collusion and Economic Extortion at Law

Sec. 426 of the Criminal Code codifies these types of transactions as criminal, as between an agent of the company (employee) and the outside party⁶⁶. Equally, there are Criminal Code and other Act provisions dealing with bribery of government officials, both domestic⁶⁷ and extra-national⁶⁸.

⁶⁶ Canadian Criminal Code

Secret commissions, s. 426 (commercial bribery)

426 (1) Every one commits an offence who

- (a) directly or indirectly, corruptly gives, offers or agrees to give or offer to an agent or to anyone for the benefit of the agent — or, being an agent, directly or indirectly, corruptly demands, accepts or offers or agrees to accept from any person, for themselves or another person — any reward, advantage or benefit of any kind as consideration for doing or not doing, or for having done or not done, any act relating to the affairs or business of the agent's principal, or for showing or not showing favour or disfavour to any person with relation to the affairs or business of the agent's principal; or*
- (b) with intent to deceive a principal, gives to an agent of that principal, or, being an agent, uses with intent to deceive his principal, a receipt, an account or other writing*
 - (i) in which the principal has an interest,*
 - (ii) that contains any statement that is false or erroneous or defective in any material particular, and*
 - (iii) that is intended to mislead the principal.*

Privity to offence

(2) Every one commits an offence who is knowingly privy to the commission of an offence under subsection (1).

Punishment

(3) A person who commits an offence under this section is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years.

Definition of agent and principal

(4) In this section, agent includes an employee, and principal includes an employer.

⁶⁷ Canadian Criminal Code:

Bribery of judicial officers, etc.

119 (1) Every one is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years who

- (a) being the holder of a judicial office, or being a member of Parliament or of the legislature of a province, directly or indirectly, corruptly accepts, obtains, agrees to accept or attempts to obtain, for themselves or another person, any money, valuable consideration, office, place or employment in respect of anything done or omitted or to be done or omitted by them in their official capacity, or*
- (b) directly or indirectly, corruptly gives or offers to a person mentioned in paragraph (a), or to anyone for the benefit of that person, any money, valuable consideration, office, place or employment in respect of anything done or omitted or to be done or omitted by that person in their official capacity.*

Consent of Attorney General

(2) No proceedings against a person who holds a judicial office shall be instituted under this section without the consent in writing of the Attorney General of Canada.

Bribery of officers

120 Every one is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years who

- (a) being a justice, police commissioner, peace officer, public officer or officer of a juvenile court, or being employed in the administration of criminal law, directly or indirectly, corruptly accepts, obtains, agrees to accept or attempts to obtain, for themselves or another person, any money, valuable consideration, office, place or employment with intent*
 - (i) to interfere with the administration of justice,*
 - (ii) to procure or facilitate the commission of an offence, or*
 - (iii) to protect from detection or punishment a person who has committed or who intends to commit an offence; or*

Equally, civil law remedies exist in for them grounded on breach of employment contract, breach in fiduciary duty, or general agency/principal malfeasance law.

The Results of “A Breach” in the Process

In a typical bribery/collusion/extortion scenario an employee has “crossed ranks” to act for the outside party to the detriment of their employer via favouring the outside party’s interests over their employer’s. The results of this type of fraudulent activity include:

- Excessive ownership of the purchasing function in one individual
- Excessive domination of one individual over others’ in the process
- Limited number of providers supplying the company thus no efficiency in price/volume
- Kick backs to the purchaser, off-books
- Charging of higher prices to pay for the kick-backs
- Charging of higher prices that were contracted for, where little post-contracting verification occurs
- Over purchasing of both product or service
- Replacement with poor quality goods/services than what was contracted for that can lead to additional purchasing than what was initially contracted for
- Accelerated payments out of the usual, and over-payments.

Typically for perpetrators, they receive payments or other types of gifts that do not show up anywhere near the employer’s accounting **however there are certain analytic procedures that can be done on the environment/transactions to produce red-flags of possible fraudulent treatment.**

Two Types of Evidence

There are two streams of evidence that can be pursued to find clear circumstantial evidence of their existence: qualifiable and quantifiable. Qualifiable is based on factors not related to prices/transactions in particular but instead the inherent quality of both the staff making the decisions to buy, what is bought, and how timely it is paid for. The quantitative depends on the amount that was bought, its price compared to others in the marketplace and how it was paid for. The below qualifiable list strengths in a purchasing system and while if one or two are missing in the environment it may not lead to a breakdown that allows the fraud to be perpetrated: *any internal control system can be overcome but these elements below should be looked to to see if there is a potential and where it comes from.* The quantifiable issues below are lists of testings the investigator can do to find circumstantial red-flags that again may help in focusing who a perpetrator may be.

Qualifiable Issues

Qualifiable aspects include:

- Has there been adequate settlement via discussion between the purchaser and the user parties in the company to determine need to begin with as stated by the actual users of the product⁶⁹?

(b) directly or indirectly, corruptly gives or offers to a person mentioned in paragraph (a), or to anyone for the benefit of that person, any money, valuable consideration, office, place or employment with intent that the person should do anything mentioned in subparagraph (a)(i), (ii) or (iii).

⁶⁸ Corruption of Foreign Public Officials Act (CFPOA)

⁶⁹ This is very important since this confirms that a PO was legitimately issued to begin with: if such didn’t occur the question should be “Who authorized this?”

- Has there been adequate discussion between the decision-maker in the company and the host of suppliers to determine which carry the product/price⁷⁰?
- How open is the market for the product/service – is the product/service a commodity or a speciality product/service⁷¹?
- Is there a budget prepared for sale/use reviewed by a non-purchasing party as the period goes by⁷²?
- How many times has the same product/service been purchased from the same supplier⁷³?
- In a bidding situation, has there been closed or open bidding?
- Is the purchase function audited by IA or an external auditor or specialist to confirm integrity⁷⁴?
- Who determines acceptance of the purchase contract? Is it the same as the person who formulates the bid or buying decision⁷⁵?
- Does the purchasing party (supervisor or employee) seem to be happy with their work or are they over-stressed, or perceived under-appreciated? Do they have financial pressure or unshareable financial burden⁷⁶?
- Has there been a rotation in purchasing staff to prevent ongoing correspondence between an employee and a certain set of providers⁷⁷?
- How long has the purchaser been employed by the employer⁷⁸?
- Has there been previous questionable purchases by the purchaser previously⁷⁹?
- Has there been a growing wastage reportage of products/services for the actual users⁸⁰?
- Has the warehouse of products being stored grown substantially⁸¹?

The ACFE equally has provided “*Fraud Risk Assessment – Module 8 Purchasing and Billing Schemes*”, available online, which details numerous indicia to evaluate.

Quantifiable Issues

⁷⁰ This should occur to access FMV for the good/service: if it hasn't why had this particular supplier been chosen?

⁷¹ This goes to the immediate previous whereby if the good/service is a commodity then the lowest price purchase should have occurred, while if the good is a speciality then there can be room for price manipulation.

⁷² If there is a budget, there should be someone confirming activity and if not reconciled excessive purchasing may take place.

⁷³ This goes to whether the employer maintains healthy buying habits by, in the case of commodity products, buying from numerous sellers, or in the case of speciality products/services, contracting with those who have specialty. If the same is purchased from only one supplier on an on-going basis this should be a concern since it may go against sound business practice.

⁷⁴ By having yearly/quarterly or surprise audits of the function the possibility of it happening is thwarted.

⁷⁵ There should be segregation of duties here – the person who seeks out suppliers should never be the same as the person who makes the decision to buy from any of them.

⁷⁶ This goes to the mental state of the parties involved with the whole purchasing function since it need only be one who has bad sentiment towards the company who can be a weak-link. If everyone is in good psychological state, then there is less of a chance for fraud.

⁷⁷ By severing the ongoing control of the provider's account from one employee to another on an ongoing basis the environment to foster provider favouritism is thwarted.

⁷⁸ This goes to how proficient the employee is and how well they act for the company to disallow an excuse on discovery of not knowing all the variables that they should be attending to. A properly functioning employee will not be able to provide “ignorance” for a “poor buying decision”, while a new or seemingly poorly acting purchaser can.

⁷⁹ If there have been questionable purchasing practices performed by this employee before, or in previous employment, this should be cause of alarm.

⁸⁰ This can be ascertained from the actual users rather than the purchaser since it's objective and reveals whether there was too much inventory/service purchased, or it was of a lower than standard or wanted quality, that may have been purchased for an inflated price.

⁸¹ This is again another objective quantitated test that can reveal building inventory of obsolete inventory or merely excessive purchase of same in advance of what needed.

The below are quantifiable issues that can be tested from accounting data/documentation processes in the company that can reveal red-flags of bribery/collusion/economic extortion. It should be noted that no one of them may be sufficient enough to come to that conclusion however coordinated test results can point towards a particular staff. As with qualifiable testing, all the results should be looked at^{82, 83} Many of these tests are to be done both globally as well as on an individual inventory item basis.

- Increased % of obsolete inventory, both as a percentage of all inventory and by absolute amount
- Shorter payment lengths for the supplier to be paid, as compared to previous purchases from that supplier, and generally across all suppliers
- Higher “smurfing” of purchase payments just under approval payment revealed through stratified payments
- Higher inventory costs to both standard and budgeted costs
- Whether reorder of inventory happens with high inventory quantities
- High amount of inventory in relation to amount selling/usage
- Any inventory that has gone up in price in relation to previous periods without sales/usage or contrary to budget (sales/costs)
- Analyze for phoney invoice numbers, or out of sequence numbering, by supplier whereby supplier issues a phoney invoice just to get paid
- Large payments to vendors that exceed the monthly/quarterly/seasonal average for that inventory item or that type of supplier
- Number of returns to or credits issued by vendor reveal inferior goods/services
- Etc

Other Red-Flags, Generally

There are other red-flags that may indicate that the relationship between the purchasing group and the suppliers has been compromised, which include:

- Do inert suppliers ask for bid-packages but don’t bid?⁸⁴
- Do qualified suppliers systematically not bid or bid marginally against each other?⁸⁵
- Does a particular supplier always win in a geographic area without normal reason and/or do other suppliers refuse to bid outside certain physical areas?⁸⁶
- Do services bid prices align between suppliers, or prices for specialty items?⁸⁷
- On second bidding, if such is the case, do the same bidders end-up having the same rank/results as before?⁸⁸
- Do certain bidders always fall within small percentages of the awarded bid?⁸⁹
- Does a new bidder submit bids out of line with the existing already-existing bidders?⁹⁰

⁸² It should be noted that it is particularly difficult to establish fraudulent abuse when the perpetrator has only allowed very incidental transactions to occur: in order to be revealed with these tests there may need to be significant movement since only that will “move the dial” to reveal that such has occurred.

⁸³ Some of these have been summarized from “**Proactively Detecting Occupational Fraud Using Computer Audit Reports**”, By: Richard B. Lanza, CPA, PMP, Foreword By: Joseph T. Wells, CFE, CPA © 2003 – The IIA Research Foundation which is available on the internet. **This summary of practice points should definitely be studied since it also applies to numerous other fraud and testing methods related to them.**

⁸⁴ May reveal collusion with subsequent winners to subcontract, at designed rates, to allow winner to stifle bids

⁸⁵ Which reveals possible exterior collusion, possibly without employee help

⁸⁶ Could indicate exterior collusion

⁸⁷ Reveals 2 or more suppliers acting together since this should rarely happen

⁸⁸ Reveals collusion in the bidders. generally

⁸⁹ Reveals inside collusion with an employee knowing the bids

⁹⁰ Reveals a bidder who bid honestly, in a field of those who did not

- Are all the bidders named, operating companies or are some shelf, numbered companies?⁹¹
- Does an employee or a member of their family have an ownership interest in bidding suppliers or an interest in the person making the purchase decision?⁹²
- Are there instances where estimates are not made prior to producing solicitations and if there are, what data forms their creation?⁹³
- Is there any possible collusion with the sales function that argues for excessively large inventory or services so as to on-sell, possibly at a discount, just as a reason to continue to buy from that supplier?
- Is there active securing of secondary sources once a bid has been awarded so as to being able to terminate the relationship?
- Is the solicitation tailored for just one supplier?⁹⁴

Additional Readings for Considerable Insight

Rather than regurgitate their contents the attached papers available on the internet for free as .pdf's are quite comprehensive and should be consulted:

1. Combating Fraud in Public Purchasing, Attorney General of New York State
2. USAID Office of Inspector General/Investigations – Fraud Indicators
3. Procurement Fraud Red Flags & Investigative Techniques
4. Protecting Your Contracts from Procurement Fraud and Abuse with Procurement Integrity Controls, By Tom Caulfield
5. Procurement Fraud Themes and Control Measures, By Fraud Prevention Group, London Public Sector
6. Procurement fraud in the public sector: The case for implementation of robust controls, Equifax
7. Procurement Fraud and Procurement Fraud and Corruption Presented By, Reuben Boro Gitahi, CPA
8. Managing Fraud Risks in Procurement & Contracting, The IIA Los Angeles Chapter October 2, 2017
9. John J. Hall, CPA
10. Procurement and Supply Chain Fraud - How It Happens and How eCommerce Can Improve Controls, by Peter Smith for OFS Portal LLC
11. Prevention of Procurement Fraud Policy, by, Loughborough University
12. Procurement Fraud Internal Controls and Monitoring Presented by: Theresa Webb, CPPO, CPPB, CPSM, C.P.M. Chief Purchasing Officer, City of Delray Beach
13. GSA OIG Procurement Fraud Handbook
14. Detection and Prevention of Contract and Procurement, Fraud Catalyst to Organization Profitability, by Gbadamosi Olaniyi Mufutau and Osho Victoria Mojisola
15. Preventing procurement fraud and corruption, KPMG

And, of course, additional insight is available from the ACFE papers and books.

Does the Soliciting Bid Require Audit of the Supplier?

It may be beneficial, if the supplier allows it, to compel the supplier to be subject to an audit by the company at any time during the bid/award/fulfillment process has begun. The company can then

⁹¹ This may reveal artificial companies that are fronts for existing who do not want to participate but who want a foot in the door to try to make some revenue

⁹² Clearly a “no-no” since they may, in place, attempt to ensure their company wins the bid

⁹³ Indicates that any possible bid is acceptable and without estimates there is no objective way, prior to receiving the bids what true prices are.

⁹⁴ This shows clear favouritism, but for what reason.

scrutinize if there have been any instances of bribery of the company's employees which will show on the supplier's since they may record them.

Not all suppliers will allow for this understandably but if they agree it's further proof that no tarnished bids have been placed.

And those who do allow it should be qualitatively favoured in the bid.

Circumstantial Only, though Can be "Stung"

Again, an enormous percentage of the results of these observations are only circumstantial of possible bribery etc. since they do not reveal the actual payments/gifts that were made to the employee to cause them.

Save typical observations of fraudulent employees having additional wealth, as in any other fraud being perpetrated, it can be very hard to prove that an employee implicated did in fact engage in the detrimental behaviour without hard evidence of such: "smoking guns may be abounding, but the party actually pulling the trigger" may be difficult to identify.⁹⁵

It is possible, however, to sting each employee involved with a Birbal's Litmus⁹⁶ test whereby a senior management chair asks a trusted supplier to attempt to perpetrate such with targeted employees⁹⁷ sequentially to find out where a weak link may exist. Obviously, an audio recording of such should be created. It's important not to go near creating a claim of criminal entrapment⁹⁸ in this instance: phrase what will be said so as to not threaten the employee with any repercussions except considering what they are doing on their own volition.

Theft of Intangible Property

Not all bribery scenarios involve suppliers of product/service to the company. Material and even more harmful bribery/collusion/economic extortion can occur when a malicious employee decides that for the access they have, they'll sell the company's intangible assets to a competitor.

Such assets, that are valuable to a competitor, include:

- Customer lists w/ price lists
- Supplier lists w/ price lists
- Marketing plans and timetables
- Advertising plans and timetables
- Production manuals detailing how products are made
- Recipes for products
- Budgets
- Personnel resumes
- Expansion plans
- Incidents of internal fraud that have not come out publicly

or any other intangible that the employee can access within the company.

⁹⁵ This depends on how much ownership of the acts detailed above can be ascribed to one or more identifiable parties in the enterprise: in some cases, depending on the evidence (paper copy and authorizations) it may be possible.

⁹⁶ Birbal's Litmus tests consist of placing a fraudulent transaction in the process and seeing how parties processing it will react: will they do anything, or take it to management? In this case a few trusted suppliers can ask purchasers to grant favours outside normal operating procedure that cut to the heart of what has been seemingly perpetrated, in effort to record the employee acquiescing. This supplies far more critical evidence of bribery, etc. after the red-flags are measured.

⁹⁷ Once the totality of all the testing and observations have been done the process can limit the number of employees this must be done in respect of.

⁹⁸ R. v. Amato, [1982] 2 S.C.R. 418, R. v. Mack, [1988] 2 S.C.R. 903, and R. v. Barnes, [1991] 1 S.C.R. 449 for some Supreme Court discussion of stinging guilty parties.

Again, since these transactions are generally off-book for the victim company, ascertaining that there has been a breach and that the content has been stolen and passed on is very difficult, in fact, more difficult than a purchase scheme since there is absolutely no internal trail *except for IT registries/histories* and unlike purchase scenarios, such doesn't take an excessive amount of time to perpetrate.

For Those with Need-To-Know

The best practice to limit these possible incidents is to completely limit the information to those who need to know it. Such would take the form of:

- Limiting access to the server directories where the data resides
- Requiring passwords for that access
- Requiring local-limitations on where that data can be accessed from (which office station), and certainly,
- Passwords on the actual electronic files where the information resides so that even if the above defences have been breached there is one final one that can be the hardest.

Given the above it's imperative that the IT Dept. have some input into how secure they can make the access of the company's data difficult and generate trails of evidence if there has been an attempted or successful breach.

Included in this would be exception reports passed on to the relevant disciplinary party when an attempt has been made, to be immediately followed up by them.

Equally, it should be clearly indicated in an employee's employment contract that no effort will be made to access said directories: the employee should be focusing only on their relevant directories and no one else's.

And, like all internal control systems, the above can be compromised depending on what access the malicious employee can arrange to obtain.

Anton Pillers/Norwich Pharmacals on Evidence

Once there is a clear trail that indicates that an employee has accessed the data three things should be done in effort to stop its transmission to a competitor, or be compensated for it:

- Investigate the employee including through assessment and then admission-seeking interview⁹⁹, and depending on the results¹⁰⁰,
- Obtain from court an Anton Piller order¹⁰¹ to have an independent inspection of the employee's hard drives in-residence,
- Obtain from court a Norwich Pharmacal order¹⁰² for the employee's bank accounts to evaluate if any unvouchered cash/cheque deposits have been made, indicating payment for the theft.

If the Anton Piller 3rd party-lawyer/judge accepts that the particular data has resided on the employee's resident computer¹⁰³ then there is further evidence that the employee has stolen it and passed it on to the competitor, especially if that's what the electronic trail on the employee computer indicates. If such is the case, then a Norwich order could possibly reveal how much the employee realized from its sale. That amount however should not be the amount ascribed to be the value of the data since intangibles have far more value than a fraudulent employee selling them.

Legal Outcomes

⁹⁹ This would include investigation of any email accounts that the employee had access to through the company's server.

¹⁰⁰ If you clearly run into an evasive employee action like the below is highly justified.

¹⁰¹ Discussed in a subsequent chapter.

¹⁰² Discussed in a subsequent chapter

¹⁰³ This assumes that the employee has not completely scrubbed his hard-drives or disposed of them all together.

In this regard, it's possibly to obtain judgement for theft with quantified damages based on projected revenue/profit lost and equally judgement against the buyer of the information for knowing assistance being the giving a market, recipient of the data, that prompted the breach to begin with. Equally, civilly, grounds could be unlawful conspiracy to accomplish same. And, this conduct is criminal as covered by theft, conspiracy to steal, commercial bribery, and aiding and abetting.

Billing Fraud

Billing fraud is a principal incidence of internal fraud that is perpetrated when either of two things happen:

1. A service/product is billed to a government/plan provider for/ at an inflated amount, artificially more frequency or ghost transaction, or
2. A service/product is under-charged for to a third-party commercial entity, with flow back of part benefit to the inside party who arranged for the under-charge.

Government/Plan Providers

In the first instance the fraudulent biller is typically a doctor/dentist/physiotherapist and the victim is a government payor or in the United States, a health plan provider.

And, such is a very large type of fraud being perpetrated since the amounts are often in the hundreds of millions of dollars, with ‘purses’ in Canada being in the hundreds of thousands for each fraudster.

The Fraud and The Indicators

Typically, a practitioner will file inflated billings to the government/plan provider based on their charging rates for providing the services. The government/plan provider will then pay the billings and the honour system is undermined.

Thankfully there are numerous ways to audit for fraud, with indicators and calculations thereof, exactly this behaviour since all practitioners’ work within certain reality confines that will reveal where they have diverged from the honour system.

The Need to Have a Professional to Consult with

Given the highly technical genre of the environment it’s important that the CFE have a professional for the milieu to consult with when starting any engagement. There is no use to reading files, which a fraud audit will come to, if the CFE doesn’t know what they are reading. By having a professional from the trade on a consultancy basis the CFE is that much more knowledgeable about what they will find and what may stick out of the ordinary.

Government/Plan Payment/Prescription Data

In Canada an enormous amount of data is maintained by government responsible for payment of the services and prescriptions related to those services. That data, on a practitioner by practitioner basis, will show number of patients and prescriptions given and is the primary centralized source of all the information on the practitioner’s work.

From this, red-flag patients may be summarily listed to investigate based on:

1. Frequency of visits
2. Services supplied
3. Amount billed
4. Prescriptions given

The Need to Actually Interview Patients and Staff

In any anti-fraud investigation of a practitioner it will always be that the examiner will eventually interview all staff including the practitioner, the support staff, pharmacy technicians and especially patients.

Once problematic files are designated it’s important to actually interview the patient involved to find out if the services were actually rendered as described in the file. They should prove a truly independent source of verification however one should be sensitive to how impartial they may be in light of liking that

practitioner, as well as any kick-back behaviour they may have entered into with them.¹⁰⁴ Phrase your interview appropriately.

Typical Indicators

Comparisons to Other Practitioners

In any fraud audit there should be a comparison, if possible, of the subject practitioner's billings with that of a known practitioner with integrity to determine how much of a divergence there may exist. Comparing one known to be sound to another, for given experience and physical local, may reveal excessive questionable billings that should be a first red-flag that questionable billing practices are being followed.

Look for and Analyse Unbundled Services

Like the ACFE Manual explains, a valid approach to measure the honesty of the practitioner is to analyse their most costly 5-15% of patients served to look at whether there has been over-bill by unbundling of services. Taking a sample or in-depth review will reveal how proficient the practitioner is, as well as their propensity to over-bill.

Maximum Really Possible per period

Practitioners sell their expertise delivered over time: they only have both of those to "sell" to the billable population, so any study of a practice should include just how volume of time-consuming files are being processed. With a study of an honourable practitioner through interview it's possible to determine just how much time a type of client takes to process and then doing average calculations in the rogue practitioner's billings should reveal that they have "over-sold time" that doesn't exist.

Understandable though interview the CFE should ascertain if the practitioners are booking more over-time however once the quantities of time with client volume are established it can be apparent when time was "over-sold" and not possible.

Note Taking and File Processing Time

In any evaluation of the environment, again after study with an honourable biller, it can be established how long it takes to make notes in a client's file as part of the process, including study before and afterwards, to have an impact on the amount of time, and thus volume, a practitioner can bill for. Certain notes can take, say, up to 15 minutes so that does have impact on the daily volume a practitioner can bill on and can be extrapolated across the average clients the study practitioner has to determine red-flags. When going through files for notes corresponding to billings it's also important to correlate those instances with the appointment book to confirm that the path of regular occurrences (data-producing activity) exists.

Administrative/Secretary Support

In any practitioner's local they will possibly rely on support-staff to process the files and appointments. Good red-flags may be ascertainable when one studies the magnitude of the salaries/existence of these staff to determine when, again, based on file processing and client volume, they are in line with what is being billed. If it is known that it, on average from study of honourable practitioners, that it takes 10 minutes/client then when processing that time with the volume and comparison with salaried time they may not coincide.

It's also wise to interview the support-staff to determine if anything untoward is going on.

¹⁰⁴ The practitioner may have prescribed medication that can be turned into cash to share with the practitioner.

Occurrences and Magnitude of Billings Close to Maximum

It's possible to analyze just how close, on any repeated basis, a practitioner comes to billing the maximum against government/plan parameters to understand just how close they are. If they come up to maximum repeatedly, while others do not, then that can serve as a red-flag that the system is being dishonored. Understandably the total parameters of the situation should be studied since maybe the study practitioner is just simply that much busier however comparisons can be made if such is the case. Do they hand off work to other practitioners, or do they take it all themselves to inflate their revenue?

Growth in Billings

One analyses that should be pursued is whether there has been substantial growth in billings over shorter periods that normal situations would provide. If the practitioner has just opened their local with or without advertising, within or outside an urban local their population base may differ which would reflect on the growth of the billings. While this is a qualitative measurement it should not be overlooked.

Physical Local to Population Centres

One factor in the above is the consideration of whether there are simply enough of a population in the area to support the billings, given competition from others. If a certain biller has substantially higher than all the others in the area, understanding that those others live within the population so to speak, it may be an indication that the system is being dishonoured.

True Costs of Overhead in Supplying Services

All practitioners practice with a cost of supplying services, from prescription pads to rolls of paper for the examination table. What are the magnitude of costs for the subject verses the honoured practitioner. If they bill higher, are their costs correspondingly higher?

Amass The Findings: Not Proficient, or Fraudulent

As the data from the investigation is being compiled its objective to consider whether it is explained by a practitioner who's not proficient or fraudulent. There is a diversity in proficiency in practitioners in any field and the same applies here.

It's important to review the findings as they are amassed with the practitioner to study their reaction: over the series of conversations it may become apparent that they have, for instance, selective memory on contentious files, or, they can't explain how some procedures were billed one way while others the other. Merely because of seeming inadequacies in the previous doesn't necessarily mean that they sought to defraud the process – that finding requires a review of the entirety of the contentious matters found and how they came to be.

Interaction with the practitioner on stand-out files will again reveal how transparent the practitioner is and whether there have been malicious transactions put through the system.

Commercial Billing Fraud

Commercial billing fraud occurs when an employee of an enterprise agrees to under-bill for a service or product on condition that the recipient pays something to them. It's entirely similar to commercial bribery however commercial bribery can also relate to over-billing where the billing party bribes the buyer (acting for an institution/government etc.) to buy the service/product.

These scenarios can easily be audited for with the indicators that may exist.

How Quickly Does the Sale Pay?

Understandably when a fraudulent sale is arranged there's probably an agreed understanding that the client will pay as soon as possible so as to not draw attention to that sale: **no one wants to appear on any**

AR attendant’s “radar” to have an invoice subject to additional scrutiny. An investigator should look for prompt payments on invoices, regardless of what that prompt payment looks like in comparison to others going through the sales process based on payment terms per enterprise policy.

Is There a Material Variance in Sales/COGS or from Budget?

Globally, it may be possible to measure where sales/COGS has changed period to period if the fraud continues unabated¹⁰⁵ so a relevant method would be to scrutinize, on a weekly or monthly basis, the sales/COGS ratio, maybe easily done if the enterprise keeps track of each category of sale/revenue. Understandably this may prove a poor method if there is no categorization of the sales/COGS ratios and all data is in two accounts however generally it won’t be.

Depending on what type of budgets sales management projects it may also be able to pinpoint deviate sales patterns when budgets are simply not met: this depends understandably on the competency of the sales management team to create budgets but could be a valid source to point out deviate sales as well.

Does the Client Demand Working with Only One Salesperson?

If it is common knowledge or known suspect that a particular client will only deal with one sales rep it may be, again, grounds to suspect that favours are being extended in return for pay-back.¹⁰⁶ This information is available through interview of the sales staff including supervisors.

Have any Sales Staff Made Seeming Mistakes in Sales Prices?

Understandably knowing what prices to charge can be done haphazardly by new sales staff or when new products are introduced, but, on a regular basis have particular sales staff seemingly mistaken pricing? If they have, depending on whether they also made similar mistakes with all clients they deal with, it may be an indication that favours are being made.¹⁰⁷

Is the Sales Person Content with Whatever Commissions they Make?

This again reflects on whether the employee is receiving unknown gifts or income from a client: if they are content with their commissions on sales in the face of others. It is common knowledge that sales people sometimes brag to each other about their commissions however in the face of this, if a salesperson doesn’t seem to mind, all things otherwise equal, it could be an indication that they are realizing “alternative earnings”. Understandably this content could be explained by other aspects in the employee’s life such as being financially accomplished regardless, investment income, better temperament in managing their expenses, etc., so by itself being content may not mean anything, but it could be an indicator that deviate arrangements exist.

Did a Particular Client Start Buying Only Upon Employment of the Employee?

In fraudulent underpriced sales one method for it to occur is when a new salesperson starts and “brings with them” “clients” that the enterprise didn’t have previously. There may be a reason why those clients didn’t exist: it’s because they scalp legitimate enterprises through purchasing products at reduced prices through their “inside man” so that they can on-sell them at market prices the enterprise otherwise has. It’s thus important to scrutinize new clients, especially if a new employee has brought them on-board to buy and they never approached the enterprise before.

¹⁰⁵ The employee may choose to broaden her behaviour across other clients over time.

¹⁰⁶ As an anti-fraud suggestion it should be that every period, 6 mths – 9 mths, etc., the sales staff are reassigned different accounts on a rotating basis to stop this.

¹⁰⁷ Understandably there should be adequate training for this behaviour, and if it occurs too often perhaps the sales person should be relieved.

Are There Any Visible signs of Collusion between Sales and A/R?

Over the long-term, to entrench a deviate sales price practice the fraudulent salesperson may have collude with the counter-party A/R person to ensure that if the latter does spot fraudulently priced product/service being billed, they don't bring it to management.

Understandably to fathom whether this occurs there can be study of whether there is only focal point dialogue between sales supervisor and A/R supervisor on regular or except circumstances. If there is dialogue between particular salesperson and particular A/R clerk there may be an environment to bury deviate sales without management knowing.

Is the Adequate Review of the Sales Supervisor's Work?

One final consideration that the examiner should have is to determine how frequently the sales supervisor has had their work evaluated through audit of adherence to budget and results to what was estimated and asked for. In any enterprise there should be periodic review of what the supervisor has accomplished and how capable and with what competence they carried out their function.

In some instances the Supervisor may actually be part of the deviate behaviour so if fraudulent billing happened under their stewardship without them seeming to know about it doesn't detract from the possibility that they were part and parcel with it.

The examiner should understandably scrutinize any sales management reports they have processed, as well as their reporting to management in cases certainly of discovered deviate billing.

Interviewing Parties and Integrating Gleaned Knowledge

In any fraud engagement, either as a risk assessment or an investigation, standard methodology is to interview employees, from top to bottom of an enterprise to determine several of their attributes in determining exposure. In an assessment there need not be a targeted circling of potential witnesses to get to those inner who have been suspected of actually committing the act.

What an employee thinks about and does are sometimes different things and an adept interviewer with experience should have the skill to “peel through the onion skin” to find out salient issues that may have results on the assessment/investigation.

Also keep in mind Cressey’s Fraud Triangle that dictates potential for fraud which consists of the points:

1. **Unshareable financial pressures** (either external or need to perform in the employment-position / segment / market)
2. **Ability to rationalize the act of fraud perpetrated** (either for personal or corporate benefit)
3. **Ability to actually perpetrate the fraud with expectation that it will not be discovered** (through override of some internal control or oversight function).

These issues that should be constantly kept at the front of the professional’s mind as the employees, at all levels¹⁰⁸, are interviewed with emphasis on finding out personal morality of the interviewee through the interview.

“All Disenchanted, Disheartened, Employees, Please Step Forward”

This author is of the opinion that the fastest way to establish if there have been on-going shenanigans in the company is to interview first the employees who are most morally objectionable to it.

These would include any employees who have:

- *not received a pay-raise the longest,*
- *who have had to adjust their vacation plans in line with any arbitrary decision of management,*
- *have been demoted or rotated to attend to nominal/mundane tasks, or*
- *who have voiced concern to management in the past on any matter that is not congruent with company policy*
- *have voiced concern to management on any matter, or,*
- *who have been employed by the company the longest and who have a high degree of emotional investment in the company.*

Theses types of employees¹⁰⁹, **not content with the status quo, or caring for their employer the strongest**, as they see it, are ideal to interview first since they may be more open about items that the examiner would take multiple interviews to get to through regular other means.

They will have heard the rumors or have seen the acts that are objectionable to them since in most companies there is always at least one person like this.

¹⁰⁸ Is there actual tone-from-the-top condemnation of fraud activity or “fly by the seat of your pants” views, or, is there just mouth-service provided?

¹⁰⁹ These employees can be identified by their supervisors or HR.

Confidentiality and Rapport

As usual, any fraud investigator will try to assure some level of confidentiality¹¹⁰ if asked for which may allow interviewees to open up more freely in what they have perceived through the enterprise which others may not be willing to reveal: a “crack here” can lead to significant outcomes on follow-up if an honest employee brings it forward in an interview.

However, there is no legal requirement for confidentiality and none should be noted to the asker of such on a request.

How Baseline is Your Baseline?

As any text on interviewing will tell you, you must attempt to interact with the interviewee with enough harmony that you’re seeing the true character of the employee. That baseline will allow you to determine if the employee is going “off course” when they’re attempting to cover something up that they don’t want to reveal. **However, this author also believes in establishing that baseline you should also attempt to elicit that response on another issue unrelated to the topics.**

In a baseline **you want to see the gamut of emotional responses**, so you know what to look for through the interview of particular issues, so you should attempt to elicit them through a range of questions that, while not too personal, will allow the employee to respond with empathy, defensiveness, etc. In effect, “stir up water”, *nominally*, to measure true reactions so you have a fuller baseline of responses against which to measure responses on the issues involved.

Understandably you would not want to take this to extremes since it could form a ground by the interviewee that she was emotionally harmed and that she is due compensation, however, it is still possible to do this exercise to gain the knowledge without too much risk of repercussion.

The original movie “Bladerunner” contained the method to evaluate whether a purported human was an artificial being or not by evaluating the pupil responses to simple questions. “*Watch for the pupils throughout your whole interview.*”

Charter of Rights Not Applicable for Non-Response, and Protection of Whistleblowers

The Charter (*sec. 7 and 11(c)*) **does not allow an employee to avoid being interviewed on any matter**, even though it relates entirely to work-place conduct, however if so doing, they draw attention to themselves as not being on-side with a legitimate investigation. The Charter applies only to *public institutions*¹¹¹ and has been held not to apply to a private setting, especially pursuant to its application target, sec. 32:

Application of Charter

32. (1) *This Charter applies*

(a) *to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and*

(b) *to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.*

Notwithstanding that, public crown corporation employers do prompt for Charter application since the employee is interacting with the government.

Interviewees may have certain reasons for doing so such as not desiring to have their own conduct being subject to scrutiny since they simply haven’t been doing the role properly, or they have fraud in their own

¹¹⁰ It’s important to tell the interviewee that confidentiality is not in fact guaranteed but that the interviewer will make her best efforts. There is no professional duty of confidentiality offered in Canada for this scenario.

¹¹¹ Public actors – depending on degree of involvement with control of employer, such as crown counsel, police officers, etc.

sphere, that they either were involved with or condoned. *Equally, they may simply not to make any statements in any context that could be passed on to law enforcement that would lead to criminal charges against them.* And, Charter rights simply do not supersede work-place private employer rights to know what the employee did as part of the employment contract.

Always be cautious about why an employee opts for Charter protection to prevent being interviewed in a private setting: it could be a telltale indicator that they are involved with what you are investigating.

Life, liberty and security of person

7. *Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.*

...

Proceedings in criminal and penal matters

11. *Any person charged with an offence has the right*

...

- (c) *not to be compelled to be a witness in proceedings against that person in respect of the offence;*

Equally, the Criminal Code makes specific provision to prevent retribution from many parties if they seek to involve any superior or law enforcement party that a crime has been committed.

425.1(1) Threats and retaliation against employees

(1) *No employer or person acting on behalf of an employer or in a position of authority in respect of an employee of the employer shall take a disciplinary measure against, demote, terminate or otherwise adversely affect the employment of such an employee, or threaten to do so,*

- (a) *with the intent to compel the employee to abstain from providing information to a person whose duties include the enforcement of federal or provincial law, respecting an offence that the employee believes has been or is being committed contrary to this or any other federal or provincial Act or regulation by the employer **or an officer or employee of the employer or, if the employer is a corporation, by one or more of its directors;** or*
 (b) *with the intent to retaliate against the employee because the employee has provided information referred to in paragraph (a) to a person whose duties include the enforcement of federal or provincial law.*

425.1(2) Punishment

(2) *Any one who contravenes subsection (1) is guilty of*

- (a) *an indictable offence and liable to imprisonment for a term not exceeding five years;*
 or
 (b) *an offence punishable on summary conviction.*

Be Cautious of Privacy Intrusions in Interviews, though if volunteers...

In Canada the subject of an employment related interview, such as in a fraud investigation case, is subject to common-law rules of not invading on the interviewee's personal life. The interview can only be about employment related issues, legitimately asked and the investigator should be ever so cautious in invading an employee's life by asking questions off-topic that can be construed as forcible invasion of privacy.

This is one of the reasons this author highly recommends legally allowable recording of the interview, to the demise of any subsequent fictional assertions that an invasion has been forcibly pursued.

If the interviewee has volunteered personal details that are not related to their position held, or that do not relate to the employment in general, the investigator should candidly ask if the interviewee is volunteering such on record, just to ensure that they can be referred to subsequently. It's very important that, on a recorded interview, the interviewee state unequivocally that the statement is volunteered to make the statement admissible. Allowing such volunteer off-issue statements to be volunteered allows the investigator to build further questions that may be rewarding.

To be noted is that there is no invasion of privacy if **a co-employee has volunteered personal aspects of another** which can reveal issues that the 2nd employee may not wish to come forth with. This further cultivates a witness who could be useful in the investigation or litigation subsequently.

The Use of Audio-recorded Interviews – Legal

In Canada interviews can be recorded though can be presented in judicial proceedings if need be, which this author highly recommends since it allows for far more accurate investigation of each point revealed. Also, the use of audio-tape will allow for further interview subsequently as closing interviews to reconfirm what the interviewee initially asserted: *if there is a divergence in content or significance on issues they may reveal items that were passed over on the initial interview.*

While the investigator cannot record others' conversations, if they are a party to one they can record it by any means. **The Rule in Canada is that only one party need consent to have the conversation: once one has, it can be recorded.**¹¹² There may be repercussions under the federal Personal Information Protection and Electronic Documents Act or a provincial equivalent Act that governs information collected on employees. Generally, management of a company cannot record regular conversations with subordinates, however an examiner should be willing to to evidence admissions that may come up and should be willing to explain to the interviewee that the interview may be recorded¹¹³.

Given that, if another party contests subsequently that there has been an intrusion into privacy it is doubted that they will be successful in proceedings for pain and suffering/trauma etc. since the recording was made in the context of a fraud investigation.

Don't let The Interviewee Interview You!

While certain descriptions of interview techniques would state that you should build some sort of rapport with the interviewee it's critical to *not allow the interviewee "interview you"* through your response to their questions that they may pose. If this is attempted the examiner may have found a party is too curious with reason so it's critical to not speak generally about any of the reasons that brought them to this juncture. *Whatever the interviewee asks may actually reveal what they are concerned about so while it's important to not respond to their questioning, substantively, **by not discouraging it the examiner may be able to map out more of where the mind-set of the interviewee is because of it.***

But, always, of course, bring the discussion back to the interview's purpose.

¹¹² However, it is illegal under the Criminal Code to record others' conversations if you're not a party to it, again, qualified if the person recording has been given authorization to do so by one of the parties.

¹¹³ In *Jones v Tsige* 2012 ONCA 32, the court considered "invasion on seclusion" in a scenario where there was an unauthorized accessing of bank account info of another by a bank employee who did have a personal interest. The Court of Appeal did supply the test:

1. an unauthorized intrusion;
2. that the intrusion was highly offensive to the reasonable person;
3. the matter intruded upon was private; and
4. the intrusion caused anguish and suffering.

This should moderate the type of questioning an examiner can practice in an interview.

Have the Interviewee Place Herself in Time in Her Mind's Eye

In garnering as much detail as possible it's important to take your time and draw out as many attributes of any series of events as possible by asking the interviewee to put themselves at that point of time. Do not accept flippant answers and ask things such as:

- What would you normally be doing that that time?
- What would others be doing at that time in your immediate surrounds?
- What were people wearing and what was their conversations?
- What caused that event to stand out in your memory?
- What were your preliminary emotional responses when you perceived there was a problem?
- To whom did you talk about this perceived problem and what did they say/explain?
- What did you think about that night on the way home – was it a bigger problem than what you initially thought?
- (If the instance happened in any sort of distant past, depending on the circumstances “what should have happened and what people would notice or not notice it?”)

These are only some of the questions that you should ask. You can certainly develop more for what type of information you are trying to obtain.

What's important is that you attempt to be able to **crystalize the exact environment in the memory** of the interviewee by teasing it out for requests for detail as much as possible, as audio-taping the interview, so that there is a wonderfully detailed recollection of what happened. This is important since if that witness has to be presented for testimony then there is a solid recollection of what happened.

Understandably it is important to interview as soon as safely possible, given the circumstance that the fraudster may still be in the employees' midst, after taking precautionary steps to secure the documentary evidence field.

Listen for “The Silences”

In Canada it was once said of a principal federal political member that “they spoke with silences between the words, not the words themselves”¹¹⁴. When you are conducting an interview, you should always be sensitive to any unexpectant silences that occur in the interviewee, which can occur for some reasons but one of which may be an attempt to deceive you.

In some instances, understandably, it could be the interviewee's inability to recall accurately and they need time to place the events/fact scenario properly in their mind to respond, however, if it's a simple fact scenario that they subsequently describe after that silence the investigator should be sensitive to think about why such a simple mundane item took that split-many second delay to respond. Understandably it may take some time to gain a better understanding of how the interviewee thinks through subsequent questioning/conversation, however once done, that length of silence may stand out as an issue that you may need to go back to to flesh out further.

Repeat Interviews

There is no rule that prevents the repeat interviews of witnesses within an investigation: in fact, it may be advisable¹¹⁵. This is important if you record the initial interview and study it in conjunction with all those you have taken to establish the work-place environment where the activity took place.

On a second interview, based on summarized point-form notes that you've generated based on the initial interview, you may be able to draw out more detail that the first did not capture, of any degree of relevance.

¹¹⁴Pierre Elliot Trudeau

¹¹⁵ Another staff of the examiner's company may be used for this, as a reason to have the follow-up interview, to confirm things that were said to the former.

Equally, you may be able to establish falsehoods since while lies can be generated on the fly, *the truth based on memory can be far harder to describe since there can every be only one vivid or reasonably articulated memory and on the second interview lapses or changes thereof may be revealed. The “I changed my story” or “I don’t remember” are issues that the second interview may readily set off that, in absence, wouldn’t have happened.*

“Can you show me?”, or, Look it Up Yourself

You can use employees who are good faith to assist in the superficial aspects of the investigation by asking them to help you find where things have become questionable in the source documents, that they have come across in their daily routines. A typical remark that can trigger this is that something was amiss with a source document or a posted transaction, both of which could take hours to ferret out on the investigator’s time. **Understandably this is one question that should be asked in any interview of anyone employed by the company. But, this depends on the measured sincerity of the interviewee and her interest in actually helping and whether she is close to the sphere of activity that could be where the fraudulent transactions are emanating from. If they satisfy these tests, then by “rewarding” them by asking for their help adds in goodwill towards an investigated conclusion.** If the employee is not sincere, in the investigator’s opinion or gut feeling or intuition, then obviously notes should be taken only but it’s important to follow up to demonstrate the sincerity of the interviewee (while if not, thinking of the reasons why they’d throw out a red herring).

Learn to Listen in Interviews

In Schultz’s “The Peanuts” we have “The Doctor is In” Lucie with her \$0.05 stand suggesting advice for any who come to her for her services: she’s a professional “listener”. She’s also a professional thinker when you think about it, in order to respond to her client. As a fraud investigator either in an assessment or an investigation that’s exactly how you should be.

Listen first, to understand the full scope of the employee and the circumstances: that will determine your course of action subsequently.

It’s important to, of course, have a short list of points you’d like the interviewee to go over before the start, as well as a reasonably good understanding of exactly what the employee does so that **you are not learning routines of what should have happened first hand at that point of time.** This is one of those situations where, through your review of the operating procedures of the enterprise before hand, you should know exactly what the employee does so that you can prepare with issues that may be far more rewarding to what you’re trying to do¹¹⁶.

These seemingly ancillary issues would include (that may not be in an operations manual or documented internal control schematic), and are certainly not limited to:

1. How can the employee make corrections for errors in the information system (acc’g software) if they are made: reveals potential to post questionable transactions and reverse?
2. Has the employee ever seen other employees not follow routines and what happened when that did occur?
3. Are there any management favourite employees, undue or otherwise? And if so, why?
4. What improvements would they like to see in the enterprise’s internal control environment that affect them: reveals the employee’s understanding of the environment where they function, and to be discovered?
5. What (internal control) steps “get in the way” and slow them down?

¹¹⁶ Knowing what the employee does allows the investigator to ask simple questions straight-forward questions, perhaps at some length, to get a good base-line of honest reaction and understand how the employee responds to possibly be alert for subsequent falsehoods.

6. What are some of the routines of the co-employees (reveals awareness of ability to cover-up either through direct intervention or collusion)?
7. Is the interviewee being paid enough in their opinion?
8. Are there employees who bring their lunch to work verses those who constantly eat out: reveals “living it large” with extra money that is a component of living beyond one’s means? (include numerous vacations, high-end garments, cars, higher tastes, etc., applied to every that interviewee sees)
9. What is the management like in the enterprise from mid to top level, in their experience?
10. What are the interviewee’s 5-10 year aspirations: what do they see themselves doing in 5-10 years?
11. How high is the peer-pressure in the enterprise?
12. Is there reasonably constantly enforced good-culture with positive reinforcement?
13. Is there a functioning team spirit towards getting tasks done or is there some animosity sometimes?
14. How much does the interviewee need this employment?
15. Are there any mal-contents/“lightening rods” in the enterprise who are constantly griping about their job or management?
16. Does management convey ethics from the top through force or persuasion?
17. Does management share segment performance knowledge (as motivational/punishment)?

These are **just some** of the issues that you should try to cover in an interview to get at the real underlying environment of the enterprise with which you’ll have a more rational and real understanding of the environment to consider against possible motivations to perpetrate a fraud with its methods.

This started with the issue of “listening” to the interviewee. Given that you should be a proverbial “42 kilometers ahead” of them as to what they will be describing to you, generally about their job function, you should always try to maintain acute eye-contact to ensure that they try to tell you the truth of what’s on their minds¹¹⁷. By asking interviewees to go over all the routines they are responsible for, that you already know, you have a solid base-line of honest behaviour that you can use to measure against their other assertions that you may not know of except for ancillary matters above mentioned.

Also, like “Lucie”, you should be very willing to listen and go further to take the point to its end to draw an interviewee conclusion on the matter, pleading ignorance of anything to help them, to see how they think. Doing so will allow you to establish what kind of employee you have, either uncaring or not, either very aware or not, either ignorant or not, which may reveal potential weaknesses for a risk assessment or further target your focus in the case of an investigation.

Liar Kinetics

The below are a set of indicators that may help you in determining whether a party is being honest in her relay of information to you. As stated, if you have a quick power of observation, and through experience, you will probably see them over time in everyone: if you develop your sense of listening and watching they may become more obvious to you as develop your career.

1. A liar will limit or stiffen physical expression, with few arm and hand movements. The liar will move hand, arm, and leg toward his own body in order to take up less space and become harder to see.
2. A liar will avoid making eye contact with you when lying to you. While the liar may have no ability to hold a gaze for any length of time, a sociopath liar might look you in the eyes without difficulty for a long time.

¹¹⁷ See below kinetics of liars

3. A liar tends to touch the face, throat & mouth, and touch or scratch the nose or behind their ear. A liar will not likely touch the chest/heart with an open hand. The liar covers the mouth as if to cover the lie.
4. A liar botches the timing between emotions gestures/expressions and words. Example: Someone says, "I love it!" when receiving a gift and then smiles after making that statement, rather than at the same time the statement is made. Micro-expressions may flash on the liar's face that do not comport with the liar's verbal responses.
5. Gestures/expressions don't match the verbal statement, such as frowning when saying "I love you."
6. The liar limits expressions to mouth movements, instead of using the whole face, when faking emotions (like happy, surprised, sad, awe,). Normally a non-liar involves the whole face when expressing emotion - jaw/cheek movement, eyes and forehead push down, etc.
7. A guilty person gets defensive. An innocent person will often go on the offensive. Or, the accused may become the accuser by pointing the finger and projecting the misdeed elsewhere. The liar may overreact by immediately behaving angry and defensive, perhaps to try to force a change of subject or to make the person submit to the liar's story.
8. A liar feels and acts uncomfortable facing his questioner/accuser and may turn his head or body away. The liar may fidget a lot and generally look uncomfortable.
9. A liar might unconsciously place objects (book, coffee cup, etc.) between the two of you.
10. A liar will use your words to make an answer to the question. When asked, "Did you eat the last cookie?" The liar answers, "No, I did not eat the last cookie," or "Are you asking me if I ate that cookie?"
11. A statement with a contraction has a greater likelihood of truthful content: "I didn't do it" instead of "I did not do it"
12. Liars sometimes avoid "lying" by not making direct statements. They imply answers instead of denying something directly.
13. The guilty person may speak more than normally, adding unnecessary details to convince you... the liar feels uncomfortable with silence or pauses in the conversation. The liar may start talking way too fast or completely change pitch or tone of voice.
14. A liar may leave out pronouns and speak in a monotonous tone. In a truthful statement the liar will emphasize the pronoun as much as or more than the rest of the words in a statement.
15. A liar may garble words or speak them softly, and make errors in grammar and syntax. In other words, the liar will muddle sentences rather than emphasize them.
16. A liar will feel a desire to leave the area so as to escape further notice or scrutiny, and may look toward possible escape routes or fabricate an excuse like "I have to go to the bathroom again."
17. A liar will often exhibit different mannerisms while lying than during normal conversation - any slight changes can have significance. For example, a person trying to remember a detail might normally look upward, but look downward when lying. you fare best if you know how the subject behaves during normal conversation before beginning the interrogation. In other words, soften the subject up, put the subject at ease, and notice how the subject normally acts. Then, when you discern any differences during interrogation, those differences constitute clues that the subject might want to hide the truth.
18. A liar will willingly and with relief change the subject, while a non-liar would try to return to the original subject. A liar may avoid the subject by making sarcastic or humorous remarks.
19. A liar tends to blink frequently as though unconsciously hiding thoughts, but revealing them instead. Note that some people blink a lot normally when not lying.
20. The liar's eyebrows become raised. This by itself does not prove lying, but it tends to signify defensiveness. A liar aware of the tendency to blink a lot may raise the eyebrows in order to compensate. People seem to have trouble avoiding this indicator to lying.

21. The liar may play dumb. “What are you talking about?” or “Why would you say that?” and of course looking appropriately shocked and confused.
22. The liar, needing more time to think, may stammer and pause in between comments as if trying to gather thoughts. Look for a subtle “thinking time” delay between asking the question and obtaining the answer - the delay can suggest lying.
23. The liar may sweat more than normal during questioning.

Care should be taken in accepting these traits as standard since there may be other extenuating circumstances that may cause them. The interviewee could be going through all sorts of personal issues regardless of employment and they could equally be on auto-defensive regardless of what is being investigated since they don’t want to be perceived as doing any wrong that will harm their employment. Equally, the interviewer may project too much gravity in the interview which may prompt these reactions.

It is imperative for the interviewer to have a good base-line of normal conversation before the interview, perhaps through group contact where the interviewee is studied discreetly in normal interaction with their colleagues.¹¹⁸

Develop Your Senses

As an Examiner or consultant you are hired to use your expertise and training in a professional manner and that certainly includes the ability to find “a crack” where it shouldn’t exist. Part of that ability to actually perceive that red-flag, is to constantly have a, in this author’s opinion, acute set of senses as to what is happening in an environment. And that includes all of your senses: in particular sight and sound.

Disciplined Steps to Listen, Acutely

In order to develop your senses, you should take *disciplined steps* to increase them. This approach has been used by this author to improve his. First of all, turn off all external stimuli that can affect and try to hear anything you can in a very very quiet room. Clearly that means getting away from the hum of the office or the constant wail of an entertainment source such as a radio/tv. You must sharpen up your sense to hear things and part of that is to actually understand what you hear. After you’ve practiced this for 1-2 months in daily/weekly intervals for 1-3 hours at a time, you will be more tuned into what exactly people say, and the way they say it.

“How Would You Write That?”

The second sensory develop skill you should try to pursue is asking yourself the question, after you’ve worked on the above, while listening to someone, “If I were to write this out, what would I write?” “And how would I write it?” If you are a reasonably functioning adult you have active listening skills at their most basic level but if you can, verbatim, recall what a person says, seconds after he has said it, you’re that much further ahead of where their mind is and how it works and also your ability to recall it until you have made a note of it. When this author wishes to make a significant mental note of someone’s expression, which can lead to being material, he has gone to the point of deciding to even place certain words used by the speaker in italics, in his memory, as if that’s what the speaker would use if she were typing them out.

The investigator should also attempt to instill this technique in the interviewee, especially if they are providing critical detail that is not realizable from an alternative source. This may be a witness who may

¹¹⁸ Sitting in on lunch-rooms or tagging a lunch with others, prior to the fact that you are an investigator, can be possible routes here.

prove out highly useful in an investigation or legal action so the better you can help them recall in their best sense, what the details are the better off the quality of your investigation product.

Improving Your Memory

One of the personal attributes you should have is an innate ability to recall accurately issues you've encountered in an engagement that you should attempt to resolve before you finish your work. Directly based on that is your ability to reflect on what you have done and where you are going in an assessment/investigation through your method of recall of what you have experienced up until that point of time. The fraud investigation method includes reformulating your hypothesis and having predication to investigate further so you should constantly be reformulating perceived red flags that you may have with the above methods.

The brain is constantly bombarded with all sorts of info. during the day and most goes into and exits short-term memory all the time. What you should try to do is program your short-term memory to classify this bombardment, as it happens, into some orderly system so that it can "attach" to some sort of matrix of info. that you have, so that you can more easily recall it. If unclassified the short-term memory will erase itself within a short period of time but if you can categorize everything you experience with some sort of classification system giving it dated/similar experience/similar appearance/materiality/etc. attributes (whatever works for you and everyone has strengths and weaknesses in how they choose) you will be able to recall far more quickly and accurately.

Active steps to improve your short-term memory is to also write down, in as much purposeful detail as possible, an event (or series)/fact/appearance, after waiting 30 minutes after its occurrence. Doing so trains the short-term memory to retain more, with the above paragraph.

And, this author highly endorses having someone take at least 30-45 minutes at the end of every day to reflect on the entirety of what happened that day.¹¹⁹ If you do this, after a short period, you will increase your ability to recall since you will be thinking that "this", "that" or "the other" are principal items that need to go into the day-end reflection.

...Record/Audio-tape, Everywhere, is Very Handy, if Appropriately Catalogued (but it has one short-fall)

This author cannot undervalue the use of recorded¹²⁰ conversations throughout any dealings you have in the assessment/investigation process, starting from the very first contact with the CEO/CFO/Directors to the documentary presentation of the report/findings.

To use audio successfully, to the extent this author advocates, there must be a catalogued system to store it for recall for use if need be. There is no use in recording for professional use the proverbial "700 hours" of multiparty conversations, if you have to recall "3 minutes" successfully since the effort to get to it can be astronomical. That's why you should have a written short recap of the most important aspects of every conversation you have in an engagement – key words -, electronically if need be so that it can be key-word searched, as you store the electronic recordings. It's very easy with the present-day size of hard-drives to store thousands of hours of hundreds of engagements on a computer¹²¹ hard-drive, compressed with a password protection to maintain security in case of computer theft¹²².

Four principal advantages occur if you do audio everything that happens in an engagement:

¹¹⁹ You can certainly journalize these, in transit if need be with an audio-recap

¹²⁰ The author is talking about electronic audio-recordings to be systematically stored on a hard-drive here, though it can be designed to include actual tape.

¹²¹ With compressed back-up, using software such as PKZip or WinRAR, with password, to a secure cloud account to certainly maintain a copy

¹²² You can also use EverNote, a free cataloguing system, to manage all parts of your investigation including audio files.

1. there hardly can ever be a disagreement with the contracting party since the agreement and discussion leading to it, properly detailed with all its parameters, is there,
2. there can never be an un-evidenced disagreement with what was said to and what an employee said to you during an engagement,
3. you have an ability to routinely reflect more accurately on the verbal behaviour/content of what was said during your engagement to further refine your predication resulting from an interview,
4. it will limit your professional liability exposure in instances if an engagement “goes sour” though management interference/employee false allegations.

The strength in using audio-taped coverage is in how well the person relying on it can encourage issues of interest to be spoken reasonably clearly but once the ability to “talk it out” has been developed by the user it will become automatic and part of the interviewer’s routine.

The strength to put the system in place, is again, in the catalogue of the material that results and it isn’t that difficult to summarize key points, some of which may be very material as they happen, into a written entry in an electronic journal for easy reference/searching. Clearly the file name of the electronic MP3 file should be given a systemically maintained reflective file name upon classification/storage¹²³.

A principle draw-back in the use of audio evidence, though legal in Canada throughout, is that if something isn’t orally expressed, it isn’t evidenced, which includes facial expressions/shrugs/eye-glances, etc. *An investigator’s ability to overcome that is to draw such an occurrence right across the audio by making immediate reference to it when it happens to ask why it happened so that it is caught on audio.*

Audio-recorders are now widely available in affordable pen/smart phone format which are very discreet which have long recording times the data of which can be easily transferred to a computer.

And smart-phones are always available to do same.

For these above reasons and rewards this author highly encourages the use of audio recorded conversations, from start to finish, of any engagement.

“Should We Send A Possible Culprit Home?”

This is a very pertinent question in any instance where an accounting fraud has occurred and become aware of. In some cases, it is advisable to do to protect both the accounting environment’s records (accounting and email systems as well as the server’s integrity as well in case of sabotage once the culprit is aware that they are aware the company has found them out), prevention of co-employee collusion to hinder the investigation, as well as ensuring that the environment stays safe for all the personnel.

Understandably there should be some level of confirmation that the employee you’re extricating from the employment environment is in fact the fraudster since if through the investigation it is found that it was another party there could be civil suit for damages to reputation for what that particular employee has erroneously been put through.

Safe to say that when there is clear evidence that a particular employee is responsible, exclusively, then it is in the prerogative of the employer to both enhance its ability to recover based on a protected accounting environment (records/emails), as well as protect its other employees from possible harm so that decision will rest on how adequate the evidence is to make it.¹²⁴

Assessing the Content and Quality of Interviews in a Schematic

The purpose of conducting interviews in a fraud investigation, or a risk assessment, is to gather both quantifiable and qualitative information on both the legitimate functioning of the company, as it surrounds

¹²³ Such as dated interview with employee/management re: XYZ, etc.

¹²⁴ Alternatively, it may be possible to have a trusted employee be designated to handle all source documents related to that area of investigation to prevent tampering, while it may also be advisable to rotate functions to get a perceived fraudster away from their area of routine to preserve the source document existence.

Safe to say in any instance a back-up of all electronic data should be done immediately.

occurrences, or generally, and thus the practitioner has to map through a schematic of all the interviews done and what they reveal. This schematic of content and quality will allow the practitioner to perhaps further investigate issues/target for re-interview to gain an understanding of what has happened or weaknesses that may exist.

Besides proper functioning of routines and controls that are described in any otherwise available operations/accounting manuals that exist for the environment some of the issues that should be displayed in the schematic that are part of the initial interviews include:

- How many years has the interviewee been with that employer¹²⁵?
- How many years do they think they'll be there¹²⁶?
- How long have they been in that function and did they perform properly in those previous¹²⁷?
- Has the employee been properly supervised throughout his role¹²⁸?
- Do they seem to abide by the established procedures as religion or with little respect¹²⁹?
- Did they have any of the problem motivators to perpetrate a fraud¹³⁰?
- Have then become suddenly irritable or secretive¹³¹?
- Have they regularly taken their regular vacation/staff rotation without protest¹³²?
- Is the work-product of this employee of seemingly high quality with tight coherence or is his work sloppily done without consistency¹³³?
- Did they obviously seem nervous in a sedate interview environment¹³⁴?
- Were they evasive anywhere in the interview¹³⁵?
- Did the interviewee try to “interview you”¹³⁶?
- Did they display any unwarranted offence towards anyone around them, and if so, did they care¹³⁷?
- Has there been any disciplinary action against the employee in the past¹³⁸?
- Has their supervisor always been satisfied with their performance¹³⁹?

¹²⁵ The longer the better since this denotes that they are happy and that they value their employment more than some who are there temporarily.

¹²⁶ This goes again to the above which denotes how much value they attribute to their position which may reflect on their rationalization to perpetrate.

¹²⁷ This goes to how well they do their work – whether they take pride in it – or don't care and possibly, as a consequence, create a scenario where they can “accidentally” create a fraud through poor performance.

¹²⁸ This is a key IC item since every employee's work-product should be reviewed on at least some frequency to ensure they are acting pursuant to the established company norms.

¹²⁹ This will denote “wheeler-dealers” who think that proper functioning of a system is a game that they can “beat” if they try, to their benefit.

¹³⁰ This denotes unshareable financial burden that would encourage fraudulent activity.

¹³¹ These are red-flags that an employee has changed their outlook towards their environment that are indicators to watch for.

¹³² This characteristic of a healthy work-place should occur on a regular basis and when not adhered to may be a red-flag of an employee who doesn't want their work overlooked in detail.

¹³³ This could denote an instance where a fraudster is attempting to convolute the evidence train through creating a disarrayed mess out of their environment.

¹³⁴ If the interviewee is irrationally nervous in an interview, after understanding their base-line, this should be cause for concern.

¹³⁵ This is a clear indication that the interviewee doesn't want you to know what they do, and consequently what they may do against the company.

¹³⁶ This is, again, an indication that the interviewee is “playing the game of a system” and preventing being honestly helpful.

¹³⁷ This is a classic indicator if the interviewee has a grudge against management/owners that they may act on as a rationalization for their behaviour, including fraudulent.

¹³⁸ This is an indicator that the employee has lower regard for the environment than their colleagues and could lead to fraudulent activity.

¹³⁹ This is a question of management review which should be exercised over all employees and if the opinion of their supervisors is good then the interviewee does their work with integrity. The opposite signals the opposite.

- Has the employee made numerous ‘mistakes’ in his duties¹⁴⁰?
- Is the employee part of an admitted or confirmed clique with coworkers, either on the premises or on off-time¹⁴¹?
- Is the employee close to any suppliers or clients outside the work-place¹⁴²?
- Does the employee sometimes fill in for others during their s/t absence¹⁴³?
- Etc.

In effect, what the investigator should have is a quick snap-shot of where that employee is in relation to the company, both in terms of function and psychological for them to quickly assess where further weakness exists or who may have been involved with the occurrence of a fraudulent entry/scheme. Such should take the form of a tree of personalities through the chain of command, with each participant assessed per the above, though understandably there could be adaptations of the above issues as one works further up the chain.

“The Tipping Point Interview” - the Possible Mareva Freeze Injunction, and Or. Freezing Orders

In any fraud investigation as the documentary and audioed interviews are amassed that point in one direction to a guilty party one should be ever so perceptive to when the tipping point of being able to prove beyond a preponderance has occurred¹⁴⁴. There is a point, when on advice from support counsel, that the investigator will have amassed and weighed enough evidence to prove that a particular party was responsible for the fraud and that is quantifiable by counsel and the evidence that speaks to the matter. This point is what this author calls “*The Tipping Point Interview*” where an admission of guilt is sought through coordinated presentation of fact to the guilty interviewee.

With respect to causes of action that could be started by the employee for any of the malicious possible reasons for termination, at least allowing the employee to articulate and confirm or deny their side of the circumstances will go along way against said malicious employer purported behaviour, when the explanation does not align with the investigated truth.

Regardless of what the interviewee admits to, it is prudent to have inhouse security on standby to escort the guilty party off-site with immediate changes in security passes, etc. so as to prevent the party from having access to anything of value of the employer. Again, once there is enough evidence, as reviewed by pending-litigation counsel, regardless of whether it is possible to elicit a confession, it is extremely important to take preventative steps immediately. At that point, regardless of whether an admission has been secured, most counsel will advise that the employer, based on the facts, has just cause to immediately relieve the employee of their duties¹⁴⁵. **This would certainly include limiting the suspect’s access to**

¹⁴⁰ Sometimes mistakes happen – it occurs in every organization – but when one employee makes inconsistent and numerous mistakes in their function it could be in effort to convolute behaviour and hide a fraudulent activity.

¹⁴¹ Collusion is one of the reasons that systems of internal control break down and if there are concentrated cliques of workers in an environment they can combine to perpetrate a breach in the control and the hiding of a fraudulent transaction.

¹⁴² This aspect relates to corruption in the sales/receivables – purchases/payables function where bribes can be taken to transact at other than otherwise fair market value prices, to the demise of the employer.

¹⁴³ This identifies both 2nd hand knowledge of what the performance of a role has been, through stepping into another’s shoes, as well as a primary assessment tool if, once that interviewee’s opinion has been garnered, it turns out to be unfounded, thus prompting red-flag in that employee’s character.

¹⁴⁴ F.H. v. McDougall, [2008] 3 S.C.R. 41 pronouncing a civil burden of preponderance

¹⁴⁵ Again, once the presentable preponderance has been over-come the employer should be able to relieve, with just cause, the contract of employment. It’s extreme important to have co-ordinated insight from counsel as you do this since you do not want to give the fraudulent employee legal grounds to counter with a termination-without-cause suit if the investigation has been poorly put together to prove fraud/malicious activity.

critical electronic files such as the accounting information system¹⁴⁶, customer lists, marketing plans, advertising plans, price lists from suppliers and to customers all of which could be of value to a competitor.¹⁴⁷

Swift action should also be taken for subsequent litigation purposes since if recovery efforts are to be subsequently attempted it is presumed that a court would be better swayed if the employee were disengaged from doing possible further damage. Equally, immediate dismissal would promote the fact that fraud is not tolerated by that employer and would send out the appropriate message of intolerance¹⁴⁸ to the other employees.

A **Mareva Injunction** is a legal tool¹⁴⁹ that your counsel may advise that you attempt on the former employee's assets to secure value that will be litigated for recovery based on that evidence that the counsel has studied to bring the matter beyond a preponderance of doubt in a civil litigation that it was that employee who perpetrated the fraud.¹⁵⁰ *Mavera's are based on value, and there is no need to trace proceeds of the fraud to the assets: they exist to freeze the assets of the opposing party so that they are available to extinguish a civil judgement that will be forthcoming on litigation.* They originated in Nippon Yusen Kaisha v. Karageorgis, [1975] 3 All E.R. 282 (Eng. C.A.) and touched down in Canada most conclusively in Aetna Financial Services Ltd. V. Feigelman, [1985] 1 S.C.R. 2 (S.C.C.) where it was held:

*"The gist of the Mareva action is the right to freeze eligible assets when found within the jurisdiction, wherever the defendant may reside, providing, of course, there is a cause between the plaintiff and the defendant which is justiciable, ... However, unless there is a genuine risk of disappearance of assets, either inside or outside the jurisdiction, the injunction will not issue."*¹⁵¹

They apply not just to financial assets in bank accounts, etc., but also to land and anywhere assets subject to seizure exist and they need not be asset specific – *need not have a connection to the actual fraud – only*

¹⁴⁶ It is highly advised that there be regular, sequential, **daily** backups of the accounting system from the very first day of the on-site investigation to prevent the fraudster from altering data: you do not want the tainted employee to be able to bury their past activity once word of an investigation is started.

¹⁴⁷ If there has been 'pilferage' of electronic files as indicated by the IT department inspection of email traffic or inspection of workstation/laptop a counsel should immediately be contacted to obtain an Acton Pillar order to obtain access to the former employee's residence to examine and take possession of what has been taken, if possible. Pilferage of such data would further a civil fraud case against the employee obviously.

¹⁴⁸ A lot depends on an employment contract that may exist or a union contract. Again, counsel for the investigation will be sensitive to this and advise accordingly. It's noted that pursuant to the ACFE's 2016 Report to Nations, Canadian Edition, that the 3rd highest outcome of a fraud investigation is no punishment at all, which ranked close to the bottom in other global jurisdictions, so it can be said that Cdn. employers tend to be more forgiving of fraudsters.

¹⁴⁹ The Ontario format can be found on the internet via a search for "Ontario Mareva Form".

¹⁵⁰ A Mareva should be integrated with Norwich Orders, described in a subsequent subchapter, that may reveal where a corrupt employee has dissipated the ill-gotten gains. Telltale signs will include gifts to others such as family members, purchase of foreign situated assets, transfers to foreign opaque-ownership bank accounts, etc. Norwich Orders should be considered the instant activity points to one particular employee, with proof, regardless of when the guilt-admitting interview is planned.

¹⁵¹ In a particular case involving fraud the Ontario Superior Ct. provided in *Sibley & Associates LP v. Ross*, 2011 ONSC 2951, para. 63, 334 DLR (4th) 645:

it seems to me that in cases of fraud, as in any case, the Mareva requirement that there be risk of removal or dissipation can be established by inference, as opposed to direct evidence, and that inference can arise from the circumstances of the fraud itself, taken in the context of all the surrounding circumstances. It is not necessary to show that the defendant has bought an air ticket to Switzerland, has sold his house and has cleared out his bank accounts. It should be sufficient to show that all the circumstances, including the circumstances of the fraud itself, demonstrate a serious risk that the defendant will attempt to dissipate assets or put them beyond the reach of the plaintiff.

to value that was realized as a result of the fraud – there is **no need to trace the use of the funds** – their objective is to capture value of assets to cover the amount that was stolen and subject of litigation. It is rarely possible to capture too much since while initial to-be-litigated sum may be small, with litigation costs it will grow, on costs awarded if won and those costs should be included within the parameters of the approach to court.

The Court's criteria that need to be satisfied for the injunction to be granted are:

1. **Make full and frank disclosure of all material matters to the court**
2. **Strong prima facie case against defendant claiming all particulars and amounts**
3. **Show some grounds that the defendant has assets within the court's jurisdiction**
4. ***Show grounds that there is a real risk of assets being removed/dissipated before a pending judgement could be satisfied***
5. **Give an undertaking as to damages that could result to defendant**

- 1-3 above are all satisfied through an exhaustive investigation of the fraudster's activity and what the results were to the victim
- 4 is satisfied by its very nature that the investigation was performed and that a fraud, though not possible to criminally prove, was perpetrated and that the employee has been dismissed
- 5 is satisfied by the victim though the undertaking may be small due to the size of the fraud and how much the fraudster has actually integrated the proceeds use into his operations, how fluid the fraudster needs to be with her other assets that are subject to the freezing order

Some key points about Mareva's include:

1. Prevents moving/spending/dissipating assets when a judgement may be against defendant – should be very first step as civil proceedings are initiated
2. Very important to act very swiftly to preserve the assets, made ***ex parte in camera when possible***
3. **Order can require defendant to list off assets, non-disclosure of which can harm defendant and strengthen plaintiff's case**
4. Can have persuasive effect on litigation settlement – fraudster may simply give up and settle
5. Hearing can be done very expeditiously, within hours of filing, without notice to the defendant
6. Possible for the order to place cap on frozen assets, as well as draw abilities regardless so be cautious of draw aspects of fraudsters in your request for injunction
7. Injunction can be phrased to reference to civil action thus no need to renew, though it may have to be defended
8. Ideal to list off financial institution account numbers
9. Should also be registered against land if possible
10. **Murky disclosure due to not knowing all the facts of the fraudster's assets/activity – can lead to argument of non-complete disclosure or damages for such – should state such in application if such is the case**
11. Order can prompt for damages which if such occur due to an ill-conceived order, could cause the plaintiff out-flow
12. If request is poorly drafted and resulting order of a poor quality it may cause problems in litigation – know your specifics.¹⁵²

¹⁵² In addition to the Mareva, in the USA, Rule 65 of the Federal Rules of Civil Procedure provides for a slightly different freezing order with:

Rule 65. Injunctions and Restraining Orders

(a) PRELIMINARY INJUNCTION.

(1) Notice. The court may issue a preliminary injunction only on notice to the adverse party.

Alternatively to a Mareva, the Ontario (Provincial) Rules of Procedure Pending Litigation Freeze Orders

(2) Consolidating the Hearing with the Trial on the Merits. Before or after beginning the hearing on a motion for a preliminary injunction, the court may advance the trial on the merits and consolidate it with the hearing. Even when consolidation is not ordered, evidence that is received on the motion and that would be admissible at trial becomes part of the trial record and need not be repeated at trial. But the court must preserve any party's right to a jury trial.

(b) TEMPORARY RESTRAINING ORDER.

(1) Issuing Without Notice. The court may issue a temporary restraining order without written or oral notice to the adverse party or its attorney only if:

(A) specific facts in an affidavit or a verified complaint clearly show that immediate and irreparable injury, loss, or damage will result to the movant before the adverse party can be heard in opposition; and

(B) the movant's attorney certifies in writing any efforts made to give notice and the reasons why it should not be required.

(2) Contents; Expiration. Every temporary restraining order issued without notice must state the date and hour it was issued; describe the injury and state why it is irreparable; state why the order was issued without notice; and be promptly filed in the clerk's office and entered in the record. The order expires at the time after entry—not to exceed 14 days—that the court sets, unless before that time the court, for good cause, extends it for a like period or the adverse party consents to a longer extension. The reasons for an extension must be entered in the record.

(3) Expediting the Preliminary-Injunction Hearing. If the order is issued without notice, the motion for a preliminary injunction must be set for hearing at the earliest possible time, taking precedence over all other matters except hearings on older matters of the same character. At the hearing, the party who obtained the order must proceed with the motion; if the party does not, the court must dissolve the order.

(4) Motion to Dissolve. On 2 days' notice to the party who obtained the order without notice—or on shorter notice set by the court—the adverse party may appear and move to dissolve or modify the order. The court must then hear and decide the motion as promptly as justice requires.

(c) SECURITY. The court may issue a preliminary injunction or a temporary restraining order only if the movant gives security in an amount that the court considers proper to pay the costs and damages sustained by any party found to have been wrongfully enjoined or restrained. The United States, its officers, and its agencies are not required to give security.

(d) CONTENTS AND SCOPE OF EVERY INJUNCTION AND RESTRAINING ORDER.

(1) Contents. Every order granting an injunction and every restraining order must:

(A) state the reasons why it issued;

(B) state its terms specifically; and

(C) describe in reasonable detail—and not by referring to the complaint or other document—the act or acts restrained or required.

(2) Persons Bound. The order binds only the following who receive actual notice of it by personal service or otherwise:

(A) the parties;

(B) the parties' officers, agents, servants, employees, and attorneys; and

(C) other persons who are in active concert or participation with anyone described in Rule 65(d)(2)(A) or (B).

(e) OTHER LAWS NOT MODIFIED. *These rules do not modify the following:*

(1) any federal statute relating to temporary restraining orders or preliminary injunctions in actions affecting employer and employee;

(2) 28 U.S.C. §2361, which relates to preliminary injunctions in actions of interpleader or in the nature of interpleader; or

(3) 28 U.S.C. §2284, which relates to actions that must be heard and decided by a three-judge district court.

(f) COPYRIGHT IMPOUNDMENT. *This rule applies to copyright-impoundment proceedings.*

NOTES

(As amended Dec. 27, 1946, eff. Mar. 19, 1948; Dec. 29, 1948, eff. Oct. 20, 1949; Feb. 28, 1966, eff. July 1, 1966; Mar. 2, 1987, eff. Aug. 1, 1987; Apr. 23, 2001, eff. Dec. 1, 2001; Apr. 30, 2007, eff. Dec. 1, 2007; Mar. 26, 2009, eff. Dec. 1, 2009.)

An alternative to the Mareva is an interim freezing of funds pending litigation under provincial Rules of Procedure. The below applies for Ontario whereby Rule 44 and 45 can apply to freeze accounts.

*The principal difference this freezing route takes however is that the fraudster must be made aware of the proceedings, and, **most importantly, the funds frozen must be shown to have come from the pending litigated fraudulent activity (victim's money), thus the need for an advanced investigation stage when applying for the certificate***¹⁵³ ¹⁵⁴

A very important difference that is to be pointed out is that unlike a Mareva, there is no need to prove the risk of dissipation of property, only that litigation is pending.

The test imposed by the court to grant the order for the preservation of assets is:

- a. *the assets sought to be preserved are those realized by the fraudster in specie and constitute the very subject matter of the dispute;*
- b. *there is a serious issue to be tried regarding the petitioner's claim to that asset; and*
- c. *the balance of convenience favours granting the relief sought by the applicant.*

Rule 42 Certificate Of Pending Litigation

ISSUING OF CERTIFICATE

Court Order Required

42.01 (1) *A certificate of pending litigation (Form 42A) under section 103 of the Courts of Justice Act may be issued by a registrar only under an order of the court. R.R.O. 1990, Reg. 194, r. 42.01 (1).*

Claim for Certificate to be in Originating Process

(2) *A party who seeks a certificate of pending litigation shall include a claim for it in the originating process or pleading that commences the proceeding, together with a description of the land in question sufficient for registration. R.R.O. 1990, Reg. 194, r. 42.01 (2).*

Motion Without Notice

(3) *A motion for an order under subrule (1) may be made without notice. R.R.O. 1990, Reg. 194, r. 42.01 (3).*

Order to be Served Forthwith

(4) *A party who obtains an order under subrule (1) shall forthwith serve it, together with a copy of the notice of motion and all affidavits and other documents used at the hearing of the motion, on all parties against whom an interest in land is claimed in the proceeding. O. Reg. 219/91, s. 4.*

DISCHARGE OF CERTIFICATE

42.02 (1) *An order discharging a certificate of pending litigation under subsection 103 (6) of the Courts of Justice Act may be obtained on motion to the court. R.R.O. 1990, Reg. 194, r. 42.02 (1).*

Factum

(2) *Each party to a motion under subrule (1) shall, unless the motion is made on consent, serve on every other party to the motion a factum consisting of a concise argument stating the facts and law relied on by the party. O. Reg. 14/04, s. 24.*

¹⁵³ Equivalent Rules can be found for Interim custody of property in; Alta. Rule (1968) 467; Alta. Rule 6.25; Man. Rule 45.01; Nfld. Rule 22.02; N.W.T. Rule 468; N.S. Rule 42.09; N.S. Rule (1972) 43.04; Ont. Rule 45.01; P.E.I. Rule 45.01; Sask. Rule 387A, 388; Fed. Rule 377, 379.

¹⁵⁴ It's possible to obtain a Norwich Pharmacal disclosure order to look into the bank accounts to confirm this in advance, with appropriate court-ordered limitation on disclosure to the fraudster.

- (3) *The moving party's factum shall be served and filed with proof of service in the court office where the motion is to be heard at least seven days before the hearing. O. Reg. 394/09, s. 19.*
- (4) *The responding party's factum shall be served and filed with proof of service in the court office where the motion is to be heard at least four days before the hearing. O. Reg. 394/09, s. 19.*
- (5) *REVOKED: O. Reg. 394/09, s. 19.*

Rule 43 Interpleader

GENERAL

Definition

43.01 (1) In rules 43.02 to 43.04,

"property" means personal property and includes a debt. O. Reg. 42/05, s. 3.

Claimants

(2) For the purposes of rules 43.02 to 43.04, the following persons are claimants:

1. *In the case of an application or motion for an interpleader order under subrule 43.02 (1), each person who makes a claim in respect of the property.*
2. *In the case of an application or motion for an interpleader order under subrule 43.02 (2),*
 - i. *the judgment debtor against whom the enforcement process has been filed,*
 - ii. *every creditor who has filed with the sheriff an enforcement process against the judgment debtor, and*
 - iii. *each person who makes a claim in respect of the property. O. Reg. 42/05, s. 3.*

WHERE AVAILABLE

Person Claiming No Beneficial Interest

43.02 (1) A person may seek an interpleader order (Form 43A) in respect of property if,

(a) *two or more other persons have made adverse claims in respect of the property; and*

(b) *the first-named person,*

(i) claims no beneficial interest in the property, other than a lien for costs, fees or expenses, and

(ii) is willing to deposit the property with the court or dispose of it as the court directs. O. Reg. 42/05, s. 3.

Claims Under Rule 60.13

(2) A claimant who is entitled to do so under subrule 60.13 (4) or (5) may seek an interpleader order (Form 43A). O. Reg. 42/05, s. 3.

HOW OBTAINED

Application or Motion under Subrule 43.02 (1)

43.03 (1) The following requirements apply when a person seeks an interpleader order under subrule 43.02 (1):

1. *If no proceeding has been commenced in respect of the property, the person shall make an application naming the claimants as respondents.*
2. *If a proceeding has been commenced in respect of the property, the person shall make a motion in the proceeding on notice to the claimants.*
3. *The notice of application or notice of motion shall require the claimants to attend the hearing to substantiate their claims.*
4. *The application or motion shall be supported by an affidavit identifying the property, containing the names and addresses of every claimant of whom the deponent has knowledge, and stating that the applicant or moving party,*

- i. claims no beneficial interest in the property, other than a lien for costs, fees or expenses,
- ii. does not collude with any of the claimants, and
- iii. is willing to deposit the property with the court or dispose of it as the court directs. O. Reg. 42/05, s. 3.

Motion under Subrule 43.02 (2)

(2) The following requirements apply when a claimant seeks an interpleader order under subrule 43.02 (2):

- 1. The claimant shall make a motion, on notice to the other claimants, in the proceeding in which the writ of execution was issued against the debtor.
- 2. The notice of motion shall require the other claimants to attend the hearing to substantiate their claims. O. Reg. 42/05, s. 3.

DISPOSITION

Powers of Court

43.04 (1) On the hearing of an application or motion for an interpleader order, the court may,

- (a) order that the applicant or moving party deposit the property with an officer of the court, sell it as the court directs or, in the case of money, pay it into court to await the outcome of a specified proceeding;*
- (b) declare that, on compliance with an order under clause (a), the liability of the applicant or moving party in respect of the property or its proceeds is extinguished; and*
- (c) order that the costs of the applicant or moving party be paid out of the property or its proceeds. O. Reg. 42/05, s. 3.*

(2) In an order under subrule (1), the court may,

- (a) order a claimant to be made a party to a proceeding already commenced in substitution for or in addition to the moving party;*
- (b) order the trial of an issue between the claimants, define the issue to be tried and direct which claimant is to be plaintiff and which defendant;*
- (c) where the question is one of law and the facts are not in dispute, decide the question without directing the trial of an issue;*
- (d) on the request of a claimant, determine the rights of the claimants in a summary manner, if, having regard to the value of the property and the nature of the issues in dispute, it seems desirable to do so;*
- (e) where a claimant fails to attend the hearing, or attends and fails to comply with an order made in the course of the proceeding, make an order declaring that the claimant and all persons claiming under the claimant are forever barred from making a claim against the applicant or moving party and all persons claiming under the applicant or moving party, without affecting the rights of the claimants as between themselves;*
- (f) stay any further step in a proceeding in respect of the property; and*
- (g) make such other order as is just. O. Reg. 42/05, s. 3.*

Certain Motions to be Heard by Judge

(3) A motion for an interpleader order that is made to a master and raises a genuine issue of fact or of law shall be adjourned to be heard by a judge. O. Reg. 42/05, s. 3.

Rule 44 Interim Recovery Of Personal Property

MOTION FOR INTERIM ORDER

44.01 (1) An interim order under section 104 of the Courts of Justice Act for recovery of possession of personal property may be obtained on motion by the plaintiff, supported by an affidavit setting out,

- (a) a description of the property sufficient to make it readily identifiable;**
- (b) the value of the property;**
- (c) that the plaintiff is the owner or lawfully entitled to possession of the property;**
- (d) that the property was unlawfully taken from the possession of the plaintiff or is unlawfully detained by the defendant; and**
- (e) the facts and circumstances giving rise to the unlawful taking or detention. R.R.O. 1990, Reg. 194, r. 44.01 (1).**

(2) The notice of motion shall be served on the defendant unless the court is satisfied that there is reason to believe that the defendant may improperly attempt to prevent recovery of possession of the property or that, for any other sufficient reason, the order should be made without notice. R.R.O. 1990, Reg. 194, r. 44.01 (2).

ORDER TO CONTAIN DESCRIPTION AND VALUE OF PROPERTY

44.02 An interim order for recovery of possession of personal property shall contain a description of the property sufficient to make it readily identifiable and shall state the value of the property. R.R.O. 1990, Reg. 194, r. 44.02.

DISPOSITION OF MOTION

Where Made on Notice

44.03 (1) On a motion for an interim order for recovery of possession of personal property made on notice to the defendant, the court may,

- (a) order the plaintiff to pay into court as security twice the value of the property as stated in the order, or such other amount as the court directs, or to give the appropriate sheriff security in such form and amount as the court approves, and direct the sheriff to take the property from the defendant and give it to the plaintiff;**
- (b) order the defendant to pay into court as security twice the value of the property as stated in the order, or such other amount as the court directs, or to give the plaintiff security in such form and amount as the court approves, and direct that the property remain in the possession of the defendant; or**
- (c) make such other order as is just. R.R.O. 1990, Reg. 194, r. 44.03 (1).**

Where Made Without Notice

(2) On a motion for an interim order for the recovery of possession of personal property made without notice to the defendant, the court may,

- (a) order the plaintiff to pay into court as security twice the value of the property as stated in the order, or such other amount as the court directs, or to give the appropriate sheriff security in such form and amount as the court approves, and direct the sheriff to take and detain the property for a period of ten days after service of the interim order on the defendant before giving it to the plaintiff; or**
- (b) make such other order as is just. R.R.O. 1990, Reg. 194, r. 44.03 (2).**

CONDITION AND FORM OF SECURITY

44.04 (1) Where an interim order for the recovery of possession of personal property requires either party to give security, the condition of the security shall be that the party providing the security will return the property to the opposite party without delay when ordered to do so, and pay

any damages and costs the opposite party has sustained by reason of the interim order. R.R.O. 1990, Reg. 194, r. 44.04 (1).

(2) Where the security is by bond, the bond shall be in Form 44A and shall remain in force until the security is released under rule 44.06. R.R.O. 1990, Reg. 194, r. 44.04 (2).

(3) Where the bond is to be given by a person other than an insurer licensed under the Insurance Act to write surety and fidelity insurance, the person giving the bond shall first be approved by the court. R.R.O. 1990, Reg. 194, r. 44.04 (3); O. Reg. 570/98, s. 2.

SETTING ASIDE ORDER

44.05 The court on motion may set aside or vary an interim order for the recovery of possession of personal property or stay enforcement of the order. R.R.O. 1990, Reg. 194, r. 44.05.

RELEASE OF SECURITY

44.06 Any security furnished pursuant to an order made under rule 44.03 may be released on the filing of the written consent of the parties or by order of the court. R.R.O. 1990, Reg. 194, r. 44.06.

DUTY OF SHERIFF

44.07 (1) Before proceeding to enforce an interim order for the recovery of possession of personal property, the sheriff shall ascertain that any security required by the order has been given. R.R.O. 1990, Reg. 194, r. 44.07 (1).

(2) The sheriff shall serve the order on the defendant when the property or any part of it is recovered or as soon thereafter as is possible. R.R.O. 1990, Reg. 194, r. 44.07 (2).

(3) Where the sheriff is unable to comply with the order, or it is dangerous to do so, the sheriff may move for directions from the court. R.R.O. 1990, Reg. 194, r. 44.07 (3).

(4) The sheriff shall, without delay after attempting to enforce the order and in any event within ten days after service of the order, report to the plaintiff on what property has been recovered and, where the sheriff has failed to recover possession of all or part of the property, on what property has not been recovered and the reason for his or her failure to recover it. R.R.O. 1990, Reg. 194, r. 44.07 (4).

WHERE DEFENDANT PREVENTS RECOVERY

44.08 Where the sheriff reports that the defendant has prevented the recovery of all or part of the property, the court may make an order,

- (a) directing the sheriff to take any other personal property of the defendant, to the value of the property that the sheriff was prevented from recovering, and give it to the plaintiff; and
- (b) directing the plaintiff to hold the substituted property until the defendant surrenders to the plaintiff the property that the sheriff was prevented from recovering. R.R.O. 1990, Reg. 194, r. 44.08.

Rule 45 Interim Preservation Of Property

INTERIM ORDER FOR PRESERVATION OR SALE

45.01 (1) The court may make an interim order for the custody or preservation of any property in question in a proceeding or relevant to an issue in a proceeding, and for that purpose may authorize entry on or into any property in the possession of a party or of a person not a party. R.R.O. 1990, Reg. 194, r. 45.01 (1).

(2) Where the property is of a perishable nature or likely to deteriorate or for any other reason ought to be sold, the court may order its sale in such manner and on such terms as are just. R.R.O. 1990, Reg. 194, r. 45.01 (2).

SPECIFIC FUND

45.02 Where the right of a party to a specific fund is in question, the court may order the fund to be paid into court or otherwise secured on such terms as are just. R.R.O. 1990, Reg. 194, r. 45.02.

RECOVERY OF PERSONAL PROPERTY HELD AS SECURITY

45.03 (1) Where in a proceeding a party from whom the recovery of personal property is claimed does not dispute the title of the party making the claim, but claims the right to retain the property as security for a debt, the court may order the party claiming recovery of the property to pay into court or otherwise give security for the debt and such further sum, if any, for interest and costs as the court directs. R.R.O. 1990, Reg. 194, r. 45.03 (1).

(2) The affidavit in support of a motion under subrule (1) shall disclose the name of every person asserting a claim to possession of the property of whom the party claiming recovery has knowledge and every such person shall be served with notice of the motion. R.R.O. 1990, Reg. 194, r. 45.03 (2).

(3) On compliance with an order under subrule (1), the property shall be given to the party claiming recovery and the money in court or the security shall await the outcome of the proceeding. R.R.O. 1990, Reg. 194, r. 45.03 (3).

Alternatively, s. 437(2) of the federal Bank Act to Freeze Funds

It is also possible to freeze ill-gotten gains in a fraudster's bank account via filing a writ against the bank and the employee-fraudster if the examiner knows the account. It is necessary to make the bank a party to the action to trigger this writ however once done, pending litigation of the fraud itself can be commenced, with some degree of success for the proceeds frozen. To trigger this process the court requires the following:

- 1) ***the funds stolen must be traced to the fraudster's bank account***¹⁵⁵;
- 2) both the fraudster and the bank must both be defendants to an originating process;
- 3) and the bank must have been served with a notice of the originating fraud-litigation process.

This can be a powerful collection mechanism since it's criteria to be satisfied are much lower than a Mareva, nor are deposits for potential damages required to be paid.

Deposit acceptance

- 437 (1) A bank may, without the intervention of any other person,
- (a) accept a deposit from any person whether or not the person is qualified by law to enter into contracts; and
 - (b) pay all or part of the principal of the deposit and all or part of the interest thereon to or to the order of that person.

Exception

- (2) Paragraph (1)(b) does not apply if, before payment, the money deposited in the bank pursuant to paragraph (1)(a) is claimed by some other person***

¹⁵⁵ Again, it's possible to ascertain this through a Norwich Pharmacal order w/ court-ordered limitation of disclosure to the fraudster.

(a) in any action or proceeding to which the bank is a party and in respect of which service of a writ or other process originating that action or proceeding has been made on the bank, or

(b) in any other action or proceeding pursuant to which an injunction or order made by the court requiring the bank not to make payment of that money or make payment thereof to some person other than the depositor has been served on the bank,

and, in the case of any such claim so made, the money so deposited may be paid to the depositor with the consent of the claimant or to the claimant with the consent of the depositor.

As previously stated, with coordination of appropriate counsel versed with all the developing factual background and good knowledge of bringing the matter beyond the preponderance of doubt in a civil suit regardless of what the guilty employee admits to, it can be easily planned for both a secure exit from the premises to prevent further damage/opportunity, as well as preservation of value that will be needed to satisfy that pending civil action victory.

Electronic Accounting Information Systems and Fraud Therein

All accounting information systems are basically the same, collections of data into relevant accounts and presentation thereof, either in total or for a period. The data consist of either direct journal entries that enter into the account, or journal entries that enter into a subsidiary account (AR, A/P, etc.) that feed into an account when prompted for, either as an on-going basis or when closed.

Even when the accounting system works on a batch method (when a series of like transactions are posted in a batch) or one-off series of individual entries this is the case.

First Precautionary Steps: Make Backup Copies and Restrict Access to Records

Depending on the nature of the engagement you may be called for one of the first steps you should take is approach the IT department of the enterprise and obtain a complete copy of everything that exists in the company's information system. This can be done with various internet-based drive back-up services such as Google as well as hard-drives which can be very expensive for the amount of data backed up.

The data to which this applies includes everything. Not just the accounting information system for the past, at least, 2 business cycles but also the email server data covering communications from within the enterprise.

Doing this allows the ready extracting of the original set of records which a fraudster in place, if and when they discover there is an investigation/risk assessment in progress, may try to eliminate so by making copies right at the on set that evidence trail cannot be maliciously deleted, possibly without ability to recoup.

On the on set of an investigation it is also highly advisable to have locks installed on filing cabinets if it is possible holding source documents for all the accounting records since there is a risk that source documents may be tampered with if a fraudster in place becomes aware of a pending investigation/assessment. In accompany to this perhaps video surveillance of access to those cabinets should be emplaced and different source document handling procedures should be emplaced to prevent tampering with existing evidence that you may need to substantiate an investigation of all aspects. Such would include using an excuse by management that all records are moved to a different location to use space/normal permanent filing, etc.

Not only are backups of all information systems with limited access to source documents a good preventative control in a risk assessment, that the enterprise should have regardless, it should automatically be the first step to ensure the freezing of the environment as it exists when you start your engagement.

Roll Your Sleeves up on Your Engagement and Do It Yourself

An opening point should be made about any type of engagement you do in fraud investigation as an outside party: NEVER let management limit your ability to examine, any aspect, once you accept to act.

It is absolutely important that management give you *cart blanche* in your own investigation since it is your opinion that they are contracting for and it could be undermined and found not professionally valid if the examiner is limited in her mandate.

The second reason that a mandate should never be limited is that the examiner should have open access to every aspect of the enterprise in order to follow up on any issue that comes to light since any issue, no matter how small, can lead to a much larger, systemic problem that isn't readily apparent: if the mandate is limited, there may be inabilities to look into these issues which will result in an ill-formed opinion¹⁵⁶.

¹⁵⁶ As a CFE will know, it's imperative to maintain professional skepticism at arm's length in any fraud engagement and you would not want to be contracted by who turns out to be a fraudster themselves seeking to focus attention away from themselves for instance. Have a wide-open access to anything allows maintenance if that professional relationship and code of ethics.

And thirdly, management **MUST** be very willing to generate complete transparency at its level to allow the examiner to have first hand senior knowledge of how the enterprise functions, as well allow the mandate to apply to itself in case fraud is occurring at the most senior level.

This senior acceptance of a full scope mandate should allow the examiner open access to every aspect of the enterprise, ranging down into any department/function, and to appropriate external parties (banks, counsel, employment firms, etc.) so that, in this case, the examiner has open access to all the accounting functions, at any level.

Familiarizing Yourself with the Accounting Software and Source Document Flow

At the start of any engagement, be it fraud investigation or risk assessment, it's absolutely important that you have a thorough understanding of the accounting information system and internal controls (as well as surrounding source document processes involved, of course).

By studying the software manuals and interviews with CFO's etc. the normal functioning of the acc'g system will be obtained to allow the examiner to see unusual transactions.

This knowledge is irreplaceable and should always be at the front of the examiner's mind since it's the accounting system, and weaknesses therein, where a fraudster can seek to hide/disguise red-flag offensive transactions, be they debits/credits or forced amounts, depending on the sophistication/access/collusion of the fraudster.

Through a good understanding of the internal control environment, as realized through interview with the IA dept. if one exists, the examiner should also be cognizant of any weaknesses that a fraudster may be able to take advantage of and gauge her investigation into their possible use as well.

If the enterprise has an internal audit department or individual then their activities should be studied over the past relevant periods to find out about issues that have come to their light which may warrant attention. It would wise to interview them in-depth to determine both the quantitative nature of the set of accounts but **also the qualitative nature of the employees operating the system**: doing so shortens the investigation by giving the examiner deep insight into how the client is functioning.

From the CFO/Operations Manual how source documents are generated/processed and stored should be readily ascertained. **An examiner should establish this before hand so that she can find the documents herself if through investigation they are needed, rather than have to ask a line staff in the process and draw attention to a focal point in her inquiry. Once the examiner knows where documents are normally stored, she need not ask again, revealing any apparent interest.**

Are There Short-Cuts/Backdoors in the Accounting System that You Should Certainly Know Of?

In any investigation, it is very wise to seek out through interview with the most senior of accounting staff such as the CFO, or even the software manufacturer, if there are any back-doors/short-cuts that have inadvertently been allowed into the software which a fraudster can use to perpetrate a cover-up.

Remember that the accounting staff, where considerable fraud has as its source, work with the software, configured perhaps to their environment considerably, on a day-to-day basis so what you should try to do is catch-up to know any weaknesses in the system where a fraudulent transaction can be sunk/plugged to possibly allow a cover-up.

Again, it's possible to get limitations from the software manufacturer, or knowing them from previous engagements, as well as senior staff such as the CFO or CEO and this aspect should also be asked in your initial interviews with line accounting staff¹⁵⁷.

¹⁵⁷ By asking them of line staff you shall be confirmed or not about that employee's knowledge: if subsequently you come across an instance where that employee has in fact done ad hoc adjustments to the software's function this will draw your attention to that employee who didn't acknowledge it previously as a possible party who would collude, etc. in a fraud perpetrated.

Make Sure You're Working with A Balanced Trial Balance to Start

Once the examiner has obtained a thorough understanding of the information system and its controls she should generate a trial balance of the enterprise and it is important at this point to ensure that the TB actually balances.

In this case, the examiner should never rely on management to produce a TB for the examiner – the latter should always, per the above, have open access to the acc'g system so that they can drill down off of balances once a TB is produced, with some expectation of finding the associated problems if such exist. If management has stymied the abilities of the examiner then this very important feature in the nature of the engagement isn't there and the opinion granted may be very limited, which is maybe what management wanted all along.

If the TB doesn't balance there could be valid reasons for it such as a subsidiary account has not been closed off, etc. however upon review, after confirming all valid reasons and a properly closed TB, it should balance.

If it doesn't, that's your first indication that something may have been forced into an account through a posting of a one-sided transaction, if the software allows it to be done¹⁵⁸. You may not be able to tell in the list of accounts, which one is causing the imbalance, but you will know that the books are off.

If your trial balance is off, start generating them backwards from the cut-off date, on a weekly basis, and see where they go astray. This assumes that it is not a cyclical problem and that they always exist which will indicate that there is on-going weakness in internal controls in transaction recording which should reveal larger problems¹⁵⁹. Unfortunately, this will not directly indicate *where* a problem exists when you find the predated start of balance trial balances, but it will tell you *when* it arose so that you have some parameters to narrow your work.

Do your Bank Reconciliations Stand-up?

The best accounting professor, at Concordia U., this examiner had in his life explained that *“Always make sure your banks balance to the penny, since if you're out a penny on one side, you may be out a million dollars on the other.”*

These are very wise words requiring you to highly scrutinize each and every bank reconciliation starting back where it is contemplated that the fraud was initially perpetrated. Bank reconciliations are important since for many fraudulent acts the objective is to embezzle/skim cash as the most fluid of assets to be defrauded from a company and by scrutinizing every bank reconciliation, again starting from where the fraud may have occurred, transactions that stand out may become aware of.

Equally, through scrutinizing of the transactions affecting the cash accounts on the books there may be transactions that are posted just to make reconciliation reconcile which should draw the attention of the examiner since, again, they may not be of the normal business of the enterprise and were in fact posted just to cover up the fraud.

Thus, scrutinize each bank reconciliation as well as the transactions that build up to that reconciliation to ensure no problematic instances.

¹⁵⁸ Most modern acc'g software packages do not allow this to happen however if collusion occurs it can. Always assume that there is a software genius hiding in the crowd, who will be the one who attempts to bury a fraudulent transaction through a forced transaction. **Such can happen with staff who, unlike you, use the information system on a day-to-day basis and who know it far better than you.**

¹⁵⁹ And alert the examiner to the need to inform mgmt. that more work will be needed in the engagement

In the instance of “soft” bank reconciliations it’s possible to appreciate just how potentially ripe an accounting environment is for fraud since if “plug it and go” entries are being made to adjust banks, a fraudster watching in the wings may seek to take advantage of this¹⁶⁰.

Once the bank reconciliations are in order it’s possible to move on to further asset accounts such as inventory to test those for fraudulent postings.

Draw Down All Entries for All Accounts, Inspect, and Test

And this is where the real work starts. In order to determine whether there has been any type of fraudulent transaction(s) entered on any accounts you must scrutinize each account’s activity for any suspicious entries.

One step that the examiner should always include at the start of any account verification is to import the draw-down into a spreadsheet to ensure numerical accuracy so that period to period balances can be properly verified.

Once the account’s transactions are in an Excel or other spreadsheet format it should be easy to do numerical testing for suspicious transactions described below using either Excel or an industry recognized fraud discovery software such as Caseware Analytics.

What constitutes a “suspicious entry” to look for in a listing of account activity? This depends a bit on the account however there are some generalities.

There are certain characteristics, depending on any account, be it a debit or credit standing account, that will stand-out if you sharpen your review of the account. They are:

- If there is a series of unusual¹⁶¹ smaller/larger adjustments with or without fuller descriptions, that when added together, show a total larger movement in one direction over a period – could be possible collusion between subsidiary account attendees and those with access to the general ledger
- If there are large, consistent, just prior to period end, adjustments that have insufficient explanations¹⁶², - that could amount to asset/liability/earnings manipulation
- Entries with some sort of non-descript narrative that build up the account over time – which again could be instances of asset/liability/earnings manipulation
- Entries that do not carry a fuller, if standardized, written description – could be an instance of an artificial entry to balance the TB with the subsidiary account if the acc’g system is of that nature

Once this thorough inspection of each account’s entries has been accomplished, sensitive to narratives that describe them, ensure to test for consistency in postings such as recurring items and a calendar month’s numbers of subsidiary account postings and ensure to look into instances where anomalies occur.

In non-subsidiary accounts – those where the entry is not collected with others but is instead entered as a one-off transaction – an entry can carry its own detailed written entry noting the particulars of the transaction. If the enterprise has a standardized methodology of what is written here there is stronger internal control since generally through such a system there is more information recorded¹⁶³. If there has been a divergence from that narrative system, it should be looked into to determine why.

¹⁶⁰ In the instance where the accounting records are in disarray the examiner should ask the pertinent question of why. Was it because the person doing the accounting was so deficient in skill that they didn’t know what they were doing, or, ore importantly, did they purposefully perpetrate this feint of disarray just to disallow easier insight into fraud they were perpetrating?

¹⁶¹ When considered against normal entries

¹⁶² Especially if there are reversals in the subsequent period, unless of course they’re normal accruals, etc.

¹⁶³ Someone with superior knowledge of this acc’g system has studied what it needs in terms of recording and reporting and instilled such, generally the external auditors over the years.

...And in Subsidiary Accounts

And all accounting systems that this author knows of have their own language of presentation of these transactions going into the accounts: if an account is one to which one-off transactions are posted, then the person posting can provide a written description of what the entry is about, if the account is a subsidiary account, then a posting to it will generate a software generated written entry that is **always the same**, per the normal functioning of the software.

In other words, in subsidiary account draws down all the entries should carry the same narrative **except for the batch number and the date that it was posted. There shouldn't be batches of the same batch number since that would indicate an artificial manual batch entry that was posted since the software will prevent, automatically, two batches from ever having the same number.**

Also, in most systems, it is hard to reproduce that format manually by going into the account and posting an artificial for two reasons:

- The software will not allow a direct posting to the account, an adjustment has to be done through only the subsidiary chart of accounts that feed into the TB account, and,
- Even if you can post an entry directly to the TB account, it can be sometimes very hard to duplicate the format of what the TB entry will be so it should show up on a draw-down of the TB account as something that stands out.

Ensure Proper Inclusion/Cut-off on Subsidiary Batches

One principle verification step that should be taken is to ensure that for each month there are the appropriate number of subsidiary postings for that month, including accruals if such is the case, so that the proverbial “extra one” cannot be buried in the TB without actually existing. Simply count out the numerical descriptions of the batches and confirm the ending batch number for each period to ensure that for that period nothing has been entered artificially outside the normal subsidiary system.

Global Payables and Receivables Statistical Scrutinizing

Most software allows a user to extract an entire listing of payables and receivables to conduct statistical tests against as detailed in a subsequent chapter.

On a global account basis, payables and receivables, these statistical listings should not be overlooked.

And, Into The Subsidiary Accounts on a Client/Supplier Basis

Once all the above steps have been done to get a feel for the enterprise's accounting system it's time to look into each client/supplier account to verify absence of fraudulent postings/errors. Seeming errors may not be in fact errors since they may be indications of instances where the poster has attempted to cover something else that has gone astray, maybe purposefully.

Verification steps at this level can be simplified if the enterprise has been advised to maintain printed records of trade balances per client/supplier as the periods progress since they allow the examiner to examine ongoing activity, cognizant of manipulations.

Do the Extensions, on Both Payables and Receivables, for Exceptions

This is a step that you should definitely do to verify that sales and purchases are actually where they should be as authorized.

It's very easy to override payables and receivables routines by the associated staff for the benefit of either a supplier or a purchaser so an additional routine that is important is to confirm, through extensions and exceptions. They will reveal if a product is being sold under sales price or a payable is being inflated artificially.

Mapping an Account Scheme for Potential Hiding/Off-sets

On every single internal financial fraud perpetrated by any party within a company they must figure out a way to hide its impact within another account on either the income statement or the balance sheet. That's the nature of double entry financial accounting – two accounts are always touched and if there is an effect on one, there must be an effect on another. At any time, the balance sheet must balance and the income statement must knit thereto through the existing retained earnings. Consequently, an internal fraudster, depending on her access to the financial routines, must have access to conceal an act with an off-set. This subchapter seeks to explain areas where fraudsters are more susceptible to try to bury this off-set, depending on the activity they perpetrated that affected the financial statements that should lead you to examine them.

Are Certain Employees/Departments Seemingly Overworked – Internal Control Stress?

Internal controls over corporate functions are almost always developed in an idealist mode to contain function to perform. Unfortunately, one of the reasons they break-down are because of stress due to lack of manpower/time to attend to the volume of transactions that are to be processed. This break-down or bottle-neck may be a hiding-point for fraudsters to perpetrate and hide their transactions on the records so a prudent question when furthering an investigation would certainly include any areas where there has been unusual “internal control stress” resulting from this scenario and an evaluation thereof.

Is There a History of Seeming Mistakes Caused by a Select Few Employees

Role supervisors should be able to explain if there has been a history of mistakes being made to the accounting system by any new or rotated employees. The investigator should certainly take note and analyze these “mistakes” since while ignorance may prove to be their cause, by putting the employee in a new position/new routines, equally there could be an issue of the *employee attempting to circumvent software/process controls by “testing” them*. If there seems to be a select few who cause the mistakes then in this author's opinion all their work should be subject to more scrutiny as well as possible casting as suspects if there has been a break-down somewhere within that employee's sphere of activity. Understandably the investigator should have an understanding of what that employee has access to to determine their “reach” to perpetrated malicious transactions. **Be cautious of “mistakes”: they may not be.**

Choice of Secondary Account May be Revealing

Also, depending on what account the perpetrator takes to post an opposing entry to there may be more solid *prima facie* grounds to accuse of internal fraud. If certain accounts are not normally touched and yet something happens in them, unexplained, then they may be either side of the illicit transaction that was posted by either of the two routine-focused employees. If the posted account has a description or account number similar to what a transaction like it would be posted then this *prima facie* evidence is softer and may be explainable by the poster.

Account “Smurfing” to Hide the Offset

This author calls it “account smurfing” whereby a poster will attempt to spread an offset across multiple accounts to hide the sum effect of the size of entry she's trying to hide.

Understandably when studying the accounts and a vague description is encountered, **and when correlated with another same/similar in another**, the investigator should start asking who had access to these accounts to do this.

The Fraud Discovered, and What is the “Access Map” of the Employees?

One of the first steps in any internal fraud investigation, regardless of what its nature when discovered, is to create an Access Map of what employees have access to what routines in the existing software that would allow them to both perpetrate the fraud but also post entries to hide it. In most accounting software systems in reasonably coherent companies posting routines that affect the FS are both physically secured and password secured for the nature of the posting to be done. Only *certain* employees should be able to affect only *certain* changes to the accounting system, as any normal internal control environment should prompt for.

Accounts payable personnel don't normally have access to the general ledger and accounts receivable don't normally have access to same, generally: they deal only with subsidiary accounts. In terms of middle management/supervisors they can have access to higher end BS and IS accounts *at the general ledger level*. *The key to note here is that the level of the employee will determine where they may choose to try to create an off-set to hide their acts.*

Globally Applicable Software Tests

There are a multitude of testing methods that can be done on electronic data realized from an enterprise's accounting system, be it for Balance Sheet or Income Statement accounts, or, for totals within each subsidiary AR, A/P or Payroll account.

Cutting to The Chase: Each Engagement has Its Peculiarities that You Must Advantageously Know

Before conducting tests on accounting data there are a series of issues that the investigator must come to terms with to further allow her to focus where to spend her time. They include:

- What data is in fact available, with high integrity, and it is important that it be worth testing¹⁶⁴?
- What exactly would an anomaly look like if it were discovered in the particular dataset discovered¹⁶⁵?
- Has there been any change in accounting policies and routines, or business practices, that would change the data¹⁶⁶?
- Has there been any change in accounting systems mid-year that would disallow all the yearly data from being tested in one file?
- How many known problematic erroneous transactions have been understood to have gone through the accounts so far that could warp testing outcomes?
- Etc.

Once all these issues are understood the investigator is much better placed to know how to peel through the datasets to determine any significant occurrences.

All, Data to Test

While a considerable majority of data to test in effort to establish anomalies or outliers consists of financial data (invoice *amounts*, pay-roll *amounts*, sales invoice *amounts*, etc.) **this is certainly not the only data that the investigator should be interested in.**

Almost as important if not just as important are analysis of the *dates of transactions* such as:

- Number of days o/s of sales invoices by salesman
- Number of days to write-off of accounts receivables
- Number of days o/s of payables invoices
- Number of days between payables invoice date and cheque issuance date
- Etc.

all considered with respect to management outlines for operations.

By analyzing dating of transactions, even though the financial amounts are not revealing, there may be anomalies that are not readily apparent that should draw concern for types of fraud such as:

- Bribery of purchasing agents/sales agents,
- Fictitious sales to generate false commissions
- Fictitious sales to generate false expense reporting
- Etc.

since these are affects on transactions that are called for to perpetrate a malicious activity regardless of amount.

¹⁶⁴ If the electronic accounting records are out of date or too full of mistakes then they may be worthless to use, except as a secondary follow-up to determine of that's where fraudulent off-sets were posted, though you may not be able to discern that on their own analysis.

¹⁶⁵ This is important since if an outlier/anomaly can't be discerned when you're looking at it in its face then you're no further ahead testing. **And an outlier may be different for each type of data scrutinized.** It's clearly wise to have complete discussion with mgmt. to ascertain "normal" transactions and parameters of transactions.

¹⁶⁶ This is very explanatory since if there has been any change then understandably the data would shift and would reveal differing results under test.

Some Need to Be Familiar with Business

There is a need to be familiar with the transactions of the business before testing is started since the investigator will then be about to determine where the most valuable data resides.

Management should certainly be consulted to determine how accounting for transactions is done per established procedures so that an anomaly can actually stand out if it is encountered: without management explanation of what should be going through the accounting system the investigator may not be able to discern that a transaction is in fact an outlier.

Caseware Analytics and Excel – W/ Some Youtubes and Ors. for Instruction

While Caseware Analytics can be used to pursue statistical testing of datasets this author highly recommends that the reader also understand how to perform such in Excel so that they know as a “renaissance man” how they are computed.

In this regard, there are numerous Youtubes available that are encouraged to be studied, while Excel features/functions can equally be thoroughly investigated to aid in a data analysis role, regardless of the chosen industry software that you settle on acquiring. The total of all Excel features/functions are beyond the scope of this book but studying them each will only add to your ability to analyze datasets¹⁶⁷.

It is wise however to become functional with industry software such as Caseware Analytics since the reader will undoubtedly be called to work with one or another in their career. Equally, Caseware Analytics comes with its own well-thought-out set of functions that Excel will not be able to give you¹⁶⁸.

Equally, when it comes to using various free-standing data software packages like SQL there are numerous USA based “web-schools” such as Coursera that have very inexpensive certificate programs that you can take at your own speed to gain software proficiency for your skill-set.

Persistent Problems Actually Finding Disguised Anomalies

Given all the possible analytic tests that can be run on any set of data it is still possible that a perpetrator will post transactions that do not raise red-flags. **Depending on their function and knowledge of the type of transactions going through the accounts they may be able to deliberately choose amounts that do not stand-out, by any method, and it is here where a good analytic specialist’s ability is demanded.** It is entirely possible for a very competent lower-level or upper-level employee to cheat the system through choice of transaction amounts that will simply not stand-out except through throwing the entire gamut of possible test parameters at the data and taking an integrated view of the results.

In short, you may have to go through the data with a very fine-toothed comb to determine whether any true anomalies exist.

Primary Tests

There are primarily 7 tests that can be done in this regard¹⁶⁹:

1. Benford’s Law
2. Number/Amount Duplication
3. Z-Score
4. Quartile Test
5. Same-same-same Test
6. Same-same-Different Test

¹⁶⁷ One should recognize however that there is a major limitation in using Excel to analyze data in the form of limited number of rows therein that it can occupy: 1.048 M, though which are rarely encountered.

¹⁶⁸ Unless you pay a 3rd party for scripting services to adjust and add the features to Excel you’re looking for

¹⁶⁹ However, there are numerous others that the reader can consider, many specifically designed and imbedded in industry software

7. Even Amounts

I highly recommend purchasing and studying Sunder Gee's **"Fraud and Fraud Detection: A Data Analytics Approach"** book for further in-depth revelations on how to detect various type of fraud in data using analytics. Basics of fraud and fraud detection concepts are introduced along with statistics and statistical sampling techniques. The book is organized by the major types of fraud so that you can directly focus on the area of relevance to you. Step by step of specific data analytic procedures are provided for each area¹⁷⁰.

Benford's Law

Benford's Law looks for abnormalities in number frequencies in naturel non-systematically produced numbers such as invoice totals, independent addresses, etc and has gained wide-scale acceptance of testing since it was first promulgated in 1938 by Frank Benford.

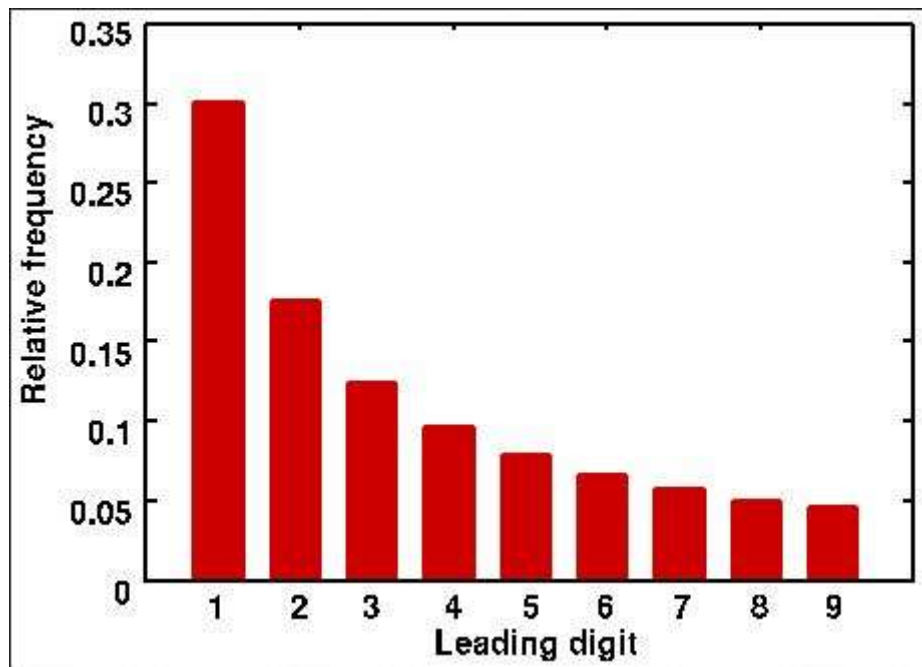
It postulates that the lower the 1st digit of a number series, the more it would appear in any set of these numbers¹⁷¹. After research, the distribution arrived at with frequency was:

Digit	1 st	2 nd	3 rd	4 th	5 th or higher
0		11.97%	10.18%	10.02%	10.00%
1	30.10%	11.39%	10.14%	10.01%	10.00%
2	17.61%	10.88%	10.10%	10.01%	10.00%
3	12.49%	10.43%	10.06%	10.01%	10.00%
4	9.69%	10.03%	10.02%	10.00%	10.00%
5	7.92%	9.67%	9.98%	10.00%	10.00%
6	6.69%	9.34%	9.94%	9.99%	10.00%
7	5.80%	9.04%	9.90%	9.99%	10.00%
8	5.12%	8.76%	9.86%	9.99%	10.00%
9	4.58%	8.50%	9.83%	9.98%	10.00%

¹⁷⁰ Source: Gee, Sunder. *Fraud and Fraud Detection: A Data Analytics Approach*, + Website. Hoboken, New Jersey: John Wiley & Sons, Inc., 2014.

¹⁷¹ Using Excel to calculate the table of 1st and 2nd digits are simply the Log₁₀ or Log₁₀₀ of the number sequence 0 through 9

A simplistic graph of the outcome of Benford's distribution is:



The accounts that this test, with software use, can be used on include¹⁷²:

- Accounts receivable
- Accounts payable
- Sales
- Cost of Goods sold
- General ledger postings (such as accruals or estimates)
- Bad debts
- And any other account that should have only naturally produced numbers in their postings.

And, you can also test the **last 1 or 2 digits** in a dataset to determine how skewed they may be. Again, the prevalence of the categorical numbers in these two generations may reveal purposeful choice when posting fraudulent transactions.

It is particularly relevant to those situations where the poster has maximum's that they can post before 2nd party authorizations on those above (JE's for example), as well as those situations where they have complete control over (payroll, payables).

The test can be very useful in determining whether an entering party is attempting to circumvent authorization controls over their limit of postings by coming as close to them as possible, while maximizing the amounts. Such would include accrual postings, payables invoice amounts, employee hours/pay-outs, etc.: all those areas where there is a maximum that a party has authority to post and who would thereby attempt to get the maximum abuse of the position.

However, even if the poster does not try to maximize her abuse of the position through exceedingly high but non-triggering amounts, their activity can still be "seen" if routinely choose the same or similar amount to post, since that too would cause a spike in the occurrence. In some instances, this repeated use

¹⁷² The tests should be applied equally on every subcomponent of the accounts, being an A/R - AP 3rd party or a GL account differentiated based on type of transaction or nature of subject.

would show up quite well when compared to the statistical spread of other amounts, but would depend on whether the abuser is posting the same or similar amount starting with the same digit. ***Given this, it would still take a considerable amount of posting of counterfeit transactions en masse in some instances to “move the dial” and appear.***

The Number Duplication Test

This test is similar to the Benford Test but looks for the frequency of potentially chosen numbers in a data-set. The important term here is “potentially chosen” since the theory works on the premise that fraudsters subconsciously favour a set of numbers within a certain range, from one day to the next, and their use as entered into the accounting system will thus become prominent if it can be searched for.

The Z-Score

The z-score is a statistical measuring calculation that determines outliers/anomalies depending on a class of data by determining its mean-average of a set of numbers. The centre point of a standardized curve of numbers in the set is the Z value and if it is to the right of 0 in the curve it is positive and if it is to the left of the centre point it's negative. The distance between that number from the mean is measured by standard deviations while if the Z-score is 0 it is 0 standard deviations from the mean of the set and equal to the mean. The Z-score is calculated by taking the difference between the number and the mean and dividing that by the standard deviation. Effectively the Z score is calculated by the formula $Z = (X - \mu) / \Omega$ where X is the number, μ is the population average and Ω is the standard deviation of X from the average.

The Z-score is always relative to the average of the set of data where it is set to 0. With the Z-score you can compare the results with a normal curve to determine outliers/anomalies based on normal tables you can obtain from the internet. ***The higher the absolute value of a Z-score, again based on a certain number within the set, the greater it is from the average and it is that number that the examiner should seek to examine in detail as an outlier. Good bench-marks for testing include any Z score that is in excess of 2.00, 2.68, and 2.75 while understandably the lower the Z score the closer it is to not being an outlier – as the Score grows higher these transactions should warrant attention***¹⁷³.

Using Excel, it's very easy to obtain specs out of datasheet with the @average and @stand-p functions and to plot the resultant Z-scores on a graph to visualize anomalies. The user can use this method to gain a grasp of not just amounts but numerated dates to reveal activity, per employee if need be.

Quartile Testing

Testing for quartile extremities rewards data points that are outside parameters determined through selection of chosen distances from the quartile range.

The 1st quartile (Q1) is simply the number in a dataset where 25% of the total population of numbers is less than that while the 3rd quartile (Q3) is merely the inverse being the number where 25% of the numbers in a population are greater than that number.

The interquartile range (IQR) is merely the distance between the two quartiles.

To determine outliers one simply multiples the IQR by a factor, **and this is discretionary with the population of outliers one wants to create (choosing a multiplier will determine how many outliers result)**, and adds or subtracts it from the Q1 or Q3 to note items that are beyond the bounds.

¹⁷³ It is entirely understandable to “shave off” exceptions in data sets based on changes in the Z Score produced for the differing values: as one grows higher, the population set of anomalies grows smaller. At a Z score of 3, 99.7 % of all transactions are statistically covered.

Same-Same-Same Testing

This method of data analyses is based on finding the same amounts in given datafields that reveal that there has been a duplication of source document processing, or a fraudulent transaction, such as a cheque payment that goes through authorization, has been duplicated.

It simply consists of doing a sort on fields in the data set such as amount of payment, numerated date of payment, text of vendor/client etc. that will reveal double or triplicates of transactions that have gone through the accounting records.

While Excel can do this it is highly recommended that you use a generally versed industry software since given large data-sets in larger companies using Excel can be very time consuming to use to pluck through a large dataset¹⁷⁴.

Same-Same-Different Testing

Same-Same-Different testing allows summary of same users, same use though with different results to be scrutinized where 2 out of 3 variables in a data set are searched.

This can occur with:

- Accounts payable and payments to vendors
- Payroll with payments to employees
- Accruals/estimates by management
- Etc.

Again, Excel can be used here, though industry software such as Caseware Analytics, with its numerous programmed tests can be used.

Difficulty with Large Datasets and “The Layered Peel”

Targeted anomaly searches, through whatever means be it an industry software or Excel, may reveal initially huge amounts of seeming outliers depending on the initial parameters of the search.

If the search parameters are too large then huge uninvestigable exceptions may be produced, even though a significant portion of them should be considered. **This especially applies to the use of Z-Score and Quartile testing with their possibility of more finely tuned exception reports.**

In this author’s opinion, it’s better to do “layered peel” back of exceptions starting at the most outer extremes of test parameters to generate smaller results with which to possibly create leads to follow, as opposed to generating larger outlier lists that require more time to investigate thoroughly.

This is not to say that you shouldn’t do both, but it could lead to faster in-depth coverage if you start at the extremes and work into a dataset to find outliers.

Difficulty When Not Enough Red-Flag Transactions to Turn the Dial

In every data set there is an inherent problem finding a fraudulent transaction that has been posted in any amount: ***does it actually stand-out in the data set to be revealed by a test?***

Picture a 1,000-transaction data set with only 1 or 2 transactions which are suspect: depending on the tests applied, they may or may not stand out so it’s imperative that the gamut of all tests possible be applied to attempt to ensure that it does. While one may not catch it, another will.

Picture a fraudulent employee passing a tainted \$1,000 transaction, through an account with \$1,000,000 worth of \$750-\$1500 transactions in every month: will it show up?

Steps that can be taken to have it stand out include analyzing:

1. on a shorter period basis, say weekly or monthly¹⁷⁵

¹⁷⁴ Unless the investigator has scripted with Excel to have this better done than its standard features now allow.

¹⁷⁵ Both comparing transaction count, value, and predominant 3rd parties

2. on payment dates – whether as an A/R or AP basis¹⁷⁶
3. on an employee by employee basis, which lessens the dataset to apply tests on
4. duplicate or near duplicate amounts for the same 3rd party
5. new 3rd parties to the period
6. cyclical period comparisons of recurring transactions for same and ‘new’ 3rd parties.

That’s why it’s important to run a full set of tests against a seemingly benign set of data. If one test doesn’t discover it, it may be found through another but it’s entirely possible not to reveal all tainted transactions even with considerable testing.

It’s an area where you can never do enough to be sure.

Is the Transaction Actually Fraudulent, or, Can It be Explained Otherwise?

This is the question that all fraud examiners should have in their minds as they test transactions or otherwise come across seemingly red-flags in their investigations.

Just because a transaction breaks with the norm doesn’t necessarily mean that it is fraudulent, though fraudulent transactions do in fact break with the norm.

This is an important issue to always consider since it requires the investigator to peel through all the circumstances in which a or series of postings/transactions occurred to determine if they can be explained by other means. Other means would include:

- A mgmt. undisclosed change in accounting process on any issue related to
- A new employee making mistakes as they process for not knowing how to do it properly
- A special customer or vendor for which there is mgmt. agreed treatment different from the others
- Etc.

Transactions that result in this environment could arouse suspicion but it’s important for the investigator to consider them all, **for legitimate answer**, to confirm that they are, or are not, fraud induced.

Equally, while an independent anomaly may not be explainable, when coupled with others revealing substantively the same result, conclusions can be drawn on whether they were fraudulently posted or not¹⁷⁷.

¹⁷⁶ Follow the series of transactions through the accounts from start to finish to see any shorter period outstandings, etc.

¹⁷⁷ “Once you eliminate the impossible, whatever remains, no matter how improbable, must be the truth”. Arthur Conan Doyle

Evidence Collection, Off-Site

In many investigations there is a plurality of different types of evidence that may need to be realized as it exists off-site of where an internal financial crime has been perpetrated. And there are 2 primary legal ways to do it Canada, The Anton Piller Order and The Norwich Pharmacal Order.

The Anton Piller Order

The Anton Piller order allows an investigator with client needs to request from an appropriate court an order to execute a “civil search and seizure” for evidence that may be clearly needed in a fraud litigation proceeding. Like a criminal search and seizure there are needed legal basis for the order to invade a person’s privacy that must be overcome as well as clear terms on what can be seized thus preventing “fishing expeditions” as well as the use of designated 3rd-party solicitor to give independence and sanctity to the court’s order.

The AP order originated in *Anton Piller KG v. Manufacturing Processes Ltd.* [1976] 1 All E.R. 779 (C.A.) where it was held that:

“There are three essential preconditions for the making of such an order, in my judgement. First, there must be an extremely strong *prima facie* case. Secondly, the damage, potential or actual, must be very serious for the plaintiff. Thirdly, there must be clear evidence that the defendants have in their possession incriminating documents or things, and that there is a real possibility that they may destroy such material before any application inter parties can be made.” – pg 784

It was further elaborated upon in *Celanese Canada v. Murray Demolition*, [2006] 2 S.C.R. 189 where the Supreme Court held:

“Experience has shown that despite their draconian nature, there is a proper role for Anton Piller orders to ensure that unscrupulous defendants are not able to circumvent the court’s processes by, on being forewarned, making relevant evidence disappear.

Their usefulness is especially important in the modern era of heavy dependence on computer technology, where documents are easily deleted, moved or destroyed. The utility of this equitable tool in the correct circumstances should not be diminished. However, such orders should only be granted in the clear recognition of their exceptional and highly intrusive character and, where granted, the terms should be carefully spelled out and limited to what the circumstances show to be necessary.

Those responsible for their implementation should conform to a very high standard of professional diligence. Otherwise, the moving party, not its target, may have to shoulder the consequences of a botched search.”

Per para. 35 of that judgement there are 4 conditions to grant order:

- 1) *The plaintiff must demonstrate a strong prima facie case*
- 2) *The damage to the plaintiff of the defendant’s alleged misconduct, potential or actual, must be very serious*
- 3) *There must be convincing evidence that the defendant has in its possession incriminating documents or things*
- 4) *It must be shown that there is a real possibility that the defendant will destroy such material before the discovery process can do its work*

Paragraph 37 of that judgement sets that there must be full and frank disclosure by petitioning counsel: there is need since the hearing is made *in camera* and *ex parte* so no possibility for countering argument from defendant’s counsel. Need to be as complete as possible in all regards, satisfying the 4 part test.

The request for the order requires considerable investigation and support attesting to how “things/documents” were realized by defendant. Such would include:

- Affidavits of witnesses of acts the defendant did with respect to the material to realize – supports prima facie case
- IT trails of documents copied, to what device and why it was copied – supports prima facie case
- Reason why the defendant would do the act – motivational drivers – supports damages
- PI possible reports of defendant's activity with respect to material – supports damages
- Proof that it was against employment contract – supports potential to be destroyed
- Proof there is a pending civil action for damages to be filed against defendant that is not frivolous or vexatious – demonstrates incentive to destroy

Para. 40: (1) of case lays the Supreme Court's views on what must be satisfied:

- Whole act of executing an Anton Piller is supervised by an Independent Supervising Solicitor (ISS) to ensure integrity in execution with consideration of both party's legal interests and prerogatives
- Plaintiff should be required to provide an undertaking/security to pay damages in event that order is unwarranted or wrongfully executed
- Scope of the order should be only as wide as necessary and no material not covered should be removed – no "in plain sight" application – material sought must be specifically targeted and only that can be realized – not a fishing expedition(?)
- Order should contained a limited use clause – items used only for pending litigation – though may lead to further AP's in other possessions of documents/things
- Order should state explicitly that defendant can return to court to discharge order or vary amount of security
- The order should state that the "things" should be returned to the defendant as soon as practical

With respect to practicalities of how the Order is exercised:

- The search order should state that the search be done during normal business for the defendant when the defendant's counsel should be present
- The premises should not be searched or items removed except with the presence of the defendant or her employee
- The persons to conduct the search should be specified and specifically limited in number
- The plaintiff's counsel should present the order w/ supporting affidavits to the defendant or counsel and explain what is to be done and its nature
- The defendant or its rep. should be given enough time (some say 2 hours, some say less, some more) to consult with counsel prior to entry into the premises
- A detailed listing of all evidence seized should be made and the ISS should provide a copy to the defendant as well as allowing the defendant to inspect to confirm
- When this is a possible issue, documents/things subject to solicitor client principle should be placed in the custody of the ISS only and be reviewable by the defendant's counsel to ascertain
- When ownership of seized items is at issue it should be safeguarded until established

With respect to procedures to follow after the search courts have held:

Procedure following the Search

- The order should make it clear the responsibilities of the ISS not just with regard to the search, but also all matters arising out of it.
- The ISS should be required to file a report with the court within a set-out time describing the execution, who was present and what was seized

- The court may desire the plaintiff to file and serve a motion for review of the execution to ensure that it reviews the execution on a timely basis, even if the defendant doesn't request a review

Anton Pillers are highly useful to realize evidence of fraudulent employee wrongdoing via realization in their possession of:

- Inventory
- Customer lists
- Trade secrets
- Internal documents of the employer
- Negotiable instruments
- Hard-drives and their data
- Etc.

And if executed properly, after proper preparatory investigation, can be highly valuable in gleaning valued outcomes.

The Norwich Pharmacal Discovery Order

Norwich Orders are a great way to realize evidence in 3rd party hands such as banks, telecommunications companies (tele. and net) and employers with respect to how they have become “mixed up” in a fraudster’s activities through their legitimate providing of services/relationships. **The 3rd party need not be any way implicated as culpable in the fraudster’s activity but they must be more than a witness: only that they had dealings with them and became mixed up in their activities, generally unknowingly.**

The case that established the precedent was *Norwich Pharmacal Co. v. Customs and Excise Commissioners*, [1974] A.C. 133 where it was held:

“If through no fault of his own a person gets mixed up in the tortious acts of others so as to facilitate their wrongdoing he may incur no personal liability but he comes under a duty to assist the person who has been wronged by giving him full information and disclosing the identity of the wrongdoers. I do not think that it matters whether he became so mixed up by voluntary action on his part or because it was his duty to do what he did. It may be that if this causes him expense the person seeking the information ought to reimburse him. But justice requires that he should co-operate in righting the wrong if he unwittingly facilitated its perpetration.”

The types of sources of evidence and inherent intelligence that can be realized include:

- Bank records (transactions)
- Telephone records
- IP addresses
- Mortgage loan file content
- Resumes and reference letters.

Basically, any type of information held by a 3rd party, as a result of their dealing with the fraudster, that inadvertently reflects what the fraudster did with their help or acquiescence – “got mixed up” – can be realized through this order¹⁷⁸.

A court will consider 5 issues in determining whether to grant the order:

¹⁷⁸ You're invited to keyword search Canlii.org cases for the types of evidence that can be targeted with this order, while also knowing that it exists in other national jurisdictions as well.

- 1) Whether the applicant has provided evidence sufficient to raise a bona fide reason for the claim – bona fide belief
- 2) Whether the applicant has established a relationship with the party from whom information is sought which establishes that the 3rd party is somehow involved with in the acts complained of – through no fault of her own, mixed up
- 3) Whether the 3rd party is the only practical source – others may be impractical due to tipping off fraudster
- 4) Whether the 3rd party can be indemnified for costs to which the 3rd party may be exposed because of disclosure either for cost or damages – though latter may not be the case for a liability due to a court order
- 5) Whether the interests of justice favour the obtaining the disclosure – taking into account the interests of the applicant, the respondents, the alleged wrong-doers, and the administration of justice

With respect to the actual mechanics of asking for and receiving this order:

- Granted without notice to defendant or 3rd party – justified to not tip off fraudsters – however may order restraining on defendant
- May need to explain type of information sought and how it is needed to justify practical utility
- Should name only the 3rd party rather than start proceedings against the primary party since doing the latter may both tip off the party as well as undermine the reason for the application
- May be restricted on use of information realized, though, could lead to further Norwich order applications “up the stream”

There are certain issues that you should be very sensitive to in acting on the order, if possible. They include:

- Know where the facts should be before hand to eliminate false statements since you may “trip over” co-conspiring parties who were knowingly co-parties to the fraud – where, and how, does the sensitive evidence trail lead?
- This can be a dangerous “play” if you have not truly done the back-ground of the possible outcomes and you should phrase your questions and portrayal of knowledge appropriately – “don’t give away your ship” – the info. flows only to you, not to them.
- If the respondent is disinterested, they should have no problem complying. Advisable to have their counsel present consequently.
- You’re there to get information and potential testimony – not to give information or contaminate witnesses.
- Audio/video as much as possible.

As previously stated, a Norwich can be very helpful in establishing evidence trails in terms of both flow of funds and communications (and subsequent explicit statements) that can reward value in bringing a matter within preponderance^{179, 180}.

Documentary and E-document Retention and Production (Litigation Holds)

Like the ACFE Fraud Manual dictates, there is considerable jurisprudence in both Canada and the USA on the rights of parties to a fraud case to rely on “documents” in the possession of the other in the preservation and presentation of their judicial proceeding. These basic rules are embedded in the rights given the parties in the civil proceeding. If either part fails to respect the pothor’s through destruction of same, either intentionally or accidentally, then there may be an adverse ruling against, or adverse decision that results based on that lack of respect for the adversary’s prerogatives.

Alex Cameron, lawyer and partner at Fasken Martineau DuMoulin LLP has authored an in-depth conference paper for the **2nd Annual e-Discovery: Equip Your Legal, Records, and IT Teams with Practical and Technical Solutions When Facing Litigation** Toronto, June 21, 2007 which details as at 2007 the Canadian jurisprudential standing of this area of law and should be studied in detail.

¹⁷⁹ It is entirely possible to discover USA resident parties in relation to a Canadian fraud under investigation with **28 USC 1782** which states:

(a) The district court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal, including criminal investigations conducted before formal accusation. The order may be made pursuant to a letter rogatory issued, or request made, by a foreign or international tribunal or upon the application of any interested person and may direct that the testimony or statement be given, or the document or other thing be produced, before a person appointed by the court. By virtue of his appointment, the person appointed has power to administer any necessary oath and take the testimony or statement. The order may prescribe the practice and procedure, which may be in whole or part the practice and procedure of the foreign country or the international tribunal, for taking the testimony or statement or producing the document or other thing. To the extent that the order does not prescribe otherwise, the testimony or statement shall be taken, and the document or other thing produced, in accordance with the Federal Rules of Civil Procedure.

A person may not be compelled to give his testimony or statement or to produce a document or other thing in violation of any legally applicable privilege.

(b) This chapter does not preclude a person within the United States from voluntarily giving his testimony or statement, or producing a document or other thing, for use in a proceeding in a foreign or international tribunal before any person and in any manner acceptable to him.

(June 25, 1948, ch. 646, 62 Stat. 949; May 24, 1949, ch. 139, § 93, 63 Stat. 103; Pub. L. 88–619, § 9(a), Oct. 3, 1964, 78 Stat. 997; Pub. L. 104–106, div. A, title XIII, § 1342(b), Feb. 10, 1996, 110 Stat. 486.)

See *Intel Corp. v. Advanced Micro Devices Inc.*, 542 U.S. 241 (2004), where the Ct. held certain discretionary issues important as well including:

- whether the person from whom discovery is sought is a participant in the foreign proceeding,
- the nature of the foreign tribunal and the character of the proceeding abroad,
- whether the request is an attempt to circumvent proof-gathering restrictions or policies in the foreign jurisdiction and
- whether the request is unduly intrusive or burdensome.

These realizations of evidence can be included in a Cdn. proceeding pursuant to *CC Chemicals Ltd. v. Sternson Ltd.*, (1980) 116 D.L.R. (3d) 239 (S.C.) and *Penty v. Law Society of British Columbia*, (1999) 69 B.C.L.R. (3d) 159 (S.C.) where extraterritorially evidence collection was commented on.

¹⁸⁰ It’s doubted that a Norwich Pharmacal can overcome a **statutory** obligation of the tax authorities to maintain secrecy of a taxpayer’s activity, such as working papers and ancillary investigations. Though there is jurisprudence to state that through other Rules tax returns can be realized: *M.N.R. v. Huron Steel Fabricators, Ltd.*, 41 D.L.R. 3d 407 (1973). Then again there is also jurisprudence at a **more senior level** that endorses the sacred confidentiality provisions in the ITA: *Glover v. Minister of National Revenue*, [1981] 2 S.C.R. 561 and **as well as the impossibility of compelling testimony of CRA investigators**: *Slattery (Trustee of) v. Slattery*, [1993] 3 S.C.R. 430.

Ontario E-Discovery Guidelines

With respect to the Ontario E-Discovery Guidelines the below is reproduced from them to assist you in knowing your immediate rights (and obligations):

Principle 1: Electronic documents containing relevant data and information are discoverable pursuant to Rule 30.

Principle 2: The obligations of the parties with respect to e-discovery are subject to balancing, and may vary with (i) the cost, burden and delay that may be imposed on parties; (ii) the nature and scope of the litigation, the importance of the issues, and the amounts at stake; and (iii) the relevance of the available electronic documents, and their importance to the court's adjudication in a given case.

Principle 3: In most cases, the primary source of electronic documents should be the parties' active data, and any other information that was stored in a manner that anticipated future business use, and that still permits efficient searching and retrieval.

Principle 4: A responding party should not be required to search for, review or produce documents that are deleted or hidden, or residual data such as fragmented or overwritten files, absent agreement or a court order based on demonstrated need and relevance.

Principle 5: As soon as litigation is contemplated or threatened, parties should immediately take reasonable and good faith steps to preserve relevant electronic documents. However, it is unreasonable to expect parties to take every conceivable step to preserve all documents that may be potentially relevant.

Principle 6: Parties should place each other on notice with respect to preserving electronic documents as early in the process as possible, as electronic documents may be lost in the ordinary course of business.

Principle 7: Parties should discuss the need to preserve or produce meta-data as early as possible. If a party considers meta-data relevant, it should notify the other party immediately.

Principle 8: Counsel should meet and confer, as soon as practicable and on an ongoing basis, regarding the location, preservation, review and production of electronic documents, and should seek to agree on the scope of each party's rights and obligations with respect to e-discovery, and a process for dealing with them.

Principle 9: The scope of e-discovery should be defined by parties and their counsel before commencing oral examinations for discovery. This can best be achieved if parties' requests for preservation of electronic documents, and pre-discovery meetings between counsel, are as specific as possible in identifying what is requested, what is being produced, and what is not being produced, and the reasons for any refusals.

Principle 10: A party may satisfy its obligation to produce relevant electronic documents in good faith by using electronic tools and processes, such as data sampling, searching, or the use of selection criteria, to identify the documents that are most likely to contain relevant data or information.

Principle 11: Parties should agree early in the litigation process on the format in which electronic documents will be produced. Such documents may be producible in electronic form where this would (i) provide more complete relevant information, (ii) facilitate access to the information in the document, by means of electronic techniques to review, search, or otherwise use the documents in the litigation process, (iii) minimize the costs to the producing party, or (iv) preserve the integrity and security of the data.

Principle 12: Where appropriate during the discovery process, parties should agree to measures to protect privileges and other objections to production of electronic documents

Principle 13: In general, consistent with the rules regarding production of paper documents, pending any final disposition of the proceeding, the interim costs of preservation, retrieval, review, and production of electronic documents will be borne by the party producing them. The other party will, similarly, be required to incur the cost of making a copy, for its own use, of the resulting productions. However, in special circumstances, it may be appropriate for the parties to arrive at a different allocation of costs on an interim basis, by agreement or court order.

Sedona Principles for Electronic Discovery

- 1. Electronic data and documents are potentially discoverable under Fed. R. Civ. P. 34 or its state law equivalents. Organizations must properly preserve electronic data and documents that can reasonably be anticipated to be relevant to litigation.*
- 2. When balancing the cost, burden and need for electronic data and documents, courts and parties should apply the balancing standard embodied in Fed. R. Civ. P. 26(b)(2) and its state-law equivalents, which require considering the technological feasibility and realistic costs of preserving, retrieving, producing and reviewing electronic data, as well as the nature of the litigation and the amount in controversy.*
- 3. Parties should confer early in discovery regarding the preservation and production of electronic data and documents when these matters are at issue in the litigation, and seek to agree on the scope of each party's rights and responsibilities.*
- 4. Discovery requests should make as clear as possible what electronic documents and data are being asked for, while responses and objections to discovery should disclose the scope and limits of what is being produced.*
- 5. The obligation to preserve electronic data and documents requires reasonable and good-faith efforts to retain information that may be relevant to pending or threatened litigation. However, it is unreasonable to expect parties to take every conceivable step to preserve all potentially relevant data.*
- 6. Responding parties are best situated to evaluate the procedures, methodologies and technologies appropriate for preserving and producing their own electronic data and documents.*
- 7. The requesting party has the burden on a motion to compel to show that the responding party's steps to preserve and produce relevant electronic data and documents were inadequate.*

8. *The primary source of electronic data and documents for production should be active data and information purposely stored in a manner that anticipates future business use and permits efficient searching and retrieval. Resort to disaster recovery backup tapes and other sources of data and documents requires the requesting party to demonstrate need and relevance that outweigh the cost, burden and disruption of retrieving and processing the data from such sources.*

9. *Absent a showing of special need and relevance, a responding party should not be required to preserve, review or produce deleted, shadowed, fragmented or residual data or documents.*

10. *A responding party should follow reasonable procedures to protect privileges and objections to production of electronic data and documents.*

11. *A responding party may satisfy its good-faith obligation to preserve and produce potentially responsive electronic data and documents by using electronic tools and processes, such as data sampling, searching or the use of selection criteria, to identify data most likely to contain responsive information.*

12. *Unless it is material to resolving the dispute, there is no obligation to preserve and produce metadata absent agreement of the parties or order of the court.*

13. *Absent a specific objection, agreement of the parties or order of the court, the reasonable costs of retrieving and reviewing electronic information for production should be borne by the responding party, unless the information sought is not reasonably available to the responding party in the ordinary course of business. If the data or formatting of the information sought is not reasonably available to the responding party in the ordinary course of business, then, absent special circumstances, the costs of retrieving and reviewing such electronic information should be shifted to the requesting party.*

14. *Sanctions, including spoliation findings, should only be considered by the court if, upon a showing of a clear duty to preserve, the court finds that there was an intentional or reckless failure to preserve and produce relevant electronic data and that there is a reasonable probability that the loss of the evidence has materially prejudiced the adverse party.*

S. 101 of the Ontario Courts of Justice Act Investigative Receiver Appointment

In at least one case¹⁸¹ a plaintiff has successfully petitioned an Ontario Court to have it apply a receiver over the actual sets of records of a business when they could not be ascertained through other legal means. (The common excuse for failure to disclose include losing electronic data, records stolen, etc.)¹⁸²

The Courts of Justice Act provides:

Injunctions and receivers

101 (1) *In the Superior Court of Justice, an interlocutory injunction or mandatory order may be granted or a receiver or receiver and manager may be appointed by an interlocutory order, where*

¹⁸¹ Degroote v. DC Entertainment Corp et al, 2013 ONSC 7101 and Schembri v. Way, 2010 ONSC 5176

¹⁸² The same court-determined placement of a receiver in BC can be found in Supreme Court Civil Rules, 10-2, 1, for instance.

it appears to a judge of the court to be just or convenient to do so. R.S.O. 1990, c. C.43, s. 101 (1); 1994, c. 12, s. 40; 1996, c. 25, s. 9 (17).

Terms

(2) An order under subsection (1) may include such terms as are considered just. R.S.O. 1990, c. C.43, s. 101 (2).

Again, the judge would have to examine the degree to which a party has refused to comply with steps taken to realize the records and it is expected that a refusal to comply would result in a contempt of court.¹⁸³

Even with Destruction of Records It's Easy, Though Time-Consuming, to Reconstruct

Even with a wholesale destruction of all records in the hands of an opposing party it's a very easy exercise to reconstruct all with some effort.

In Canada all banking records are maintained by a bank/credit union, for Norwich Pharmacal realization, for the **past 7 years**¹⁸⁴. This allows reconstruction of the entire set of records since cheques¹⁸⁵ and deposits¹⁸⁶ are maintained for that period. For cash transactions that are merely withdrawals it's possible to correlate with telephone calls to see where systematic cash drains happened.

The bank will also have financial statements if the fraudster has provided them pursuant to a loan application/mortgage/credit application, which can serve as a confirmation/foundation, though with questioned integrity¹⁸⁷.

Equally, once certain payments are observed, such as 3rd party loan/mortgage payments, it's possible to know what inflows may have happened before that time because of it when the parties are determined. While income and sales tax data shouldn't be realizable because of statutory confidentiality sections¹⁸⁸ in the relevant Acts (ITA, prov. ITA, ETA, etc.) it's relatively easy to reconstruct that *based on the payments that were made* from the fraudster's/corporate bank account¹⁸⁹.

In short, everywhere you look in a corporate environment, or in an employee's environment, **even without direct initially existing documentary trails**, it's easy to systematically amass and process this

¹⁸³ In *Akagi v Synergy Group (2000) Inc.*, 2015 ONCA 36, in respect of "investigative receivers" – which the reader should Canlii.org search for additional case – it was effectively provided that the court would evaluate whether:

1. the receiver can alleviate risk the claimant has in their right to recover;
2. that the receiver could ascertain the true state of affairs of the defendant including related parties;
3. that the receiver does not control the assets or business of the defendant, only ascertain its affairs, thus allowing the defendant to continue its affairs; and
4. in any case the receivers must both carefully assist in recovery of the plaintiff's judgement while at the same time maintain the defendant's interests and go no further than necessary to these ends.

¹⁸⁴ It may be possible to secure further back than that on an incident basis.

¹⁸⁵ Inventory, payroll, rent and utilities purchases, dividends, s/h loans and owner draws

¹⁸⁶ Sales of inventory and assets, loans, based on notations on deposit slips, maintained by the bank

¹⁸⁷ Who's to say that she didn't perpetrate a fraud on the bank as well, though depending on whether the statements were audited they could have more weight.

¹⁸⁸ It's doubted that a Norwich Pharmacal can overcome a **statutory** obligation of the tax authorities to maintain secrecy of a taxpayer's activity such as working papers related to an audit/investigation. Though there is jurisprudence to state that through other Rules tax returns can be realized: *M.N.R. v. Huron Steel Fabricators, Ltd.*, 41 D.L.R. 3d 407 (1973), again there is also jurisprudence at a **more senior level** that endorses the sacred confidentiality provisions in the ITA: *Glover v. Minister of National Revenue*, [1981] 2 S.C.R. 561 and **as well as the impossibility of compelling testimony by CRA investigators**: *Slattery (Trustee of) v. Slattery*, [1993] 3 S.C.R. 430.

¹⁸⁹ Equally, it's possible to realize tax returns in the possession of the fraudster with an Anton Piller order.

data from 3rd parties that resulted from the fraudster transacting with them to yield the picture that the fraudster was attempting to shield.

No entity is “an island” in other words, but instead functioning with all these other parties leaving trails of information that can be mined and integrated.

And this route may have to be pursued regardless of legal tools that are available to realize same since it may prove to have higher integrity than statements made pursuant to a court action by the fraudster.

“The difficult is what takes a little time; the impossible is what takes a little longer”¹⁹⁰.

¹⁹⁰ Fridtjof Nansen

Net Worth Analysis

Reasons for Them

The ACFE Fraud Manual details methods to perform net worth analysis by various means. The reason they can be important include:

- Establishing living beyond a parties' means who has been an employee fraudster
- Discovering unestablished wealth in matrimonial disputes
- Discovering where assets were dissipated to in a bankruptcy bust-out
- Discovering tax-evaded income

to name a few.

The method of performing a net worth analysis, as the ACFE Fraud Manual describes, can be revenue based or asset/liability based, whereby, depending on the information available to you you can obtain more refined determinative results with one over the other.

A Joint/Related Party Analysis

One should always perform net worth analysis across all the possible related parties to the party concerned since it is entirely possible for the primary party to be hiding the growth in net worth with family/friends which would not be captured if you too-narrowly focussed your data collection/analysis. Such creates substantial difficulty in realizing some information, in particular through Norwich orders for some financial information, until it's been established that there is a trail, and further complicates the whole analysis since it requires in-depth study of those related parties to reveal hidden wealth increases.

Sources of Information

Sources of information for an analysis include:

- Bank statements - realizable through a Norwich
- Credit card statements - realizable through a Norwich
- Investment statements – realizable through a Norwich
- Mortgage statements - realizable through property registries in the provinces and a Norwich
- Income statements - realizable from mortgage/loan applications¹⁹¹
- Telephone records - realizable through a Norwich¹⁹²

Harder data to realize and include in the analysis¹⁹³ include cash-based normal cost of everyday expenses such as:

- Groceries,
- Entertainment,
- Travel,
- Furniture,
- Jewelry,

¹⁹¹ It's important to note that income statements that went into tax statements for corporations and individuals cannot be realized directly through a Norwich on a tax authority such as Canada Revenue Agency or a provincial income tax assessor, same as in the USA, since a statutory confidentiality provision prevents the tax authority from complying with any such order and a judge would most undoubtedly not even grant it. That being said, the same information can be realized from non-governmental sources such as the accounting firms which prepared the tax returns, since there is no statutory confidentiality protection for such and there is no client-accountant privilege in North America (like in the UK), as well as loan files/applications generally since they almost always ask for such to be in compliance with loan provisions, be they corporate or individual.

¹⁹² These will feed out to where the parties have contacted, perhaps with frequency, to establish relationships, sometimes correlated with other activity, that the examiner may not initially be aware of.

¹⁹³ Because it's "softer" and harder to assess across the environment

- Allowances to off-spring,
- Gift-cards and traveller's cheques,
- Renovations paid with cash,
- Gifts,
- Prescriptions/medical coverages/insurance,
- Etc.

However, it is possible to comprehend the existence and value of such if it shows up as background data on the primary sources of information above.

Personal Property and Land Registry Databases and Information Extraction

Part of your search for value, in any fraud-related or fraud-focussed data collection will definitely include investigations of both provincial Personal Property databases as well as Land Registries to confirm hidden ownership of assets that may not be readily apparent from other records.

In this regard, again, a wide net should be cast of known close friends and family members who may own property in stead as a nominee of the target that is the subject.

The following are the provincial fees you can expect to pay for searching for titles, with url:

	Fee	URL
Alberta	\$1.00	http://www.servicealberta.ca/554.cfm
BC	\$8.50	http://www2.gov.bc.ca/gov/content/employment-business/business/managing-a-business/running-a-business/bc-online
Manitoba	\$9.00	https://www.tprmb.ca/ppr/actions/mainPage
New Brunswick	\$10.00	https://www.pwx1.snb.ca/snb7001/e/2000/2700e_6.asp
Nfld and Lab.	\$10.00	https://www.acol.ca/en/pprs/lien-check
Nova Scotia	\$8.50	
Northwest Terr.	\$7.00	https://www.justice.gov.nt.ca/en/files/personal-property-registry/Search%20Request.pdf
Nunavut	\$7.00	
Ontario	\$8.00	https://www.personalproperty.gov.on.ca/ppsrweb/en/enquiry/cc_enquiry.jsp?jsOn=Y&_ga=2.76740629.1077904107.1494754093-211630919.1483131170
PEI	\$10.00	
Quebec	\$9.00	
Sask.	\$7.00	
Yukon	\$10.00	

It's to be noted that some of the provincial Registries allow only specific verification of known assets rather than identity verification based on holdings by legal entities (ind. and corp.).

Starting Points, Importance and Evolving

In the asset-based analysis it's important to crystalize the net worth at the start of the period to determine maximum asset and liability cost values and ensure that at that point of time, they are in fact what existed in the hands of the spectrum on parties that are to be analyzed. Without it you may be constantly drawn to make adjustments for them as time goes by so while it is expected that an effort should be made to crystalize all aspects at the opening point, don't be surprised that as new data is collected you have to revise your starting points.

This is important since part of the asset-based analysis is to compare that opening against closing balances, taking into account known income and expense amounts to determine unexplained growth in wealth.

Choice of Method: Asset-Based or Income-Based

It is entirely possible to make both forms of analysis simultaneously whereby one fact of data will flow into the other method be it asset-based or income-based.

Asset Tracing

The principal reason assets are traced, in a civil action environment, is to realize stolen value that has not been covered through corporate risk mitigation insurance.

The legal cause for such can be founded on many different premises such as:

- Proprietary claims for assets
- Actions in tort
- Actions on breach of contract or invalidity or
- Unjust enrichment/constructive trust

First Step: Don't Race to Get Judgement but "Who Really Is the Fraudster?"

Asset tracing requires several different perspectives of "what happened and where it went". While a fraud may have misappropriated funds, etc. obtaining an immediate judgement isn't necessarily the best first step in an asset-tracing endeavour since by getting a judgement you have immediately alerted the fraudster that you will be pursuing her: it may prove far more constructive to collect the intelligence of who is involved and where the value of the stolen assets resides to maximize favourable results¹⁹⁴. Thus, one of the 1st steps is to:

- *Understand the fraudster's psychology and thought patterns via examination of her personal network and how she spends her legitimate funds;*
- *Consider how and where assets might have been hidden based on her recent travel activity, her personal connections with professionals and her retirement plans;*
- *Attempt to detect patterns from seemingly random acts in the above, sometimes spanning many years into the past.*

Where to Immediately Look

The most common methods to launder funds away from potential creditors of a fraudster include:

- laundering money through local and international banks and especially those having strong privacy legislation¹⁹⁵;
- transfers to corporations, or of and to family members or friends¹⁹⁶;
- transfers to private trusts;
- purchases of pre-paid credit cards or other prepaid financial assets¹⁹⁷;
- payments into paid-up insurance policies in family or friends' names;
- securing safety deposit boxes for cash holding in nominee names as well as their own or family's;
- mortgage payments on property owned by family members or friendly nominees;
- purchases of cashiers or travelers checks through friends/family's accounts¹⁹⁸;
- purchases of readily saleable and portable property that is highly liquid, such as casino chips;
- purchases of valuable art, jewelry, novelties such as sports cards, collectibles or other memorabilia;
- and

¹⁹⁴ While these participants will eventually come to light if a recovery legal action is initiated, by not knowing where the assets lie, and who to obtain freezing orders against ahead of a recovery action you run the risk of the fraudster simply sending them on to another nominee/strawman to complicate freezing and may eventually lead to no assets being collectible. Look deeply into the initiating fraudster's web of participating parties first, which may also allow for knowing assistance awards potentially, before an action is started at the ground floor.

¹⁹⁵ Though in Canada a fraudster would understandably be concerned with Fed. Proceeds of Crime (Money Laundering) and Terrorist Financing Act (AML) that alerts authorities as to large cash transactions or suspicious cash transactions

¹⁹⁶ Revealed through telephone records and publicly known family trees

¹⁹⁷ Though of limited value before AML reporting occurs.

¹⁹⁸ Again, conscientious of Cdn AML law in above.

- increased spending on personal items/renovations to assets or trips, of family and friends, w/out cheque trails

Use of Foreign Bodies as Recipients

If the fraudster is seeking to deposit her ill-gotten gains beyond the normal reach of tracers she may use foreign entities such as bank accounts, corporations and trusts. This would be the case if the fraudster:

- transfers of funds to/from offshore accounts;
- consultations with offshore tax or legal counsel;
- conversion of funds to easily exchangeable, non-traceable forms coupled with “vacations” to tax/secretcy havens;
- usual patterns of travel or telephone calls with known secrecy-dominated resident parties;
- purchase of unusual bearer securities or travelers checks; and
- unusual patterns of e-mail or other Internet activity.

Criminal Action not Possible

This assumes that criminal action cannot be persuaded from law enforcement where onuses for realization may be larger, law enforcement resources may not exist for it, or the action that can be taken is criminally prescribed.

While criminal restitution law does exist in various jurisdictions, to allow a criminal victim to be returned her property¹⁹⁹, only a successful conviction would allow that to occur so civil recovery, predicated on bringing the matter beyond mere preponderance rather than doubt (in criminal trial), may be the option available.

Not only that, but even if criminal action results in a restitution order, that restitution may not be forthcoming for years, if ever in the magnitude that was lost, so it may be prudent to equally commence civil action as soon as practical rather than wait for a criminal action that may not be as rewarding.

Civil Steps

This chapter deals exclusively with civil actions to trace assets and realize them for the benefit of contracting enterprise. It assumes that the loss and risk for it has not been transferred through subrogation to an insurance company through a fidelity insurance policy, though these steps would equally apply to the insurance company as well.

The primary steps in asset recovery are:

1. Collection of Intelligence/Evidence and Tracing Assets to jurisdictions
2. Securing the Assets through enforcement orders in the foreign jurisdiction (prov./nat.)
3. International Cooperation between civil parties in joint states
4. Court Proceedings in relevant jurisdictions
5. Enforcement of Orders (for return or liquidation) and Asset Return

Collection of Intelligence/Evidence and Tracing Assets

Most valuable assets are converted upon being taken possession of by the fraudster for liquid capital for ease of transfer/use so it's imperative that the CFE be able to look into the bank account activity of the perpetrator through Norwich orders, and other production orders, requests for reviews of books of account to trace the proceeds. Again, this assumes that the asset has been converted to liquid money. If the CFE

¹⁹⁹ Though some commentators have noted that criminal restitution law can leave victims short-changed to lesser payouts of the subject matter of the offence.

has any idea where the perpetrator does her banking (cheque) they can pierce that account and if not, it's possible to obtain Norwich orders to inquire of all banks in the area if an account exists to study. Remember that the premise of the Norwich is to trace assets fraudulently taken so it's important that pending civil suit also be initiated in the jurisdiction.

Through audit etc, it is possible to find sudden influxes of such into a company's/individual's net worth, generally unexplainable, from which to work. Upon entering the perpetrator's cash-flow the funds will go somewhere, or be stagnat awaiting a Mareva injunction to be frozen to be realized in the recovery suit. If found through Norwich a Mareva injunction should immediately be emplaced to prevent their dissipation: be prepared for partial allowance pending the civil action to prove ownership.

In general, the type of activities at this stage would be to obtain all relevant financial information including bank statements, financial reports, credit applications, credit statements, contracts and regulatory filings and synergize the data to "follow the money trail" including possibly also doing net worth analysis. The **Egmont Group** may also be of assistance in securing additional data on financial records. Again, all this information can be realizable through Norwich discoveries.

Additional data that the tracer should attempt to maintain on file given where funds may lead include:

- Date and place of birth (include aliases); copies of birth certificates, passports, and national identity cards.
- Names and birth dates of spouses, children, both parents (and new partners, if divorced, separated, or widowed), siblings, spouses of siblings, immediate relatives (uncles, aunts, cousins, grandparents, grandchildren).
- Relevant telephone numbers (business, home, mobile), e-mail address, and contact details of any other Internet or social network communication.

In some jurisdictions, it may be possible to obtain subscriber information from the service provider.

- Recent photographs of all targets and associates (preferably government issued identification).
- A fingerprint card.
- Results of a criminal record search.
- Results of public-source searches on targets and associates, using Internet search engines, social networking sites, local media reports, and libraries.
- Information from other government agencies, especially
 - land, vehicle, and utility information;
 - business records;
 - court records;
 - tax records;
 - border crossings and customs declarations;
 - immigration records;
 - salary statements (from a relevant government employer, if applicable);
 - and
 - asset and income declarations.
- Real estate records, including purchase agreements, mortgages, loan applications, and appraisals.
- Information identifying banks or bank accounts and other entities that may hold business records.

Once all the data has been amassed, put it together to reveal flows of where funds have flowed, sometimes through numerous companies/family members/past-present business associates/friends. It is possible to realize through Norwich orders ancillary parties bank accounts if there is a direct link of transfer, with explained illegitimate reason other than to shift holding to another's.

Securing Assets through liens/Marevas, etc.

If the value of the stolen property has been converted to real property there must be co-ordination with chosen counsel in that area to have a lien placed on the real property or attached to prevent its value from being transferred out of jurisdiction. Such can take of various liens as well as Mareva injunctions placed on the property. Understandably there must be some sort of link with the use of the funds flowed to the acquisition of the property while on Marevas their purpose is to secure value generally.

Court proceedings in Relevant Jurisdictions

Pursuing through tracing includes not just commencing litigation in resident jurisdiction but also co-ordinated securing/enforcement litigation where the assets are then subsequently resident to realize upon them.

The resident jurisdiction should be the venue to action a fraud-based cause while the foreign jurisdiction will be that where it is enforced upon the lien property to have its value returned.

It's thus important to establish a network of counsel who can act across prov./national jurisdictions who can act in a timely manner, cognizant of the pressing need that tracing sometimes calls for given the desire of the fraudster to not have his assets attached.

Bankruptcy and Debtor Judgement Investigations

The BIA, CCAA, (and Winding Up Act) and Provincial Fraudulent Conveyances/Preferences Acts Governing

In Canada two principal federal Acts govern the insolvency/wind-up of a company that is bankrupt: the Bankruptcy and Insolvency Act and the Company's Creditors Arrangement Act. It's both their purposes to allow a company to be brought to a state that benefit its creditors through either an orderly windup of its affairs through cessation of its activities and realization of its assets to satisfy its creditors, or through restructuring of the creditor side of the BS to allow time to turn itself around, through a proposal to those creditors, to be attempted to return to being a going-concern.

Equally, in each province, there are provincial Acts that govern fraudulent transfers/preferences that apply to companies such as the Ontario Fraudulent Conveyances Act or Fraudulent Preferences Act that can act to reward protection to illicitly undermined creditors etc. when certain transactions have occurred that take value from their financial interests in the party perpetrating them. Such results from having a judgement arising out of a separate action already that the debtor is attempting to evade by shifting assets away from their ownership.

It is sometimes advantageous to pursue an action under the provincial Acts if a creditor interest has been undermined, rather than attempt to petition into bankruptcy proceedings which may not be applicable. It's important to note that merely because of debtor is refusing to pay a particular creditor does not mean that her intent is to perform a bankruptcy to avoid paying or to perpetrate a fraudulent conveyance: there must be a fraudulent intent in doing so that prompts for the conclusion.²⁰⁰

The Triggering Events and Why They're Important

The date that these Acts begin to have application is when the subject company fails to "meet its obligations as they come due", ie; when in normal trade practice they have become financially insolvent. The BIA effectively provides that an entity is insolvent when liabilities to creditors provable as claims under the BIA amount to at least \$1,000, and

- (a) is unable to meet obligations as they generally become due;
- (b) who has ceased paying current obligations in the ordinary course of business as they generally become due; or
- (c) the aggregate of whose property is not, at fair valuation, sufficient to enable payment of all of his obligations, due and accruing due. ...^{201 202}

²⁰⁰ In fact, there can be count-claims for damages if a creditor petitions into a bankruptcy proceeding, or initiates a FCA action, if the circumstances are subsequently determined at trial that the facts were contrary to what was asserted by the creditor, so this is one area of investigation that CFE's, on contract from creditors, should not take lightly.

²⁰¹ These facts can be determined from the records of the bankrupt and their interview. It's important to note that it can take a consistent failure to pay, rather than a piecemeal refusal since the debtor may argue on other grounds than inability, though this may not be the case with larger debt.

²⁰² The BIA provides an Act of Bankruptcy shall be:

Acts of bankruptcy

42 (1) A debtor commits an act of bankruptcy in each of the following cases:

- (a) if in Canada or elsewhere he makes an assignment of his property to a trustee for the benefit of his creditors generally, whether it is an assignment authorized by this Act or not;
- (b) if in Canada or elsewhere the debtor makes a fraudulent gift, delivery or transfer of the debtor's property or of any part of it;
- (c) if in Canada or elsewhere the debtor makes any transfer of the debtor's property or any part of it, or creates any charge on it, that would under this Act be void or, in the Province of Quebec, null as a fraudulent preference;
- (d) if, with intent to defeat or delay his creditors, he departs out of Canada, or, being out of Canada, remains out of Canada, or departs from his dwelling-house or otherwise absents himself;

These dates are important since a few provisions in the BIA measure from when insolvency existed to determine if property transferred from the bankrupt's previous estate can be actioned against to receive by the trustee. Also, the prov. FCA will determine based on the state of affairs at that time whether there was an intent that caused the transfer to occur upon which the Act works.

The Spectrum of Statutory BIA Offences and the Ontario Fraudulent Conveyances Act

The following are the principal BIA offences that a party can perpetrate. Equally, the Canadian Criminal Code contains numerous provisions related to fraudulent title documents.

Bankruptcy offences

198 (1) Any bankrupt who

- (a) makes any fraudulent disposition of the bankrupt's property before or after the date of the initial bankruptcy event,*
- (b) refuses or neglects to answer fully and truthfully all proper questions put to the bankrupt at any examination held pursuant to this Act,*
- (c) makes a false entry or knowingly makes a material omission in a statement or accounting,*
- (d) after or within one year immediately preceding the date of the initial bankruptcy event, conceals, destroys, mutilates, falsifies, makes an omission in or disposes of, or is privy to the concealment, destruction, mutilation, falsification, omission from or disposition of, a book or document affecting or relating to the bankrupt's property or affairs, unless the bankrupt had no intent to conceal the state of the bankrupt's affairs,*
- (e) after or within one year immediately preceding the date of the initial bankruptcy event, obtains any credit or any property by false representations made by the bankrupt or made by any other person to the bankrupt's knowledge,*
- (f) after or within one year immediately preceding the date of the initial bankruptcy event, fraudulently conceals or removes any property of a value of fifty dollars or more or any debt due to or from the bankrupt, or*
- (g) after or within one year immediately preceding the date of the initial bankruptcy event, hypothecates, pawns, pledges or disposes of any property that the bankrupt has*

-
- (e) if the debtor permits any execution or other process issued against the debtor under which any of the debtor's property is seized, levied on or taken in execution to remain unsatisfied until within five days after the time fixed by the executing officer for the sale of the property or for fifteen days after the seizure, levy or taking in execution, or if any of the debtor's property has been sold by the executing officer, or if the execution or other process has been held by the executing officer for a period of fifteen days after written demand for payment without seizure, levy or taking in execution or satisfaction by payment, or if it is returned endorsed to the effect that the executing officer can find no property on which to levy or to seize or take, but if interpleader or opposition proceedings have been instituted with respect to the property seized, the time elapsing between the date at which the proceedings were instituted and the date at which the proceedings are finally disposed of, settled or abandoned shall not be taken into account in calculating the period of fifteen days;*
 - (f) if he exhibits to any meeting of his creditors any statement of his assets and liabilities that shows that he is insolvent, or presents or causes to be presented to any such meeting a written admission of his inability to pay his debts;*
 - (g) if he assigns, removes, secretes or disposes of or attempts or is about to assign, remove, secrete or dispose of any of his property with intent to defraud, defeat or delay his creditors or any of them;*
 - (h) if he gives notice to any of his creditors that he has suspended or that he is about to suspend payment of his debts;*
 - (i) if he defaults in any proposal made under this Act; and*
 - (j) if he ceases to meet his liabilities generally as they become due.*

obtained on credit and has not paid for, unless in the case of a trader the hypothecation, pawning, pledging or disposing is in the ordinary way of trade and unless the bankrupt had no intent to defraud,

is guilty of an offence and is liable, on summary conviction, to a fine not exceeding five thousand dollars or to imprisonment for a term not exceeding one year or to both, or on conviction on indictment, to a fine not exceeding ten thousand dollars or to imprisonment for a term not exceeding three years, or to both.

Failure to comply with duties

(2) A bankrupt who, without reasonable cause, fails to comply with an order of the court made under section 68 or to do any of the things required of the bankrupt under section 158 is guilty of an offence and is liable

(a) on summary conviction, to a fine not exceeding five thousand dollars or to imprisonment for a term not exceeding one year, or to both; or

(b) on conviction on indictment, to a fine not exceeding ten thousand dollars or to imprisonment for a term not exceeding three years, or to both.

Failure to disclose fact of being undischarged

199 An undischarged bankrupt who

(a) engages in any trade or business without disclosing to all persons with whom the undischarged bankrupt enters into any business transaction that the undischarged bankrupt is an undischarged bankrupt, or

(b) obtains credit to a total of \$1,000 or more from any person or persons without informing them that the undischarged bankrupt is an undischarged bankrupt,

is guilty of an offence punishable on summary conviction and is liable to a fine not exceeding five thousand dollars or to imprisonment for a term not exceeding one year, or to both.

Bankrupt failing to keep proper books of account

200 (1) Any person becoming bankrupt or making a proposal who has on any previous occasion been bankrupt or made a proposal to the person's creditors is guilty of an offence punishable on summary conviction and is liable to a fine not exceeding five thousand dollars or to imprisonment for a term not exceeding one year, or to both, if

(a) being engaged in any trade or business, at any time within the period beginning on the day that is two years before the date of the initial bankruptcy event and ending on the date of the bankruptcy, both dates included, that person has not kept and preserved proper books of account; or

(b) within the period mentioned in paragraph (a), that person conceals, destroys, mutilates, falsifies or disposes of, or is privy to the concealment, destruction, mutilation, falsification or disposition of, any book or document affecting or relating to the person's property or affairs, unless the person had no intent to conceal the state of the person's affairs.

Proper books of account defined

(2) For the purposes of this section, a debtor shall be deemed not to have kept proper books of account if he has not kept such books or accounts as are necessary to exhibit or explain his transactions and financial position in his trade or business, including a book or books containing entries from day to day in sufficient detail of all cash received and cash paid, and, where the trade

or business has involved dealings in goods, also accounts of all goods sold and purchased, and statements of annual and other stock-takings.

False claim, etc.

201 (1) Where a creditor, or a person claiming to be a creditor, in any proceedings under this Act, wilfully and with intent to defraud makes any false claim or any proof, declaration or statement of account that is untrue in any material particular, the creditor or person is guilty of an offence punishable on summary conviction and is liable to a fine not exceeding five thousand dollars, or to imprisonment for a term not exceeding one year, or to both.

Inspectors accepting unlawful fee

(2) Where an inspector accepts from the bankrupt or from any person, firm or corporation acting on behalf of the bankrupt or from the trustee any fee, commission or emolument other than or in addition to the regular fees provided for by this Act, the inspector is guilty of an offence punishable on summary conviction and is liable to a fine not exceeding five thousand dollars, or to imprisonment for a term not exceeding one year, or to both.

Unlawful transactions

(3) Where the bankrupt enters into any transaction with any person for the purpose of obtaining a benefit or advantage to which either of them would not be entitled, the bankrupt is guilty of an offence punishable on summary conviction and is liable to a fine not exceeding five thousand dollars, or to imprisonment for a term not exceeding one year, or to both.

“Fraudulent” Preferences and Transfers, The Relevant “Date”, That Can Occur to Investigate

Under both the BIA and a generally applicable provincial Fraudulent Preferences/Conveyances Acts a CFE can be called to determine financial arrangements that a bankrupt had perpetrated to given fraudulent preferences to any spectrum of unsecured creditors for non-fair market value favouring them illicitly. This can happen for various reasons such as to remove actionable personal exposure the pending bankrupt may have on guarantees extended/sureties that may have been brought into the corporate financing, etc. and a CFE’s finding of such “fraudulent” preferences can operate to allow a disenfranchised creditor who did not enjoy this preferred treatment to have actionable cause to be placed back through voiding the questioned transaction and allowing the value to be recovered. This is because there is an underlying societal policy principle that legally equally footed creditors show have equal sharing of assets upon bankruptcy, while secured creditors have access to enforce their liens: a preferred transfer/creation of a lien ahead of equals in the class defeats this needed policy. While legitimate reasons may exist for some preferences, each must be examined.²⁰³

In both cases the insolvency date is quite important (“bankruptcy event”) since it determines how far back in time one can reach to capture transactions that the debtor may have taken knowing bankruptcy was inevitable and they sought to limit their personal exposure or grant favour with foresight, perhaps, towards future post-bankruptcy business relationships.

And, the “bankruptcy event” can include both instances where the debtor became in fact unable to pay his liabilities as they came due (possibly before the demands for their payment were in fact made) as well as

²⁰³ To gain a fuller understanding of these issues it is highly recommended that you study “UNIFORM LAW CONFERENCE OF CANADA CIVIL LAW SECTION REFORM OF FRAUDULENT CONVEYANCES AND FRAUDULENT PREFERENCES LAW (Transactions at Undervalue and Preferential Transfers) PART II: PREFERENTIAL TRANSFERS By Tamara M. Buckwold Faculty of Law, University of Alberta Edmonton, Alberta, August 2008.” For detailed review of the interaction of both federal bankruptcy law and provincial law.

“balance sheet bankrupt”, when the fair market value of the debtor’s assets was exceeded by the fair market value of its debts, so the “bankruptcy date” must be acutely examined as to when it actually occurred to reach back to capture transactions. In this regard, one should examine what the debtor’s cash flow actually was and what market rates for its assets and liabilities were.

Federal Bankruptcy and Insolvency Act Prohibited Acts

With respect to the BIA coverage of fraudulent creditor preferences the provisions are:

Preferences

95 (1) *A transfer of property made, a provision of services made, a charge on property made, a payment made, an obligation incurred or a judicial proceeding taken or suffered by an insolvent person*

(a) in favour of a creditor who is dealing at arm’s length with the insolvent person, or a person in trust for that creditor, with a view to giving that creditor a preference over another creditor is void as against — or, in Quebec, may not be set up against — the trustee if it is made, incurred, taken or suffered, as the case may be, during the period beginning on the day that is three months before the date of the initial bankruptcy event and ending on the date of the bankruptcy; and

(b) in favour of a creditor who is not dealing at arm’s length with the insolvent person, or a person in trust for that creditor, that has the effect of giving that creditor a preference over another creditor is void as against — or, in Quebec, may not be set up against — the trustee if it is made, incurred, taken or suffered, as the case may be, during the period beginning on the day that is 12 months before the date of the initial bankruptcy event and ending on the date of the bankruptcy.

Preference presumed

(2) If the transfer, charge, payment, obligation or judicial proceeding referred to in paragraph (1)(a) has the effect of giving the creditor a preference, it is, in the absence of evidence to the contrary, presumed to have been made, incurred, taken or suffered with a view to giving the creditor the preference — even if it was made, incurred, taken or suffered, as the case may be, under pressure — and evidence of pressure is not admissible to support the transaction.

Exception

(2.1) Subsection (2) does not apply, and the parties are deemed to be dealing with each other at arm’s length, in respect of the following:

(a) a margin deposit made by a clearing member with a clearing house; or

(b) a transfer, charge or payment made in connection with financial collateral and in accordance with the provisions of an eligible financial contract.

Definitions

(3) In this section,

clearing house means a body that acts as an intermediary for its clearing members in effecting securities transactions; (chambre de compensation)

clearing member means a person engaged in the business of effecting securities transactions who uses a clearing house as intermediary; (membre)

creditor includes a surety or guarantor for the debt due to the creditor; (créancier)
margin deposit means a payment, deposit or transfer to a clearing house under the rules of the clearing house to assure the performance of the obligations of a clearing member in connection with security transactions, including, without limiting the generality of the foregoing, transactions respecting futures, options or other derivatives or to fulfil any of those obligations. (dépôt de couverture)

Transfer at undervalue

96 (1) On application by the trustee, a court may declare that a transfer at undervalue is void as against, or, in Quebec, may not be set up against, the trustee — or order that a party to the transfer or any other person who is privy to the transfer, or all of those persons, pay to the estate the difference between the value of the consideration received by the debtor and the value of the consideration given by the debtor — if

- (a) the party was dealing at arm's length with the debtor and
 - (i) the transfer occurred during the period that begins on the day that is one year before the date of the initial bankruptcy event and that ends on the date of the bankruptcy,
 - (ii) the debtor was insolvent at the time of the transfer or was rendered insolvent by it, and
 - (iii) the debtor intended to defraud, defeat or delay a creditor; or
- (b) the party was not dealing at arm's length with the debtor and
 - (i) the transfer occurred during the period that begins on the day that is one year before the date of the initial bankruptcy event and ends on the date of the bankruptcy, or
 - (ii) the transfer occurred during the period that begins on the day that is five years before the date of the initial bankruptcy event and ends on the day before the day on which the period referred to in subparagraph (i) begins and
 - (A) the debtor was insolvent at the time of the transfer or was rendered insolvent by it, or
 - (B) the debtor intended to defraud, defeat or delay a creditor.

Establishing values

(2) In making the application referred to in this section, the trustee shall state what, in the trustee's opinion, was the fair market value of the property or services and what, in the trustee's opinion, was the value of the actual consideration given or received by the debtor, and the values on which the court makes any finding under this section are, in the absence of evidence to the contrary, the values stated by the trustee.

Meaning of person who is privy

(3) In this section, a person who is privy means a person who is not dealing at arm's length with a party to a transfer and, by reason of the transfer, directly or indirectly, receives a benefit or causes a benefit to be received by another person

Protected transactions

97 (1) No payment, contract, dealing or transaction to, by or with a bankrupt made between the date of the initial bankruptcy event and the date of the bankruptcy is valid, except the following,

which are valid if made in good faith, subject to the provisions of this Act with respect to the effect of bankruptcy on an execution, attachment or other process against property, and subject to the provisions of this Act respecting preferences and transfers at undervalue:

- (a) a payment by the bankrupt to any of the bankrupt's creditors;
- (b) a payment or delivery to the bankrupt;
- (c) a transfer by the bankrupt for adequate valuable consideration; and
- (d) a contract, dealing or transaction, including any giving of security, by or with the bankrupt for adequate valuable consideration.

Definition of adequate valuable consideration

(2) The expression adequate valuable consideration in paragraph (1)(c) means a consideration of fair and reasonable money value with relation to that of the property assigned or transferred, and in paragraph (1)(d) means a consideration of fair and reasonable money value with relation to the known or reasonably to be anticipated benefits of the contract, dealing or transaction.

Law of set-off or compensation

(3) The law of set-off or compensation applies to all claims made against the estate of the bankrupt and also to all actions instituted by the trustee for the recovery of debts due to the bankrupt in the same manner and to the same extent as if the bankrupt were plaintiff or defendant, as the case may be, except in so far as any claim for set-off or compensation is affected by the provisions of this Act respecting frauds or fraudulent preferences.

Recovering proceeds if transferred

98 (1) If a person has acquired property of a bankrupt under a transaction that is void or voidable and set aside or, in the Province of Quebec, null or annulable and set aside, and has sold, disposed of, realized or collected the property or any part of it, the money or other proceeds, whether further disposed of or not, shall be deemed the property of the trustee.

Trustee may recover

(2) The trustee may recover the property or the value thereof or the money or proceeds therefrom from the person who acquired it from the bankrupt or from any other person to whom he may have resold, transferred or paid over the proceeds of the property as fully and effectually as the trustee could have recovered the property if it had not been so sold, disposed of, realized or collected.

Operation of section

(3) Notwithstanding subsection (1), where any person to whom the property has been sold or disposed of has paid or given therefor in good faith adequate valuable consideration, he is not subject to the operation of this section but the trustee's recourse shall be solely against the person entering into the transaction with the bankrupt for recovery of the consideration so paid or given or the value thereof.

Trustee subrogated

(4) Where the consideration payable for or on any sale or resale of the property or any part thereof remains unsatisfied, the trustee is subrogated to the rights of the vendor to compel payment or satisfaction.

Ontario Fraudulent Conveyances Act²⁰⁴

Following are the substantive provisions in the provincial Act:

Where conveyances void as against creditors

2. Every conveyance of real property or personal property and every bond, suit, judgment and execution heretofore or hereafter made with intent to defeat, hinder, delay or defraud creditors or others of their just and lawful actions, suits, debts, accounts, damages, penalties or forfeitures are void as against such persons and their assigns. R.S.O. 1990, c. F.29, s. 2.

Where s. 2 does not apply

3. Section 2 does not apply to an estate or interest in real property or personal property conveyed upon good consideration and in good faith to a person not having at the time of the conveyance to the person notice or knowledge of the intent set forth in that section. R.S.O. 1990, c. F.29, s. 3.

Where s. 2 applies

4. Section 2 applies to every conveyance executed with the intent set forth in that section despite the fact that it was executed upon a valuable consideration and with the intention, as between the parties to it, of actually transferring to and for the benefit of the transferee the interest expressed to be thereby transferred, unless it is protected under section 3 by reason of good faith and want of notice or knowledge on the part of the purchaser. R.S.O. 1990, c. F.29, s. 4.

When fraudulent conveyances declared void as against purchasers

5. Every conveyance of real property heretofore or hereafter made with intent to defraud and deceive the purchaser shall be deemed to be void only as against that person and the person's assigns and all persons lawfully claiming under that person or the person's assigns who have purchased or hereafter purchase for money or other good consideration the same real property or a part thereof.

Badges of Fraud in Fraudulent Conveyances

It can be quite difficult to prove intent of debtors who fraudulently dissipate their assets to undermine their creditors however the courts in Canada have developed criteria for measuring that intent with circumstantial evidence. These “Badges of Fraud²⁰⁵” are:

- a) the transfer documents contained false statements for consideration;
- b) the transfer was secret;
- c) the transfer was made with pending/threatened legal proceedings;
- d) the settlor retained some benefit under a trust created;
- e) the seller continued in possession continued to use the property;
- f) the seller embarked on a hazardous venture;
- g) a close relationship exists between parties to the transfer;

²⁰⁴ For further insight see: “REFORM OF FRAUDULENT CONVEYANCES AND FRAUDULENT PREFERENCES LAW (Transactions at Undervalue and Preferential Transfers) PART II: PREFERENTIAL TRANSFERS By Tamara M. Buckwold, Faculty of Law, University of Alberta, Edmonton, Alberta” on the internet

²⁰⁵ As initially formulated in *Twyne's Case* (1601) 76 E.R. 809

- h) there is unusual haste in making the transfer;
- i) there has been a loss of documents evidencing the transfer;
- j) the debtor's continued involvement with the transferee;
- k) the debtor kept the power to revoke the conveyance; or
- l) the consideration is considerably inadequate.

Understandably most of these elements can only be properly assessed through a thorough investigation of the debtor's affairs (as well as the counterparty) which may require varying realizations of information of both a financial and related-party effect. ***Per the case law, the counsel need prove only one such instance to have a presumption of fraudulent intent swing to the onus of the conveyancer to disprove.*** In some cases, surveillance may be pursued to obtain the true nature of the environment you're facing. CANLii.org can be investigated for jurisprudence on Canadian badges of fraud.

The Primary Common Bankruptcy Fraudulent Actions

The most common offences committed under the Bankruptcy and Insolvency Act (BIA) and the Criminal Code are when the bankrupt:

- 1) Fraudulently disposes of property before or after the bankruptcy;
- 2) Makes false entries in a statement of account or hides, destroys or falsifies a document related to his/her property or affairs;
- 3) Obtains credit or any other good through false representations;
- 4) Conceals or fraudulently removes property, or conceals claims or debts;
- 5) Obtains credit or engages in trade without informing the people involved that he/she is bankrupt
- 6) Refuses to respond fully and truthfully to questions posed during an examination held in accordance with the BIA.²⁰⁶

The Interview of the Bankrupt

Statutorily the bankrupt can be interrogated as to why the corporation failed, under the BIA so there can be information gleaned from accounting records and their reasons during that interview process. (This author recommends video-taping all these interviews.) It's be noted that it is a BIA offence to hide/destroy accounting records and documents related to the bankrupt's affairs so they should exist while if this is not the case it is possible to entirely reconstruct them from bank statements and compilation of supporting documents from "the other side of the table", who cheques were negotiated by as paid.

During this examination, the bankrupt will explain how, they think, their enterprise became insolvent, while the trustee may extrapolate on such other reasons if such is the case.

Of importance, however, is that the bankrupt can be compelled to give answer as to what happened with certain transactions which can be very rewarding to determining fraudulent transactions.

The Bankrupt's Previous Transactions with Related Parties

In any investigation of a bankruptcy it's important to look behind any material transactions to determine related party transactions and consequently to determine if there has been in fact transfer for value that could otherwise prompt BIA/FCA application if not.

In this case, every material sale/invoice should be "looked behind" to determine who the principals of the other entity are, and their relationship to the bankrupt.

²⁰⁶ As listed on the web-site of the Office of the Superintendent of Bankruptcy, Canada

This aspect of the investigation can be carried on by PI's if need be, or through routine verification of relationships CFE's should be versed with.

As a CFE, Determine Movement in the Bankrupt's Entire Common Estate

One of the first routines a CFE should take, in this author's opinion, is to **determine the joint value of all the corporate and guarantor's estate over at least 2 years leading up to the petitioned or voluntary bankruptcy.** *The reason for this is that in the case of fraudulent bankruptcy actions, the principals will start to shield assets in their estates that could be recovered from in bankruptcy, either as owned by the failing corporation, or in the hands of its guarantors such as the principal shareholders, etc.*

Such would include transfers of property to satisfy spousal claims, that are not actionable in the instance regardless save for the pending bankruptcy, transfers of RRSPs, and other financial nest-eggs to children/spouse/friends, again to prevent their realization as owned by the principal guarantor of a failing corporation.

What is important is to examine not just the bankrupt corporation's activity, but also that of its guarantors to see if there are any badges of fraud in effort to undermine creditors claims to equity they may be entitled to.

The Bust Out, On Other's Money

All "bust-outs" happen on the premise of obtaining value by the bankrupt with other's money in the form of either unsecured trade payables or bank financing whereby the funds are used to buy valueless services or assets leaving the bank exposed and streaming off that cash-flow to related parties or to inventory that is liquidated without payment to the suppliers.

Due to this, in almost all initial trade terms in Canada the principals behind the corporation will be asked to personally guarantee the debt sustained, either on opening a trade account with a supplier, or on obtaining a bank loan. One would think that this would prevent purposeful bust-outs however once the financing by others has been provided, after some initial period, the bankrupt simply creditor shields his personal assets through creditor-proofing them or transferring them away, and proceeds to bust-out regardless. In this planned case, while personal guarantees exist, they are worthless by then since assets to realize have dissipated.

This correlation of activity is a ready badge of fraud when it happens, unfortunately too late to be noticed by the creditor, with the supply already in the pending bankrupt's possession.

As a CFE one would want to look into the timetable of asset dissipation, at both the corporate and personal level, as well as ramping up in payables/bank debt to reveal the mind of a bust-out fraudster.

"The Bust-out", Generally

Items 1) and 4) above are how "bust-outs" are primarily perpetrated in Canada whereby the bankrupt, as a system, takes steps to gradually grow his inventory through escalating purchases, (and history of payments), from suppliers to lull them into thinking that they will be paid as the outstanding accounts payable by the pending bankrupt grows to them. Finally, the bankrupt simply disposes of the enlarged fresh inventory, after finding cash buyers for it, and closes the doors – declares bankruptcy - without paying the suppliers. The suppliers have unsecured claims on any property that the bankrupt may have, though it is generally secured with bank loans that the bankrupt has also taken out.

Given the ability to leverage capital and appearance of going-concerns in Canada its quite possible for this system to work whereby the principal value of a corporation, purposefully formed to perpetrate just that, is its inventory fraudulently realized to do exactly this type of bust-out.

Unfortunately, while there are criminal proceedings available that generally will be pursued by the RCMP these attempts continue since many do not view short prison sentences as a deterrent to a financial bust-out. Per the Office of the Superintendent of Bankruptcy:

Between April 1, 2015 and March 31, 2016, 66 new investigation orders were sent to the OSB Special Investigation Units. Legal proceedings were commenced in 34 bankruptcy files, with liabilities totaling approximately \$17 million, several of which resulted from investigation orders issued prior to the period in question. Specifically, 134 charges were laid under the BIA and 131 charges under the Criminal Code.

A variety of sentences have been imposed on bankrupts found guilty of offences, for example:

- *prison;*
- *conditional sentence orders which can include (but are not limited to) house arrest, community service hours, probation, curfews, electronic monitoring; and*
- *restitution orders.*

The “Valueless Service” Bust-out

Another way planned bankrupts abuse the process is to have friends and related parties supply seemingly needed fictional services to the corporation which are paid with cheques properly so that cash-flow is streamed out of the environment without possibility of recovery through either BIA or FCA applications. This is a very effective way to abuse the bankruptcy environment, ancillary to other principal aspects that the bust-out has planned since no assets are realized for recovery and the funds are legally non-recoverable.

It's thus paramount on bankruptcy investigation that every “service”/“consulting” fee be extremely examined if they have occurred, and they in total do add up materially, by asking the question “*Why was this expense incurred?*” to the principals. With proper study of the environment it is entirely possible to find instances where these seemingly “needed” expenses were not in fact and that they were transacted with related parties to the bankrupt to stream out funds away from creditors.

Given that the objective of this exercise is to get the funds into the pending bankrupt's hands it should be possible to obtain Norwich orders to examine the bankrupt's personal bank accounts for unexpected cash deposits to verify if there has been fraudulent flow-back.

The “Valueless Asset” Bust-out

Another spin on a devious bust-out is the purchase of value-less assets with bank debt, from related parties, that have no realizable value, that occur just to get the funds on the pending bankrupt outside his estate to prevent their realization by the creditors. Again, the fundamental question that should be asked is “*Why was this asset purchased?*” and a comparison of its face price against what its fair market value was as established in the market. In many cases a considerable difference in these two values readily establishes fraud, especially if the other party is related either legally or through past dealings with the bankrupt.

Again, given this nature of transaction it is possible to obtain a Norwich order to obtain access to the bankrupt's personal bank accounts to verify flow-back.

Detailed Bankruptcy Fraud Techniques and Steps to Take

From the above primary reported techniques in perpetrating a bankruptcy fraud the below are some steps that a CFE should be concerned with:

1) *Fraudulently disposes of property before or after the bankruptcy;*

Per the BIA the bankrupt's entire estate is available to be realized for the benefit of their creditors which includes collateralized property to be realized by secured creditors. In many instances the bankrupt will secret assets from discovery to undermine their creditors through physical removal or undervalued sale. A CFE should seek to examine what happened to all assets that were built up – their “flow of existence” in the bankrupt's environment – and where they are/went. That will entail

looking for any undervalued disposals within 1-3 years prior to the insolvency date, as well as what happened to inventory that was acquired in at least the previous full business cycle of the bankrupt.

- 2) *Makes false entries in a statement of account or hides, destroys or falsifies a document related to his/her property or affairs;*

In perpetrating a fraud on their creditors the bankrupt may make false entries to lower sales for instance, which were for cash, so there should be a full audit understandably of any financial transactions that occurred to determine whether there was appropriate value-for-money transactions, always sensitive to related party transactions. A CFE would want to audit all sales to confirm that no inventory was dissipated without being properly accounted for – no streaming off for cash – and that all sales of other assets were for established fmV at that time.

When accounting records, including source documents have been destroyed/lost it is entirely possible to investigate all transactions through the bank statements of the bankrupt (with same for its guarantors) and while such does take time cheques both in and out of the bankrupt's environment can be realized from the financial institution. The weakness in this however is that while cheques are realizable, it's not known what assets were dealt with, in particular, inventory, so there must be contact with suppliers to determine their past transactions with the bankrupt to determine assets dealt with and when.

- 3) *Obtains credit or any other good through false representations;*

One would want to examine any trade supplier credit applications with supplied financial statements to determine if fraud was perpetrated when obtaining inventory in the previous, at least, 5 years. This, if it happened, would allow artificially high inventory levels to be enjoyed by the bust-out which is why the fraudulent statements/assertions were provided to the supplier. Such would also include applications for bank financing/lines of credit with provision of "soft" (friendly) supplied audited statements or accounts receivable schedules spiked with either unwritten-off balances or purely fictitious sales which the bank creditor would base their lending value on.

- 4) *Conceals or fraudulently removes property, or conceals claims or debts;*

Again, one should look for dissipated inventory/assets that could be converted to cash on quick sale for discounted value, through examination of "where everything went" which would include the director(s)/executive(s) personal financial realm: did they buy large-ticket items recently, new homes, vacations, gifts to family, etc. *In this author's opinion, it should be possible to apply to court to have a Norwich Pharmacal order granted with respect to related parties' bank accounts who have shown an intense relationship with the bankrupt when there has been disappearance of material values of property since the related party may be being used to hide the proceeds therefrom in its financial realm: if the CFE with counsel can indicate that there was a fraudulent conspiracy to perpetrate this, or on a grounds of knowing assistance, the court may allow examination of the related though 3rd party's bank accounts on the grounds that they were directly involved as apparent.*

- 5) *Obtains credit or engages in trade without informing the people involved that he/she is bankrupt;*

Here the date of insolvency, with some element of permanence, is key since when the business-owner knows that they can't continue is generally well before instances where others petition them into bankruptcy for not meeting their debts as they come due. That insider knowledge may lead to massive additional inventory purchase, so again, the actual date of insolvency is key, not the later

date when “the music stops”, on petitioning. If purchasing continues when all hope is lost then it’s a contributing factor in the bust-out.

Consequently, it’s important to know the financial resources of the bankrupt leading up to the petitioning etc. as to when it became clear that its cash flow prompted an existence of financial insolvency via looking at cash realizations and outflows and the liquidated values of its assets compared to its liabilities.

6) *Refuses to respond fully and truthfully to questions posed during an examination held in accordance with the BIA.*

Per the BIA, the trustee can compel the disclosure of the bankrupt and all its employees on any affairs of the bankrupt. This is key in the trustee in fulfilling her duty to realizing maximum value for the creditors, and this also allows a trustee, with supported by then concluded reporting by a CFE, to fathom about other discrepancies in the bankrupt’s environment that could work for the benefit of the creditors.

This means that the trustee can compel the bankrupt to disclose all personal and corporate bank statements and telephone records²⁰⁷ to indicate exactly what was going on previous to the petition/assignment so that the trustee can prepare the necessary study²⁰⁸.

Some Red-Flags for Typical Bankruptcy Fraud

The following are some typical signals that a planned bust-out has been perpetrated and should serve as red-flags to start more thorough investigation.

- Corporation with a short life
- Sister companies or inactive companies under same directors’ names
- Established company with good credit recently taken over by a new group attempting to hide ownership
- Soft or Fraudulent financial statements
- Old capital assets that are not invigorated through new purchases
- False data in or credit references to suppliers
- Disproportionately high cash basis operation
- Inventory turn-over is accelerating w/ sales to one-off customers for cash
- Inventory consists of readily marketable items, or there has been a movement towards such
- Temporary employees or employees who do not see full picture
- Over-remunerated CFO/Controller
- Overly cash-flow-damaging draws by principals
- Secured creditor status given to principals on cash-flow loans, that happen before larger inventory purchases
- Leased equipment/premises
- Few big creditors, and unsecured debt is primarily comprised of trade suppliers
- Period of stress payment terms to some but not all suppliers, (systematic unexplained preferences)
- Same individuals/directors/principals involved in previous "failed companies"
- Unusual banking activities (check kiting, credit-card kiting)
- Increasing balances on corporate credit cards or multiple, unneeded, credit cards

²⁰⁷ These telephone records may reveal relationships with parties who “are not on the books” as silent business where dissipated assets ended up, “through the back doors”. Use reverse look-up on various internet telephone databases to confirm identity.

²⁰⁸ The trustee must make a written report as to what caused the bankruptcy, which is made after thorough interview with the bankrupt and evaluation of the affairs thereof.

- Financial statements are not requested to be produced on a period basis by mgmt.
- The same attorney/exterior professional accountant repeatedly represents these types of debtors
- Many related party transactions on assets and liabilities entering corporate sphere during lead-up to insolvency

Remedial Judicial Outcomes

Depending on the environment by which a fraudulent conveyance or a bankruptcy offence was perpetrated a court can set aside the transaction (generally, unless there was trade for fair value) or set-up the receiving party as a constructive or resulting trustee of the property for return to the creditor. **In the BIA** the specific provisions are:

Preferences

95 (1) *A transfer of property made, a provision of services made, a charge on property made, a payment made, an obligation incurred or a judicial proceeding taken or suffered by an insolvent person*

*(a) in favour of a creditor who is **dealing at arm's length** with the insolvent person, or a person in trust for that creditor, with a view to giving that creditor a preference over another creditor is void as against — or, in Quebec, may not be set up against — the trustee if it is made, incurred, taken or suffered, as the case may be, during the period beginning on the day that is **three months** before the date of the initial bankruptcy event and ending on the date of the bankruptcy; and*

*(b) in favour of a creditor who is **not dealing at arm's length** with the insolvent person, or a person in trust for that creditor, that has the effect of giving that creditor a preference over another creditor is void as against — or, in Quebec, may not be set up against — the trustee if it is made, incurred, taken or suffered, as the case may be, during the period beginning on the day that is **12 months before** the date of the initial bankruptcy event and ending on the date of the bankruptcy.*

Preference presumed

(2) If the transfer, charge, payment, obligation or judicial proceeding referred to in paragraph (1)(a) has the effect of giving the creditor a preference, it is, in the absence of evidence to the contrary, presumed to have been made, incurred, taken or suffered with a view to giving the creditor the preference — even if it was made, incurred, taken or suffered, as the case may be, under pressure — and evidence of pressure is not admissible to support the transaction.

Exception

(2.1) Subsection (2) does not apply, and the parties are deemed to be dealing with each other at arm's length, in respect of the following:

(a) a margin deposit made by a clearing member with a clearing house; or

(b) a transfer, charge or payment made in connection with financial collateral and in accordance with the provisions of an eligible financial contract.

The Ontario Fraudulent Conveyances Act provides that:

Where conveyances void as against creditors

2. Every conveyance of real property or personal property and every bond, suit, judgment and execution heretofore or hereafter made with intent to defeat, hinder, delay or defraud creditors or others of their just and lawful actions, suits, debts, accounts, damages, penalties or forfeitures are void as against such persons and their assigns. R.S.O. 1990, c. F.29, s. 2.

Where s. 2 does not apply

3. Section 2 does not apply to an estate or interest in real property or personal property conveyed upon good consideration and in good faith to a person not having at the time of the conveyance to the person notice or knowledge of the intent set forth in that section. R.S.O. 1990, c. F.29, s. 3.

Where s. 2 applies

4. Section 2 applies to every conveyance executed with the intent set forth in that section despite the fact that it was executed upon a valuable consideration and with the intention, as between the parties to it, of actually transferring to and for the benefit of the transferee the interest expressed to be thereby transferred, unless it is protected under section 3 by reason of good faith and want of notice or knowledge on the part of the purchaser. R.S.O. 1990, c. F.29, s. 4.

When fraudulent conveyances declared void as against purchasers

5. Every conveyance of real property heretofore or hereafter made with intent to defraud and deceive the purchaser shall be deemed to be void only as against that person and the person's assigns and all persons lawfully claiming under that person or the person's assigns who have purchased or hereafter purchase for money or other good consideration the same real property or a part thereof. R.S.O. 1990, c. F.29, s. 5.

Where s. 5 does not apply

6. Section 5 does not apply to and shall not be construed to impeach, defeat or make void a conveyance of real property made in good faith and for good consideration. R.S.O. 1990, c. F.29, s. 6.

Conveyances made revocable

7. (1) If a person makes a conveyance of real property with a clause, provision, article, or condition of revocation, determination or alteration at that person's will or pleasure, and after such conveyance bargains, sells, demises, grants, conveys or charges such real property or a part thereof to a person for money or other good consideration paid or given, such first conveyance not being revoked, made void or altered according to the power and authority so reserved or expressed therein, then such first conveyance as touching the real property so after bargained, sold, conveyed, demised or charged is void against the bargainees, vendees, lessees, grantees, their heirs, successors, and their assigns and against every person lawfully claiming under them. R.S.O. 1990, c. F.29, s. 7 (1).

Saving as to mortgages

(2) No lawful mortgage made in good faith, and without fraud or covin, and upon good consideration shall be impeached or impaired by force of this Act, but it has the like force and effect as if this Act had not been passed. R.S.O. 1990, c. F.29, s. 7 (2).

Validity of voluntary conveyance, etc., executed in good faith and duly registered

8. (1) Nothing in section 5, 6 or 7 extends to a conveyance that is executed in good faith and duly registered in the proper land registry office before the execution of the conveyance to, and before the creation of any binding contract for the conveyance to a subsequent purchaser from the same grantor of the same real property or a part thereof, nor is such a conveyance merely by reason of

the absence of a valuable consideration void as against such purchaser or the heirs, executors, administrators or assigns of the purchaser or any person claiming by, from or under any of them. R.S.O. 1990, c. F.29, s. 8 (1).

Effect of subs. (1)

(2) Nothing in subsection (1) has the effect of making valid an instrument that is for any reason, other than or in addition to the absence of a valuable consideration, void under section 5, 6 or 7 or otherwise, nor has the effect of making valid an instrument as against a purchaser who had before the 28th day of February, 1868, entered into a binding contract for or received a conveyance upon such purchase. R.S.O. 1990, c. F.29, s. 8 (2).

Equal enforceable Criminal Code Infractions

The CC equally provides a deterrent to fraudsters attempting to defraud their creditors through malicious actions to undermine their claims. The Criminal Code provides the following:

Disposal of property to defraud creditors, s. 392

392 Every one who,

(a) with intent to defraud his creditors,

(i) makes or causes to be made any gift, conveyance, assignment, sale, transfer or delivery of his property, or

(ii) removes, conceals or disposes of any of his property, or

(b) with intent that any one should defraud his creditors, receives any property by means of or in relation to which an offence has been committed under paragraph (a),

is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years.

Further Case Compilation on Bankruptcy and CCAA Generally

The author has on Googlebooks a further free source on the BIA and CCAA with Acts, OSB Directives and cases as cited most predominately by CANLII.org as the most relevant, which you can familiarize yourself with.

Income and Sales Tax Evasion

In Canada, the two federal Acts that govern the imposition of income and sales tax are the Canada Income Tax (ITA) and the Excise Tax Act provisions applicable to collecting and remitting the Goods and Services Tax (GST). Both collection/enforcement functions are carried out through Canada Revenue Agency.

The Two Primary Forms of Tax Evasion in Canada

There are a few primary forms of tax evasion in Canada, which will be perpetrated by people depending on their relationships with others and what revenues they have.

Firstly, the size of the underground economy in Canada has been estimated to be somewhere between \$42-45 B arising in certain primary industries where excess unreported cash income shifts, such as residential construction, accommodation and entertainment, etc. but the common aspect of them is that they are all cash-based whereby the payor has excessive cash from their own hidden unreported activity that they pay in turn to others who equally do not report it.

Equally, there are constant attempts to deduct for income tax purposes expenses that are not allowable per the statutory scheme of the ITA/provincial Act which are illegal when, while form is there, substance isn't, or they are simply non-deductible regardless.

The CRA "Criminal Investigations Manual" details tax evasion to be:

***Tax evasion** is the commission or omission of an act knowingly, the conspiracy to commit such an act or the involvement in the accommodation of such an act, which can result in a charge being laid in a criminal court under subsections 239(1), (1.1) and (2) of the Income Tax Act (ITA) or subsection 327(1) and (2) of the Excise Tax Act (ETA). It may be accomplished by one or a series of acts, transactions, schemes, arrangements, or devices, whereby the tax is reduced or completely evaded. It usually involves the deliberate omission of revenue, the fraudulent claiming of expenses or allowances, or the deliberate misrepresentation, concealment or withholding of material facts. Tax evasion can also be accomplished by failing to file tax returns.*

So, in Canada, the two primary tax evasion instances are when revenue in the form of cash is not reported, or when artificial deductions are taken, both of which reduce taxes payable.

CRA's Mandate to Collect

The Statutory Obligation to Maintain Records

There are requirements under both Acts for the taxpayer to maintain sets of records of their transactions. In the ITA the provisions are:

Records and books

230 (1) Every person carrying on business and every person who is required, by or pursuant to this Act, to pay or collect taxes or other amounts shall keep records and books of account (including an annual inventory kept in prescribed manner) at the person's place of business or residence in Canada or at such other place as may be designated by the Minister, in such form and containing such information as will enable the taxes payable under this Act or the taxes or other amounts that should have been deducted, withheld or collected to be determined.

Records and books

(2) Every qualified donee referred to in paragraphs (a) to (c) of the definition qualified donee in subsection 149.1(1) shall keep records and books of account — in the case of a qualified donee

referred to in any of subparagraphs (a)(i) and (iii) and paragraphs (b) and (c) of that definition, at an address in Canada recorded with the Minister or designated by the Minister — containing

- (a) information in such form as will enable the Minister to determine whether there are any grounds for the revocation of its registration under this Act;
- (b) a duplicate of each receipt containing prescribed information for a donation received by it; and
- (c) other information in such form as will enable the Minister to verify the donations to it for which a deduction or tax credit is available under this Act.

Idem, lawyers

(2.1) For greater certainty, the records and books of account required by subsection 230(1) to be kept by a person carrying on business as a lawyer (within the meaning assigned by subsection 232(1)) whether by means of a partnership or otherwise, include all accounting records of the lawyer, including supporting vouchers and cheques.

Minister's requirement to keep records, etc.

(3) Where a person has failed to keep adequate records and books of account for the purposes of this Act, the Minister may require the person to keep such records and books of account as the Minister may specify and that person shall thereafter keep records and books of account as so required.

Limitation period for keeping records, etc.

(4) Every person required by this section to keep records and books of account shall retain

- (a) the records and books of account referred to in this section in respect of which a period is prescribed, together with every account and voucher necessary to verify the information contained therein, for such period as is prescribed; and
- (b) all other records and books of account referred to in this section, together with every account and voucher necessary to verify the information contained therein, until the expiration of six years from the end of the last taxation year to which the records and books of account relate.

Electronic records

(4.1) Every person required by this section to keep records who does so electronically shall retain them in an electronically readable format for the retention period referred to in subsection 230(4).

Exemptions

(4.2) The Minister may, on such terms and conditions as are acceptable to the Minister, exempt a person or a class of persons from the requirement in subsection 230(4.1).

Exception where no return filed

(5) Where, in respect of any taxation year, a person referred to in subsection 230(1) has not filed a return with the Minister as and when required by section 150, that person shall retain every record and book of account that is required by this section to be kept and that relates to that taxation year, together with every account and voucher necessary to verify the information contained therein, until the expiration of six years from the day the return for that taxation year is filed.

Exception where objection or appeal

(6) Where a person required by this section to keep records and books of account serves a notice of objection or where that person is a party to an appeal to the Tax Court of Canada under this Act, that person shall retain every record, book of account, account and voucher necessary for dealing with the objection or appeal until, in the case of the serving of a notice of objection, the time provided by section 169 to appeal has elapsed or, in the case of an appeal, until the appeal is disposed of and any further appeal in respect thereof is disposed of or the time for filing any such further appeal has expired.

Exception where demand by Minister

(7) Where the Minister is of the opinion that it is necessary for the administration of this Act, the Minister may, by registered letter or by a demand served personally, require any person required by this section to keep records and books of account to retain those records and books of account, together with every account and voucher necessary to verify the information contained therein, for such period as is specified in the letter or demand.

Permission for earlier disposal

(8) A person required by this section to keep records and books of account may dispose of the records and books of account referred to in this section, together with every account and voucher necessary to verify the information contained therein, before the expiration of the period in respect of which those records and books of account are required to be kept if written permission for their disposal is given by the Minister.

In the Excise Act the equivalent provisions are:

Keeping books and records

286 (1) Every person who carries on a business or is engaged in a commercial activity in Canada, every person who is required under this Part to file a return and every person who makes an application for a rebate or refund shall keep records in English or in French in Canada, or at such other place and on such terms and conditions as the Minister may specify in writing, in such form and containing such information as will enable the determination of the person's liabilities and obligations under this Part or the amount of any rebate or refund to which the person is entitled.

Inadequate records

(2) Where a person fails to keep adequate records for the purposes of this Part, the Minister may require the person to keep such records as the Minister may specify and the person shall thereafter keep the records so specified.

Period for retention

(3) Every person required under this section to keep records shall retain them until the expiration of six years after the end of the year to which they relate or for such other period as may be prescribed.

Electronic records

(3.1) Every person required by this section to keep records who does so electronically shall retain them in an electronically readable format for the retention period set out in subsection (3).

Exemptions

(3.2) The Minister may, on such terms and conditions as are acceptable to the Minister, exempt a person or a class of persons from the requirement in subsection (3.1).

Objection or appeal

(4) Where a person who is required under this section to keep records serves a notice of objection or is a party to an appeal or reference under this Part, the person shall retain, until the objection, appeal or reference and any appeal therefrom is finally disposed of, every record that pertains to the subject-matter of the objection, appeal or reference.

Demand by Minister

(5) Where the Minister is of the opinion that it is necessary for the administration of this Part, the Minister may, by a demand served personally or by registered or certified mail, require any person required under this section to keep records to retain those records for such period as is specified in the demand.

Permission for earlier disposal

(6) A person who is required under this section to keep records may dispose of the records before the expiration of the period in respect of which the records are required to be kept if written permission for their disposal is given by the Minister.

The Offences

Understandably there are offence provisions in both the ITA and ETA(GST) that would prompt for application of penal consequences.

The ITA Offence Provisions

In the ITA the principal provisions, with s. 239(1) being by-and-large having the principal occurrences in Canada, are:

Offences and punishment

238 (1) Every person who has failed to file or make a return as and when required by or under this Act or a regulation or who has failed to comply with subsection 116(3), 127(3.1) or (3.2), 147.1(7) or 153(1), any of sections 230 to 232, 244.7 and 267 or a regulation made under subsection 147.1(18) or with an order made under subsection (2) is guilty of an offence and, in addition to any penalty otherwise provided, is liable on summary conviction to

(a) a fine of not less than \$1,000 and not more than \$25,000; or

(b) both the fine described in paragraph 238(1)(a) and imprisonment for a term not exceeding 12 months.

Compliance orders

(2) Where a person has been convicted by a court of an offence under subsection 238(1) for a failure to comply with a provision of this Act or a regulation, the court may make such order as it deems proper in order to enforce compliance with the provision.

Saving

(3) Where a person has been convicted under this section of failing to comply with a provision of this Act or a regulation, the person is not liable to pay a penalty imposed under section 162 or 227 for the same failure unless the person was assessed for that penalty or that penalty was demanded from the person before the information or complaint giving rise to the conviction was laid or made.

Other offences and punishment

239 (1) Every person who has

- (a) made, or participated in, assented to or acquiesced in the making of, false or deceptive statements in a return, certificate, statement or answer filed or made as required by or under this Act or a regulation,***
- (b) to evade payment of a tax imposed by this Act, destroyed, altered, mutilated, secreted or otherwise disposed of the records or books of account of a taxpayer,***
- (c) made, or assented to or acquiesced in the making of, false or deceptive entries, or omitted, or assented to or acquiesced in the omission, to enter a material particular, in records or books of account of a taxpayer,***
- (d) wilfully, in any manner, evaded or attempted to evade compliance with this Act or payment of taxes imposed by this Act, or***
- (e) conspired with any person to commit an offence described in paragraphs 239(1)(a) to 239(1)(d),***

is guilty of an offence and, in addition to any penalty otherwise provided, is liable on summary conviction to

- (f) a fine of not less than 50%, and not more than 200%, of the amount of the tax that was sought to be evaded, or***
- (g) both the fine described in paragraph 239(1)(f) and imprisonment for a term not exceeding 2 years.***

Offences re refunds and credits

(1.1) Every person who obtains or claims a refund or credit under this Act to which the person or any other person is not entitled or obtains or claims a refund or credit under this Act in an amount that is greater than the amount to which the person or other person is entitled

- (a) by making, or participating in, assenting to or acquiescing in the making of, a false or deceptive statement in a return, certificate, statement or answer filed or made under this Act or a regulation,***
- (b) by destroying, altering, mutilating, hiding or otherwise disposing of a record or book of account of the person or other person,***
- (c) by making, or assenting to or acquiescing in the making of, a false or deceptive entry in a record or book of account of the person or other person,***
- (d) by omitting, or assenting to or acquiescing in an omission to enter a material particular in a record or book of account of the person or other person,***
- (e) wilfully in any manner, or***
- (f) by conspiring with any person to commit any offence under this subsection,***

is guilty of an offence and, in addition to any penalty otherwise provided, is liable on summary conviction to

- (g) a fine of not less than 50% and not more than 200% of the amount by which the amount of the refund or credit obtained or claimed exceeds the amount, if any, of the refund or credit to which the person or other person, as the case may be, is entitled, or***
- (h) both the fine described in paragraph 239(1.1)(g) and imprisonment for a term not exceeding 2 years.***

Prosecution on indictment

(2) Every person who is charged with an offence described in subsection 239(1) or 239(1.1) may, at the election of the Attorney General of Canada, be prosecuted on indictment and, if convicted, is, in addition to any penalty otherwise provided, liable to

- (a) a fine of not less than 100% and not more than 200% of
 - (i) where the offence is described in subsection 239(1), the amount of the tax that was sought to be evaded, and
 - (ii) where the offence is described in subsection 239(1.1), the amount by which the amount of the refund or credit obtained or claimed exceeds the amount, if any, of the refund or credit to which the person or other person, as the case may be, is entitled; and
- (b) imprisonment for a term not exceeding 5 years.

Providing incorrect tax shelter identification number

(2.1) Every person who wilfully provides another person with an incorrect identification number for a tax shelter is guilty of an offence and, in addition to any penalty otherwise provided, is liable on summary conviction to

- (a) a fine of not less than 100%, and not more than 200%, of the cost to the other person of that person's interest in the shelter;
- (b) imprisonment for a term not exceeding 2 years; or
- (c) both the fine described in paragraph 239(2.1)(a) and the imprisonment described in paragraph 239(2.1)(b).

Offence with respect to confidential information

(2.2) Every person who

- (a) contravenes subsection 241(1), or
- (b) knowingly contravenes an order made under subsection 241(4.1)

is guilty of an offence and liable on summary conviction to a fine not exceeding \$5,000 or to imprisonment for a term not exceeding 12 months, or to both.

Idem

(2.21) Every person

- (a) to whom taxpayer information has been provided for a particular purpose under paragraph 241(4)(b), (c), (e), (h), (k), (n), (o) or (p).
- (b) who is an official to whom taxpayer information has been provided for a particular purpose under paragraph 241(4)(a), (d), (f), (f.1), (i), (j.1) or (j.2)

and who for any other purpose knowingly uses, provides to any person, allows the provision to any person of, or allows any person access to, that information is guilty of an offence and liable on summary conviction to a fine not exceeding \$5,000 or to imprisonment for a term not exceeding 12 months, or to both.

ETA(GST) Offence Provisions

Offences

326 (1) Every person who fails to file or make a return as and when required by or under this Part or who fails to comply with subsection 286(2) or 291(2) or with an order made under subsection (2) is guilty of an offence and, in addition to any penalty otherwise provided, is liable on summary conviction to

- (a) a fine of not less than \$1,000 and not more than \$25,000; or

(b) both a fine referred to in paragraph (a) and imprisonment for a term not exceeding twelve months.

Compliance orders

(2) Where a person has been convicted by a court of an offence under subsection (1) for a failure to comply with a provision of this Part or a regulation made under this Part, the court may make such order as it deems proper in order to enforce compliance with the provision.

Saving

(3) A person that is convicted under this section of failing to comply with a provision of this Part or a regulation made under this Part is not liable to pay a penalty imposed under any of sections 280.1, 280.11 and 283 to 284.1 or under a regulation made under this Part for the same failure, unless a notice of assessment for the penalty was issued before the information or complaint giving rise to the conviction was laid or made.

Offences

327 (1) Every person who has

(a) made, or participated in, assented to or acquiesced in the making of, false or deceptive statements in a return, application, certificate, statement, document or answer filed or made as required by or under this Part or the regulations made under this Part,

(b) for the purpose of evading payment or remittance of any tax or net tax payable under this Part, or obtaining a refund or rebate to which the person is not entitled under this Part,

(i) destroyed, altered, mutilated, secreted or otherwise disposed of any documents of a person, or

(ii) made, or assented to or acquiesced in the making of, false or deceptive entries, or omitted, or assented to or acquiesced in the omission, to enter a material particular in the documents of a person,

(c) wilfully, in any manner, evaded or attempted to evade compliance with this Part or payment or remittance of tax or net tax imposed under this Part,

(d) wilfully, in any manner, obtained or attempted to obtain a rebate or refund to which the person is not entitled under this Part, or

(e) conspired with any person to commit an offence described in any of paragraphs (a) to (c),

is guilty of an offence and, in addition to any penalty otherwise provided, is liable on summary conviction to

(f) a fine of not less than 50%, and not more than 200%, of the amount of the tax or net tax that was sought to be evaded, or of the rebate or refund sought, or, where the amount that was sought to be evaded cannot be ascertained, a fine of not less than \$1,000 and not more than \$25,000, or

(g) both a fine referred to in paragraph (f) and imprisonment for a term not exceeding two years.

Prosecution on indictment

(2) Every person who is charged with an offence described in subsection (1) may, at the election of the Attorney General of Canada, be prosecuted on indictment and, if convicted, is, in addition to any penalty otherwise provided, liable to

- (a) a fine of not less than 100%, and not more than 200%, of the amount of the tax or net tax that was sought to be evaded, or of the rebate or refund sought, or, where the amount that was sought to be evaded cannot be ascertained, a fine of not less than \$2,000 and not more than \$25,000, or
- (b) both a fine referred to in paragraph (a) and imprisonment for a term not exceeding five years.

Penalty on conviction

(3) A person that is convicted of an offence under this section is not liable to pay a penalty imposed under any of sections 280.1, 280.11 and 283 to 285.1 or under a regulation made under this Part for the same evasion or attempt unless a notice of assessment for that penalty was issued before the information or complaint giving rise to the conviction was laid or made.

Stay of appeal

(4) Where, in any appeal under this Part, substantially the same facts are at issue as those that are at issue in a prosecution under this section, the Minister may file a stay of proceedings with the Tax Court and thereupon the proceedings before the Tax Court are stayed pending final determination of the outcome of the prosecution.

Definitions

327.1(1) The definitions in subsection 285.01(1) apply in this section.

Offences

(2) Every person that, without lawful excuse, the proof of which lies on the person,

- (a) uses an electronic suppression of sales device or a similar device or software in relation to records that are required to be kept by any person under section 286,**
- (b) acquires or possesses an electronic suppression of sales device, or a right in respect of an electronic suppression of sales device, that is, or is intended to be, capable of being used in relation to records that are required to be kept by any person under section 286,**
- (c) designs, develops, manufactures, possesses for sale, offers for sale, sells, transfers or otherwise makes available to another person an electronic suppression of sales device that is, or is intended to be, capable of being used in relation to records that are required to be kept by any person under section 286,**
- (d) supplies installation, upgrade or maintenance services for an electronic suppression of sales device that is, or is intended to be, capable of being used in relation to records that are required to be kept by any person under section 286, or**
- (e) participates in, assents to or acquiesces in the commission of, or conspires with any person to commit, an offence described in any of paragraphs (a) to (d),**

is guilty of an offence and, in addition to any penalty otherwise provided, is liable on summary conviction to a fine of not less than \$10,000 and not more than \$500,000 or to imprisonment for a term not exceeding two years, or to both.

Prosecution on indictment

(3) Every person that is charged with an offence described in subsection (2) may, at the election of the Attorney General of Canada, be prosecuted on indictment and, if convicted, is, in addition to any penalty otherwise provided, liable to a fine of not less than \$50,000 and not more than \$1,000,000 or to imprisonment for a term not exceeding five years, or to both.

Penalty on conviction

(4) A person that is convicted of an offence under this section is not liable to pay a penalty imposed under any of sections 280.1, 280.11 and 283 to 285.1 or under a regulation made under this Part for the same action unless a notice of assessment for that penalty was issued before the information or complaint giving rise to the conviction was laid or made.

Powers to Have Access to Records

In order to prosecute offences under the Acts various and similar access powers are granted under each Act to have court-authorized access.

Income Tax Act Access to Records Powers

Definitions

231 In sections 231.1 to 231.7,

authorized person means a person authorized by the Minister for the purposes of sections 231.1 to 231.5; (personne autorisée)

document includes money, a security and a record; (document)

dwelling-house means the whole or any part of a building or structure that is kept or occupied as a permanent or temporary residence and includes

(a) a building within the curtilage of a dwelling-house that is connected to it by a doorway or by a covered and enclosed passageway, and

(b) a unit that is designed to be mobile and to be used as a permanent or temporary residence and that is being used as such a residence; (maison d'habitation)

judge means a judge of a superior court having jurisdiction in the province where the matter arises or a judge of the Federal Court. (juge)

Inspections

231.1 (1) An authorized person may, at all reasonable times, for any purpose related to the administration or enforcement of this Act,

(a) inspect, audit or examine the books and records of a taxpayer and any document of the taxpayer or of any other person that relates or may relate to the information that is or should be in the books or records of the taxpayer or to any amount payable by the taxpayer under this Act, and

(b) examine property in an inventory of a taxpayer and any property or process of, or matter relating to, the taxpayer or any other person, an examination of which may assist the authorized person in determining the accuracy of the inventory of the taxpayer or in ascertaining the information that is or should be in the books or records of the taxpayer or any amount payable by the taxpayer under this Act,

and for those purposes the authorized person may

(c) subject to subsection 231.1(2), enter into any premises or place where any business is carried on, any property is kept, anything is done in connection with any business or any books or records are or should be kept, and

(d) require the owner or manager of the property or business and any other person on the premises or place to give the authorized person all reasonable assistance and to

answer all proper questions relating to the administration or enforcement of this Act and, for that purpose, require the owner or manager to attend at the premises or place with the authorized person.

Prior authorization

(2) Where any premises or place referred to in paragraph 231.1(1)(c) is a dwelling-house, an authorized person may not enter that dwelling-house without the consent of the occupant except under the authority of a warrant under subsection 231.1(3).

Application

(3) Where, on ex parte application by the Minister, a judge is satisfied by information on oath that
(a) there are reasonable grounds to believe that a dwelling-house is a premises or place referred to in paragraph 231.1(1)(c),
(b) entry into the dwelling-house is necessary for any purpose relating to the administration or enforcement of this Act, and
(c) entry into the dwelling-house has been, or there are reasonable grounds to believe that entry will be, refused,

the judge may issue a warrant authorizing an authorized person to enter the dwelling-house subject to such conditions as are specified in the warrant but, where the judge is not satisfied that entry into the dwelling-house is necessary for any purpose relating to the administration or enforcement of this Act, the judge may

- (d) order the occupant of the dwelling-house to provide to an authorized person reasonable access to any document or property that is or should be kept in the dwelling-house, and*
- (e) make such other order as is appropriate in the circumstances to carry out the purposes of this Act,*

to the extent that access was or may be expected to be refused and that the document or property is or may be expected to be kept in the dwelling-house.

Requirement to provide documents or information

231.2 (1) Notwithstanding any other provision of this Act, the Minister may, subject to subsection (2), for any purpose related to the administration or enforcement of this Act (including the collection of any amount payable under this Act by any person), of a listed international agreement or, for greater certainty, of a tax treaty with another country, by notice served personally or by registered or certified mail, require that any person provide, within such reasonable time as is stipulated in the notice,

- (a) any information or additional information, including a return of income or a supplementary return; or*
- (b) any document.*

Unnamed persons

(2) The Minister shall not impose on any person (in this section referred to as a “third party”) a requirement under subsection 231.2(1) to provide information or any document relating to one or more unnamed persons unless the Minister first obtains the authorization of a judge under subsection 231.2(3).

Judicial authorization

(3) A judge of the Federal Court may, on application by the Minister and subject to any conditions that the judge considers appropriate, authorize the Minister to impose on a third party a requirement under subsection (1) relating to an unnamed person or more than one unnamed person (in this section referred to as the “group”) if the judge is satisfied by information on oath that

- (a) the person or group is ascertainable; and
- (b) the requirement is made to verify compliance by the person or persons in the group with any duty or obligation under this Act.

Search warrant

231.3 (1) A judge may, on ex parte application by the Minister, issue a warrant in writing authorizing any person named therein to enter and search any building, receptacle or place for any document or thing that may afford evidence as to the commission of an offence under this Act and to seize the document or thing and, as soon as practicable, bring it before, or make a report in respect of it to, the judge or, where the judge is unable to act, another judge of the same court to be dealt with by the judge in accordance with this section.

Evidence in support of application

(2) An application under subsection 231.3(1) shall be supported by information on oath establishing the facts on which the application is based.

Evidence

(3) A judge may issue the warrant referred to in subsection 231.3(1) where the judge is satisfied that there are reasonable grounds to believe that

- (a) an offence under this Act was committed;
- (b) a document or thing that may afford evidence of the commission of the offence is likely to be found; and
- (c) the building, receptacle or place specified in the application is likely to contain such a document or thing.

Contents of warrant

(4) A warrant issued under subsection 231.3(1) shall refer to the offence for which it is issued, identify the building, receptacle or place to be searched and the person alleged to have committed the offence and it shall be reasonably specific as to any document or thing to be searched for and seized.

Seizure of document

(5) Any person who executes a warrant under subsection 231.3(1) may seize, in addition to the document or thing referred to in that subsection, any other document or thing that the person believes on reasonable grounds affords evidence of the commission of an offence under this Act and shall as soon as practicable bring the document or thing before, or make a report in respect thereof to, the judge who issued the warrant or, where the judge is unable to act, another judge of the same court to be dealt with by the judge in accordance with this section.

Retention of things seized

(6) Subject to subsection 231.3(7), where any document or thing seized under subsection 231.3(1) or 231.3(5) is brought before a judge or a report in respect thereof is made to a judge, the judge shall, unless the Minister waives retention, order that it be retained by the Minister, who shall take

reasonable care to ensure that it is preserved until the conclusion of any investigation into the offence in relation to which the document or thing was seized or until it is required to be produced for the purposes of a criminal proceeding.

Return of things seized

(7) Where any document or thing seized under subsection 231.3(1) or 231.3(5) is brought before a judge or a report in respect thereof is made to a judge, the judge may, of the judge's own motion or on summary application by a person with an interest in the document or thing on three clear days notice of application to the Deputy Attorney General of Canada, order that the document or thing be returned to the person from whom it was seized or the person who is otherwise legally entitled thereto if the judge is satisfied that the document or thing

- (a) will not be required for an investigation or a criminal proceeding; or*
- (b) was not seized in accordance with the warrant or this section.*

Access and copies

(8) The person from whom any document or thing is seized pursuant to this section is entitled, at all reasonable times and subject to such reasonable conditions as may be imposed by the Minister, to inspect the document or thing and to obtain one copy of the document at the expense of the Minister.

Inquiry

231.4 (1) The Minister may, for any purpose related to the administration or enforcement of this Act, authorize any person, whether or not the person is an officer of the Canada Revenue Agency, to make such inquiry as the person may deem necessary with reference to anything relating to the administration or enforcement of this Act.

Appointment of hearing officer

(2) Where the Minister, pursuant to subsection 231.4(1), authorizes a person to make an inquiry, the Minister shall forthwith apply to the Tax Court of Canada for an order appointing a hearing officer before whom the inquiry will be held.

Powers of hearing officer

(3) For the purposes of an inquiry authorized under subsection 231.4(1), a hearing officer appointed under subsection 231.4(2) in relation thereto has all the powers conferred on a commissioner by sections 4 and 5 of the Inquiries Act and that may be conferred on a commissioner under section 11 thereof.

When powers to be exercised

(4) A hearing officer appointed under subsection 231.4(2) in relation to an inquiry shall exercise the powers conferred on a commissioner by section 4 of the Inquiries Act in relation to such persons as the person authorized to make the inquiry considers appropriate for the conduct thereof but the hearing officer shall not exercise the power to punish any person unless, on application by the hearing officer, a judge of a superior or county court certifies that the power may be exercised in the matter disclosed in the application and the applicant has given to the person in respect of whom the applicant proposes to exercise the power 24 hours notice of the hearing of the application or such shorter notice as the judge considers reasonable.

Rights of witness at inquiry

(5) Any person who gives evidence in an inquiry authorized under subsection 231.4(1) is entitled to be represented by counsel and, on request made by the person to the Minister, to receive a transcript of the evidence given by the person.

Rights of person whose affairs are investigated

(6) Any person whose affairs are investigated in the course of an inquiry authorized under subsection 231.4(1) is entitled to be present and to be represented by counsel throughout the inquiry unless the hearing officer appointed under subsection 231.4(2) in relation to the inquiry, on application by the Minister or a person giving evidence, orders otherwise in relation to the whole or any part of the inquiry on the ground that the presence of the person and the person's counsel, or either of them, would be prejudicial to the effective conduct of the inquiry.

Copies

231.5 (1) Where any document is seized, inspected, audited, examined or provided under any of sections 231.1 to 231.4, the person by whom it is seized, inspected, audited or examined or to whom it is provided or any officer of the Canada Revenue Agency may make, or cause to be made, one or more copies thereof and, in the case of an electronic document, make or cause to be made a print-out of the electronic document, and any document purporting to be certified by the Minister or an authorized person to be a copy of the document, or to be a print-out of an electronic document, made pursuant to this section is evidence of the nature and content of the original document and has the same probative force as the original document would have if it were proven in the ordinary way.

Compliance

(2) No person shall, physically or otherwise, interfere with, hinder or molest an official (in this subsection having the meaning assigned by subsection 241(10)) doing anything that the official is authorized to do under this Act or attempt to interfere with, hinder or molest any official doing or prevent or attempt to prevent an official from doing, anything that the official is authorized to do under this Act, and every person shall, unless the person is unable to do so, do everything that the person is required to do by or under subsection (1) or sections 231.1 to 231.4.

Definition of foreign-based information or document

231.6 (1) For the purposes of this section, foreign-based information or document means any information or document that is available or located outside Canada and that may be relevant to the administration or enforcement of this Act, including the collection of any amount payable under this Act by any person.

Requirement to provide foreign-based information

(2) Notwithstanding any other provision of this Act, the Minister may, by notice served personally or by registered or certified mail, require that a person resident in Canada or a non-resident person carrying on business in Canada provide any foreign-based information or document.

Notice

(3) The notice referred to in subsection 231.6(2) shall set out

- (a) a reasonable period of time of not less than 90 days for the production of the information or document;*
- (b) a description of the information or document being sought; and*

(c) the consequences under subsection 231.6(8) to the person of the failure to provide the information or documents being sought within the period of time set out in the notice.

Review of foreign information requirement

(4) The person on whom a notice of a requirement is served under subsection 231.6(2) may, within 90 days after the service of the notice, apply to a judge for a review of the requirement.

Powers on review

(5) On hearing an application under subsection 231.6(4) in respect of a requirement, a judge may
(a) confirm the requirement;
(b) vary the requirement as the judge considers appropriate in the circumstances; or
(c) set aside the requirement if the judge is satisfied that the requirement is unreasonable.

Idem

(6) For the purposes of paragraph 231.6(5)(c), the requirement to provide the information or document shall not be considered to be unreasonable because the information or document is under the control of or available to a non-resident person that is not controlled by the person served with the notice of the requirement under subsection 231.6(2) if that person is related to the non-resident person.

Time during consideration not to count

(7) The period of time between the day on which an application for review of a requirement is made pursuant to subsection 231.6(4) and the day on which the review is decided shall not be counted in the computation of
(a) the period of time set out in the notice of the requirement; and
(b) the period of time within which an assessment may be made pursuant to subsection 152(4).

Consequence of failure

(8) If a person fails to comply substantially with a notice served under subsection 231.6(2) and if the notice is not set aside by a judge pursuant to subsection 231.6(5), any court having jurisdiction in a civil proceeding relating to the administration or enforcement of this Act shall, on motion of the Minister, prohibit the introduction by that person of any foreign-based information or document covered by that notice.

Compliance order

231.7 (1) On summary application by the Minister, a judge may, notwithstanding subsection 238(2), order a person to provide any access, assistance, information or document sought by the Minister under section 231.1 or 231.2 if the judge is satisfied that

- (a) the person was required under section 231.1 or 231.2 to provide the access, assistance, information or document and did not do so; and*
- (b) in the case of information or a document, the information or document is not protected from disclosure by solicitor-client privilege (within the meaning of subsection 232(1)).*

Notice required

(2) An application under subsection (1) must not be heard before the end of five clear days from the day the notice of application is served on the person against whom the order is sought.

Judge may impose conditions

(3) A judge making an order under subsection (1) may impose any conditions in respect of the order that the judge considers appropriate.

Contempt of court

(4) If a person fails or refuses to comply with an order, a judge may find the person in contempt of court and the person is subject to the processes and the punishments of the court to which the judge is appointed.

Appeal

(5) An order by a judge under subsection (1) may be appealed to a court having appellate jurisdiction over decisions of the court to which the judge is appointed. An appeal does not suspend the execution of the order unless it is so ordered by a judge of the court to which the appeal is made.

Definitions

232 (1) In this section,

custodian means a person in whose custody a package is placed pursuant to subsection 232(3); (gardien)

judge means a judge of a superior court having jurisdiction in the province where the matter arises or a judge of the Federal Court; (juge)

lawyer means, in the province of Quebec, an advocate or notary and, in any other province, a barrister or solicitor; (avocat)

officer means a person acting under the authority conferred by or under sections 231.1 to 231.5; (fonctionnaire)

solicitor-client privilege means the right, if any, that a person has in a superior court in the province where the matter arises to refuse to disclose an oral or documentary communication on the ground that the communication is one passing between the person and the person's lawyer in professional confidence, except that for the purposes of this section an accounting record of a lawyer, including any supporting voucher or cheque, shall be deemed not to be such a communication. (privilège des communications entre client et avocat)

Solicitor-client privilege defence

(2) Where a lawyer is prosecuted for failure to comply with a requirement under section 231.2 with respect to information or a document, the lawyer shall be acquitted if the lawyer establishes to the satisfaction of the court

(a) that the lawyer, on reasonable grounds, believed that a client of the lawyer had a solicitor-client privilege in respect of the information or document; and

(b) that the lawyer communicated to the Minister, or some person duly authorized to act for the Minister, the lawyer's refusal to comply with the requirement together with a

claim that a named client of the lawyer had a solicitor-client privilege in respect of the information or document.

Seizure of certain documents where privilege claimed

(3) Where, pursuant to section 231.3, an officer is about to seize a document in the possession of a lawyer and the lawyer claims that a named client of the lawyer has a solicitor-client privilege in respect of that document, the officer shall, without inspecting, examining or making copies of the document,

- (a) seize the document and place it, together with any other document in respect of which the lawyer at the same time makes the same claim on behalf of the same client, in a package and suitably seal and identify the package; and*
- (b) place the package in the custody of the sheriff of the district or county in which the seizure was made or, if the officer and the lawyer agree in writing on a person to act as custodian, in the custody of that person.*

Examination of certain documents where privilege claimed

(3.1) Where, pursuant to section 231.1, an officer is about to inspect or examine a document in the possession of a lawyer or where, pursuant to section 231.2, the Minister has required provision of a document by a lawyer, and the lawyer claims that a named client or former client of the lawyer has a solicitor-client privilege in respect of the document, no officer shall inspect or examine the document and the lawyer shall

- (a) place the document, together with any other document in respect of which the lawyer at the same time makes the same claim on behalf of the same client, in a package and suitably seal and identify the package or, if the officer and the lawyer agree, allow the pages of the document to be initialed and numbered or otherwise suitably identified; and*
- (b) retain it and ensure that it is preserved until it is produced to a judge as required under this section and an order is issued under this section in respect of the document.*

Application to judge

(4) Where a document has been seized and placed in custody under subsection 232(3) or is being retained under subsection 232(3.1), the client, or the lawyer on behalf of the client, may

- (a) within 14 days after the day the document was so placed in custody or commenced to be so retained apply, on three clear days notice of motion to the Deputy Attorney General of Canada, to a judge for an order*
 - (i) fixing a day, not later than 21 days after the date of the order, and place for the determination of the question whether the client has a solicitor-client privilege in respect of the document, and*
 - (ii) requiring the production of the document to the judge at that time and place;*
- (b) serve a copy of the order on the Deputy Attorney General of Canada and, where applicable, on the custodian within 6 days of the day on which it was made and, within the same time, pay to the custodian the estimated expenses of transporting the document to and from the place of hearing and of safeguarding it; and*
- (c) if the client or lawyer has proceeded as authorized by paragraph 232(4)(b), apply at the appointed time and place for an order determining the question.*

Disposition of application

(5) An application under paragraph 232(4)(c) shall be heard in camera, and on the application

- (a) the judge may, if the judge considers it necessary to determine the question, inspect the document and, if the judge does so, the judge shall ensure that it is repackaged and resealed; and
 - (b) the judge shall decide the matter summarily and,
 - (i) if the judge is of the opinion that the client has a solicitor-client privilege in respect of the document, shall order the release of the document to the lawyer, and
 - (ii) if the judge is of the opinion that the client does not have a solicitor-client privilege in respect of the document, shall order
 - (A) that the custodian deliver the document to the officer or some other person designated by the Commissioner of Revenue, in the case of a document that was seized and placed in custody under subsection 232(3), or
 - (B) that the lawyer make the document available for inspection or examination by the officer or other person designated by the Commissioner of Revenue, in the case of a document that was retained under subsection 232(3.1),
- and the judge shall, at the same time, deliver concise reasons in which the judge shall identify the document without divulging the details thereof.

Order to deliver or make available

- (6) Where a document has been seized and placed in custody under subsection 232(3) or where a document is being retained under subsection 232(3.1) and a judge, on the application of the Attorney General of Canada, is satisfied that neither the client nor the lawyer has made an application under paragraph 232(4)(a) or, having made that application, neither the client nor the lawyer has made an application under paragraph 232(4)(c), the judge shall order
- (a) that the custodian deliver the document to the officer or some other person designated by the Commissioner of Revenue, in the case of a document that was seized and placed in custody under subsection 232(3); or
 - (b) that the lawyer make the document available for inspection or examination by the officer or other person designated by the Commissioner of Revenue, in the case of a document that was retained under subsection 232(3.1).

Delivery by custodian

(7) The custodian shall

- (a) deliver the document to the lawyer
 - (i) in accordance with a consent executed by the officer or by or on behalf of the Deputy Attorney General of Canada or the Commissioner of Revenue, or
 - (ii) in accordance with an order of a judge under this section; or
- (b) deliver the document to the officer or some other person designated by the Commissioner of Revenue
 - (i) in accordance with a consent executed by the lawyer or the client, or
 - (ii) in accordance with an order of a judge under this section.

Continuation by another judge

- (8) Where the judge to whom an application has been made under paragraph 232(4)(a) cannot for any reason act or continue to act in the application under paragraph 232(4)(c), the application under paragraph 232(4)(c) may be made to another judge.

Costs

(9) No costs may be awarded on the disposition of any application under this section.

Directions

(10) Where any question arises as to the course to be followed in connection with anything done or being done under this section, other than subsection 232(2), 232(3) or 232(3.1), and there is no direction in this section with respect thereto, a judge may give such direction with regard thereto as, in the judge's opinion, is most likely to carry out the object of this section of allowing solicitor-client privilege for proper purposes.

Prohibition

(11) The custodian shall not deliver a document to any person except in accordance with an order of a judge or a consent under this section or except to any officer or servant of the custodian for the purposes of safeguarding the document.

Idem

(12) No officer shall inspect, examine or seize a document in the possession of a lawyer without giving the lawyer a reasonable opportunity of making a claim under this section.

Authority to make copies

(13) At any time while a document is in the custody of a custodian under this section, a judge may, on an ex parte application of the lawyer, authorize the lawyer to examine or make a copy of the document in the presence of the custodian or the judge by an order that shall contain such provisions as may be necessary to ensure that the document is repackaged and that the package is resealed without alteration or damage.

Waiver of claim of privilege

(14) Where a lawyer has, for the purpose of subsection 232(2), 232(3) or 232(3.1), made a claim that a named client of the lawyer has a solicitor-client privilege in respect of information or a document, the lawyer shall at the same time communicate to the Minister or some person duly authorized to act for the Minister the address of the client last known to the lawyer so that the Minister may endeavour to advise the client of the claim of privilege that has been made on the client's behalf and may thereby afford the client an opportunity, if it is practicable within the time limited by this section, of waiving the claim of privilege before the matter is to be decided by a judge or other tribunal.

Compliance

(15) No person shall hinder, molest or interfere with any person doing anything that that person is authorized to do by or pursuant to this section or prevent or attempt to prevent any person doing any such thing and, notwithstanding any other Act or law, every person shall, unless the person is unable to do so, do everything the person is required to do by or pursuant to this section.

Excise Tax Act (GST) Access to Records Powers

Definitions

287 In sections 288 to 292,

authorized person means a person who is authorized by the Minister for the purposes of sections 288 to 292; (personne autorisée)

dwelling-house means the whole or any part of a building or structure that is kept or occupied as a permanent or temporary residence, and includes

- (a) a building within the curtilage of a dwelling-house that is connected to it by a doorway or by a covered and enclosed passageway, and*
- (b) a unit that is designed to be mobile and to be used as a permanent or temporary residence and that is being used as such a residence; (maison d'habitation)*

judge means a judge of a superior court having jurisdiction in the province where the matter arises or a judge of the Federal Court. (juge)

Inspections

288 (1) An authorized person may, at all reasonable times, for any purpose related to the administration or enforcement of this Part, inspect, audit or examine the documents, property or processes of a person that may be relevant in determining the obligations of that or any other person under this Part or the amount of any rebate or refund to which that or any other person is entitled and, for those purposes, the authorized person may

- (a) subject to subsection (2), enter any premises or place where any business or commercial activity is carried on, any property is kept, anything is done in connection with any business or commercial activity or any documents are or should be kept; and*
- (b) require the owner or manager of the property, business or commercial activity and any other person on the premises or in the place to give to the authorized person all reasonable assistance and to answer all proper questions relating to the administration or enforcement of this Part and, for that purpose, require the owner or manager to attend at the premises or place with the authorized person.*

Prior authorization

(2) Where any premises or place referred to in paragraph (1)(a) is a dwelling-house, an authorized person may not enter that dwelling-house without the consent of the occupant, except under the authority of a warrant issued under subsection (3).

Application

(3) Where, on ex parte application by the Minister, a judge is satisfied by information on oath that

- (a) there are reasonable grounds to believe that a dwelling-house is a premises or place referred to in paragraph (1)(a),*
- (b) entry into the dwelling-house is necessary for any purpose relating to the administration or enforcement of this Part, and*
- (c) entry into the dwelling-house has been, or there are reasonable grounds to believe that entry will be, refused,*

the judge may issue a warrant authorizing an authorized person to enter the dwelling-house subject to such conditions as are specified in the warrant, but, where the judge is not satisfied that entry into the dwelling-house is necessary for any purpose related to the administration or enforcement of this Part, the judge may

- (d) order the occupant of the dwelling-house to provide an authorized person with reasonable access to any document or property that is or should be kept in the dwelling-house, and*

(e) make such other order as is appropriate in the circumstances to carry out the purposes of this Part,

to the extent that access was or may be expected to be refused and that the document or property is or may be expected to be kept in the dwelling-house.

Requirement to provide documents or information

289 (1) Despite any other provision of this Part, the Minister may, subject to subsection (2), for any purpose related to the administration or enforcement of a listed international agreement or this Part, including the collection of any amount payable or remittable under this Part by any person, by notice served personally or by registered or certified mail, require that any person provide the Minister, within any reasonable time that is stipulated in the notice, with

- (a) any information or additional information, including a return under this Part; or*
- (b) any document.*

Unnamed persons

(2) The Minister shall not impose on any person (in this section referred to as a “third party”) a requirement under subsection (1) to provide information or any document relating to one or more unnamed persons unless the Minister first obtains the authorization of a judge under subsection (3).

Judicial authorization

(3) A judge of the Federal Court may, on application by the Minister and subject to any conditions that the judge considers appropriate, authorize the Minister to impose on a third party a requirement under subsection (1) relating to an unnamed person or more than one unnamed person (in this section referred to as the “group”) if the judge is satisfied by information on oath that

- (a) the person or group is ascertainable; and*
- (b) the requirement is made to verify compliance by the person or persons in the group with any duty or obligation under this Part.*

Compliance order

289.1 (1) On summary application by the Minister, a judge may, despite subsection 326(2), order a person to provide any access, assistance, information or document sought by the Minister under section 288 or 289 if the judge is satisfied that

- (a) the person was required under section 288 or 289 to provide the access, assistance, information or document and did not do so; and*
- (b) in the case of information or a document, the information or document is not protected from disclosure by solicitor-client privilege (within the meaning of subsection 293(1)).*

Notice required

(2) An application under subsection (1) must not be heard before the end of five clear days from the day the notice of application is served on the person against whom the order is sought.

Judge may impose conditions

(3) The judge making an order under subsection (1) may impose any conditions in respect of the order that the judge considers appropriate.

Contempt of court

(4) If a person fails or refuses to comply with an order, a judge may find the person in contempt of court and the person is subject to the processes and the punishments of the court to which the judge is appointed.

Appeal

(5) An order by a judge under subsection (1) may be appealed to a court having appellate jurisdiction over decisions of the court to which the judge is appointed. An appeal does not suspend the execution of the order unless it is so ordered by a judge of the court to which the appeal is made.

Search warrant

290 (1) A judge may, on ex parte application by the Minister, issue a warrant authorizing any person named therein to enter and search any building, receptacle or place for any document or thing that may afford evidence of the commission of an offence under this Part and to seize the document or thing and, as soon as is practicable, bring it before, or make a report in respect thereof to, the judge or, where that judge is unable to act, another judge of the same court, to be dealt with by the judge in accordance with this section.

Evidence on oath

(2) An application under subsection (1) shall be supported by information on oath establishing the facts on which the application is based.

Issue of warrant

(3) A judge may issue a warrant referred to in subsection (1) where the judge is satisfied that there are reasonable grounds to believe that

- (a) an offence under this Part has been committed;*
- (b) a document or thing that may afford evidence of the commission of the offence is likely to be found; and*
- (c) the building, receptacle or place specified in the application is likely to contain such a document or thing.*

Contents of warrant

(4) A warrant issued under subsection (1) shall refer to the offence for which it is issued, identify the building, receptacle or place to be searched and the person who is alleged to have committed the offence, and it shall be reasonably specific as to any document or thing to be searched for and seized.

Seizure of document

(5) Any person who executes a warrant issued under subsection (1) may seize, in addition to the document or thing referred to in that subsection, any other document or thing that the person believes on reasonable grounds affords evidence of the commission of an offence under this Part and shall, as soon as is practicable, bring the document or thing before, or make a report in respect thereof to, the judge who issued the warrant or, where that judge is unable to act, another judge of the same court, to be dealt with by the judge in accordance with this section.

Retention of things seized

(6) Subject to subsection (7), where any document or thing seized under subsection (1) or (5) is brought before a judge or a report in respect thereof is made to a judge, the judge shall, unless the Minister waives retention, order that it be retained by the Minister, who shall take reasonable care to ensure that it is preserved until the conclusion of any investigation into the offence in relation to which the document or thing was seized or until it is required to be produced for the purposes of a criminal proceeding.

Return of things seized

(7) Where any document or thing seized under subsection (1) or (5) is brought before a judge or a report in respect thereof is made to a judge, the judge may, on the judge's own motion or on summary application by a person with an interest in the document or thing on three clear days notice of application to the Deputy Attorney General of Canada, order that the document or thing be returned to the person from whom it was seized or the person who is otherwise legally entitled thereto, if the judge is satisfied that the document or thing

- (a) will not be required for an investigation or a criminal proceeding; or
- (b) was not seized in accordance with the warrant or this section.

Access and copies

(8) The person from whom any document or thing is seized under this section is entitled, at all reasonable times and subject to such reasonable conditions as may be imposed by the Minister, to inspect the document or thing and, in the case of a document, to obtain one copy of the document at the expense of the Minister.

Copies

291 (1) If any document is seized, inspected, audited, examined or provided under any of sections 276 and 288 to 290, the person by whom it is seized, inspected, audited or examined or to whom it is provided or any officer of the Agency may make or cause to be made one or more copies of it and, in the case of an electronic document, make or cause to be made a print-out of the electronic document, and any document purporting to be certified by the Minister or an authorized person to be a copy of the document, or to be a print-out of an electronic document, made under this section is evidence of the nature and content of the original document and has the same probative force as the original document would have if it were proven in the ordinary way.

Compliance

(2) No person shall, physically or otherwise, do or attempt to do any of the following:

- (a) interfere with, hinder or molest any official (in this subsection having the same meaning as in section 295) doing anything the official is authorized to do under this Part, or
- (b) prevent any official from doing anything the official is authorized to do under this Part

and every person shall, unless the person is unable to do so, do everything the person is required to do by or pursuant to subsection (1) or any of sections 288 to 290 and 292.

Meaning of foreign-based information or document

292 (1) For the purposes of this section, foreign-based information or document means any information or document that is available or located outside Canada and that may be relevant to the administration or enforcement of this Part, including the collection of any amount payable or remittable under this Part by any person.

Requirement to provide foreign-based information

(2) Notwithstanding any other provision of this Part, the Minister may, by notice served personally or by registered or certified mail, require a person resident in Canada or a non-resident person who carries on business in Canada to provide any foreign-based information or document.

Notice

(3) A notice referred to in subsection (2) shall set out

- (a) a reasonable period of time of not less than ninety days for the provision of the information or document;
- (b) a description of the information or document being sought; and
- (c) the consequences under subsection (8) to the person of the failure to provide the information or document being sought within the period of time set out in the notice.

Review of foreign information requirement

(4) The person on whom a notice of a requirement is served under subsection (2) may, within ninety days after the service of the notice, apply to a judge for a review of the requirement.

Powers on review

(5) On hearing an application under subsection (4) in respect of a requirement, a judge may

- (a) confirm the requirement;
- (b) vary the requirement if satisfied that it is appropriate in the circumstances; or
- (c) set aside the requirement if satisfied that it is unreasonable.

Idem

(6) For the purposes of subsection (5), a requirement to provide information or a document shall not be considered to be unreasonable because the information or document is under the control of or available to a non-resident person that is not controlled by the person served with the notice of the requirement under subsection (2) if that person is related to the non-resident person.

Time during consideration not to count

(7) The period of time between the day an application for the review of a requirement is made under subsection (4) and the day the review is decided shall not be counted in the computation of

- (a) the period of time set out in the notice of the requirement; and
- (b) the period of time within which an assessment may be made under section 296 or 297.

Consequence of failure

(8) If a person fails to comply substantially with a notice served under subsection (2) and if the notice is not set aside under subsection (5), any court having jurisdiction in a civil proceeding relating to the administration or enforcement of this Part shall, on motion of the Minister, prohibit the introduction by that person of any foreign-based information or document covered by that notice.

Definitions

293 (1) In this section,

custodian means a person in whose custody a package is placed under subsection (3); (*gardien*)

judge means a judge of a superior court having jurisdiction in the province where the matter arises or a judge of the Federal Court; (juge)

lawyer means, in the Province of Quebec, an advocate, lawyer or notary and, in any other province, a barrister or solicitor; (avocat)

officer means a person acting under the authority conferred by any of sections 276 and 288 to 291; (fonctionnaire)

solicitor-client privilege means the right, if any, that a person has in a superior court in the province where the matter arises to refuse to disclose an oral or documentary communication on the ground that the communication is one passing between the person and the person's lawyer in professional confidence, except that, for the purposes of this section, an accounting record of a lawyer, including any supporting invoice, voucher or cheque, shall be deemed not to be such a communication. (privilège des communications entre client et avocat)

Solicitor-client privilege defence

(2) Where a lawyer is prosecuted for failure to comply with a requirement under section 289 with respect to information or a document, the lawyer shall be acquitted if the lawyer establishes to the satisfaction of the court that the lawyer

(a) believed on reasonable grounds that a client of the lawyer had a solicitor-client privilege in respect of the information or document; and

(b) communicated to the Minister, or to a person duly authorized to act for the Minister, the lawyer's refusal to comply with the requirement, together with a claim that a named client of the lawyer had a solicitor-client privilege in respect of the information or document.

Seizure where privilege claimed

(3) Where, under section 290, an officer is about to seize a document in the possession of a lawyer and the lawyer claims that a named client of the lawyer has a solicitor-client privilege in respect of the document, the officer shall, without inspecting, examining or making copies of the document,

(a) seize the document and place it, together with any other document in respect of which the lawyer at the same time makes the same claim on behalf of the same client, in a package and suitably seal and identify the package; and

(b) place the package in the custody of the sheriff of the district or county in which the seizure was made or, if the officer and the lawyer agree in writing on a person to act as custodian, in the custody of that person.

Retention where privilege claimed

(4) If, under section 288, an officer is about to inspect or examine a document in the possession of a lawyer or if, under section 289, the Minister has required the provision of a document by a lawyer, and the lawyer claims that a named client of the lawyer has a solicitor-client privilege in respect of the document, no officer shall inspect or examine the document and the lawyer shall

(a) place the document, together with any other document in respect of which the lawyer at the same time makes the same claim on behalf of the same client, in a package and suitably seal and identify the package or, if the officer and the lawyer agree, allow the pages of the document to be initialed and numbered or otherwise suitably identified; and
(b) retain it and ensure that it is preserved until it is produced to a judge as required under this section and an order is issued under this section in respect of the document.

Application to judge

(5) Where a document is seized and placed in custody under subsection (3) or is retained under subsection (4), the client, or the lawyer on behalf of the client, may

(a) within fourteen days after the day the document was so placed in custody or began to be so retained apply, on three clear days notice of motion to the Deputy Attorney General of Canada, to a judge for an order

(i) fixing a day, not later than twenty-one days after the date of the order, and a place for the determination of the question whether the client has a solicitor-client privilege in respect of the document, and

(ii) requiring the production of the document to the judge at that time and place;

(b) serve a copy of the order on the Deputy Attorney General of Canada and, where applicable, on the custodian within six days after the day it was made and, within the same time, pay to the custodian the estimated expenses of transporting the document to and from the place of hearing and of safeguarding it; and

(c) if the client or lawyer has proceeded as authorized by paragraph (b), apply at the appointed time and place for an order determining the question.

Disposition of application

(6) An application made under paragraph (5)(c) shall be heard in camera and, on the application, the judge

(a) may, if the judge considers it necessary to determine the question, inspect the document and, if the judge does so, the judge shall ensure that it is repackaged and resealed; and

(b) shall decide the matter summarily, and if the judge is of the opinion that the client

(i) has a solicitor-client privilege in respect of the document, the judge shall order the release of the document to the lawyer, and

(ii) does not have a solicitor-client privilege in respect of the document, the judge shall order that

(A) the custodian deliver the document to the officer or some other person designated by the Commissioner in the case of a document that was seized and placed in custody under subsection (3), or

(B) the lawyer make the document available for inspection or examination by the officer or other person designated by the Commissioner in the case of a document that was retained under subsection (4),

and shall, at the same time, deliver concise reasons in which the document shall be identified without divulging any of its details.

Order on application

(7) Where a document is seized and placed in custody under subsection (3) or is retained under subsection (4) and a judge, on the application of the Attorney General of Canada, is satisfied that neither the client nor the lawyer has made an application under paragraph (5)(a) or, having made such an application, that neither the client nor the lawyer has made an application under paragraph (5)(c), the judge shall order that

- (a) the custodian deliver the document to the officer or some other person designated by the Commissioner in the case of a document that was seized and placed in custody under subsection (3); or*
- (b) the lawyer make the document available for inspection or examination by the officer or other person designated by the Commissioner in the case of a document that was retained under subsection (4).*

Delivery by custodian

(8) The custodian shall deliver the document

(a) to the lawyer

- (i) in accordance with a consent executed by the officer or by or on behalf of the Deputy Attorney General of Canada or the Commissioner, or*
- (ii) in accordance with an order of a judge under this section; or*

(b) to the officer or some other person designated by the Commissioner

- (i) in accordance with a consent executed by the lawyer or the client, or*
- (ii) in accordance with an order of a judge under this section.*

Continuation by another judge

(9) Where the judge to whom an application is made under paragraph (5)(a) cannot for any reason act or continue to act in the application under paragraph (5)(c), the application under paragraph (5)(c) may be made to another judge.

Costs

(10) No costs may be awarded on the disposition of any application under this section.

Directions

(11) Where any question arises as to the course to be followed in connection with anything done or being done under this section, other than subsection (2), (3) or (4), and there is no direction in this section with respect thereto, a judge may give such direction with regard thereto as, in the judge's opinion, is most likely to carry out the object of this section of allowing solicitor-client privilege for proper purposes.

Prohibition

(12) The custodian shall not deliver a document to any person except in accordance with an order of a judge or a consent under this section or except to any officer or servant of the custodian for the purposes of safeguarding the document.

Idem

(13) No officer shall inspect, examine or seize a document in the possession of a lawyer without giving the lawyer a reasonable opportunity to make a claim under this section.

Copies

(14) At any time while a document is in the custody of a custodian under this section, a judge may, on ex parte application of the lawyer, by order, authorize the lawyer to examine or make a copy of the document in the presence of the custodian or the judge, which order shall contain such provisions as may be necessary to ensure that the document is repackaged and that the package is resealed without alteration or damage.

Waiver of privilege

(15) Where, for the purpose of subsection (2), (3) or (4), a lawyer makes a claim that a named client of the lawyer has a solicitor-client privilege in respect of information or a document, the lawyer shall at the same time communicate to the Minister or to a person duly authorized to act for the Minister the address of the client last known to the lawyer so that the Minister may endeavour to advise the client of the claim of privilege that has been made on the client's behalf and thereby give the client an opportunity, if it is practicable within the time limited by this section, to waive the claim of privilege before the matter is to be decided by a judge or other tribunal.

Compliance

(16) No person shall hinder, molest or interfere with any person doing anything that the person is authorized to do under this section or prevent or attempt to prevent any person doing any such thing and, notwithstanding any other Act or law, every person shall, unless the person is unable to do so, do everything the person is required to do under this section.

The Listing of ITA/ETA Offences – Per Their Manual

The below is what the CRA Criminal Investigations Manual details as the criminal offences a taxpayer can be found liable for, followed with a reference table:

2.3 Offences and Powers

(1) Every person who commits an offence under subsection 239(1) of the ITA or subsection 327(1) of the ETA is guilty of an offence, and in addition to administrative penalties, is liable on **summary conviction** to a fine of not less than 50% and not more than 200% of the amount of the tax that was sought to be evaded, or to both fine and imprisonment for a term not exceeding two years. Every person who obtains or claims a refund or credit, to which the person is not entitled, is also liable for a fine and imprisonment as stated above, under subsection 239(1.1) of the ITA and paragraph 327(1)(d) of the ETA. Refer to **Chapter 15 of the Criminal Investigations Manual** for more information on fraudulent returns and fraudulent refunds.

(2) Every person who is charged with an offence may, at the election of the Attorney General of Canada, be prosecuted on **indictment** and, if convicted, in addition to administrative penalties, be liable to a fine of not less than 100% and not more than 200% of the tax evaded (or amount of refund or credit claimed), and imprisonment for a term not exceeding five years as per subsection 239(2) of the ITA. Subsection 327(2) of the ETA is similar to subsection 239(2) of the ITA, however, a person may be liable to a fine of not less than \$2,000 and not more than \$25,000 where the amount that was sought to be evaded cannot be ascertained.

(3) Where a person is convicted under section 239 of the ITA or 327 of the ETA, administrative penalties cannot be applied unless the person is assessed for the penalties before the information or complaint is laid or made as per subsection 239(3) of the ITA and subsection 327(3) of the ETA.

(4) Where a corporation commits an offence, the officer, director or agent of the corporation who directed, authorized, assented to, acquiesced in or participated in the commission of an offence, is a party to and guilty of the offence. The officer is liable on conviction to the punishment provided for the offence, whether or not the corporation has been prosecuted or convicted. Refer to section 242 of the ITA and section 330 of the ETA.

(5) Section 244 of the ITA and section 332 of the ETA deals with the limitations for prosecution periods as well as evidence. It should be noted that subsection 244(4) of the ITA and 332(4) of the ETA set out the limitation of prosecutions and states that an information or complaint relating to summary convictions, in respect of an offence under the ITA or the ETA must be laid or made on or before the day that is 8 years after the day on which the matter of the information or complaint arose. When the charges are laid under indictment, the time limitation does not apply.

<i>(6) Offences and Powers - Legislation Comparison Provision</i>	<i>Income Tax Act</i>	<i>Excise Tax Act</i>
<i>Failure to file a return or failure to comply with an obligation</i>	238(1)	326(1)
<i>Failure to make books and records available</i>	238(2)	326(2)
<i>Court order for compliance</i>	238(2)	326(2)
<i>False or deceptive statements</i>	239(1)(a)	327(1)(a)
<i>Destruction of records</i>	239(1)(b)	327(1)(b)(i)
<i>False entries</i>	239(1)(c)	327(1)(b)(ii)
<i>Omission from records</i>	239(1)(c)	327(1)(b)(ii)
<i>Wilful evasion</i>	239(1)(d)	327(1)(c)
<i>False refund or rebate</i>	239(1.1)	327(1)(d)
<i>Conspiracy</i>	239(1)(e)	327(1)(e)
<i>Prosecution by indictment</i>	239(2)	327(2)
<i>Communicating information</i>	239(2.2)	328
<i>Administrative penalty on conviction</i>	239(3)	327(3)
<i>Stay of Appeal</i>	239(4)	327(4)
<i>Failure to pay/collect/remit</i>		329(1)
<i>General offence</i>		329(2)
<i>Officers of corporations</i>	242	330
<i>Power to decrease punishment</i>	243	331
<i>Information or complaint</i>	244(1)-(2)-(3)	332(1)
<i>Period of limitation for prosecution</i>	244(4)	332(4)

The Ontario and British Columbia Income Tax Acts, with Referenced Powers

The below are bridging provisions in the Ontario and British Columbia Income Tax Acts that allow provincial tax officials to have the same powers as under the federal ITA:

Ontario:

Inspections, privilege, information returns and corporate execution

40. (1) Sections 231 to 231.5, 232, 233 and 236 of the Federal Act and sections 158 to 160 of the Provincial Offences Act apply for the purposes of this Act. R.S.O. 1990, c. I.2, s. 40 (1); 2004, c. 16, s. 3.

Idem

(2) Where a warrant is issued under section 158 of the Provincial Offences Act, the provisions of sections 158 to 160 of that Act, and not sections 231 to 231.5 and 232 of the Federal Act, apply for the purposes of this Act. R.S.O. 1990, c. I.2, s. 40 (2); 2004, c. 16, s. 3.

Penalty for failure to comply with regulations

41. (1) Every person who fails to comply with a regulation made under paragraph 221 (1) (d) or (e) of the Federal Act, as it applies by virtue of subsection 29 (2) of this Act, is liable in respect of each failure to so comply to a penalty of \$10 a day for each day of default but not more than \$2,500 in all. R.S.O. 1990, c. I.2, s. 41 (1); 2004, c. 16, s. 3.

Idem

(2) Every person who fails to comply with a regulation made under section 29 or incorporated by reference by virtue of subsection (2) thereof is liable to a penalty of \$10 a day for each day of default but not more than \$2,500 in all. R.S.O. 1990, c. I.2, s. 41 (2); 2004, c. 16, s. 3.

British Columbia:

Application of federal provisions — inspections, privilege, information returns and corporate execution

59 Sections 231 to 231.5, 231.7, 232, 233 (1) and 236 of the federal Act apply for the purposes of this Act.

Offence and penalty

61 (1) A person who fails to file a return as and when required by or under this Act or a regulation, or by or under a provision of the federal Act or of the federal regulations, as that provision applies for the purposes of this Act, or who fails to comply with any of sections 153 (1), 227 (5), 230 (3), (4) and (6), 231 to 231.5 and 232 of the federal Act, as they apply for the purposes of this Act, is guilty of an offence and, in addition to any penalty otherwise provided, is liable on summary conviction to

(a) a fine of at least \$1 000 and not exceeding \$25 000, or

(b) both the fine described in paragraph (a) and imprisonment for a term not exceeding 12 months.

(2) Section 238 (2) of the federal Act applies for the purposes of this Act.

(3) If a person is convicted under this section for failure to comply with a provision of this Act or a regulation or a provision of the federal Act or of the federal regulations that applies for the purposes of this Act, the person is not liable to a penalty under any of section 162 (1) to (3), (5), (7), (7.01), (7.02), (7.2), (7.3) or (11) or 227 (8), (9) or (9.5) of the federal Act, as those subsections apply for the purposes of this Act, for the same failure unless the person was assessed for that penalty or that penalty was demanded from the person before the information or complaint giving rise to the conviction was laid or made.

Audit Evidence Findings cannot Lead to Criminal Investigation

Two Supreme Court decisions of *Jarvis* and *Ling* on November 21, 2002 held that there was an inability of a taxpayer to exercise their Charter rights when they had been audited and the findings used to pursue penal consequences since the taxpayers could not self-incriminate themselves complying with a strict regulatory scheme to disclose in a tax audit. As a consequence in both cases the taxpayer evidence collected during audit, in breach of Charter rights was disregarded resulting in acquittal. In this regard, the current Criminal Investigations Manual reads with respect to referrals from audit:

3.6 Review of Referrals for Potential Charter Violations

1) When a referral is received, the investigator's review must not only cover the file potential but also any possible violations of the taxpayer's rights under the Charter of Rights and Freedoms during the civil process.

2) The investigator's review should include, among other things, all steps that the referring auditor undertook especially ones that occurred after the auditor suspected fraud. Did the auditor deviate from the original audit plan? Are the reasons documented?

3) Investigators should make sure that auditors have documented the information that they have prepared and gathered to the point when they referred the case (or considered referring the case) to Criminal Investigations. This snapshot will help demonstrate what information the CRA collected using its authorities under the ITA/ETA and what information investigators obtained using the tools that they are permitted to use once a criminal investigation has begun.

4) If investigators, in consultation with their team leader, are uncertain as to whether the taxpayer's rights may have been violated, they should discuss the situation with the PWDS.

and

3.11 Communication with Auditors

1) For various reasons (such as health and safety, applying civil penalties) it is important for auditors to be aware of the status of the investigation. Therefore, investigators should contact the referring auditor at the following stages of the investigation:

- after receiving the referral;
- after deciding to accept or reject the case;
- when investigators know the day of the search or when investigators officially notify the taxpayer that he/she is under criminal investigation if no search is required;
- at least one month before laying charges;
- as soon as investigators learn the dates when the auditor has to testify;
- on the final disposition of the case (guilty plea/guilty verdict/acquittal).

2) This is not an exhaustive list. Investigators should contact the referring auditor (and/or the respective Audit Division team leader and assistant director, Audit) whenever they feel it is reasonable to update them on the status of the investigation.

3) Investigators must document all discussions they have with the auditor.

3.12 Access to Information the Taxpayer Provides to Auditors after the Case is referred to the Criminal Investigations Division

1) In general, investigators should not review information that the taxpayer provides to CRA auditors once the case is referred to Criminal Investigations (the beginning of the criminal investigation).

2) The onus is on the investigator, in consultation with his/her team leader and the Investigations Advisory Services Section, to determine the appropriate method to review any new information that auditors have obtained since the case was referred to Criminal Investigations.

Since audit findings cannot be used in penal investigations the Manual equally supplies:

6.1 General Remarks

(1) To prove that a taxpayer/registrant willfully evaded the payment of tax and/or fraudulently obtained a refund, an investigator must produce evidence to prove to a Court, beyond a reasonable doubt, that a taxpayer/registrant had knowledge of facts constituting the offence. However, as a result of the Supreme Court of Canada decisions in *Jarvis* and *Ling* on November 21, 2002, the administrative provisions of the Income Tax Act and the Excise Tax Act cannot be used for penal consideration (criminal investigative purposes). Thus, evidence sought in the possession of a taxpayer/registrant or a third party, if not voluntarily provided, must be obtained through the use of judiciary tools. (2) There are several methods of obtaining evidence:

- Search warrant (section 487(1) Criminal Code (CC), section 231.3 Income Tax Act (ITA), section 290 Excise Tax Act (ETA) with or without an assistance order
- Special search warrants (CC 462.32)
- Production order (CC 487.012 or 487.013)

- General warrants (CC 487.01) with or without an assistance order
- Obtaining evidence seized by other law enforcement agencies (CC 490(15))
- Informed voluntary consent
- Inquiry (Section 231.4 of the (ITA) section 276 (ETA))
- Commission evidence (CC 709)
- Mutual Legal Assistance Treaty (MLAT) (Mutual Legal Assistance in Criminal Matters Act) (MLACMA)
- Tax Treaty Request
- United States/Canada Simultaneous Criminal Investigation Program (SCIP)
- Surveillance

(3) While both the ITA (Section 231.3) and the ETA (Section 290) contain provisions for obtaining search warrants, it is the Agency's policy to use the search provisions of the CC to obtain the necessary search warrants. The primary reason is that the CC allows the Agency to allege offences under the ITA, the ETA and the CC, all in one Information To Obtain (ITO), if necessary.

(4) The policies and procedures pertaining to most of the methods are outlined further in this chapter. Inquiries are covered in chapter 10 Commission Evidence and MLAT in chapter 11 and SCIP in chapter 17. Policy related to special search warrants (CC 462.32) is in chapter 24 Revenue Statutes, Money Laundering and Proceeds of Crime and the policy on surveillance is in chapter 25 Covert Operations.

(5) In keeping with the **Best Evidence Rule**, the original books and records, documents and things are the best evidence. Therefore, original records are to be secured through one of the methods outlined above. The use of certified copies in lieu of the original documents will be restricted to those instances where the originals have been secreted, destroyed, or otherwise unavailable as evidence for reasons beyond the Agency's control (for example, copies of banking records certified by bank employees pursuant to section 29 of the Canada Evidence Act would replace originals).

6.2 Obtaining the Evidence

As stated above, there are several methods of obtaining evidence. This section will deal with the policies and procedures pertaining to the primary methods that the Criminal Investigations Program (CIP) uses. The next topic will be writing an "Information to Obtain" (referred to as an ITO). The reason for this is that in order to obtain a search warrant, a general warrant or a production order the applicant will have to draft an ITO. Finally, the policies and procedures pertaining to search warrants, general warrants and production orders will be outlined.

6.2.1 Informed Voluntary Consent

October 2009

(1) In certain exceptional cases, informed voluntary consent may be obtained from the taxpayer/registrant to obtain the books and records, documents and things for the purpose of a criminal investigation. A situation where this may occur is when a potential accused becomes aware that their fraud has been detected. They may approach the Agency wishing to seek a quick resolution to the matter. As part of this they volunteer to make their books and records etc. available for the purposes of concluding the matter. The method of proceeding will depend on whether we are dealing with the potential accused or a third party.

(2) With respect to a potential accused, when consideration is being given to obtaining their books and records by way of voluntary consent the following conditions must be present:

- The taxpayer/registrant must have been informed of their Charter rights;
- The taxpayer/registrant be strongly advised to obtain legal counsel;
- The consenter must have the power and authority to release the records and things;

- *In the event that the taxpayer/registrant revokes the agreement, the Agency will be given a time period (normally 30 days written notice) to make a decision as to whether to photocopy the documents or apply for a search warrant to seize the documents;*
- *All of the above details must be set out in writing. The consent must be signed by the taxpayer/registrant and witnessed by a third person, preferably, the taxpayer/registrant's representative.*
- *Whenever investigators meet with the potential accused, they should do so in the presence of another colleague.*

(3) With respect to a third party, there are three important considerations:

- *Are there any indications that the third party participated in the scheme?*
 - *Does the third party have the power and authority to release the documents and things?*
 - *Is the information investigators are seeking likely to be found on the third party's computer? If so, a search warrant may be the best means of securing the data since it will allow CRA informatics investigators to properly extract it from the third party's computer without altering it.*
- If investigators are seeking hard-copy documents and there are no suspicions regarding the third party's involvement in the scheme and the third party has the authority to release the information to CRA investigators, then consideration should be given to obtaining the information voluntarily or by production order rather than executing a search warrant.*

6.2.2 Obtaining Evidence via Judicial Authorization

6.2.2.1 Search Warrant

(1) A search warrant is the most common judicial tool used by investigators. It allows those named on the warrant to search and seize the books and records and things that were made available during the course of the audit along with items the taxpayer/registrant withheld, such as a second set of books and records, missing cash register tapes etc.

(2) In order to obtain a search warrant the investigator must have reasonable grounds to believe that an offence was committed, that records or things that are evidence of the offence exist and are to be found in a particular location.

6.2.2.2 Production Orders

A Justice of the Peace (JP)/Judge may order a person who is not under investigation to produce documents or copies of documents certified to be true copies to a peace officer or public officer within a time frame and place to be named in the order.

6.2.2.3 General Warrants

A general warrant can only be used for situations when there is **no other provision under the Criminal Code or any other Act of Parliament** that would provide for a warrant, authorization, or order permitting the technique, procedure or device to be used or the things to be done. In most cases, a search warrant or a production order pursuant to the CC can be obtained to secure the necessary evidence.

As previously stated, in order to obtain a search warrant, production order or a general warrant, investigators will have to prepare an ITO. The next section will outline the policies and procedures pertaining to the preparation of an ITO.

6.2.3 Information To Obtain (ITO)

6.2.3.1 General Remarks

(1) An **affidavit** (commonly referred to as an Information to Obtain) is required, under section 487 of the CC, to obtain a search warrant, general warrant and/or a production order. The ITO must be objective, disclosing all the significant and relevant facts that came to light during the investigation. All material facts must be disclosed, not only those that support the allegation that an offence has been committed, but any facts that may point to the contrary.

(2) As a rule, the JP/Judge will decide whether or not to grant the application based on the information contained in the ITO. In rare situations, the JP/Judge may seek verbal clarification. But, for the most part, the decision will be based on what is contained in the ITO.

(3) The usual language of the taxpayer/registrant/third party subject to the search should be determined in order to prepare the documentation in one of the official languages. Although investigators may write the ITO in their language of choice, it is preferable to use the language of the subject of the search. The warrant must be written in the official language of the subject of the search.

(4) To comply with the provisions of the CC relating to a search warrant, general warrant or production order the ITO must contain the following information:

a) A listing of the things to be searched for (487 search warrants), documents or data to be produced (for 487.012 production orders), names or account numbers to be produced (for 487.013 production orders) or the investigative technique or procedure to be used (for 487.01 general warrants);

b) The alleged offence(s);

c) The place(s) to be searched (for search warrants) - the place where the special technique will be used (for general warrants), the person who has possession or control of the documents or data to be produced (for 487.012 production orders) or the institution, person or entity who has possession or control of the account number or name to be produced (for 487.013 production orders);

d) Grounds for belief (for 487 warrants, 487.01 general warrants and 487.012 production orders) and grounds to suspect (for 487.013 production orders) including:

– A link or nexus between the things to be searched for, documents, data, account number, name to be produced or the special techniques to be used and the offence(s). That is, it is important to show a connection between them, or how the things, documents, data, account number or name will be needed to prove the offence(s),

– A link or nexus between the things to be searched for (search warrants), the special techniques to be used (for general warrants) and the place(s). That is, it is important to show a connection between them, or where the things to be searched for will be found.

– A link or nexus between the documents or data to be produced (for 487.012 production orders) and the person who has possession or control of them.

– A link or nexus between the name or account number to be produced (for 487.013 production orders) and the institution, person, or entity who has possession or control of them.

	Search Warrant	487.012 Production Order	487.013 Production Order	General Warrant
Things to be searched for	Yes	N/A	N/A	N/A
Documents or data to be produced	N/A	Yes	N/A	N/A
Account number or name to be produced	N/A	N/A	Yes	N/A
Investigative technique or procedure to be used	N/A	N/A	N/A	Yes

<i>Alleged Offence(s)</i>	Yes	Yes	Yes	Yes
<i>Places to be searched</i>	Yes	N/A	N/A	N/A
<i>Person who has possession or control of the documents or data to be produced</i>	N/A	Yes	N/A	N/A
<i>Institution, person or entity who has possession or control of the account number or name to be produced</i>	N/A	N/A	Yes	N/A
<i>Place(s) where the investigative technique or procedure will be used</i>	N/A	N/A	N/A	Yes
<i>Grounds for Belief</i>	Yes	Yes	N/A	Yes
<i>Grounds to suspect</i>	N/A	N/A	Yes	N/A

Net Worth Assessments – A Primary Way to Validate Illicit Income

A primary way that CRA proves illicit income realized by taxpayers which has not been reported to CRA, a substantial amount may result from criminal activities themselves, is through a refined Tax Net Worth Assessment.

Effectively CRA collects the taxpayer's data from financial records (primarily bank records and other known established expenses) and compares the analysis thereof with the amount of income the taxpayer fraudulently reported on their disclosures to CRA

Again, data affiliated with the taxpayer in the form of bank inflows/outflows and established expenses are analyzed and this data, on property ownership where the illicit funds flow to, can be "mined" from the transactions on the primary bank accounts, or through the bank accounts of family members, which can be realized through statutory demands for information served on the financial institutions.

It's very important to cast the "discovery net" to examine not just the targeted taxpayer but also her family and possible friends who could deposit illicit cash income in lieu of the taxpayer from holding onto it.

In order for a valid assessment to be made it has to have accurate opening and closing bank balances and reasonably accurate validated level of expenses during the periods.

The below is a standardized net worth assessment **ending**, relevant tax purposes, which basically simply takes a **regular net worth assessment and adjusts for tax reporting** to get to tax-affected reporting covering 3 years adjusted:

Taxpayer XYZ	2014	2015	2016
Net Worth Increase	75000	125000	325000
Personal Living Expenses	35000	45000	20000
Non-taxable income	-1500	-2000	-3000
<i>Adjusted Income</i>	<i>108500</i>	<i>168000</i>	<i>342000</i>
Itemized Deductions	-40000	-42000	-60000
Exemptions	-3000	-3000	-4000
Corrected Taxable Income	65500	123000	278000
Reported Taxable Income	45000	85000	220000
<i>Income Not Reported</i>	<i>20500</i>	<i>38000</i>	<i>58000</i>

Once the unreported income is multiplied by its relevant tax rate, for both the federal and provincial taxes, it's clear why taxpayers attempt to hide illicit income through the above methods.

Artificial Fraudulent Deductions – The Other Primary Way Taxpayers Cheat

While hiding income is one way that cheating taxpayers fraudulently under-pay their taxes, attempting to deduct artificial and fraudulent deductions is the other way. Taking fake deductions has the same effect on net income calculation as hiding the revenue, the former being maybe easier to facilitate than trying to hide the revenue given CRA's ability to search for wealth via identity markers in numerous parties.

Section 18 of the federal Income Tax Act provides:

18 (1) *In computing the income of a taxpayer from a business or property no deduction shall be made in respect of*

General limitation

(a) an outlay or expense except to the extent that it was made or incurred by the taxpayer for the purpose of gaining or producing income from the business or property;

While this compendium has no means to dig deep into the stream of jurisprudence in Canada on determining what constitutes a fake tax deduction the salient question that should be asked in any investigation is, **“Given the current law, is the expense supporting the deduction made to produce taxable income for the taxpayer and is it reasonable in the circumstances?”**

In any tax audit-investigation that is the question that should be asked of any seemingly innocent deduction since while many may be able to state that an expense was necessary to earn taxable income, even though it actually didn't, a key **tipping test is was it reasonable for the business?** It can be quite common to see deductions based on payments, with flow-back of proceeds, to related parties that has not resulted in any true change in economic ownership, which were perpetrated exclusively to transfer income recognition to related lower-tax rate parties, with again, proceed flow-back to the payor. One would understandably want to dig into the identity of who the recipient is, in relation to the payer in such a case, to indicate fraudulent collusion, through audit of the payee²⁰⁹. With the latter aspect it's possible to quickly weed-out fictitious expenses, that though supported with traceable payment cheques/wire-transfers, were not reasonable for the business nature/structure/level of sales, etc.

²⁰⁹ It may even transpire that the payee has done this with other taxpayers in addition to the taxpayer that led you to it.

The Entire Criminal Investigations Manual Reproduced

Without explaining completely on the mechanics by which ITA/ETA evasion is investigated by CRA the Criminal Investigations Manual is reproduced in the Appendix for your complete insight.

It should be studied quite extensively since it is rather detailed with types of evasion, the legal reasoning to investigate and remittance for prosecution to the PPSC.

Further Case Compilation on Federal Income Tax Collection, Enforcement and Prosecution

The author has compiled a Google Book court case compilation on federal income tax collection, enforcement and prosecution that the reader can drill down to in length to understand such issues as sentencing, liens, collection mechanics, enforced disclosure that is not within the preview of this on Googlebooks. You're welcome to study it at length.

Securities Fraud

Securities fraud can take one of three primary forms:

- 1) *Outside participants who manipulate the market through alternative trading to fool the public perception of the market to their own ends*
- 2) *Fraud perpetrated by employees – IAs/RRs - within a brokerage firms/working independently, for themselves, or their clients, and*
- 3) *Fraud instituted on the market by listed/listing companies on false prospectuses/disclosures to the market (SEDAR/EDGAR – shareholders)*

The victims can range from individual investors who trade in the securities to the banks who use the debt/equity as collateral for legitimate loans and there are numerous links in the chain of disclosure and possession of instruments proving ownership where fraudsters can take advantage for illicit gain.

The Provincial Securities Commissions and Their Investigatory Arms, the Prov. Police, the RCMP and the CSA

The mission of all enforcement parties in the regulation of Canada's stock exchanges is to:

- **Protect and promote the public interest by fostering:**
- **A securities market that is fair and warrants public confidence**
- **A dynamic and competitive securities industry that provides investment opportunities and access to capital**

through investigation and prosecution of offences on either provincial Securities Acts or the CC criminal provisions applicable to the participants.

There are 3 levels of enforcement bodies in Canada:

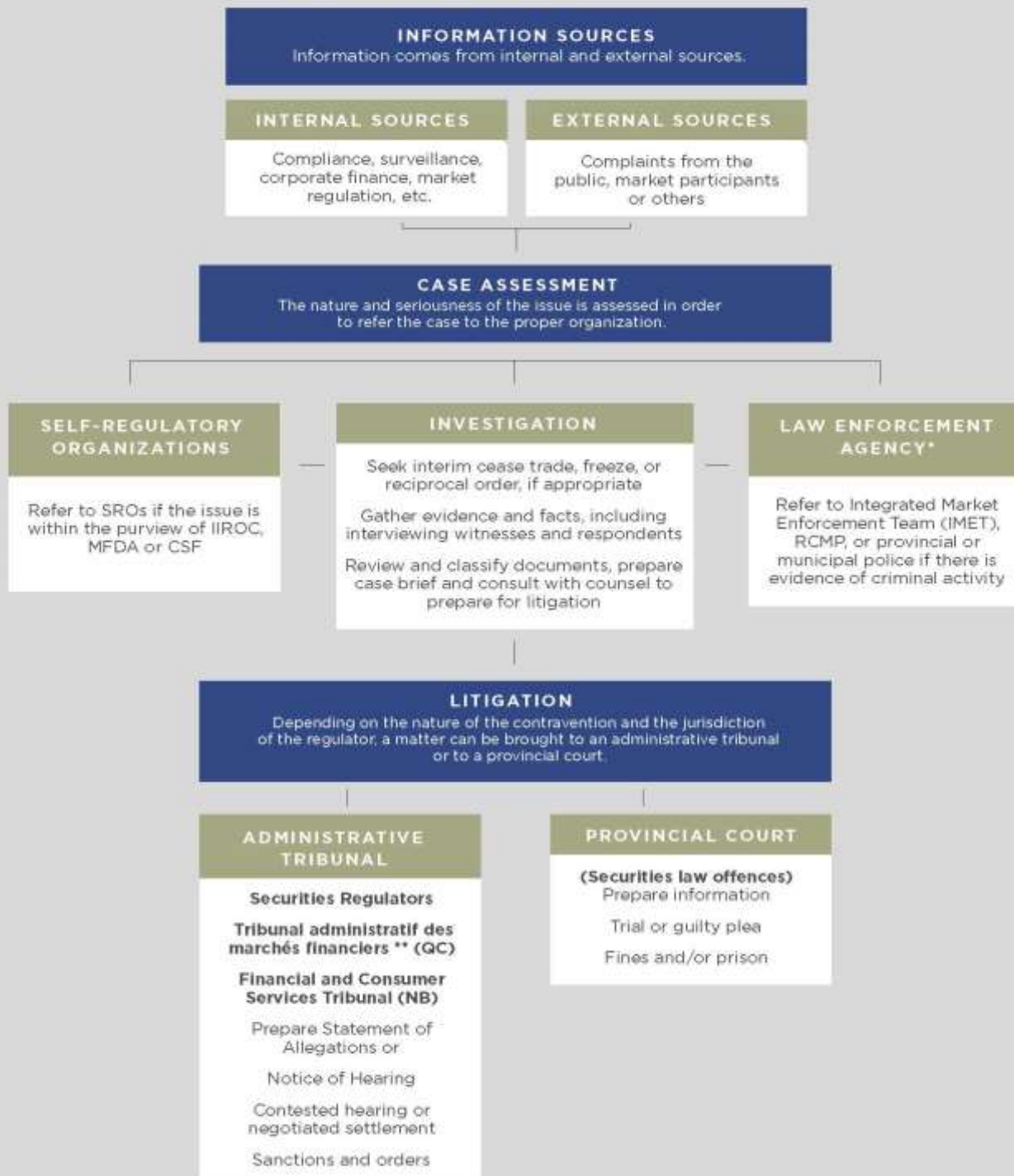
- 1) *The Self-Regulated Organizations, which is IIROC and MFDA, dealing with IA/RR etc. offences of members employed in the industry per self-regulated rules of conduct*
- 2) *The Provincial Securities Regulators such as the Ontario and BC Securities Commissions, dealing with public and market participants, per rules under the various provincial securities Acts, and,*
- 3) *National, Provincial or Local penal law enforcement which deals with public and market participants, per the Canadian Criminal Code.*

The Complaint Process

The following is from the CSA 2016 Report detailing statistics on securities complaints in Canada in 2016 which has numerous links to typical resolutions that occurred depending on the circumstances.

THE ENFORCEMENT PROCESS

This graphic breaks down the securities enforcement process from identification of a potential securities breach through to sanction.



*Some securities regulators work in partnership with law enforcement agencies to investigate and prosecute offences under the Criminal Code relating to financial misconduct.

** As of July 18, 2016, the Bureau de décision et de révision, the independent administrative tribunal operating in the Québec financial sector, is known as the Tribunal administratif des marchés financiers.

IMET and Police Criminal Code Enforcement

The Integrated Market Enforcement Team (IMET) consists of specially trained police officers in the RCMP and Provincial/Municipal police forces who have the mandate to investigate for criminal offences, actions taken in the securities marketplace. They can receive complaints from the public or be handed actions from provincial securities commissions for criminal action and while the securities are regulatory bodies the following are provisions in the Criminal Code that can apply to a fraudulent securities transaction.

Fraud - Affecting public market, s. 380(2)

(2) Every one who, by deceit, falsehood or other fraudulent means, whether or not it is a false pretence within the meaning of this Act, with intent to defraud, affects the public market price of stocks, shares, merchandise or anything that is offered for sale to the public is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years.

Fraudulent manipulation of stock exchange transactions, s. 382

382 Every one who, through the facility of a stock exchange, curb market or other market, with intent to create a false or misleading appearance of active public trading in a security or with intent to create a false or misleading appearance with respect to the market price of a security,

- (a) effects a transaction in the security that involves no change in the beneficial ownership thereof,*
 - (b) enters an order for the purchase of the security, knowing that an order of substantially the same size at substantially the same time and at substantially the same price for the sale of the security has been or will be entered by or for the same or different persons, or*
 - (c) enters an order for the sale of the security, knowing that an order of substantially the same size at substantially the same time and at substantially the same price for the purchase of the security has been or will be entered by or for the same or different persons,*
- is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years.*

Prohibited Insider trading, s. 382.1

382.1 (1) A person is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years who, directly or indirectly, buys or sells a security, knowingly using inside information that they

- (a) possess by virtue of being a shareholder of the issuer of that security;*
- (b) possess by virtue of, or obtained in the course of, their business or professional relationship with that issuer;*
- (c) possess by virtue of, or obtained in the course of, a proposed takeover or reorganization of, or amalgamation, merger or similar business combination with, that issuer;*
- (d) possess by virtue of, or obtained in the course of, their employment, office, duties or occupation with that issuer or with a person referred to in paragraphs (a) to (c); or*
- (e) obtained from a person who possesses or obtained the information in a manner referred to in paragraphs (a) to (d).*

Tipping

(2) Except when necessary in the course of business, a person who knowingly conveys inside information that they possess or obtained in a manner referred to in subsection (1) to another person, knowing that there is a risk that the person will use the information to buy or sell,

directly or indirectly, a security to which the information relates, or that they may convey the information to another person who may buy or sell such a security, is guilty of

- (a) an indictable offence and liable to imprisonment for a term not exceeding five years; or*
- (b) an offence punishable on summary conviction.*

Saving

(3) For greater certainty, an act is not an offence under this section if it is authorized or required, or is not prohibited, by any federal or provincial Act or regulation applicable to it.

Definition of inside information

(4) In this section, inside information means information relating to or affecting the issuer of a security or a security that they have issued, or are about to issue, that

- (a) has not been generally disclosed; and*
- (b) could reasonably be expected to significantly affect the market price or value of a security of the issuer.*

Gaming in stocks or merchandise, s. 383

383 (1) Every one is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years who, with intent to make gain or profit by the rise or fall in price of the stock of an incorporated or unincorporated company or undertaking, whether in or outside Canada, or of any goods, wares or merchandise,

- (a) makes or signs, or authorizes to be made or signed, any contract or agreement, oral or written, purporting to be for the purchase or sale of shares of stock or goods, wares or merchandise, without the bona fide intention of acquiring the shares, goods, wares or merchandise or of selling them, as the case may be, or*
- (b) makes or signs, or authorizes to be made or signed, any contract or agreement, oral or written, purporting to be for the sale or purchase of shares of stock or goods, wares or merchandise in respect of which no delivery of the thing sold or purchased is made or received, and without the bona fide intention of making or receiving delivery thereof, as the case may be,*

but this section does not apply where a broker, on behalf of a purchaser, receives delivery, notwithstanding that the broker retains or pledges what is delivered as security for the advance of the purchase money or any part thereof.

Onus

(2) Where, in proceedings under this section, it is established that the accused made or signed a contract or an agreement for the sale or purchase of shares of stock or goods, wares or merchandise, or acted, aided or abetted in the making or signing thereof, the burden of proof of a bona fide intention to acquire or to sell the shares, goods, wares or merchandise or to deliver or to receive delivery thereof, as the case may be, lies on the accused.

Broker reducing stock by selling for his own account, s. 384

384 Every one is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years who, being an individual, or a member or an employee of a partnership, or a director, an officer or an employee of a corporation, where he or the partnership or corporation is employed as a broker by any customer to buy and carry on margin any shares of an incorporated

or unincorporated company or undertaking, whether in or out of Canada, thereafter sells or causes to be sold shares of the company or undertaking for any account in which

(a) he or his firm or a partner thereof, or

(b) the corporation or a director thereof,

has a direct or indirect interest, if the effect of the sale is, otherwise than unintentionally, to reduce the amount of those shares in the hands of the broker or under his control in the ordinary course of business below the amount of those shares that the broker should be carrying for all customers.

False prospectus, s. 400

400 (1) Every one who makes, circulates or publishes a prospectus, a statement or an account, whether written or oral, that he knows is false in a material particular, with intent

(a) to induce persons, whether ascertained or not, to become shareholders or partners in a company,

(b) to deceive or defraud the members, shareholders or creditors, whether ascertained or not, of a company, or

(c) to induce any person to

(i) entrust or advance anything to a company, or

(ii) enter into any security for the benefit of a company,

(d) [Repealed, 1994, c. 44, s. 26]

is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years.

Definition of “company”

(2) In this section, company means a syndicate, body corporate or company, whether existing or proposed to be created.

The Ontario Securities Act Enforcement Provisions

The below are the OSA Enforcement provisions applicable to principal criminal acts that can be perpetrated with respect to securities fraud. Similar provisions exist across Canada in equivalent provincial Acts.

PART XXII ENFORCEMENT

Offences, general

122. (1) Every person or company that,

(a) makes a statement in any material, evidence or information submitted to the Commission, a Director, any person acting under the authority of the Commission or the Executive Director or any person appointed to make an investigation or examination under this Act that, in a material respect and at the time and in the light of the circumstances under which it is made, is misleading or untrue or does not state a fact that is required to be stated or that is necessary to make the statement not misleading;

(b) makes a statement in any application, release, report, preliminary prospectus, prospectus, return, financial statement, information circular, take-over bid circular, issuer bid circular or other document required to be filed or furnished under Ontario securities law that, in a material respect and at the time and in the light of the circumstances under which it is made, is misleading or untrue or does not state a fact that is required to be stated or that is necessary to make the statement not misleading; or

Note: On a day to be named by proclamation of the Lieutenant Governor, clause (b) is amended by striking out “issuer bid circular” and substituting “issuer bid circular,

disclosure document in respect of a designated derivative”. See: 2010, c. 26, Sched. 18, ss. 31 (1), 47 (2).

(c) *contravenes Ontario securities law, is guilty of an offence and on conviction is liable to a fine of not more than \$5 million or to imprisonment for a term of not more than five years less a day, or to both. 1994, c. 11, s. 373; 2002, c. 22, s. 181 (1).*

Exemption

(1.1) *Clauses (1) (a) and (b) do not apply to a statement made or given to the Commission in a submission in respect of a proposed rule or policy. 1994, c. 33, s. 7.*

Defence

(2) *Without limiting the availability of other defences, no person or company is guilty of an offence under clause (1) (a) or (b) if the person or company did not know and in the exercise of reasonable diligence could not have known that the statement was misleading or untrue or that it omitted to state a fact that was required to be stated or that was necessary to make the statement not misleading in light of the circumstances in which it was made. 1994, c. 11, s. 373.*

Directors and officers

(3) *Every director or officer of a company or of a person other than an individual who authorizes, permits or acquiesces in the commission of an offence under subsection (1) by the company or person, whether or not a charge has been laid or a finding of guilt has been made against the company or person in respect of the offence under subsection (1), is guilty of an offence and is liable on conviction to a fine of not more than \$5 million or to imprisonment for a term of not more than five years less a day, or to both. 1994, c. 11, s. 373; 2002, c. 22, s. 181 (2).*

Fine for contravention of s. 76

(4) *Despite subsection (1) and in addition to any imprisonment imposed under subsection (1), a person or company who is convicted of contravening subsection 76 (1), (2) or (3) is liable to a minimum fine equal to the profit made or the loss avoided by the person or company by reason of the contravention and a maximum fine equal to the greater of,*

- (a) *\$5 million; and*
- (b) *the amount equal to triple the amount of the profit made or the loss avoided by the person or company by reason of the contravention. 2002, c. 18, Sched. H, s. 11; 2002, c. 22, s. 181 (3); 2002, c. 22, s. 188 (3).*

Same

(5) *If it is not possible to determine the profit made or loss avoided by the person or company by reason of the contravention, subsection (4) does not apply but subsection (1) continues to apply. 1994, c. 11, s. 373.*

Definitions: “loss avoided”, “profit made”

(6) *In subsections (4) and (5),*

“loss avoided” means,

- (a) *in respect of a security, other than anything deemed to be a security under subsection 76 (6), the amount by which the amount received for the security sold in contravention of*

subsection 76 (1) exceeds the average trading price of the security in the 20 trading days following general disclosure of the material fact or the material change, and

(b) in respect of anything deemed to be a security under subsection 76 (6), such amount as may be prescribed by or determined in accordance with a regulation made by the Lieutenant Governor in Council; (“*perte évitée*”)

“*profit made*” means,

(a) in respect of a security, other than anything deemed to be a security under subsection 76 (6), and except in respect of a short sale, the amount by which the average trading price of the security in the 20 trading days following general disclosure of the material fact or the material change exceeds the amount paid for the security purchased in contravention of subsection 76 (1),

(b) in respect of a short sale, the amount by which the amount received for the security sold in contravention of subsection 76 (1) exceeds the average trading price of the security in the twenty trading days following general disclosure of the material fact or the material change,

(b.1) in respect of anything deemed to be a security under subsection 76 (6), such amount as may be prescribed by or determined in accordance with a regulation made by the Lieutenant Governor in Council, or

(c) the value of any consideration received for informing another person or company of a material fact or material change with respect to the reporting issuer in contravention of subsection 76 (2) or (3). (“*profit réalisé*”) 1994, c. 11, s. 373; 2010, c. 26, Sched. 18, s. 31 (2-4).

Consent of Commission

(7) No proceeding under this section shall be commenced except with the consent of the Commission. 1994, c. 11, s. 373.

Trial by provincial judge

(8) The Commission or an agent for the Commission may by notice to the clerk of the court having jurisdiction in respect of an offence under this Act require that a provincial judge preside over the proceeding. 1994, c. 11, s. 373.

Section Amendments with date in force (d/m/y)

1994, c. 11, s. 373 - 11/07/1994; 1994, c. 33, s. 7 - 1/01/1995

2002, c. 18, Sched. H, s. 11 - 26/11/2002; 2002, c. 22, s. 181 (1-3) - 7/04/2003; 2002, c. 22, s. 188 (3) - 7/04/2003

2010, c. 26, Sched. 18, s. 31 (1) - not in force; 2010, c. 26, Sched. 18, s. 31 (2-4) - 8/12/2010

Additional remedies

122.1 (1) If a person or company is convicted of an offence under this Act, the court may, in addition to any penalty, order the convicted person or company to make restitution or pay compensation in relation to the offence to an aggrieved person or company. 2006, c. 33, Sched. Z.5, s. 12.

Notice

(2) If a court makes an order for restitution or compensation, it shall cause a copy of the order or a notice of the content of the order to be given to the person or company to whom the restitution or compensation is ordered to be paid. 2006, c. 33, Sched. Z.5, s. 12.

Filing

(3) An order for restitution or compensation may be filed with a local registrar of the Superior Court of Justice and the responsibility for filing shall be on the person or company to whom the restitution or compensation is ordered to be paid. 2006, c. 33, Sched. Z.5, s. 12.

Enforcement

(4) An order for restitution or compensation filed under subsection (3) may be enforced as if it were an order of the court. 2006, c. 33, Sched. Z.5, s. 12.

Postjudgment interest

(5) Section 129 of the Courts of Justice Act applies in respect of an order for restitution or compensation filed under subsection (3) and, for that purpose, the date of filing shall be deemed to be the date of the order. 2006, c. 33, Sched. Z.5, s. 12.

Limitation

(6) A person or company is not entitled to participate in a proceeding in which an order may be made under this section solely on the basis that the person or company has a right of action against a defendant to the proceeding or that the person or company may be entitled to receive an amount under the order. 2006, c. 33, Sched. Z.5, s. 12.

Civil remedies protected

(7) A civil remedy for an act or omission is not affected by reason only that an order for restitution or compensation under this section has been made in respect of that act or omission. 2006, c. 33, Sched. Z.5, s. 12.

Section Amendments with date in force (d/m/y)

2006, c. 33, Sched. Z.5, s. 12 - 20/12/2006

123. REPEALED: 1994, c. 11, s. 373.

Section Amendments with date in force (d/m/y)

1994, c. 11, s. 373 - 11/07/1994

Information containing more than one offence

124. An information in respect of any contravention of this Act may be for one or more offences, and no information, summons, warrant, conviction or other proceeding in any prosecution is objectionable or insufficient by reason of the fact that it relates to two or more offences. R.S.O. 1990, c. S.5, s. 124.

Execution of warrant issued in another province

125. (1) Where a provincial judge, magistrate or justice of another province or territory of Canada issues a warrant for the arrest of any person on a charge of contravening any provision of a statute of such province or territory similar to this Act, any provincial judge or justice of Ontario within whose jurisdiction that person is or is suspected to be, may, upon satisfactory proof of the handwriting of the provincial judge, magistrate or a justice who issued the warrant, make an endorsement thereon in the form prescribed by the regulations, and a warrant so endorsed is sufficient authority to the person bringing the warrant and to all other persons to whom it was originally directed and to all police officers to execute the warrant within that jurisdiction and to take the person arrested thereunder either out of or anywhere in Ontario and to rearrest such person anywhere in Ontario. R.S.O. 1990, c. S.5, s. 125 (1).

Prisoner in transit

(2) Any police officer of Ontario or of any other province or territory of Canada who is passing through Ontario and who has in custody a person arrested in another province or territory under a warrant endorsed under subsection (1) is entitled to hold, take and rearrest the accused anywhere in Ontario under such warrant without proof of the warrant or the endorsement thereof. R.S.O. 1990, c. S.5, s. 125 (2); 1994, c. 11, s. 374.

Section Amendments with date in force (d/m/y)

1994, c. 11, s. 374 - 11/07/1994

Freeze direction

126. (1) If the Commission considers it expedient for the due administration of Ontario securities law or the regulation of the capital markets in Ontario or expedient to assist in the due administration of the securities laws or the regulation of the capital markets in another jurisdiction, the Commission may,

(a) direct a person or company having on deposit or under its control or for safekeeping any funds, securities or property of any person or company to retain those funds, securities or property;

(b) direct a person or company to refrain from withdrawing any funds, securities or property from another person or company who has them on deposit, under control or for safekeeping; or

(c) direct a person or company to maintain funds, securities or property, and to refrain from disposing of, transferring, dissipating or otherwise dealing with or diminishing the value of those funds, securities or property. 2014, c. 7, Sched. 28, s. 13 (1).

Duration

(1.1) A direction under subsection (1) applies until the Commission in writing revokes the direction or consents to release funds, securities or property from the direction, or until the Superior Court of Justice orders otherwise. 2014, c. 7, Sched. 28, s. 13 (1).

Application

(2) A direction under subsection (1) that names a bank or other financial institution shall apply only to the branches of the bank or other financial institution identified in the direction. 1994, c. 11, s. 375.

Exclusions

(3) A direction under subsection (1) shall not apply to funds, securities or property in a recognized clearing agency or to securities in process of transfer by a transfer agent unless the direction so states. 1994, c. 11, s. 375.

Certificate of pending litigation

(4) The Commission may order that a direction under subsection (1) be certified to a land registrar or mining recorder and that it be registered or recorded against the lands or claims identified in the direction, and on registration or recording of the certificate it shall have the same effect as a certificate of pending litigation. 1994, c. 11, s. 375.

Review by court

(5) As soon as practicable, but not later than 10 days after a direction is issued under subsection (1), the Commission shall serve and file a notice of application in the Superior Court of

Justice to continue the direction or for such other order as the court considers appropriate. 2010, c. 26, Sched. 18, s. 32.

Grounds for continuance or other order

(5.1) *An order may be made under subsection (5) if the court is satisfied that the order would be reasonable and expedient in the circumstances, having due regard to the public interest and,*

(a) *the due administration of Ontario securities law or the securities laws of another jurisdiction; or*

(b) *the regulation of capital markets in Ontario or another jurisdiction. 2014, c. 7, Sched. 28, s. 13 (2).*

Notice

(6) *A direction under subsection (1) may be made without notice but, in that event, copies of the direction shall be sent forthwith by such means as the Commission may determine to all persons and companies named in the direction. 1994, c. 11, s. 375.*

Clarification or revocation

(7) *A person or company directly affected by a direction may apply to the Commission for clarification or to have the direction varied or revoked. 1994, c. 11, s. 375.*

Section Amendments with date in force (d/m/y)

1994, c. 11, s. 375 - 11/07/1994

2006, c. 19, Sched. C, s. 1 (1) - 22/06/2006

2010, c. 26, Sched. 18, s. 32 - 8/12/2010

2014, c. 7, Sched. 28, s. 13 (1, 2) - 24/07/2014

Fraud and market manipulation

126.1 (1) *A person or company shall not, directly or indirectly, engage or participate in any act, practice or course of conduct relating to securities, derivatives or the underlying interest of a derivative that the person or company knows or reasonably ought to know,*

(a) *results in or contributes to a misleading appearance of trading activity in, or an artificial price for, a security, derivative or underlying interest of a derivative; or*

(b) *perpetrates a fraud on any person or company. 2010, c. 26, Sched. 18, s. 33.*

Attempts

(2) *A person or company shall not, directly or indirectly, attempt to engage or participate in any act, practice or course of conduct that is contrary to subsection (1). 2013, c. 2, Sched. 13, s. 3.*

Section Amendments with date in force (d/m/y)

2002, c. 22, s. 182 - 31/12/2005

2010, c. 26, Sched. 18, s. 33 - 8/12/2010

2013, c. 2, Sched. 13, s. 3 - 21/06/2013

Misleading or untrue statements

126.2 (1) *A person or company shall not make a statement that the person or company knows or reasonably ought to know,*

(a) in a material respect and at the time and in the light of the circumstances under which it is made, is misleading or untrue or does not state a fact that is required to be stated or that is necessary to make the statement not misleading; and

(b) would reasonably be expected to have a significant effect on the market price or value of a security, derivative or underlying interest of a derivative. 2002, c. 22, s. 182; 2004, c. 31, Sched. 34, s. 4 (1); 2010, c. 26, Sched. 18, s. 34.

Same

(2) A breach of subsection (1) does not give rise to a statutory right of action for damages otherwise than under Part XXIII or XXIII.1. 2004, c. 31, Sched. 34, s. 4 (2).

Section Amendments with date in force (d/m/y)

2002, c. 22, s. 182 - 31/12/2005

2004, c. 31, Sched. 34, s. 4 (1, 2) - 31/12/2005

2010, c. 26, Sched. 18, s. 34 - 8/12/2010

Orders in the public interest

127. (1) The Commission may make one or more of the following orders if in its opinion it is in the public interest to make the order or orders:

1. An order that the registration or recognition granted to a person or company under Ontario securities law be suspended or restricted for such period as is specified in the order or be terminated, or that terms and conditions be imposed on the registration or recognition.

2. An order that trading in any securities by or of a person or company or that trading in any derivatives by a person or company cease permanently or for such period as is specified in the order.

2.1 An order that the acquisition of any securities by a particular person or company is prohibited permanently or for the period specified in the order.

3. An order that any exemptions contained in Ontario securities law do not apply to a person or company permanently or for such period as is specified in the order.

4. An order that a market participant submit to a review of his, her or its practices and procedures and institute such changes as may be ordered by the Commission.

5. If the Commission is satisfied that Ontario securities law has not been complied with, an order that a release, report, preliminary prospectus, prospectus, return, financial statement, information circular, take-over bid circular, issuer bid circular, offering memorandum, proxy solicitation or any other document described in the order,

Note: On a day to be named by proclamation of the Lieutenant Governor, paragraph 5 is amended by striking out the portion before subparagraph i and substituting the following:

5. If the Commission is satisfied that Ontario securities law has not been complied with, an order that a release, report, preliminary prospectus, prospectus, return, financial statement, information circular, take-over bid circular, issuer bid circular, offering memorandum, proxy solicitation, disclosure document in respect of a derivative or any other document described in the order,

See: 2010, c. 26, Sched. 18, ss. 35 (2), 47 (2).

- i. be provided by a market participant to a person or company,
 - ii. not be provided by a market participant to a person or company, or
 - iii. be amended by a market participant to the extent that amendment is practicable.
6. An order that a person or company be reprimanded.
7. An order that a person resign one or more positions that the person holds as a director or officer of an issuer.

8. An order that a person is prohibited from becoming or acting as a director or officer of any issuer.

8.1 An order that a person resign one or more positions that the persons holds as a director or officer of a registrant.

8.2 An order that a person is prohibited from becoming or acting as a director or officer of a registrant.

8.3 An order that a person resign one or more positions that the person holds as a director or officer of an investment fund manager.

8.4 An order that a person is prohibited from becoming or acting as a director or officer of an investment fund manager.

8.5 An order that a person or company is prohibited from becoming or acting as a registrant, as an investment fund manager or as a promoter.

9. If a person or company has not complied with Ontario securities law, an order requiring the person or company to pay an administrative penalty of not more than \$1 million for each failure to comply.

10. If a person or company has not complied with Ontario securities law, an order requiring the person or company to disgorge to the Commission any amounts obtained as a result of the non-compliance. 1994, c. 11, s. 375; 1999, c. 9, s. 215; 2002, c. 22, s. 183 (1); 2005, c. 31, Sched. 20, s. 8; 2010, c. 26, Sched. 18, s. 35 (1).

Terms and conditions

(2) An order under this section may be subject to such terms and conditions as the Commission may impose. 1994, c. 11, s. 375.

Cease trading order

(3) The Commission may make an order under paragraph 2 of subsection (1) despite the delivery of a report to it under subsection 75 (3). 1994, c. 11, s. 375.

Exception

(3.1) A person or company is not entitled to participate in a proceeding in which an order may be made under paragraph 9 or 10 of subsection (1) solely on the basis that the person or company may be entitled to receive any amount paid under the order. 2004, c. 31, Sched. 34, s. 5.

Hearing requirement

(4) No order shall be made under this section without a hearing, subject to section 4 of the Statutory Powers Procedure Act. 1994, c. 11, s. 375.

No hearing required

(4.1) Despite subsection (4), the Commission may make an order under paragraph 2 or 2.1 of subsection (1) without giving the person or company that is subject to the order an opportunity to be heard if the person or company fails to file a record required to be filed under this Act. 2015, c. 20, Sched. 39, s. 3.

Contents of order

(4.2) An order made under subsection (4.1) must include a reference to the record that was not filed. 2015, c. 20, Sched. 39, s. 3.

Revocation of order

(4.3) Subject to subsection (4.6), the Commission shall revoke an order made under subsection (4.1) as soon as practicable after the record referred to in the order is filed. 2015, c. 20, Sched. 39, s. 3.

Notice of order

(4.4) The Commission shall publish a notice of every order made under subsection (4.1) as soon as practicable after the order is made. 2015, c. 20, Sched. 39, s. 3.

Notice of revocation

(4.5) The Commission shall publish a notice of every order revoked under subsection (4.3) as soon as practicable after the order is revoked. 2015, c. 20, Sched. 39, s. 3.

Additional information

(4.6) If an order made under subsection (4.1) has been in effect for more than 90 days and the Commission is of the opinion that it would be in the public interest to do so, the Commission may require that, before it revokes the order, in addition to filing the record referred to in the order, the person or company that is the subject of the order concurrently file or deliver such additional records or information about the person or company as the Commission requests. 2015, c. 20, Sched. 39, s. 3.

Temporary orders

(5) Despite subsection (4), if in the opinion of the Commission the length of time required to conclude a hearing could be prejudicial to the public interest, the Commission may make a temporary order under paragraph 1, 2, 2.1 or 3 of subsection (1) or subparagraph ii of paragraph 5 of subsection (1). 1994, c. 11, s. 375; 2016, c. 37, Sched. 23, s. 1 (1).

Period of temporary order

(6) The temporary order shall take effect immediately and shall expire on the fifteenth day after its making unless extended by the Commission. 1994, c. 11, s. 375.

Extension of temporary order

(7) The Commission may extend a temporary order until the hearing is concluded if a hearing is commenced within the fifteen-day period. 1994, c. 11, s. 375.

Same

(8) Despite subsection (7), the Commission may extend a temporary order under paragraph 2 or 2.1 of subsection (1) for such period as it considers necessary if satisfactory information is not provided to the Commission within the fifteen-day period. 1994, c. 11, s. 375; 2016, c. 37, Sched. 23, s. 1 (2).

Notice of temporary order

(9) The Commission shall give written notice of every temporary order made under subsection (5), together with a notice of hearing, to any person or company directly affected by the temporary order. 1994, c. 11, s. 375.

Inter-jurisdictional enforcement

(10) Without limiting the generality of subsections (1) and (5), an order may be made under subsection (1) or (5) in respect of a person or company if any of the following circumstances exist:

1. The person or company has been convicted in any jurisdiction of an offence arising from a transaction, business or course of conduct related to securities or derivatives.
2. The person or company has been convicted in any jurisdiction of an offence under a law respecting the buying or selling of securities or derivatives.
3. The person or company has been found by a court in any jurisdiction to have contravened the laws of the jurisdiction respecting the buying or selling of securities or derivatives.
4. The person or company is subject to an order made by a securities regulatory authority, derivatives regulatory authority or financial regulatory authority, in any jurisdiction, that imposes sanctions, conditions, restrictions or requirements on the person or company.
5. The person or company has agreed with a securities regulatory authority, derivatives regulatory authority or financial regulatory authority, in any jurisdiction, to be made subject to sanctions, conditions, restrictions or requirements. 2008, c. 19, Sched. R, s. 1; 2010, c. 26, Sched. 18, s. 35 (3-6).

Section Amendments with date in force (d/m/y)

1994, c. 11, s. 375 - 11/07/1994; 1999, c. 9, s. 215 - 14/12/1999

2002, c. 22, s. 183 (1, 2) - 7/04/2003

2004, c. 31, Sched. 34, s. 5 - 16/12/2004

2005, c. 31, Sched. 20, s. 8 - 15/12/2005

2008, c. 19, Sched. R, s. 1 - 27/11/2008

2010, c. 26, Sched. 18, s. 35 (1, 3-6) - 8/12/2010; 2010, c. 26, Sched. 18, s. 35 (2) - not in force

2015, c. 20, Sched. 39, s. 3 - 4/06/2015

2016, c. 37, Sched. 23, s. 1 - 08/12/2016

Payment of investigation costs

127.1 (1) If, in respect of a person or company whose affairs were the subject of an investigation, the Commission,

(a) is satisfied that the person or company has not complied with, or is not complying with, Ontario securities law; or

(b) considers that the person or company has not acted in the public interest, the Commission may, after conducting a hearing, order the person or company to pay the costs of the investigation. 1999, c. 9, s. 216.

Payment of hearing costs

(2) If, in respect of a person or company whose affairs were the subject of a hearing, the Commission, after conducting the hearing,

(a) is satisfied that the person or company has not complied with, or is not complying with, Ontario securities law; or

(b) considers that the person or company has not acted in the public interest, the Commission may order the person or company to pay the costs of or related to the hearing that are incurred by or on behalf of the Commission. 1999, c. 9, s. 216.

Payment of costs where offence

(3) Where a person or company is guilty of an offence under this Act or the regulations, the Commission may, after conducting a hearing, order the person or company to pay the costs of any investigation carried out in respect of that offence. 1999, c. 9, s. 216.

Costs

(4) For the purposes of subsections (1), (2) and (3), the costs that the Commission may order the person or company to pay include, but are not limited to, all or any of the following:

1. Costs incurred in respect of services provided by persons appointed or engaged under section 5, 11 or 12.
2. Costs of matters preliminary to the hearing.
3. Costs for time spent by the Commission or the staff of the Commission.
4. Any fee paid to a witness.
5. Costs of legal services provided to the Commission. 1999, c. 9, s. 216.

Section Amendments with date in force (d/m/y)

1999, c. 9, s. 216 - 14/12/1999

Applications to court

128. (1) The Commission may apply to the Superior Court of Justice for a declaration that a person or company has not complied with or is not complying with Ontario securities law. 1994, c. 11, s. 375; 2006, c. 19, Sched. C, s. 1 (1).

Prior hearing not required

(2) The Commission is not required, before making an application under subsection (1), to hold a hearing to determine whether the person or company has not complied with or is not complying with Ontario securities law. 1994, c. 11, s. 375.

Remedial powers of court

(3) If the court makes a declaration under subsection (1), the court may, despite the imposition of any penalty under section 122 and despite any order made by the Commission under section 127, make any order that the court considers appropriate against the person or company, including, without limiting the generality of the foregoing, one or more of the following orders:

1. An order that the person or company comply with Ontario securities law.
2. An order requiring the person or company to submit to a review by the Commission of his, her or its practices and procedures and to institute such changes as may be directed by the Commission.
3. An order directing that a release, report, preliminary prospectus, prospectus, return, financial statement, information circular, takeover bid circular, issuer bid circular, offering memorandum, proxy solicitation or any other document described in the order,
 - i. be provided by the person or company to another person or company,
 - ii. not be provided by the person or company to another person or company, or
 - iii. be amended by the person or company to the extent that amendment is practicable.
4. An order rescinding any transaction entered into by the person or company relating to trading in securities including the issuance of securities.
5. An order requiring the issuance, cancellation, purchase, exchange or disposition of any securities by the person or company.
6. An order prohibiting the voting or exercise of any other right attaching to securities by the person or company.
7. An order prohibiting the person from acting as officer or director or prohibiting the person or company from acting as promoter of any market participant permanently or for such period as is specified in the order.
8. An order appointing officers and directors in place of or in addition to all or any of the officers and directors of the company then in office.
9. An order directing the person or company to purchase securities of a security holder.

10. An order directing the person or company to repay to a security holder any part of the money paid by the security holder for securities.

11. An order requiring the person or company to produce to the court or an interested person financial statements in the form required by Ontario securities law, or an accounting in such other form as the court may determine.

12. An order directing rectification of the registers or other records of the company.

13. An order requiring the person or company to compensate or make restitution to an aggrieved person or company.

14. An order requiring the person or company to pay general or punitive damages to any other person or company.

15. An order requiring the person or company to disgorge to the Minister any amounts obtained as a result of the non-compliance with Ontario securities law.

16. An order requiring the person or company to rectify any past non-compliance with Ontario securities law to the extent that rectification is practicable. 1994, c. 11, s. 375.

Interim orders

(4) On an application under this section the court may make such interim orders as it considers appropriate. 1994, c. 11, s. 375.

Section Amendments with date in force (d/m/y)

1994, c. 11, s. 375 - 11/07/1994

2006, c. 19, Sched. C, s. 1 (1) - 22/06/2006

Appointment of receiver, etc.

129. (1) The Commission may apply to the Superior Court of Justice for an order appointing a receiver, receiver and manager, trustee or liquidator of all or any part of the property of any person or company. 1994, c. 11, s. 375; 2006, c. 19, Sched. C, s. 1 (1).

Grounds

(2) No order shall be made under subsection (1) unless the court is satisfied that,

(a) the appointment of a receiver, receiver and manager, trustee or liquidator of all or any part of the property of the person or company is in the best interests of the creditors of the person or company or of persons or companies any of whose property is in the possession or under the control of the person or company or the security holders of or subscribers to the person or company; or

(b) it is appropriate for the due administration of Ontario securities law. 1994, c. 11, s. 375.

Application without notice

(3) The court may make an order under subsection (1) on an application without notice, but the period of appointment shall not exceed fifteen days. 1994, c. 11, s. 375.

Motion to continue order

(4) If an order is made without notice under subsection (3), the Commission may make a motion to the court within fifteen days after the date of the order to continue the order or for the issuance of such other order as the court considers appropriate. 1994, c. 11, s. 375.

Powers of receiver, etc.

(5) A receiver, receiver and manager, trustee or liquidator of the property of a person or company appointed under this section shall be the receiver, receiver and manager, trustee or liquidator of all or any part of the property belonging to the person or company or held by the person or company on behalf of or in trust for any other person or company, and, if so directed by the court, the receiver, receiver and manager, trustee or liquidator has the authority to wind up or manage the business and affairs of the person or company and has all powers necessary or incidental to that authority. 1994, c. 11, s. 375.

Directors' powers cease

(6) If an order is made appointing a receiver, receiver and manager, trustee or liquidator of the property of a person or company under this section, the powers of the directors of the company that the receiver, receiver and manager, trustee or liquidator is authorized to exercise may not be exercised by the directors until the receiver, receiver and manager, trustee or liquidator is discharged by the court. 1994, c. 11, s. 375.

Fees and expenses

(7) The fees charged and expenses incurred by a receiver, receiver and manager, trustee or liquidator appointed under this section in relation to the exercise of powers pursuant to the appointment shall be in the discretion of the court. 1994, c. 11, s. 375.

Variation or discharge of order

(8) An order made under this section may be varied or discharged by the court on motion. 1994, c. 11, s. 375.

Section Amendments with date in force (d/m/y)

1994, c. 11, s. 375 - 11/07/1994

2006, c. 19, Sched. C, s. 1 (1) - 22/06/2006

Limitation period

129.1 Except where otherwise provided in this Act, no proceeding under this Act shall be commenced later than six years from the date of the occurrence of the last event on which the proceeding is based. 1999, c. 9, s. 217.

Section Amendments with date in force (d/m/y)

1999, c. 9, s. 217 - 14/12/1999

Directors and officers

129.2 For the purposes of this Act, if a company or a person other than an individual has not complied with Ontario securities law, a director or officer of the company or person who authorized, permitted or acquiesced in the non-compliance shall be deemed to also have not complied with Ontario securities law, whether or not any proceeding has been commenced against the company or person under Ontario securities law or any order has been made against the company or person under section 127. 2002, c. 22, s. 184.

Section Amendments with date in force (d/m/y)

2002, c. 22, s. 184 - 7/04/2003

The OSC's Investigative Powers per the OSA

PART VI INVESTIGATIONS AND EXAMINATIONS

Investigation order

11. (1) *The Commission may, by order, appoint one or more persons to make such investigation with respect to a matter as it considers expedient,*

(a) *for the due administration of Ontario securities law or the regulation of the capital markets in Ontario; or*

(b) *to assist in the due administration of the securities or derivatives laws or the regulation of the capital markets in another jurisdiction. 1994, c. 11, s. 358; 2010, c. 26, Sched. 18, s. 4 (1).*

Contents of order

(2) *An order under this section shall describe the matter to be investigated. 1994, c. 11, s. 358.*

Scope of investigation

(3) *For the purposes of an investigation under this section, a person appointed to make the investigation may investigate and inquire into,*

(a) *the affairs of the person or company in respect of which the investigation is being made, including any trades, communications, negotiations, transactions, investigations, loans, borrowings or payments to, by, on behalf of, or in relation to or connected with the person or company and any property, assets or things owned, acquired or alienated in whole or in part by the person or company or by any other person or company acting on behalf of or as agent for the person or company; and*

(b) *the assets at any time held, the liabilities, debts, undertakings and obligations at any time existing, the financial or other conditions at any time prevailing in or in relation to or in connection with the person or company, and any relationship that may at any time exist or have existed between the person or company and any other person or company by reason of investments, commissions promised, secured or paid, interests held or acquired, the loaning or borrowing of money, stock or other property, the transfer, negotiation or holding of stock, interlocking directorates, common control, undue influence or control or any other relationship. 1994, c. 11, s. 358.*

Right to examine

(4) *For the purposes of an investigation under this section, a person appointed to make the investigation may examine any documents or other things, whether they are in the possession or control of the person or company in respect of which the investigation is ordered or of any other person or company. 1994, c. 11, s. 358.*

Minister may order investigation

(5) *Despite subsection (1), the Minister may, by order, appoint one or more persons to make such investigation as the Minister considers expedient,*

(a) *for the due administration of Ontario securities law or the regulation of the capital markets in Ontario; or*

(b) *to assist in the due administration of the securities or derivatives laws or the regulation of the capital markets in another jurisdiction. 1994, c. 11, s. 358; 2010, c. 26, Sched. 18, s. 4 (2).*

Same

(6) A person appointed under subsection (5) has, for the purpose of the investigation, the same authority, powers, rights and privileges as a person appointed under subsection (1). 1994, c. 11, s. 358.

Section Amendments with date in force (d/m/y)

1994, c. 11, s. 358 - 11/07/1994

2010, c. 26, Sched. 18, s. 4 (1, 2) - 8/12/2010

Financial examination order

12. (1) The Commission may, by order, appoint one or more persons to make such examination of the financial affairs of a market participant as it considers expedient,

(a) for the due administration of Ontario securities law or the regulation of the capital markets in Ontario; or

(b) to assist in the due administration of the securities or derivatives laws or the regulation of the capital markets in another jurisdiction. 1994, c. 11, s. 358; 2010, c. 26, Sched. 18, s. 5.

Contents of order

(2) An order under subsection (1) shall describe the matter to be examined. 1994, c. 11, s. 358.

Right to examine

(3) For the purposes of an examination under this section, a person appointed to conduct the examination may examine any documents or other things, whether they are in the possession or control of the market participant or any other person or company. 1994, c. 11, s. 358.

Section Amendments with date in force (d/m/y)

1994, c. 11, s. 358 - 11/07/1994

2010, c. 26, Sched. 18, s. 5 - 8/12/2010

Power of investigator or examiner

13. (1) A person making an investigation or examination under section 11 or 12 has the same power to summon and enforce the attendance of any person and to compel him or her to testify on oath or otherwise, and to summon and compel any person or company to produce documents and other things, as is vested in the Superior Court of Justice for the trial of civil actions, and the refusal of a person to attend or to answer questions or of a person or company to produce such documents or other things as are in his, her or its custody or possession makes the person or company liable to be committed for contempt by the Superior Court of Justice as if in breach of an order of that court. 1994, c. 11, s. 358; 2006, c. 19, Sched. C, s. 1 (1).

Rights of witness

(2) A person or company giving evidence under subsection (1) may be represented by counsel and may claim any privilege to which the person or company is entitled. 1994, c. 11, s. 358.

Inspection

(3) A person making an investigation or examination under section 11 or 12 may, on production of the order appointing him or her, enter the business premises of any person or company named in the order during business hours and inspect any documents or other things that are used in the business of that person or company and that relate to the matters specified in the

order, except those maintained by a lawyer in respect of his or her client's affairs. 1994, c. 11, s. 358.

Authorization to search

(4) A person making an investigation or examination under section 11 or 12 may apply to a judge of the Ontario Court of Justice in the absence of the public and without notice for an order authorizing the person or persons named in the order to enter and search any building, receptacle or place specified and to seize anything described in the authorization that is found in the building, receptacle or place and to bring it before the judge granting the authorization or another judge to be dealt with by him or her according to law. 1994, c. 11, s. 358; 2006, c. 19, Sched. C, s. 1 (2).

Grounds

(5) No authorization shall be granted under subsection (4) unless the judge to whom the application is made is satisfied on information under oath that there are reasonable and probable grounds to believe that there may be in the building, receptacle or place to be searched anything that may reasonably relate to the order made under section 11 or 12. 1994, c. 11, s. 358.

Power to enter, search and seize

(6) A person named in an order under subsection (4) may, on production of the order, enter any building, receptacle or place specified in the order between 6 a.m. and 9 p.m., search for and seize anything specified in the order, and use as much force as is reasonably necessary for that purpose. 1994, c. 11, s. 358.

Expiration

(7) Every order under subsection (4) shall name the date that it expires, and the date shall be not later than fifteen days after the order is granted. 1994, c. 11, s. 358.

Application

(8) Sections 159 and 160 of the Provincial Offences Act apply to searches and seizures under this section with such modifications as the circumstances require. 1994, c. 11, s. 358.

Private residences

(9) For the purpose of subsections (4), (5) and (6), "building, receptacle or place" does not include a private residence. 1994, c. 11, s. 358.

Section Amendments with date in force (d/m/y)

1994, c. 11, s. 358 - 11/07/1994

2006, c. 19, Sched. C, s. 1 (1, 2) - 22/06/2006

Copying

14. (1) Anything seized or produced under this Part shall be made available for inspection and copying by the person or company from which it was obtained, if practicable. 1994, c. 11, s. 358.

Return

(2) Anything seized or produced under this Part shall be returned to the person or company from which it was obtained when,

(a) retention is no longer necessary for the purposes of an investigation, examination, proceeding or prosecution; or

(b) the Commission so orders. 1994, c. 11, s. 358.
 Section Amendments with date in force (d/m/y)
 1994, c. 11, s. 358 - 11/07/1994

Report of investigation or examination

15. (1) A person appointed under subsection 11 (1) or 12 (1) shall, at the request of the Chair of the Commission or of a member of the Commission involved in making the appointment, provide a report to the Chair or member, as the case may be, or any testimony given and any documents or other things obtained under section 13. 1994, c. 11, s. 358.

Same

(2) A person appointed under subsection 11 (5) shall, at the request of the Chair of the Commission, provide a report to the Chair or any testimony given and any documents or other things obtained under section 13. 1994, c. 11, s. 358.

Report privileged

(3) A report provided under this section is privileged. 1994, c. 11, s. 358.
 Section Amendments with date in force (d/m/y)
 1994, c. 11, s. 358 - 11/07/1994

Non-disclosure

16. (1) Except in accordance with section 17, no person or company shall disclose at any time, except to his, her or its counsel,

- (a) the nature or content of an order under section 11 or 12; or
- (b) the name of any person examined or sought to be examined under section 13, any testimony given under section 13, any information obtained under section 13, the nature or content of any questions asked under section 13, the nature or content of any demands for the production of any document or other thing under section 13, or the fact that any document or other thing was produced under section 13. 1994, c. 11, s. 358.

Confidentiality

(2) If the Commission issues an order under section 11 or 12, all reports provided under section 15, all testimony given under section 13 and all documents and other things obtained under section 13 relating to the investigation or examination that is the subject of the order are for the exclusive use of the Commission or of such other regulator as the Commission may specify in the order, and shall not be disclosed or produced to any other person or company or in any other proceeding except as permitted under section 17. 2002, c. 18, Sched. H, s. 7.

Section Amendments with date in force (d/m/y)
 1994, c. 11, s. 358 - 11/07/1994
 2002, c. 18, Sched. H, s. 7 - 26/11/2002

Disclosure by Commission

17. (1) If the Commission considers that it would be in the public interest, it may make an order authorizing the disclosure to any person or company of,

- (a) the nature or content of an order under section 11 or 12;
- (b) the name of any person examined or sought to be examined under section 13, any testimony given under section 13, any information obtained under section 13, the nature or content of any questions asked under section 13, the nature or content of any demands for the production of

any document or other thing under section 13, or the fact that any document or other thing was produced under section 13; or

(c) all or part of a report provided under section 15. 1994, c. 11, s. 358.

Opportunity to object

(2) No order shall be made under subsection (1) unless the Commission has, where practicable, given reasonable notice and an opportunity to be heard to,

(a) persons and companies named by the Commission; and

(b) in the case of disclosure of testimony given or information obtained under section 13, the person or company that gave the testimony or from which the information was obtained. 1994, c. 11, s. 358.

Order without notice

(2.1) Despite subsection (2), if the Commission considers that it would be in the public interest, it may make an order without notice and without giving an opportunity to be heard authorizing the disclosure of the things described in clauses (1) (a) to (c) to any entity referred to in paragraph 1, 3, 4 or 5 of section 153. 2013, c. 2, Sched. 13, s. 1 (1).

Disclosure to police

(3) Without the written consent of the person from whom the testimony was obtained, no order shall be made under subsection (1) or (2.1) authorizing the disclosure of testimony given under subsection 13 (1) to,

(a) a municipal, provincial, federal or other police force or to a member of a police force; or

(b) a person responsible for the enforcement of the criminal law of Canada or of any other country or jurisdiction. 1994, c. 11, s. 358; 2013, c. 2, Sched. 13, s. 1 (2).

Terms and conditions

(4) An order under subsection (1) or (2.1) may be subject to terms and conditions imposed by the Commission. 1994, c. 11, s. 358; 2013, c. 2, Sched. 13, s. 1 (3).

Disclosure by court

(5) A court having jurisdiction over a prosecution under the Provincial Offences Act initiated by the Commission may compel production to the court of any testimony given or any document or other thing obtained under section 13, and after inspecting the testimony, document or thing and providing all interested parties with an opportunity to be heard, the court may order the release of the testimony, document or thing to the defendant if the court determines that it is relevant to the prosecution, is not protected by privilege and is necessary to enable the defendant to make full answer and defence, but the making of an order under this subsection does not determine whether the testimony, document or thing is admissible in the prosecution. 1994, c. 11, s. 358.

Disclosure in investigation or proceeding

(6) A person appointed to make an investigation or examination under this Act may disclose or produce anything mentioned in subsection (1), but may do so only in connection with,

(a) a proceeding commenced or proposed to be commenced before the Commission or the Director under this Act; or

(b) an examination of a witness, including an examination of a witness under section 13. 2001, c. 23, s. 210; 2016, c. 5, Sched. 26, s. 1.

Disclosure to police

(7) Without the written consent of the person from whom the testimony was obtained, no disclosure shall be made under subsection (6) of testimony given under subsection 13 (1) to,

(a) a municipal, provincial, federal or other police force or to a member of a police force; or

(b) a person responsible for the enforcement of the criminal law of Canada or of any other country or jurisdiction. 1999, c. 9, s. 196.

Section Amendments with date in force (d/m/y)

1994, c. 11, s. 358 - 11/07/1994; 1999, c. 9, s. 196 - 14/12/1999

2001, c. 23, s. 210 - 5/12/2001

2013, c. 2, Sched. 13, s. 1 (1-3) - 21/06/2013

2016, c. 5, Sched. 26, s. 1 - 19/04/2016

Prohibition on use of compelled testimony

18. Testimony given under section 13 shall not be admitted in evidence against the person from whom the testimony was obtained in a prosecution for an offence under section 122 or in any other prosecution governed by the Provincial Offences Act. 1994, c. 11, s. 358.

Section Amendments with date in force (d/m/y)

1994, c. 11, s. 358 - 11/07/1994

Some Understood Techniques How Securities Fraud Occurs

The Central Bank of Bahrain has provided on the internet the following types of participant market manipulation schemes that differing parties can be entered into.

Some of these transactions can be more readily perpetrated by an IA/RR than by an individual account holder without some degree of sophistication.

Painting the Tape:

This practice involves engaging in a transaction or series of transactions which are shown on a public display facility to give the impression of activity or price movement in a security. This may include an unlawful practice in which traders buy and sell a specific security among themselves, creating the illusion of high trading volume and significant investor interest, which can attract unsuspecting investors who might then buy the stock and enable the traders to profit. Or, an unlawful action by a group of market manipulators buying and/or selling a security among themselves to create artificial trading activity, which, when reported on the ticker tape, lures in unsuspecting investors as they perceive an unusual volume.

Wash Sales:

This is the practice of entering into arrangements for the sale or purchase of a security where there is no change in beneficial interests or market risk, or where the transfer of beneficial interest or market risk is only between parties who are acting in concert or collusion. (Repo transactions and stock lending/borrowing or other transactions involving transfer of securities as collateral do not constitute wash trades.) Wash sales include an unlawful transaction a trader makes by simultaneously buying and selling a security through two different brokers, thereby creating the

illusion of activity. The trader sometimes would use a relative to conclude such manipulative transactions.

Improper Matched Orders:

Transactions where both buy and sell orders are usually entered at the same time, with the exact same price and quantity by different but colluding parties.

Marking the Close:

Marking the close (or ramping) involves deliberately buying or selling securities or derivatives contracts at the close of the market in an effort to alter the closing price of the security or derivatives contract. This practice may take place on any individual trading day but is particularly associated with dates such as future/option expiry dates or quarterly/annual portfolio or index reference/valuation points.

Cornering the Market:

Securing such control of the bid or demand-side of both the derivative and the underlying asset that leads to a dominant position. This position can be exploited to manipulate the price of the derivative and/or the asset. With regards to derivatives, in a corner, a market participant or group of participants accumulates a controlling position in an asset in the cash, derivative and other markets. The market participant or group of participants then requires those holding short positions to settle their obligations under the terms of their contracts, either by making delivery or by purchasing the asset from the manipulator or by offsetting in the derivatives market opposite the manipulator at prices distorted by the manipulators.

In the context of a futures contract and leveraged foreign trading corners or attempts to corner, any commodity which is the subject of a futures contract.

Abusive Squeeze:

This involves a party or parties with a significant influence over the supply of, or demand for, or delivery mechanisms for a security and/or the underlying product of a derivative contract exploiting a dominant position in order materially to distort the price at which others have to deliver, take delivery or defer delivery of the security/product in order to satisfy their obligations.

Capping and Pegging:

This practice involves activity on both the stock market and the derivatives market. A trader writes an option, which obliges the trader to sell to (in the case of a call option) or buy from (in the case of a put option) the option holder a specified number of shares covered by the option in order to affect the share price in a direction that will make the option unprofitable to exercise.

Manipulative Naked Short Sales:

A short sale is generally the sale of a stock the seller does not own. In a "naked" short sale, the seller does not borrow or arrange to borrow the securities in time to make delivery to the buyer within the standard settlement period. As a result, the seller fails to deliver securities to the buyer when delivery is due. Selling stock short and failing to deliver shares at the time of settlement with the purpose of driving down the security's price is a manipulative activity.

Pooling and Churning:

"Pooling and Churning" can involve wash sales or pre-arranged trades executed in order to give an impression of active trading, and therefore investor interest in the stock.

Interpositioning:

Interpositioning involves a 2-step process that allows the brokerage firm to generate a profit for the brokerage firm from the spread between two opposite trades. Interpositioning can take various forms. In one form, the broker purchases stock for the brokerage firm's proprietary account from the customer sell order; and then fills the customer buy order by selling from the brokerage firm's proprietary account at a higher price — thus locking in a riskless profit for the brokerage firm's proprietary account. A second form of interpositioning involves the broker selling stock into the customer buy order, and then filling the customer sell order by buying for the brokerage firm's proprietary account at a lower price — again, locking in a riskless profit for the brokerage firm's proprietary account. In both forms of interpositioning, the broker participates on both sides of the trade, thereby capturing the spread between the purchase and sale prices, disadvantaging at least one of the parties to the transaction.

Late Trading:

This involves purchasing mutual fund shares at the closing price after the market closes. This is an investment technique involving short-term "in and out" trading of mutual fund shares, which has a detrimental effect on the long-term shareholders. The technique is designed to exploit market inefficiencies when the "net asset value" of the mutual fund shares; which is set at the market close, does not reflect the current market value of the stocks held by the mutual fund. When a "market timer" buys mutual fund shares at the stale NAV, it realizes a profit when it sells those shares the next trading day or thereafter. That profit dilutes the value of shares held by long term investors. Late Trading (or market timing) includes: (a) frequent buying and selling of shares of the same mutual fund; or (b) buying or selling mutual fund shares in order to exploit inefficiencies in mutual fund pricing. Market timing, while not illegal per se, can harm other mutual fund shareholders because it can dilute the value of their shares, if the market timer is exploiting pricing inefficiencies, or disrupt the management of the mutual funds' investment portfolio and can cause the targeted mutual fund to incur costs borne by other shareholders to accommodate frequent buying and selling of shares by the market timer.

Holding the Market:

The practice of placing active or pending orders for a security into a market where the price is dropping rapidly in an attempt to "hold" the price of the security steady, or create a floor in the security. This practice is unlawful except when a broker or other party is mandated to keep the price of a security steady as part of Price Stabilization or a buy-back programme. This is only done in rare cases where there is not enough market depth to hold the price.

Ghosting:

An unlawful practice whereby two or more market makers or brokers collectively attempt to influence and change the price of a stock. Ghosting is used to affect stock prices so the manipulators can profit from the price movement.

Freeriding:

An unlawful practice in which an underwriting syndicate member withholds part of a new securities issue and later sells it at a higher price. This practice involves the unlawful activity of buying a stock and selling it before paying for the purchase.

Bucketing:

A brokerage that makes trades on a client's behalf and promises a certain price and/or confirms execution of an order to a client without actually executing it. The brokerage however, waits until a different price arises and then makes the trade, keeping the difference as profit in an attempt to make a short-term profit.

Portfolio Pumping:

The unlawful act of bidding up the value of a fund's holdings right before the end of a quarter, when the fund's performance is measured. This is done by placing a large number of orders on existing holdings, which drives up the value of the securities within the Portfolio.

Civil Recourses for Securities Actions

The below are the statutory rights the OSA grants investors to realize, as parties in civil actions initiated on their own standing, where they have suffered losses due to certain types of investment fraud. More are detailed following.

**PART XXIII
CIVIL LIABILITY**

Liability for misrepresentation in prospectus

130. (1) *Where a prospectus, together with any amendment to the prospectus, contains a misrepresentation, a purchaser who purchases a security offered by the prospectus during the period of distribution or during distribution to the public has, without regard to whether the purchaser relied on the misrepresentation, a right of action for damages against,*

- (a) the issuer or a selling security holder on whose behalf the distribution is made;*
- (b) each underwriter of the securities who is required to sign the certificate required by section 59;*
- (c) every director of the issuer at the time the prospectus or the amendment to the prospectus was filed;*
- (d) every person or company whose consent to disclosure of information in the prospectus has been filed pursuant to a requirement of the regulations but only with respect to reports, opinions or statements that have been made by them; and*
- (e) every person or company who signed the prospectus or the amendment to the prospectus other than the persons or companies included in clauses (a) to (d), or, where the purchaser purchased the security from a person or company referred to in clause (a) or (b) or from another underwriter of the securities, the purchaser may elect to exercise a right of rescission against such person, company or underwriter, in which case the purchaser shall have no right of action for damages against such person, company or underwriter. R.S.O. 1990, c. S.5, s. 130 (1); 2004, c. 31, Sched. 34, s. 6; 2006, c. 33, Sched. Z.5, s. 13.*

Defence

(2) No person or company is liable under subsection (1) if he, she or it proves that the purchaser purchased the securities with knowledge of the misrepresentation. R.S.O. 1990, c. S.5, s. 130 (2).

Idem

(3) No person or company, other than the issuer or selling security holder, is liable under subsection (1) if he, she or it proves,

(a) that the prospectus or the amendment to the prospectus was filed without his, her or its knowledge or consent, and that, on becoming aware of its filing, he, she or it forthwith gave reasonable general notice that it was so filed;

(b) that, after the issue of a receipt for the prospectus and before the purchase of the securities by the purchaser, on becoming aware of any misrepresentation in the prospectus or an amendment to the prospectus he, she or it withdrew the consent thereto and gave reasonable general notice of such withdrawal and the reason therefor;

(c) that, with respect to any part of the prospectus or the amendment to the prospectus purporting to be made on the authority of an expert or purporting to be a copy of or an extract from a report, opinion or statement of an expert, he, she or it had no reasonable grounds to believe and did not believe that there had been a misrepresentation or that such part of the prospectus or the amendment to the prospectus did not fairly represent the report, opinion or statement of the expert or was not a fair copy of or extract from the report, opinion or statement of the expert;

(d) that, with respect to any part of the prospectus or the amendment to the prospectus purporting to be made on his, her or its own authority as an expert or purporting to be a copy of or an extract from his, her or its own report, opinion or statement as an expert but that contains a misrepresentation attributable to failure to represent fairly his, her or its report, opinion or statement as an expert,

(i) the person or company had, after reasonable investigation, reasonable grounds to believe and did believe that such part of the prospectus or the amendment to the prospectus fairly represented his, her or its report, opinion or statement, or

(ii) on becoming aware that such part of the prospectus or the amendment to the prospectus did not fairly represent his, her or its report, opinion or statement as an expert, he, she or it forthwith advised the Commission and gave reasonable general notice that such use had been made and that he, she or it would not be responsible for that part of the prospectus or the amendment to the prospectus; or

(e) that, with respect to a false statement purporting to be a statement made by an official person or contained in what purports to be a copy of or extract from a public official document, it was a correct and fair representation of the statement or copy of or extract from the document, and he, she or it had reasonable grounds to believe and did believe that the statement was true. R.S.O. 1990, c. S.5, s. 130 (3).

Idem

(4) No person or company, other than the issuer or selling security holder, is liable under subsection (1) with respect to any part of the prospectus or the amendment to the prospectus purporting to be made on his, her or its own authority as an expert or purporting to be a copy of or an extract from his, her or its own report, opinion or statement as an expert unless he, she or it,

(a) failed to conduct such reasonable investigation as to provide reasonable grounds for a belief that there had been no misrepresentation; or

(b) believed there had been a misrepresentation. R.S.O. 1990, c. S.5, s. 130 (4).

Idem

(5) No person or company, other than the issuer or selling security holder, is liable under subsection (1) with respect to any part of the prospectus or the amendment to the prospectus not purporting to be made on the authority of an expert and not purporting to be a copy of or an extract from a report, opinion or statement of an expert unless he, she or it,

(a) failed to conduct such reasonable investigation as to provide reasonable grounds for a belief that there had been no misrepresentation; or

(b) believed there had been a misrepresentation. R.S.O. 1990, c. S.5, s. 130 (5).

Limitation re underwriters

(6) No underwriter is liable for more than the total public offering price represented by the portion of the distribution underwritten by the underwriter. R.S.O. 1990, c. S.5, s. 130 (6).

Limitation in action for damages

(7) In an action for damages pursuant to subsection (1), the defendant is not liable for all or any portion of such damages that the defendant proves do not represent the depreciation in value of the security as a result of the misrepresentation relied upon. R.S.O. 1990, c. S.5, s. 130 (7).

Joint and several liability

(8) All or any one or more of the persons or companies specified in subsection (1) are jointly and severally liable, and every person or company who becomes liable to make any payment under this section may recover a contribution from any person or company who, if sued separately, would have been liable to make the same payment provided that the court may deny the right to recover such contribution where, in all the circumstances of the case, it is satisfied that to permit recovery of such contribution would not be just and equitable. R.S.O. 1990, c. S.5, s. 130 (8).

Limitation re amount recoverable

(9) In no case shall the amount recoverable under this section exceed the price at which the securities were offered to the public. R.S.O. 1990, c. S.5, s. 130 (9).

No derogation of rights

(10) The right of action for rescission or damages conferred by this section is in addition to and without derogation from any other right the purchaser may have at law. R.S.O. 1990, c. S.5, s. 130 (10).

Section Amendments with date in force (d/m/y)

2004, c. 31, Sched. 34, s. 6 - 16/12/2004

2006, c. 33, Sched. Z.5, s. 13 - 20/12/2006

Liability for misrepresentation in offering memorandum

130.1 (1) Where an offering memorandum contains a misrepresentation, a purchaser who purchases a security offered by the offering memorandum during the period of distribution has, without regard to whether the purchaser relied on the misrepresentation, the following rights:

1. The purchaser has a right of action for damages against the issuer and a selling security holder on whose behalf the distribution is made.

2. If the purchaser purchased the security from a person or company referred to in paragraph 1, the purchaser may elect to exercise a right of rescission against the person or company. If the purchaser exercises this right, the purchaser ceases to have a right of action for damages against the person or company. 2004, c. 31, Sched. 34, s. 7.

Defence

(2) No person or company is liable under subsection (1) if he, she or it proves that the purchaser purchased the securities with knowledge of the misrepresentation. 1999, c. 9, s. 218.

Limitation in action for damages

(3) In an action for damages pursuant to subsection (1), the defendant is not liable for all or any portion of the damages that the defendant proves do not represent the depreciation in value of the security as a result of the misrepresentation relied upon. 1999, c. 9, s. 218.

Joint and several liability

(4) Subject to subsection (5), all or any one or more of the persons or companies specified in subsection (1) are jointly and severally liable, and every person or company who becomes liable to make any payment under this section may recover a contribution from any person or company who, if sued separately, would have been liable to make the same payment, unless the court rules that, in all the circumstances of the case, to permit recovery of the contribution would not be just and equitable. 1999, c. 9, s. 218.

Same

(5) Despite subsection (4), an issuer shall not be liable where it is not receiving any proceeds from the distribution of the securities being distributed and the misrepresentation was not based on information provided by the issuer, unless the misrepresentation,

- (a) was based on information that was previously publicly disclosed by the issuer;
- (b) was a misrepresentation at the time of its previous public disclosure; and
- (c) was not subsequently publicly corrected or superseded by the issuer prior to the completion of the distribution of the securities being distributed. 1999, c. 9, s. 218.

Limitation re amount recoverable

(6) In no case shall the amount recoverable under this section exceed the price at which the securities were offered. 1999, c. 9, s. 218.

No derogation of rights

(7) The right of action for rescission or damages conferred by this section is in addition to and without derogation from any other right the purchaser may have at law. 1999, c. 9, s. 218.

Application

(8) This section applies only with respect to an offering memorandum which has been furnished to a prospective purchaser in connection with a distribution of a security under an exemption from section 53 of the Act that is specified in the regulations for the purposes of this section. 2001, c. 23, s. 216.

Section Amendments with date in force (d/m/y)

1999, c. 9, s. 218 - 14/12/1999

2001, c. 23, s. 216 - 5/12/2001

2004, c. 31, Sched. 34, s. 7 - 16/12/2004

Liability for misrepresentation in circular

131. (1) Where a take-over bid circular sent to the security holders of an offeree issuer as required by the regulations related to Part XX, or any notice of change or variation in respect of the circular, contains a misrepresentation, a security holder may, without regard to whether the security holder relied on the misrepresentation, elect to exercise a right of action for rescission or damages against the offeror or a right of action for damages against,

(a) every person who at the time the circular or notice, as the case may be, was signed was a director of the offeror;

(b) every person or company whose consent in respect of the circular or notice, as the case may be, has been filed pursuant to a requirement of the regulations but only with respect to reports, opinions or statements that have been made by the person or company; and

(c) each person who signed a certificate in the circular or notice, as the case may be, other than the persons included in clause (a). R.S.O. 1990, c. S.5, s. 131 (1); 2004, c. 31, Sched. 34, s. 8 (1); 2015, c. 38, Sched. 18, s. 7 (1).

Same

(2) Where a directors' circular or a director's or officer's circular delivered to the security holders of an offeree issuer as required by the regulations related to Part XX, or any notice of change or variation in respect of the circular, contains a misrepresentation, a security holder has, without regard to whether the security holder relied on the misrepresentation, a right of action for damages against every director or officer who signed the circular or notice that contained the misrepresentation. 2004, c. 31, Sched. 34, s. 8 (2); 2007, c. 7, Sched. 38, s. 9 (1); 2015, c. 38, Sched. 18, s. 7 (2).

Idem

(3) Subsection (1) applies with necessary modifications where an issuer bid circular or any notice of change or variation in respect thereof contains a misrepresentation. R.S.O. 1990, c. S.5, s. 131 (3).

Defence

(4) No person or company is liable under subsection (1), (2) or (3) if the person or company proves that the security holder had knowledge of the misrepresentation. R.S.O. 1990, c. S.5, s. 131 (4).

Idem

(5) No person or company, other than the offeror, is liable under subsection (1), (2) or (3) if he, she or it proves,

(a) that the take-over bid circular, issuer bid circular, directors' circular or director's or officer's circular, as the case may be, was sent without his, her or its knowledge or consent and that, on becoming aware of it, he, she or it forthwith gave reasonable general notice that it was so sent;

(b) that, after the sending of the take-over bid circular, issuer bid circular, directors' circular or director's or officer's circular, as the case may be, on becoming aware of any misrepresentation in the take-over bid circular, issuer bid circular, directors' circular or director's or officer's circular, he, she or it withdrew the consent thereto and gave reasonable general notice of the withdrawal and the reason therefor;

(c) that, with respect to any part of the circular purporting to be made on the authority of an expert or purporting to be a copy of or an extract from a report, opinion or statement of an expert, he, she or it had no reasonable grounds to believe and did not believe that there had been a misrepresentation or that such part of the circular did not fairly represent the report, opinion or statement of the expert or was not a fair copy of or extract from the report, opinion or statement of the expert;

(d) that, with respect to any part of the circular purporting to be made on his, her or its own authority as an expert or purporting to be a copy of or an extract from his, her or its own report, opinion or statement as an expert, but that contains a misrepresentation attributable to failure to represent fairly his, her or its report, opinion or statement as an expert,

(i) the person or company had, after reasonable investigation, reasonable grounds to believe and did believe that such part of the circular fairly represented his, her or its report, opinion or statement as an expert, or

(ii) on becoming aware that such part of the circular did not fairly represent his, her or its report, opinion or statement as an expert, he, she or it forthwith advised the Commission and gave reasonable general notice that such use had been made and that he, she or it would not be responsible for that part of the circular; or

(e) that, with respect to a false statement purporting to be a statement made by an official person or contained in what purports to be a copy of or extract from a public official document, it was a correct and fair representation of the statement or copy of or extract from the document and he, she or it had reasonable grounds to believe and did believe that the statement was true. R.S.O. 1990, c. S.5, s. 131 (5); 2007, c. 7, Sched. 38, s. 9 (2, 3).

Idem

(6) No person or company, other than the offeror, is liable under subsection (1), (2) or (3) with respect to any part of the circular purporting to be made on his, her or its own authority as an expert or purporting to be a copy of or an extract from his, her or its own report, opinion or statement as an expert unless he, she or it,

(a) failed to conduct such reasonable investigation as to provide reasonable grounds for a belief that there had been no misrepresentation; or

(b) believed there had been a misrepresentation. R.S.O. 1990, c. S.5, s. 131 (6).

Idem

(7) No person or company, other than the offeror, is liable under subsection (1), (2) or (3) with respect to any part of the circular not purporting to be made on the authority of an expert and not purporting to be a copy of or an extract from a report, opinion or statement of an expert unless he, she or it,

(a) failed to conduct such reasonable investigation as to provide reasonable grounds for a belief that there had been no misrepresentation; or

(b) believed there had been a misrepresentation. R.S.O. 1990, c. S.5, s. 131 (7).

Joint and several liability

(8) All or any one or more of the persons or companies specified in subsection (1), (2) or (3) are jointly and severally liable, and every person or company who becomes liable to make any payment under this section may recover a contribution from any person or company who, if sued separately, would have been liable to make the same payment provided that the court may deny the right to recover such contribution where, in all the circumstances of the case, it is satisfied that to permit recovery of such contribution would not be just and equitable. R.S.O. 1990, c. S.5, s. 131 (8).

Limitation of damages

(9) In an action for damages pursuant to subsection (1), (2) or (3) based on a misrepresentation affecting a security offered by the offeror company in exchange for securities of the offeree company, the defendant is not liable for all or any portion of such damages that the defendant proves do not represent the depreciation in value of the security as a result of the misrepresentation. R.S.O. 1990, c. S.5, s. 131 (9).

Deemed issuer bid circular

(10) Where the offeror in an issuer bid made in the normal course through the facilities of a designated exchange in reliance on an exemption set out in the regulations related to Part XX is required by the by-laws, regulations or policies of the applicable designated exchange to file with it or deliver to security holders of the offeree issuer a disclosure document, the disclosure document shall be deemed, for the purposes of this section, to be an issuer bid circular delivered to the security holders as required by Part XX or the regulations related to Part XX. 2015, c. 38, Sched. 18, s. 7 (3).

No derogation of rights

(11) The right of action for rescission or damages conferred by this section is in addition to and without derogation from any other right the security holders of the offeree issuer may have at law. R.S.O. 1990, c. S.5, s. 131 (11).

Section Amendments with date in force (d/m/y)

2004, c. 31, Sched. 34, s. 8 (1, 2) - 16/12/2004

2007, c. 7, Sched. 38, s. 9 (1-4) - 1/02/2008

2010, c. 26, Sched. 18, s. 36 - 8/12/2010

2015, c. 38, Sched. 18, s. 7 (1-3) - 9/05/2016

Standard of reasonableness

132. In determining what constitutes reasonable investigation or reasonable grounds for belief for the purposes of sections 130 and 131, the standard of reasonableness shall be that required of a prudent person in the circumstances of the particular case. R.S.O. 1990, c. S.5, s. 132.

Defence to liability for misrepresentation

132.1 (1) A person or company is not liable in an action under section 130, 130.1 or 131 for a misrepresentation in forward-looking information if the person or company proves all of the following things:

1. The document containing the forward-looking information contained, proximate to that information,

i. reasonable cautionary language identifying the forward-looking information as such, and identifying material factors that could cause actual results to differ materially from a conclusion, forecast or projection in the forward-looking information, and

ii. a statement of the material factors or assumptions that were applied in drawing a conclusion or making a forecast or projection set out in the forward-looking information.

2. The person or company had a reasonable basis for drawing the conclusions or making the forecasts and projections set out in the forward-looking information. 2004, c. 31, Sched. 34, s. 9.

Exception

(2) Subsection (1) does not relieve a person or company of liability respecting forward-looking information in a financial statement or forward-looking information in a document released in connection with an initial public offering. 2004, c. 31, Sched. 34, s. 9.

Section Amendments with date in force (d/m/y)
2004, c. 31, Sched. 34, s. 9 - 16/12/2004

Liability of dealer or offeror

133. Each of the following has a right of action for rescission or damages against the dealer or offeror who failed to comply with the applicable requirement:

1. A purchaser of a security to whom a prospectus was required to be sent or delivered but was not sent or delivered in compliance with subsection 71 (1).

2. A purchaser of an investment fund security to whom a prescribed disclosure document referred to in subsection 71 (1.1) was required to be sent or delivered but was not sent or delivered in compliance with the regulations.

Note: On December 10, 2018, the day named by proclamation of the Lieutenant Governor, section 133 is amended by adding the following paragraph: (See: 2014, c. 7, Sched. 28, ss. 14, 18 (2))

2.1 A purchaser of a prescribed investment fund security trading on an exchange or an alternative trading system to whom a prescribed disclosure document referred to in subsection 71 (1.3) was required to be sent or delivered but was not sent or delivered in compliance with the regulations.

3. A security holder to whom a take-over bid and take-over bid circular or an issuer bid and an issuer bid circular, or any notice of change or variation to any such bid or circular, were required by the regulations related to Part XX to be sent or delivered but were not sent or delivered in compliance with that Part. 2011, c. 9, Sched. 38, s. 3; 2015, c. 38, Sched. 18, s. 8.

Section Amendments with date in force (d/m/y)

2007, c. 7, Sched. 38, s. 10 - 1/02/2008

2011, c. 9, Sched. 38, s. 3 - 1/09/2013

2014, c. 7, Sched. 28, s. 14 - 10/12/2018

2015, c. 38, Sched. 18, s. 8 - 9/05/2016

Liability where material fact or change undisclosed

134. (1) Every person or company in a special relationship with an issuer who purchases or sells securities of the issuer with knowledge of a material fact or material change with respect to the issuer that has not been generally disclosed is liable to

compensate the seller or purchaser of the securities, as the case may be, for damages as a result of the trade unless,

(a) the person or company in the special relationship with the issuer proves that the person or company reasonably believed that the material fact or material change had been generally disclosed; or

(b) the material fact or material change was known or ought reasonably to have been known to the seller or purchaser, as the case may be. R.S.O. 1990, c. S.5, s. 134 (1); 2015, c. 20, Sched. 39, s. 4 (1-3).

Idem, tipping

(2) Every,

(a) issuer;

(b) person or company in a special relationship with an issuer;

(c) person or company that is considering or evaluating whether to make a take-over bid, as defined in Part XX, or that proposes to make a take-over bid, as defined in Part XX, for the securities of the issuer; and

(c.1) person or company that is considering or evaluating whether to become a party, or that proposes to become a party, to a reorganization, amalgamation, merger or arrangement or similar business combination with the issuer or to acquire a substantial portion of its property,

and who informs another person or company of a material fact or material change with respect to the issuer that has not been generally disclosed is liable to compensate for damages any person or company that thereafter sells securities of the issuer to or purchases securities of the issuer from the person or company that received the information unless,

(d) the person or company who informed the other person or company proves that the informing person or company reasonably believed the material fact or material change had been generally disclosed;

(e) the material fact or material change was known or ought reasonably to have been known to the seller or purchaser, as the case may be;

(f) in the case of an action against an issuer or a person in a special relationship with the issuer, the information was given in the necessary course of business; or

(g) in the case of an action against a person or company described in clause (c) or (c.1), the information was given in the necessary course of business relating to the take-over bid, business combination or acquisition. R.S.O. 1990, c. S.5, s. 134 (2); 2013, c. 2, Sched. 13, s. 4; 2015, c. 20, Sched. 39, s. 4 (1-6).

Liability for improper use of information, mutual funds

(3) A person or company is accountable to a mutual fund in Ontario for any benefit or advantage received or receivable as a result of a purchase or sale of securities of an issuer if,

(a) the portfolio securities of the mutual fund include securities of that issuer; and

(b) the person or company,

(i) has access to information concerning the investment program of the mutual fund, and

(ii) uses that information for his, her or its direct benefit or advantage to purchase or sell securities of that issuer for his, her or its own account. 2009, c. 18, Sched. 26, s. 17.

Same, discretionary investment portfolios

(3.1) *A person or company is accountable to a client of a registrant for any benefit or advantage received or receivable as a result of a purchase or sale of securities of an issuer if,*

- (a) *an investment portfolio is managed for the client by the registrant through discretionary authority provided by the client;*
 - (b) *the portfolio securities of the investment portfolio include securities of that issuer;*
 - (c) *the registrant is a registered adviser or registered dealer; and*
 - (d) *the person or company has,*
 - (i) *access to information concerning the investment portfolio, and*
 - (ii) *uses that information for his, her or its direct benefit or advantage to purchase or sell securities of that issuer.*
- 2009, c. 18, Sched. 26, s. 17.

Accountability for gain

(4) *Every person or company who is an insider, affiliate or associate of an issuer that,*

- (a) *sells or purchases the securities of the issuer with knowledge of a material fact or material change with respect to the issuer that has not been generally disclosed; or*
 - (b) *communicates to another person, other than in the necessary course of business, knowledge of a material fact or material change with respect to the issuer that has not been generally disclosed,*
- is accountable to the issuer for any benefit or advantage received or receivable by the person or company as a result of the purchase, sale or communication, as the case may be, unless the person or company proves that the person or company reasonably believed that the material fact or material change had been generally disclosed. R.S.O. 1990, c. S.5, s. 134 (4); 2015, c. 20, Sched. 39, s. 4 (1-3).*

Liability, joint and several

(5) *Where more than one person or company in a special relationship with an issuer is liable under subsection (1) or (2) as to the same transaction or series of transactions, their liability is joint and several. R.S.O. 1990, c. S.5, s. 134 (5); 2015, c. 20, Sched. 39, s. 4 (2, 3).*

Measure of damages

- (6) *In assessing damages under subsection (1) or (2), the court shall consider,*
 - (a) *if the plaintiff is a purchaser, the price paid by the plaintiff for the security less the average market price of the security in the twenty trading days following general disclosure of the material fact or material change; or*
 - (b) *if the plaintiff is a vendor, the average market price of the security in the twenty trading days following general disclosure of the material fact or material change less the price received by the plaintiff for the security,*
- but the court may instead consider such other measures of damages as may be relevant in the circumstances. R.S.O. 1990, c. S.5, s. 134 (6).*

Definitions

(7) *For the purposes of this section,*

“person or company in a special relationship with an issuer” has the same meaning as in subsection 76 (5); (“personne ou compagnie ayant des rapports particuliers avec un émetteur assujetti”)

“issuer” means,

- (a) a reporting issuer, or
- (b) any other issuer whose securities are publicly traded; (“émetteur”) R.S.O. 1990, c. S.5, s. 134 (7); 2010, c. 26, Sched. 18, s. 37 (1); 2015, c. 20, Sched. 39, s. 4 (2, 3, 7, 8).

Idem

(8) For the purposes of subsections (1) and (2), a security of the issuer shall be deemed to include,

- (a) a put, call, option or other right or obligation to purchase or sell securities of the issuer;
- (b) a security, the market price of which varies materially with the market price of the securities of the issuer; or
- (c) a related derivative. R.S.O. 1990, c. S.5, s. 134 (8); 2010, c. 26, Sched. 18, s. 37 (2); 2015, c. 20, Sched. 39, s. 4 (1, 3).

Section Amendments with date in force (d/m/y)

2009, c. 18, Sched. 26, s. 17 - 28/09/2009

2010, c. 26, Sched. 18, s. 37 (1, 2) - 8/12/2010

2013, c. 2, Sched. 13, s. 4 (1, 2) - 21/06/2013

2015, c. 20, Sched. 39, s. 4 (1-8) - 4/06/2015

Action by Commission on behalf of issuer

135. (1) Upon application by the Commission or by any person or company who was at the time of a transaction referred to in subsection 134 (1) or (2) or is at the time of the application a security holder of the reporting issuer, a judge of the Superior Court of Justice may, if satisfied that,

- (a) the Commission or the person or company has reasonable grounds for believing that the reporting issuer has a cause of action under subsection 134 (4); and
- (b) either,
 - (i) the reporting issuer has refused or failed to commence an action under section 134 within sixty days after receipt of a written request from the Commission or such person or company so to do, or
 - (ii) the reporting issuer has failed to prosecute diligently an action commenced by it under section 134,

make an order, upon such terms as to security for costs and otherwise as to the judge seems fit, requiring the Commission or authorizing such person or company or the Commission to commence or continue an action in the name of and on behalf of the reporting issuer to enforce the liability created by subsection 134 (4). R.S.O. 1990, c. S.5, s. 135 (1); 2006, c. 19, Sched. C, s. 1 (1).

Action by Commission on behalf of mutual fund

(2) Upon the application by the Commission or any person or company who was at the time of a transaction referred to in subsection 134 (3) or is at the time of the application

a security holder of the mutual fund, a judge of the Superior Court of Justice may, if satisfied that,

- (a) the Commission or the person or company has reasonable grounds for believing that the mutual fund has a cause of action under subsection 134 (3); and
- (b) the mutual fund has either,
 - (i) refused or failed to commence an action under subsection 134 (3) within sixty days after receipt of a written request from the Commission or the person or company so to do, or
 - (ii) failed to prosecute diligently an action commenced by it under subsection 134 (3),

make an order, upon terms as to security for costs or otherwise as to the judge seems proper, requiring the Commission or authorizing the person or company or the Commission to commence and prosecute or to continue an action in the name of and on behalf of the mutual fund to enforce the liability created by subsection 134 (3). R.S.O. 1990, c. S.5, s. 135 (2); 2006, c. 19, Sched. C, s. 1 (1).

Costs

- (3) Where an action under subsection 134 (3), (3.1) or (4) is,
 - (a) commenced;
 - (b) commenced and prosecuted; or
 - (c) continued,

by a board of directors of a reporting issuer, the trial judge or, on motion to the Superior Court of Justice, a judge of the Court may order that the costs properly incurred by the board of directors in commencing, commencing and prosecuting or continuing the action, as the case may be, shall be paid by the reporting issuer, if the judge is satisfied that there were apparent grounds for believing the action was in the best interests of the reporting issuer and the security holders thereof. R.S.O. 1990, c. S.5, s. 135 (3); 2006, c. 19, Sched. C, s. 1 (1); 2009, c. 18, Sched. 26, s. 18 (1).

Action by Commission on behalf of security holder of the reporting issuer

- (4) Where an action under subsection 134 (3), (3.1) or (4) is,
 - (a) commenced;
 - (b) commenced and prosecuted; or
 - (c) continued,

by a person or company who is a security holder of the reporting issuer, the trial judge or, on motion to the Superior Court of Justice, a judge of the Court may order that the costs properly incurred by such person or company in commencing, commencing and prosecuting or continuing the action, as the case may be, shall be paid by the reporting issuer, if the judge is satisfied that,

- (d) the reporting issuer failed to commence the action or had commenced it but had failed to prosecute it diligently; and
- (e) there are apparent grounds for believing that the continuance of the action is in the best interests of the reporting issuer and the security holders thereof. R.S.O. 1990, c. S.5, s. 135 (4); 2006, c. 19, Sched. C, s. 1 (1); 2009, c. 18, Sched. 26, s. 18 (2).

Idem

- (5) Where an action under subsection 134 (3), (3.1) or (4) is,
 - (a) commenced;

(b) commenced and prosecuted; or

(c) continued,

by the Commission, the trial judge or, on motion to the Superior Court of Justice, a judge of the Court shall order the reporting issuer to pay all costs properly incurred by the Commission in commencing, commencing and prosecuting or continuing the action, as the case may be. R.S.O. 1990, c. S.5, s. 135 (5); 2006, c. 19, Sched. C, s. 1 (1); 2009, c. 18, Sched. 26, s. 18 (3).

Idem

(6) In determining whether there are apparent grounds for believing that an action or its continuance is in the best interests of a reporting issuer and the security holders thereof, the judge shall consider the relationship between the potential benefit to be derived from the action by the reporting issuer and the security holders thereof and the cost involved in the prosecution of the action. R.S.O. 1990, c. S.5, s. 135 (6).

Notice of application

(7) Notice of every application under subsection (1) or (2) shall be given to the Commission, the reporting issuer or the mutual fund, as the case may be, and each of them may appear and be heard thereon. R.S.O. 1990, c. S.5, s. 135 (7).

Order to co-operate

(8) Every order made under subsection (1) or (2) requiring or authorizing the Commission to commence and prosecute or continue an action shall provide that the reporting issuer or mutual fund, as the case may be, shall co-operate fully with the Commission in the commencement and prosecution or continuation of the action, and shall make available to the Commission all books, records, documents and other material or information known to the reporting issuer or mutual fund or reasonably ascertainable by the reporting issuer or mutual fund relevant to such action. R.S.O. 1990, c. S.5, s. 135 (8).

Appeal

(9) An appeal lies to the Divisional Court from any order made under this section. R.S.O. 1990, c. S.5, s. 135 (9).

Section Amendments with date in force (d/m/y)

2006, c. 19, Sched. C, s. 1 (1) - 22/06/2006

2009, c. 18, Sched. 26, s. 18 (1-3) - 28/09/2009

Disclosure of intended status as principal

136. (1) If, contrary to Ontario securities law, a registered dealer fails to disclose to a person or company with whom it effects a purchase or sale of a security that it intended to act as principal in respect of the purchase or sale, the person or company may rescind the contract effecting the purchase or sale by mailing or delivering written notice of the rescission to the registered dealer within 60 days after the date of delivery of the security to or by the person or company, as the case may be. 2009, c. 18, Sched. 26, s. 19.

Disclosure of actual status as principal

(2) If, contrary to Ontario securities law, a registered dealer fails to disclose to a person or company that it has acted as principal in respect of a purchase or sale of a security, the person or company may rescind the contract effecting the purchase or sale by

mailing or delivering written notice of the rescission to the registered dealer within seven days after the date of the delivery to the person or company of the written confirmation of the contract. 2009, c. 18, Sched. 26, s. 19.

Service

(3) For the purposes of subsection (2), a confirmation sent by ordinary letter mail is deemed to be delivered to the person or company to whom it was addressed in the ordinary course of mail. 2009, c. 18, Sched. 26, s. 19.

Exception

(4) Subsections (1) and (2) do not allow the rescission of a contract effecting the purchase of a security by a person or company if the person or company no longer owns the security. 2009, c. 18, Sched. 26, s. 19.

Onus

(5) In an action respecting a rescission to which subsection (1) or (2) applies, the onus of proving that a registered dealer disclosed that he, she or it acted or intended to act as principal is on the registered dealer. 2009, c. 18, Sched. 26, s. 19.

Limitation period

(6) No action respecting a rescission shall be commenced under this section after the expiration of a period of 90 days from the date of delivery of the notice under subsection (1) or (2). 2009, c. 18, Sched. 26, s. 19.

Section Amendments with date in force (d/m/y)

2009, c. 18, Sched. 26, s. 19 - 28/09/2009

Rescission of purchase of mutual fund security

137. (1) Every purchaser of a security of a mutual fund in Ontario may, where the amount of the purchase does not exceed the sum of \$50,000, rescind the purchase by notice given to the registered dealer from whom the purchase was made within forty-eight hours after receipt of the confirmation for a lump sum purchase or within sixty days after receipt of the confirmation for the initial payment under a contractual plan but, subject to subsection (5), the amount the purchaser is entitled to recover on exercise of this right to rescind shall not exceed the net asset value of the securities purchased, at the time the right is exercised. R.S.O. 1990, c. S.5, s. 137 (1).

Idem

(2) The right to rescind a purchase made under a contractual plan may be exercised only with respect to payments scheduled to be made within the time specified in subsection (1) for rescinding a purchase made under a contractual plan. R.S.O. 1990, c. S.5, s. 137 (2).

Notice

(3) The notice mentioned in subsection (1) shall be in writing, and may be given by prepaid mail, telegram or other means. R.S.O. 1990, c. S.5, s. 137 (3).

Service

(4) *A confirmation sent by prepaid mail shall be deemed conclusively to have been received in the ordinary course of mail by the person or company to whom it was addressed. R.S.O. 1990, c. S.5, s. 137 (4).*

Reimbursement

(5) *Every registered dealer from whom the purchase was made shall reimburse the purchaser who has exercised the right of rescission in accordance with this section for the amount of sales charges and fees relevant to the investment of the purchaser in the mutual fund in respect of the shares or units of which the notice of exercise of the right of rescission was given. R.S.O. 1990, c. S.5, s. 137 (5).*

Limitation periods

138. *Unless otherwise provided in this Act, no action shall be commenced to enforce a right created by this Part more than,*

- (a) *in the case of an action for rescission, 180 days after the date of the transaction that gave rise to the cause of action; or*
- (b) *in the case of any action, other than an action for rescission, the earlier of,*
 - (i) *180 days after the plaintiff first had knowledge of the facts giving rise to the cause of action, or*
 - (ii) *three years after the date of the transaction that gave rise to the cause of action. R.S.O. 1990, c. S.5, s. 138.*

Investment Industry Regulatory Organization of Canada (IIROC) Enforcement

In Canada, significant enforcement function has been assigned and contracted to the IIROC through dealer membership as well as by the Exchanges. If you publicly deal in securities either as agent or principal with a private member transacting on an exchange you must be a member of IIROC.

IIROC is the Self Regulatory Agency that principally governs stock trading in Canada with its more detailed stricter rules of functioning than the general Securities Acts in each province.

In its ePublications concerning disciplinary actions IIROC provides:

IIROC is the national self-regulatory organization which oversees all investment dealers and their trading activity in Canada's debt and equity markets. IIROC sets high quality regulatory and investment industry standards, protects investors and strengthens market integrity while supporting healthy Canadian capital markets. IIROC carries out its regulatory responsibilities through setting and enforcing rules regarding the proficiency, business and financial conduct of dealer firms and their registered employees and through setting and enforcing market integrity rules regarding trading activity on Canadian equity marketplaces.

IIROC provides **daily ePublications** which details IIROC-sphere matters over disciplinary actions and securities issues. It is available for sign-up for free email at: <https://epublications.iiroc.ca/>

The Rule Book

The principal document that IIROC measures industry compliance with its preogatives is the **Rule Book** which contains universally application rules with which all members and their employees must abide by. It evolves nominally over time and it's available at:

http://www.iiroc.ca/RuleBook/MemberRules/RulesCollated_en.pdf

It should be pointed out that in Rule 200 there contains a systematic list of documentation that members must maintain which is available for audit/investigative purposes.

UMIR and Restricted Practices

IIROC also maintains its UMIR, *Universal Market Integrity Rules*, that govern all activity of Registered Representatives and Investment Representatives in Canada the purpose of which is to promote a fair and transparent marketplace. The principal aspects of fraudulent trading include the below, which are monitored for real-time with proprietary software covering all the market activity. The IIROC web-site should be consulted in depth for numerous other types of restricted practices. It's available at:

<http://www.iiroc.ca/industry/rulebook/Pages/UMIR-Marketplace-Rules.aspx>

In respect of both the UMIR and Rule Book both comprehensively cover the activities of registered representatives and investment advisors in Canada.

The IIROC Enforcement process is described at:

<http://www.iiroc.ca/industry/enforcement/Pages/IIROC-Guide-Enforcement-Proceedings.aspx#1>

The Canadian Securities Institute - CSI and Its Industry Courses

If the reader is contemplating a career in the securities industry in Canada they are encouraged to investigate the numerous courses offered by the **Canadian Securities Institute (CSI)** which are the industry's foundation courses that all participants should/must take to gain a proficiency in the industry's practices. They offer principally all the foundation course materials to both become an RR/IA, as well as those designed to monitor and investigate them.

The **Canadian Securities Institute, CSI**, offers numerous courses for potential employees of the trade in Canada, one of which is the **Chief Compliance Officer Qualifying Exam** which is a self-study course for compliance professionals giving expertise for functions either in-firm or with a regulator. For purposes of this discussion, the author takes in summary form from its text-book, a course well worth taking if a new CFE is seeking employment with either party above.

Further Case Compilation on Securities Law Generally

The author also has a Googlebook on Canadian securities law (cases w/ Acts and National Instruments) for download and study to familiarize yourself with the fundamentals of the environment.

Corporate Internal Audit Functions and the CFE

Internal audit is a diverse function within a corporate setting that calls on internal auditors to apply various professional skills to test internal controls and manage risks to the corporation in line with dialogued objectives of the Chief Audit Executive, the management, and the board of directors. Internal auditors need not be thoroughly versed in fraud assessment or investigation, though it is quite common to have a CFE embedded in the internal audit team, or be able to turn to external CFE's to perform same if incidences of fraud are uncovered.

This chapter explains the principal fraud related IIA Standards that do apply in relation to internal fraud and IIA education that a CFE can further their skill-set by way of obtaining one or more of the IIA's Certification courses.

The IIA's Standards as They Relate to Fraud

There are no particular professional Standards that relate comprehensively to fraud *per se* though the Certified Internal Auditor (CIA) should be aware that it can exist in relation to the examination of controls that they further.

The following are some of the principal IIA Standards²¹⁰:

1112 – Chief Audit Executive Roles Beyond Internal Auditing

Where the chief audit executive has or is expected to have roles and/or responsibilities that fall outside of internal auditing, safeguards must be in place to limit impairments to independence or objectivity.

Interpretation:

The chief audit executive may be asked to take on additional roles and responsibilities outside of internal auditing, such as responsibility for compliance or risk management activities. These roles and responsibilities may impair, or appear to impair, the organizational independence of the internal audit activity or the individual objectivity of the internal auditor. Safeguards are those oversight activities, often undertaken by the board, to address these potential impairments, and may include such activities as periodically evaluating reporting lines and responsibilities and developing alternative processes to obtain assurance related to the areas of additional responsibility.

1120 – Individual Objectivity

Internal auditors must have an impartial, unbiased attitude and avoid any conflict of interest.

Interpretation:

Conflict of interest is a situation in which an internal auditor, who is in a position of trust, has a competing professional or personal interest. Such competing interests can make it difficult to fulfill his or her duties impartially. A conflict of interest exists even if no unethical or improper act results. A conflict of interest can create an appearance of impropriety that can undermine confidence in the internal auditor, the internal audit activity, and the profession. A conflict of interest could impair an individual's ability to perform his or her duties and responsibilities objectively.

²¹⁰ International Professional Practices Framework and International Standards for the Professional Practice of Internal Auditing, available at: <https://global.theiia.org/standards-guidance>. Lake Mary, FL: Copyright © 2017 by The Institute of Internal Auditors, Inc. All rights reserved.

1200 – Proficiency and Due Professional Care

Engagements must be performed with proficiency and due professional care.

1210 – Proficiency

Internal auditors must possess the knowledge, skills, and other competencies needed to perform their individual responsibilities. The internal audit activity collectively must possess or obtain the knowledge, skills, and other competencies needed to perform its responsibilities.

Interpretation:

Proficiency is a collective term that refers to the knowledge, skills, and other competencies required of internal auditors to effectively carry out their professional responsibilities. It encompasses consideration of current activities, trends, and emerging issues, to enable relevant advice and recommendations. Internal auditors are encouraged to demonstrate their proficiency by obtaining appropriate professional certifications and qualifications, such as the Certified Internal Auditor designation and other designations offered by The Institute of Internal Auditors and other appropriate professional organizations.

1210.A1 – The chief audit executive must obtain competent advice and assistance if the internal auditors lack the knowledge, skills, or other competencies needed to perform all or part of the engagement.

1210.A2 – Internal auditors must have sufficient knowledge to evaluate the risk of fraud and the manner in which it is managed by the organization, but are not expected to have the expertise of a person whose primary responsibility is detecting and investigating fraud.

1210.A3 – Internal auditors must have sufficient knowledge of key information technology risks and controls and available technology-based audit techniques to perform their assigned work. However, not all internal auditors are expected to have the expertise of an internal auditor whose primary responsibility is information technology auditing.

1210.C1 – The chief audit executive must decline the consulting engagement or obtain competent advice and assistance if the internal auditors lack the knowledge, skills, or other competencies needed to perform all or part of the engagement.

1220 – Due Professional Care

Internal auditors must apply the care and skill expected of a reasonably prudent and competent internal auditor. Due professional care does not imply infallibility.

1220.A1 – Internal auditors must exercise due professional care by considering the:

- *Extent of work needed to achieve the engagement's objectives.*
- *Relative complexity, materiality, or significance of matters to which assurance procedures are applied.*
- *Adequacy and effectiveness of governance, risk management, and control processes.*
- ***Probability of significant errors, fraud, or noncompliance.***
- *Cost of assurance in relation to potential benefits.*

1220.A2 – In exercising due professional care internal auditors must consider the use of technology-based audit and other data analysis techniques.

1220.A3 – Internal auditors must be alert to the significant risks that might affect objectives, operations, or resources. However, assurance procedures alone, even when performed with due professional care, do not guarantee that all significant risks will be identified.

1220.C1 – Internal auditors must exercise due professional care during a consulting engagement by considering the:

- Needs and expectations of clients, including the nature, timing, and communication of engagement results.
- Relative complexity and extent of work needed to achieve the engagement's objectives.
- Cost of the consulting engagement in relation to potential benefits.

2010 – Planning

The chief audit executive must establish a risk-based plan to determine the priorities of the internal audit activity, consistent with the organization's goals.

Interpretation:

To develop the risk-based plan, the chief audit executive consults with senior management and the board and obtains an understanding of the organization's strategies, key business objectives, associated risks, and risk management processes. The chief audit executive must review and adjust the plan, as necessary, in response to changes in the organization's business, risks, operations, programs, systems, and controls.

2010.A1 – The internal audit activity's plan of engagements must be based on a documented risk assessment, undertaken at least annually. The input of senior management and the board must be considered in this process.

2010.A2 – The chief audit executive must identify and consider the expectations of senior management, the board, and other stakeholders for internal audit opinions and other conclusions.

2010.C1 – The chief audit executive should consider accepting proposed consulting engagements based on the engagement's potential to improve management of risks, add value, and improve the organization's operations. Accepted engagements must be included in the plan.

2050 – Coordination and Reliance

The chief audit executive should share information, coordinate activities, and consider relying upon the work of other internal and external assurance and consulting service providers to ensure proper coverage and minimize duplication of efforts.

Interpretation:

In coordinating activities, the chief audit executive may rely on the work of other assurance and consulting service providers. A consistent process for the basis of reliance should be established, and the chief audit executive should consider the competency, objectivity, and due professional care of the assurance and consulting service providers. The chief audit executive should also have a clear understanding of the scope, objectives, and results of the work performed by other providers of assurance and consulting services. Where reliance is placed on the work of others, the chief audit executive is still accountable and responsible for ensuring adequate support for conclusions and opinions reached by the internal audit activity

2100 – Nature of Work

The internal audit activity must evaluate and contribute to the improvement of the organization's governance, risk management, and control processes using a systematic, disciplined, and riskbased approach. Internal audit credibility and value are enhanced when auditors are proactive and their evaluations offer new insights and consider future impact.

2120 – Risk Management

The internal audit activity must evaluate the effectiveness and contribute to the improvement of risk management processes.

Interpretation:

Determining whether risk management processes are effective is a judgment resulting from the internal auditor's assessment that:

- Organizational objectives support and align with the organization's mission.
- Significant risks are identified and assessed.
- Appropriate risk responses are selected that align risks with the organization's risk appetite.
- Relevant risk information is captured and communicated in a timely manner across the organization, enabling staff, management, and the board to carry out their responsibilities.

The internal audit activity may gather the information to support this assessment during multiple engagements. The results of these engagements, when viewed together, provide an understanding of the organization's risk management processes and their effectiveness.

Risk management processes are monitored through ongoing management activities, separate evaluations, or both.

2120.A1 – The internal audit activity must evaluate risk exposures relating to the organization's governance, operations, and information systems regarding the:

- Achievement of the organization's strategic objectives.
- Reliability and integrity of financial and operational information.
- Effectiveness and efficiency of operations and programs.
- Safeguarding of assets.
- Compliance with laws, regulations, policies, procedures, and contracts.

2120.A2 – The internal audit activity must evaluate the potential for the occurrence of fraud and how the organization manages fraud risk.

2120.C1 – During consulting engagements, internal auditors must address risk consistent with the engagement's objectives and be alert to the existence of other significant risks.

2120.C2 – Internal auditors must incorporate knowledge of risks gained from consulting engagements into their evaluation of the organization's risk management processes.

2120.C3 – When assisting management in establishing or improving risk management processes, internal auditors must refrain from assuming any management responsibility by actually managing risks.

2130 – Control

The internal audit activity must assist the organization in maintaining effective controls by evaluating their effectiveness and efficiency and by promoting continuous improvement.

2130.A1 – The internal audit activity must evaluate the adequacy and effectiveness of controls in responding to risks within the organization's governance, operations, and information systems regarding the:

- Achievement of the organization's strategic objectives.
- Reliability and integrity of financial and operational information.
- Effectiveness and efficiency of operations and programs.
- Safeguarding of assets.
- Compliance with laws, regulations, policies, procedures, and contracts.

2130.C1 – Internal auditors must incorporate knowledge of controls gained from consulting engagements into evaluation of the organization's control processes.

2201 – Planning Considerations

In planning the engagement, internal auditors must consider:

- *The strategies and objectives of the activity being reviewed and the means by which the activity controls its performance.*
- *The significant risks to the activity's objectives, resources, and operations and the means by which the potential impact of risk is kept to an acceptable level.*
- *The adequacy and effectiveness of the activity's governance, risk management, and control processes compared to a relevant framework or model.*
- *The opportunities for making significant improvements to the activity's governance, risk management, and control processes.*

2201.A1 – When planning an engagement for parties outside the organization, internal auditors must establish a written understanding with them about objectives, scope, respective responsibilities, and other expectations, including restrictions on distribution of the results of the engagement and access to engagement records.

2201.C1 – Internal auditors must establish an understanding with consulting engagement clients about objectives, scope, respective responsibilities, and other client expectations. For significant engagements, this understanding must be documented.

2210 – Engagement Objectives

Objectives must be established for each engagement.

2210.A1 – Internal auditors must conduct a preliminary assessment of the risks relevant to the activity under review. Engagement objectives must reflect the results of this assessment.

2210.A2 – Internal auditors must consider the probability of significant errors, fraud, noncompliance, and other exposures when developing the engagement objectives.

2210.A3 – Adequate criteria are needed to evaluate governance, risk management, and controls. Internal auditors must ascertain the extent to which management and/or the board has established adequate criteria to determine whether objectives and goals have been accomplished. If adequate, internal auditors must use such criteria in their evaluation. If inadequate, internal auditors must identify appropriate evaluation criteria through discussion with management and/or the board.

Interpretation:

Types of criteria may include:

- *Internal (e.g., policies and procedures of the organization).*
- *External (e.g., laws and regulations imposed by statutory bodies).*
- *Leading practices (e.g., industry and professional guidance).*

2210.C1 – Consulting engagement objectives must address governance, risk management, and control processes to the extent agreed upon with the client.

2210.C2 – Consulting engagement objectives must be consistent with the organization's values, strategies, and objectives.

2600 – Communicating the Acceptance of Risks

When the chief audit executive concludes that management has accepted a level of risk that may be unacceptable to the organization, the chief audit executive must discuss the matter with senior management. If the chief audit executive determines that the matter has not been resolved, the chief audit executive must communicate the matter to the board.

Interpretation:

The identification of risk accepted by management may be observed through an assurance or consulting engagement, monitoring progress on actions taken by management as a result of prior engagements, or other means. It is not the responsibility of the chief audit executive to resolve the risk.

“Consulting Services”

Advisory and related client service activities, the nature and scope of which are agreed with the client, are intended to add value and improve an organization’s governance, risk management, and control processes without the internal auditor assuming management responsibility. Examples include counsel, advice, facilitation, and training.

“Control”

Any action taken by management, the board, and other parties to manage risk and increase the likelihood that established objectives and goals will be achieved. Management plans, organizes, and directs the performance of sufficient actions to provide reasonable assurance that objectives and goals will be achieved.

“Control Environment”

The attitude and actions of the board and management regarding the importance of control within the organization. The control environment provides the discipline and structure for the achievement of the primary objectives of the system of internal control. The control environment includes the following elements:

- *Integrity and ethical values.*
- *Management’s philosophy and operating style.*
- *Organizational structure.*
- *Assignment of authority and responsibility.*
- *Human resource policies and practices.*
- *Competence of personnel.*

“Control Processes”

The policies, procedures (both manual and automated), and activities that are part of a control framework, designed and operated to ensure that risks are contained within the level that an organization is willing to accept.

“Fraud”

Any illegal act characterized by deceit, concealment, or violation of trust. These acts are not dependent upon the threat of violence or physical force. Frauds are perpetrated by parties and organizations to obtain money, property, or services; to avoid payment or loss of services; or to secure personal or business advantage.

“Internal Audit Activity”

A department, division, team of consultants, or other practitioner(s) that provides independent, objective assurance and consulting services designed to add value and improve an organization’s operations. The internal audit activity helps an organization accomplish its objectives by

bringing a systematic, disciplined approach to evaluate and improve the effectiveness of governance, risk management and control processes.

“Risk”

The possibility of an event occurring that will have an impact on the achievement of objectives. Risk is measured in terms of impact and likelihood.

“Risk Appetite”

The level of risk that an organization is willing to accept.

“Risk Management”

A process to identify, assess, manage, and control potential events or situations to provide reasonable assurance regarding the achievement of the organization’s objectives.

The AICPA View on Integration of Internal Audit and CFE’s

The AICPA has provided in its Standard AU-316 “*Consideration of Fraud in a Financial Statement Audit*”²¹¹ external auditors can find value in internal audit results, as well as the contribution CFE’s can make to the anti-fraud environment of the client.

Internal Auditors

An effective internal audit team can be extremely helpful in performing aspects of the oversight function. Their knowledge about the entity may enable them to identify indicators that suggest fraud has been committed. The Standards for the Professional Practice of Internal Auditing (IIA Standards), issued by the Institute of Internal Auditors, state, “The internal auditor should have sufficient knowledge to identify the indicators of fraud but is not expected to have the expertise of a person whose primary responsibility is detecting and investigating fraud.” Internal auditors also have the opportunity to evaluate fraud risks and controls and to recommend action to mitigate risks and improve controls. Specifically, the IIA Standards require internal auditors to assess risks facing their organizations. This risk assessment is to serve as the basis from which audit plans are devised and against which internal controls are tested. The IIA Standards require the audit plan to be presented to and approved by the audit committee (or board of directors where no audit committee exists). The work completed as a result of the audit plan provides assurance on which management’s assertion about controls can be made. Internal audits can be both a detection and a deterrence measure. Internal auditors can assist in the deterrence of fraud by examining and evaluating the adequacy and the effectiveness of the system of internal control, commensurate with the extent of the potential exposure or risk in the various segments of the organization’s operations. In carrying out this responsibility, internal auditors should, for example, determine whether:

- *The organizational environment fosters control consciousness.*
- *Realistic organizational goals and objectives are set.*
- *Written policies (for example, a code of conduct) exist that describe prohibited activities and the action required whenever violations are discovered.*

²¹¹ <https://www.aicpa.org/Research/Standards/AuditAttest/DownloadableDocuments/AU-00316.pdf>

- *Appropriate authorization policies for transactions are established and maintained.*
- *Policies, practices, procedures, reports, and other mechanisms are developed to monitor activities and safeguard assets, particularly in high-risk areas.*
- *Communication channels provide management with adequate and reliable information.*
- *Recommendations need to be made for the establishment or enhancement of cost-effective controls to help deter fraud.*

Internal auditors may conduct proactive auditing to search for corruption, misappropriation of assets, and financial statement fraud. This may include the use of computer-assisted audit techniques to detect particular types of fraud. Internal auditors also can employ analytical and other procedures to isolate anomalies and perform detailed reviews of high-risk accounts and transactions to identify potential financial statement fraud. The internal auditors should have an independent reporting line directly to the audit committee, to enable them to express any concerns about management's commitment to appropriate internal controls or to report suspicions or allegations of fraud involving senior management.

Independent Auditors

Independent auditors can assist management and the board of directors (or audit committee) by providing an assessment of the entity's process for identifying, assessing, and responding to the risks of fraud. Those charged with governance, such as the board of directors or audit committee, should have an open and candid dialogue with the independent auditors regarding management's risk assessment process and the system of internal control. Such a dialogue should include a discussion of the susceptibility of the entity to fraudulent financial reporting and the entity's exposure to misappropriation of assets.

Certified Fraud Examiners

Certified fraud examiners may assist the audit committee and board of directors with aspects of the oversight process either directly or as part of a team of internal auditors or independent auditors. Certified fraud examiners can provide extensive knowledge and experience about fraud that may not be available within a corporation. They can provide more objective input into management's evaluation of the risk of fraud (especially fraud involving senior management, such as financial statement fraud) and the development of appropriate antifraud controls that are less vulnerable to management override. They can assist the audit committee and board of directors in evaluating the fraud risk assessment and fraud prevention measures implemented by management. Certified fraud examiners also conduct examinations to resolve allegations or suspicions of fraud, reporting either to an appropriate level of management or to the audit committee or board of directors, depending upon the nature of the issue and the level of personnel involved.

How Fraud is Generally Discovered by Internal Audit

Standard observations by which IA staff become aware of a fraud include:

- unusual or inexplicable variances to budget in accounting records;

- unusual activity in procedures over cash or other liquid assets;
- poor or failed segregation of duties related to liquid assets;
- seemingly excessive accounting estimates;
- high accounting staff turnover;
- no supporting documentation/calculations (schedules) for journal entries or other adjustments; and
- excessive period-end adjustments, repeated and/or without explanation.

Steps that the IA Team Should Immediately Take in face of Fraud Discovered

Once a meaningful fraud has been discovered there should be a systematic process to inform interested parties as detailed in a previously thought out fraud reaction plan. *A CFE does have a place in the equation since internal auditors are not versed in all the aspects of fraud investigation, even per the IIA Standards, though they must design their procedures to look for it.*

If a CAE (Chief Audit Executive) exists, they should be informed since they will have the responsibility to pass on the existence of the incident to the relevant parties.

If the corporation carries fidelity insurance on its employees they should be contacted per the terms of the policy, the triggering event of which may be a formal complaint to a law enforcement party.

If no CAE exists then the Audit Committee and the corporate counsel²¹² should be informed since, firstly, they will be better fluent in informing the Board, and corporate counsel will be better versed to determine how to proceed with either in-house investigation or via police enforcement.

If neither a CAE or Audit Committee exists then of course the Board must be informed since they have ultimate oversight, but, this depends on pre-established parameters for being informed of insignificant occurrences²¹³.

Whether to activate law enforcement depends on a variety of factors, including

- Whether fidelity insurance requires it to be the triggering event;
- The amount defrauded;
- Possible 3rd party involvement in the fraud's perpetration;
- The corporate responsibilities to protect funds; and
- Reporting requirements of governmental authorities such as a securities commission re: past filings²¹⁴.

²¹² Bringing in in-house counsel, or special counsel, will allow the corporation to determine how to handle instances where reputation is at risk, as well as whether to hand the matter over to the police, in the event of no fidelity insurance, which can complicate in-house investigation. They would also be more sensitive to how in-house investigations should be conducted, cognizant of employee's rights and legal steps that must be coordinated upon the initial facts that are revealed through the investigation. They would be best placed to ensure that countering suits are not resultant from a poorly executed investigation, be they from employees or 3rd parties. They can also ensure that solicitor-client privilege can be extended over certain investigation steps that enhance litigation strategy.

²¹³ A Board may have previously stated that it needs not to know frauds that occur for less than \$100 k for instance, or \$10 k, etc.

²¹⁴ There's nothing to say that an inhouse investigation can't be completed with its results then handed over to law enforcement, this depends on the extent the employer would like to take such as interviewing employees.

And, the IT department should be immediately alerted, to retain all electronic data as well as emails that were sent over the server, for evidence²¹⁵.

And, in all cases senior HR dept. officials should be informed with request for advice on interview and legal status²¹⁶ issues.

And in all cases the security department of the corporation should be alerted for their reaction to secure source documents and access thereto²¹⁷.

Once these steps are taken it's time to bring in/apply inhouse CFE expertise to carry out an investigation, coordinated with the CAE/Audit Committee and counsel.

And the CFE will want to know everything there is to know about the internal control environment and problems therewith in the past.

Understandably, it's advantageous to have a CFE on the IA staff since they will be better versed to quickly carry out proper investigative steps, cognizant of the corporation's particulars, *pursuant to the ACFE norms*, with counsel oversight, as they are pertinent.

The CFE/CIA Designation Combination – Well Worth Pursuing

The CFE designation comes from studying a specialized body of professional issues that relate to fraud and while part of that study does include having a very good knowledge of accounting systems and internal control processes this author highly advocates for the obtaining of the Certified Internal Auditor (CIA) designation as well.

The latter comes from in-depth study of all the parameters of sound internal control systems, their emplacement, and their professional assessment in furtherance of ensuring a sound corporate control environment, vis-à-vis risk assessment and fraud possibility, as well as testing the environment to confirm that they meet their objectives.

As previously stated, CIA's are not experts on corporate fraud though from professional requirements they must be sensitive to it. Having the CFE designation adds considerable expertise in functioning in an internal audit environment since that expertise is readily available as a testing progresses, as well as being able to apply it if it is found.

To this end, the IIA web-site should be studied as to what course of study the reader would like to pursue (there are several specialized) and practice requirements.

Combined Body of Knowledge (CBOK) “Risk: Responding to Fraud Risk Exploring Where Internal Auditing Stands”

The IIA has researched a well put together paper²¹⁸ on how the fraud assessment/investigation processes integrate with regular internal audit functions detailing pervasiveness across geographic area, size of

²¹⁵ This applies only to servers, and not individual's desk-top stations since the latter will require highly specialised procedures to retain all data thereon, such as RAM mirroring etc., though once the investigators have a chance to fathom out how they will be proceeding and who will be affected re: evidence existence.

²¹⁶ Such as whether there is a written employment contract w/ terms to be abided with, whether the suspect is a contract employee with little on-going obligations from the company, whether some questions can be asked of the suspect, etc.

²¹⁷ Such as installing locks on source document cabinets/installing CCT coverage thereof. This could also include enabling new personnel procedures such as no bags in the office, etc. to prevent pilphering, or designated access to source documents in one trusted person, etc.

²¹⁸ By Farah G. Araj, CIA, CPA, CFE, QIAL

entities as well as reasons why it was accepted. It should certainly be examined in detail since it explains why ancillary expertise of CFE's can materially make a difference in the functioning of the internal audit department.

Ancillary Professional Information Web-sites

The following are some professional web-sites detailing genre of information that you may subscribe to for on-going industry developments.

<i>Mondaq.com</i>	articles on Canadian law, several different genre
<i>AuditNet</i>	webinars on several different aspects of internal audit/fraud detection
<i>Caseware Analytics</i>	an email service of blog entries, also around Caseware products
<i>ComplianceWeek</i>	A media and information resource covering corporate governance, risk, compliance, and ethics
<i>ACL</i>	webinars, studies on anti-fraud practice, around using ACL products
<i>Norman Marks on Governance, Risk Management, and Audit</i>	blog on risk, compliance and audit
<i>IIROCePublications</i>	IIROC summaries of regulatory actions

Criminal Investigations Manual

October 2014

Chapter 1 – Criminal Investigations Program Policy

Disclaimer

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DISCLAIMER

The Criminal Investigations Manual constitutes a set of guidelines as to procedures to be followed by Canada Revenue Agency (CRA) investigators. These guidelines are not law, and therefore, must give way in any case where the law so requires. Moreover, as guidelines they are to be applied with discretion, judgement and flexibility.

1.1 Criminal Investigations Program Mandate

The Criminal Investigations Program (CIP) mandate is to conduct criminal investigations into suspected cases of evasion or fraud with respect to the Acts administered and to prosecute and pursue public awareness in each case where sufficient evidence is obtained to support conviction for deliberate or wilful evasion with respect to these Acts. The major acts administered are the *Income Tax Act* and the *Excise Tax Act*.

1.2 Objective and Goals

- (1) The CIP objectives are to strategically investigate, assess, penalize, seize and recommend prosecution of significant cases of fraud under the Income Tax Act and the Excise Tax Act (GST). The objectives include providing public awareness of court convictions as a means of encouraging specific and voluntary compliance with the acts administered.
Criminal Investigations Divisions' public awareness policy ensures that information is provided to the media on a local, regional and/or national basis. Public awareness is a means of obtaining the maximum deterrent effect from our successful prosecutions. The Criminal Investigations Division is one of only a few programs who can openly pursue public awareness of the specific impact of non-compliance on persons.
- (2) As part of our case selection process, the Criminal Investigations Division endeavours to accept referrals that will provide as wide a geographical and industry coverage as possible within a TSO. This objective can only be achieved over a span of years considering the territory covered by each TSO, the annual number of completed prosecutions, and the mix of referrals received from various areas of the TSO.
- (3) In all cases, full-scale investigations involve the gathering of sufficient evidence through search and seizure action and other means to prove the commission of tax fraud offences before the courts.
- (4) The main program activities directed at these objectives are:
 - To solicit leads and referrals of suspected fraudulent activities under the Acts being administered and to evaluate and select cases that meet the current case selection criteria.
 - To conduct quality investigations into the selected cases of suspected or alleged fraud.

- To refer all cases to the Public Prosecutions Services Canada (PPSC) with a recommendation of criminal prosecution where evidence of fraud has been obtained.
- To assist the PPSC in the resulting criminal prosecutions.
- To assess revenue liabilities and to apply sanctions as provided by the Acts being administered.
- To enhance compliance by communicating and promoting the message that tax fraud is a criminal offence that will be prosecuted and that public awareness will be pursued.

1.3 Badges

Designated individuals within the CRA are issued a badge.

The badge and authorization card allows for a clear distinction between criminal investigations and audit functions.

In the *Jarvis* and *Ling* decisions, the Supreme Court of Canada said taxpayers' Charter rights are engaged once the CRA starts a criminal investigation. This is why investigators cannot compel taxpayers or third parties to answer questions or to provide access to their books and records. The badge and authorization card allows CRA investigators to properly identify themselves to taxpayers and third parties and to impress on them the distinction between an audit and a criminal investigation.

1.3.1 Designated Individuals Authorized to Receive a CRA Badge

For the purposes of this policy, a designated individual is a person who occupies one of the following positions in the CRA:

- Commissioner
- Deputy Commissioner
- Assistant Commissioner, Compliance Programs Branch
- Deputy Assistant Commissioner, Compliance Programs Branch
- Substantive employee within the Criminal Investigations Directorate, Compliance Programs Branch
- Substantive employee within the Criminal Investigations Division of a Tax Services Office

1.3.2 Principles

The CRA Code of Ethics and Conduct calls upon employees to fulfill their responsibilities in an ethical manner. The badge and accompanying authorization card serve as official identification only; they are to be used by employees to properly identify themselves when performing their duties.

Like any other official CRA identification, the badge is not to be used to obtain any privilege, favour for oneself or others, or to engage in activities outside the scope of its intended use, that are illegal, improper or against the best interests of the CRA.

An employee must not lend his/her badge to any other person.

Improper use of the badge may constitute an infraction under CRA Code of Ethics and Conduct and employee misconduct will be dealt with in accordance with the CRA Discipline Policy. **1.3.3**

Responsibilities

The Criminal Investigations Directorate is responsible for

- ordering badges from the supplier;
- the safe storage of new badges and authorization cards;
- ensuring the Directorate's control register is up to date;
- establishing procedures for issuing, storing, surrendering and retiring badges. The

Assistant Director, Criminal Investigations Division is responsible for:

- ensuring that designated individuals within his/her division have surrendered their previous CRA authorization card, if any;
- ensuring designated individuals are familiar with the content of this policy;
- safeguarding the badges and accompanying authorization cards that have been returned or temporarily surrendered;
- ensuring the division's control register is up to date.

Designated individuals are responsible for:

- carrying the wallet containing both their badge and accompanying authorization card when performing their official duties;

- ensuring their badge and authorization card remain safe and secure at all times to reduce the risk of loss or theft;
- only using the badge and accompanying authorization card to properly identify themselves when performing their duties.

1.4 Tax Evasion

Tax evasion is the commission or omission of an act knowingly, the conspiracy to commit such an act or the involvement in the accommodation of such an act, which can result in a charge being laid in a criminal court under subsections 239(1), (1.1) and (2) of the Income Tax Act (ITA) or subsection 327(1) and (2) of the Excise Tax Act (ETA). It may be accomplished by one or a series of acts, transactions, schemes, arrangements, or devices, whereby the tax is reduced or completely evaded. It usually involves the deliberate omission of revenue, the fraudulent claiming of expenses or allowances, or the deliberate misrepresentation, concealment or withholding of material facts. Tax evasion can also be accomplished by failing to file tax returns.

1.5 Obtaining Evidence 1.5.1

Seizure of Records

- (1) In most cases, investigators will obtain evidence by search warrant and/or production order where there are reasonable grounds to support the use of these tools.
- (2) The method of obtaining evidence from a third party depends on the type of records and the relationship between the third party and the target of the investigation. In cases where the third party is suspected of being part of the tax evasion scheme, investigators should obtain a search warrant. If the third party is not suspected of being part of the scheme and investigators are seeking regular business records such as invoices, purchase orders and sales journals, they could ask the third party for the documents. However, if the information is more personal in nature such as bank or health records, investigators must obtain them by production order or search warrant.
- (3) If the police have seized information or records that CRA investigators require for trial purposes as evidence they may be obtained by issuing a subpoena to a member of the police force to bring the required documents to the tax evasion trial. If the police complete their investigation before the CRA's investigation is finished, the TSO should consult with Headquarters to determine alternative methods of obtaining the records. If the police are ready to return the seized records, the CRA may seize them from the police or from the subject after their return.
- (4) Auditors may borrow records from the taxpayer and examine them at the Tax Services Office. If investigators wish to take possession of these original records they must obtain a search warrant and seize them from the auditor.
- (5) Chapter 6 contains further guidelines on obtaining and securing evidence. **1.5.2 No**

Search Required

It will be infrequent that a case will not require a search. Such cases should be restricted to the following situations:

- No records exist;
- Investigators obtain informed voluntary consent to borrow records;
- The books and records were seized by another law enforcement agency;
- Exceptional cases in which sufficient evidence is available from other sources to warrant the laying of charges, for example, as a result of a matching program of the CRA, (T4, T5, T600, etc). Searches in some of these cases may still be necessary to obtain evidence of *mens rea*.

1.5.3 Notification to Potential Accused

- (1) Persons are to be notified at the time of the seizure, confirmed by registered letter, that they are the subjects of a criminal investigation.
- (2) If no records of the subject are required to prove the violation, that person should be informed in writing, shortly after the decision is made to move the case into the investigation stage that he is under investigation.
- (3) Subjects are to be notified at the time of search and by registered mail following the seizure, that their records are available for examination by them or their authorized representatives at the TSO during

regular business hours. Cite the authority under which the records are held. Refer to chapter 6.5 **Availability of Seized Records.**

1.5.4 Seized Records

- (1) Subsection 231.3(8) of the ITA and subsection 290(8) of the ETA provide that at all reasonable times and subject to reasonable conditions, a person from whom a document was seized is entitled to inspect the document and obtain one copy of it at the CRA's expense. It is policy that these subsections also apply to items seized pursuant to section 487 of the Criminal Code.
- (2) Records seized pursuant to section 487 of the Criminal Code may be retained for 3 months after which an application for further detention must be made to the court.
- (3) To assist the Collections Division in their efforts to keep tax losses to a minimum, and permit implementation of procedures to prevent persons under investigation from becoming judgment proof or moving their assets beyond our reach, all cases should be discussed with the Assistant Director Taxpayer Services and Debt Management prior to seizure of records. Discussions should also occur at such other times throughout the development of the case as is necessary to supply new information on the assets or activities of the subjects.
- (4) For details regarding the seizure and control of documents, refer to **Chapter 6 Obtaining and Securing Evidence.**

1.5.5 Authority for Prosecution Decisions

- (1) Cases selected for full-scale investigation will be handled on the assumption that prosecution action will be undertaken. Each case will be appraised, as soon as possible, after seizure of records. A decision will then be reached by the TSO as to whether prosecution is likely to be a realistic and feasible means of finalization from an evidentiary viewpoint.
- (2) Where prosecution is decided upon, full-scale investigation will continue until the case is ready for referral to PPSC.
- (3) In accordance with section 241 of the ITA and section 295 of the ETA, no information obtained by a CRA official in relation to an ITA or ETA prosecution case may be communicated to an outside counsel, unless the case has been referred to the PPSC and the counsel has been appointed as an agent by PPSC for this particular prosecution. Cases with prosecution recommendations will be referred to the Regional Office of the PPSC, which services the TSO, when sufficient evidence has been accumulated to warrant the laying of charges.

1.6 Early Resolution November 2012

- (1) Early resolution is a negotiated disposition of a criminal tax case prior to a referral to the Public Prosecution Service of Canada (PPSC). Early resolution in this context commences when the criminal investigations case is in the hands of the CRA Criminal Investigations Division and the Agency is still in investigation mode. However, a proposed early resolution agreement must still meet basic legal requirements and is subject to approval by the PPSC and the courts.
- (2) During early resolution discussions the alleged offender is not compelled to provide any information or documents.
- (3) Early resolution discussions and agreements must include all Acts under which there is evidence that an offence has been committed. It is not acceptable that offences under an Act are not pursued simply to facilitate an agreement.
- (4) This policy deals solely with the criminal aspects of a case. Disposition of the civil aspects of a case rests solely with the CRA and must be concluded in accordance with the appropriate Act of Parliament and sound auditing principles. The intention of this policy is not to put a taxpayer/registrant in a better position for civil tax purposes than if they had not been prosecuted.
- (5) While early guilty pleas entered after a referral to the PPSC are desirable for the same reasons as an early resolution, they may involve judicial pre-trial conferences and other legal steps not within the scope of these recommendations. Thus, early resolution represents a more streamlined and cost effective means of case disposition.

Legal Culture

Early resolution succeeds in a legal culture characterized by good faith and communication, as opposed to confrontation. Compromise is essential to facilitating and achieving an early resolution.

CRA

In order for early resolution to be a successful option, investigators must be: •

- Communicative;
- Open-minded;
- Respectful of the accused;
- Professional;
- Diligent. **PPSC**

In order for early resolution to be a successful option, prosecutors must be:

- Willing to compromise;
- Mindful that the public interest includes both deterrence and efficiency;
- Informed of the case specific facts;
- Diligent;
- Respectful of the role of the investigator;
- Respectful of the accused

Defence

In order for early resolution to be a successful option, defence lawyers and accused must be:

- Willing to compromise;
- Willing to admit the accused's responsibility;
- Diligent;
- Honest in the process and their communications.

Strategic Planning

- (1) The importance of a methodical and logical investigation cannot be overstated. The investigator must be mindful of the consequences of his/her investigative steps. All investigative steps including discussions of an early resolution with the accused or their representative must be carefully documented. Further, investigative steps must never be taken for the purpose of intimidating any person. Fairness and compliance with the Charter of Rights and Freedoms must be borne in mind during the early resolution process.
- (2) Timing of investigative steps must be sensitive both to the need for timeliness in building a case for prosecution and the reality of seeking an early resolution. For example, an investigator should give an accused adequate opportunity to complete negotiations of an early resolution without jeopardizing the successful completion of the case.
- (3) It is not necessary to assume every discussion or correspondence with the accused falls under the early resolution policy. There may be discussions and correspondence with the accused to clarify aspects of the investigation and is merely part of the investigative process.
- (4) Cases that involve multiple individuals and corporations must be fully analyzed prior to an early resolution agreement taking place with a particular accused. An agreement with one accused may have an impact on the case as a whole and other accused. In some instances, PPSC should be engaged prior to the commencement of early resolution discussions in multi-dimensional cases.
- (5) If the accused contacts the CRA's Criminal Investigations Program (CIP) before or shortly after a search great care must be taken before initiating early resolution discussions. It is imperative that the investigator has an opportunity to review all available evidence to better understand the case against the accused. It may be necessary to tell the accused that CRA is not ready to undertake early resolution discussions until it has had an opportunity to do further investigative work.

Procedures

The following are the procedures to be followed during the early resolution process:

- The Assistant Director, Criminal Investigations must be made aware of all early resolution discussions and must authorize any proposed agreements;
- During discussions with an accused, it must be clear that any recommendations made by the CRA do not bind either the PPSC or the Courts. The accused must understand that CRA will recommend an agreed upon resolution but the PPSC or the courts may not accept it;

- Any mention to an accused that early resolution is an option must be given without pressure and should be coupled with a recommendation documented in writing to seek legal representation;
- The written notification to the accused that he/she is under investigation must indicate to them that they are welcome to provide representations to CRA. They should also be advised that if they wish to pursue an early resolution of the matter they should contact the investigator;
- During the course of any resolution discussions, it must be made clear to the accused that the facts ultimately put before the court must be the truth and fairly reflect the offence(s) that have been committed;
- Before any discussions are initiated with an alleged offender on an early resolution, proper criminal cautions must be given and their understanding confirmed – refer to **Chapter 9 – Interviews and other communication with taxpayers and third parties**;
- Sufficient steps must be taken to secure books and records sufficient to prove the offences. Where records are obtained voluntarily, it must be with the accused's written acknowledgement that they understand that the records may be used as evidence in a criminal proceeding;
- In order for an early resolution to be successful the accused must take full responsibility for and admit to committing the offences. This will include describing the scheme, dollar amount involved and the time frame. The preferred method for obtaining these admissions is a videotaped interview. If a videotaped interview is not obtained a signed written statement from the accused should be obtained. The accused should be asked to prepare the statement in their own words. If the accused refuses to or is unable to prepare a statement an investigator may prepare the statement and have the accused read it and sign it;
- If the accused interviewed is to be electronically recorded it should take place in a room that is equipped to KGB standards (see **chapter 9 Appendix 2**);
- The videotaped interview or written statement must be made in such a manner that it is admissible in court if the early resolution option is not pursued. If an accused or their representative insist on the interview or written statement be done on a without prejudice basis then early resolution discussions should be ceased;
- The case against the accused must be fully explained to him/her in order that they can make a fully informed decision on whether to pursue an early resolution option. This may include providing copies of evidence, working papers or other documents. However, the accused has no right to full disclosure until charges have been laid;
- An investigator must always be accompanied by a team leader or Assistant Director, Criminal Investigations when engaging in early resolution discussions. Further, these discussions should take place at CRA offices;
- The investigator or Assistant Director, Criminal Investigations must make their CIP Headquarters contact aware of any tentative early resolution agreements. In most cases Headquarters will be advised prior to consulting with PPSC;
- The PPSC, in consultation with the CRA, will deal exclusively with the disposition of the criminal matters related to a case;
- The investigator must prepare a complete Prosecution Report in accordance with **Chapter 14.1.5 Prosecution Report**;
- PPSC must be satisfied that evidence exists establishing a reasonable prospect of conviction and an absence of public interest impediment to prosecution as required by the FPS Deskbook;
- The videotaped interview or written statement must be shared with PPSC when the possibility of an early resolution is discussed;
- The details of a final early resolution agreement must be in writing;
- Arrangements for the payment of all criminal fines must be completed prior to CRA agreeing to an early resolution;
- There should never be an agreement to limit publicity or an agreement to not lay charges against an individual in exchange for a plea by a corporation.

Unrepresented Accused

- (1) An unrepresented accused that approaches the CRA for the purpose of commencing early resolution discussions should be encouraged to seek independent legal representation. If he/she refuses, preliminary discussions with the CRA can take place but with extreme care. It is essential that any such discussions proceed only where it is clear that the accused is acting voluntarily. All discussions with an accused concerning the possibility of an early resolution must be fully documented – preferably by videotaped recording. The same procedures described above should be followed.
- (2) The PPSC must approve any early resolution agreement – especially those where the accused is unrepresented. When the case is resolved by way of a negotiated agreement, the PPSC will tell the judge about the agreement and that the accused was encouraged to retain counsel but declined to do so.

1.7 Public Awareness

- (1) Media coverage will be disseminated by means of **Information for the media** (IFM) document written in both official languages. Each tax evasion conviction will be reported in an IFM upon conviction or sentencing. Only material facts and information that is available on public record may be included in an IFM. Refer to the Public Affairs Branch for the CRA Policy and Recommended Practices for Publicizing Compliance Activities.
http://infozone/english/r1713497/pa/governance/directive_communications-e.html
- (2) All contact with the media is through the Public Affairs Branch, either through HQ or the region and the IFM must be approved by regional communications in consultation with Investigations staff and legal services. Significant cases (large fine, jail term, etc.) may be distributed nationally through HQ, with approval of the Assistant Commissioner of Public Affairs Branch.
- (3) Investigators are expected to provide information to the Public Affairs staff, who prepare IFMs and respond to media inquiries. Both areas have to work together for the publicity program to function effectively. An investigator should not deal directly with the media unless the interview had been arranged by the Public Affairs staff and/or has been approved by the regional Public Affairs staff.

1.8 Civil Reassessments

- (1) The CRA's Audit section is responsible for issuing civil assessments to taxpayers under investigation. Investigators must discuss the appropriate timing with the referring auditor (or the appropriate Audit section if the investigation began without a referral from Audit).
- (2) Subsection 239(3) of the ITA and subsection 327(3) of the ETA preclude the CRA from imposing penalties under section 162 or 163 of the ITA and sections 283 to 285 of the ETA, unless the subject is assessed for the penalties before criminal charges are laid.
- (3) If, at any time during an investigation, investigators have reason to believe that the collection of tax owing is in jeopardy, they should (in consultation with the Audit Division) contact the Collections Liaison officer for the Criminal Investigations Division in their region.
- (4) When charges are laid and a civil appeal has been filed or is subsequently filed on (re)assessments containing substantially the same set of facts that are at issue in the prosecution proceedings, the Director, Appeals Branch, or the TSO Appeals will file a Stay of Proceedings with the appropriate court in accordance with the provisions of subsection 239(4) of the ITA or 327(4) of the ETA. The Notice of Stay of Proceedings filed with the Tax Court of Canada will prevent hearing of the civil appeal pending final disposition of the criminal prosecution. Refer to the Appeals Manual, 4,31 Criminal Investigations Cases.
http://infozone/english/r2110203/c/0300/302/08_028-e.asp#a431

1.9 Staff

Transfers, Promotions and Separation from CRA

- (1) When an investigator transfers to other Division within a TSO, either through promotional competition or rotation, provision should be made for the employee involved to finalize cases that are in advanced stages of completion (i.e. a recommendation for prosecution has been made) and for his availability as a witness, etc.
- (2) Where a transfer to another TSO or Headquarters is involved, provision should be made for the re-assignment of all work-in-process, subsequent appeals, etc., to another investigator. Once the

investigator has officially moved to a new location, requests for assistance should be restricted to situations where their appearance as a witness in court is required.

- (3) Where a separation from the CRA is involved, individuals should be advised that they might be required to appear as witnesses in subsequent court proceedings. If their appearance is necessary, the individuals can be:
 - Served with a subpoena for their own protection, or
 - Employed as a "casual" for the time required, which in most cases would be at the same group and level they held at termination of employment. This method is preferable and, if used, the Assistant Director, Criminal Investigations should make the necessary arrangements through Human Resources office.
- (4) Costs - Travel and time will be charged to the TSO making the request. Transfer of salary costs will only be made where extended periods are involved to cover-off the vacancy created.

1.10 Pardons Granted Pursuant to the Criminal Records Act

- (1) A person convicted of a criminal offence under the ITA or ETA can apply for a pardon **after** the expiration of two years from the termination of the sentence of imprisonment, the termination of the period of probation or the payment of the fine, as the case may be.
- (2) If the pardon is granted, then the following procedures will be followed:
 - (a) The Criminal Investigations Directorate will advise the appropriate Criminal Investigations Division that a pardon has been granted to a particular subject.
 - (b) HQ and the TSO will examine all files respecting the pardoned subject to **determine** if a judicial record of conviction i.e. certificate of conviction, issued by the court, is in its custody. Normal practice in our cases is that the clerk of the court retains any judicial record respecting a conviction. Should a judicial record of conviction be located at the TSO, it will be forwarded to the Director, Criminal Investigations Division, Criminal Investigations Directorate.
 - (c) The case file will be stamped or marked "Pardoned" in a conspicuous place.
 - (d) Any record of the conviction in respect of which a pardon has been granted and has been received by HQ, as mentioned in paragraph (b) above, shall be kept separate and apart from other criminal records, in a file that is specifically identified and where all convictions and granted pardons are kept in. Any other record of the conviction, such as memoranda, newspaper articles, etc. found at either the TSO or HQ level should be destroyed.
- (3) The Criminal Records Act provides that, subsequent to the granting of a pardon, no information concerning the conviction can be disclosed without first obtaining the approval of the Solicitor General of Canada.

1.11 Commendation Letters

It is recognized that procedures that result in fraud detection, are an integral part of the day-to-day activities of any TSO. The actual detection of fraudulent schemes or practices usually requires some ingenuity on the part of the officer or employee and it is the practice of the CRA to give credit for this by formal commendation.

1.11.1 Procedure

- (1) In order to recognize the extra effort by the auditor in making a referral to the Criminal Investigations Division, a commendation letter, signed by the Assistant Director, Criminal Investigations, is to be directed to the CRA employee(s) originating the lead when accepted for full-scale investigation. The TSO Director's signature may be requested in certain situations, at the discretion of the Assistant Director, Criminal Investigations. The letter should acknowledge the efforts of the referring employee and commend them for their contribution to the goals and objectives of the CRA. In appropriate cases, more than one letter can be prepared, as encouragement and recognition should also be extended to all persons materially involved in creating the referral, i.e. a T133 lead from Source Deductions results in a T134 referral from the Audit Division. There may also be referrals, which are not accepted for full-scale investigation but which, in the opinion of the Assistant Director, Criminal Investigations warrant such a letter.

- (2) All letters should be prepared for the signature of the Assistant Director, Criminal Investigations or the Director of the TSO. The form and content of the letter is to be determined by the TSO but should include the following points:
 - The significance of fraud referrals to the CRA program and to compliance in general, and
 - Recognition of and appreciation for the specific referral by name.
- (3) A copy of the letter should be placed in the personnel file of the referring person(s). 1.11.2

Extended Recognition

- (1) In the course of some investigations, there will be situations where a staff member from an external enforcement organization has made an outstanding contribution toward the completion of a significant case and appropriate recognition should be extended. These situations will usually involve members of the Internal Revenue Service, other Foreign or Provincial authorities, or enforcement agencies. The factors to be considered for such nominations include:
 - Assistance was supplied or conduct of the person was beyond that normally expected of a person outside of the employ of the CRA;
 - The services provided required the nominee to devote long hours to satisfactorily complete the task;
 - The nominee exhibited unique talents or ingenuity in overcoming logistical or technical complications or deliberate concealment of facts;
 - The provision of the outstanding services constituted a contribution of unusual benefit to the CRA.
- (2) Recommendations for special service awards will be processed by the Assistant Director, Criminal Investigations through TSO management levels for screening and approval. Approved nominations will be forwarded to the Director, Criminal Investigations Division, HQ. Those nominations meeting or exceeding the above criteria will be submitted to the Director General, Criminal Investigations Directorate with recommendations and appropriate certificates for signatures as required. Arrangements will be made at the HQ level for transmittal of the award through official channels.

1.12 Consulting the Public Prosecution Service of Canada

The Criminal Investigations Directorate must approve requests from CRA investigators to seek legal advice from the Public Prosecution Service of Canada (PPSC) until the case is referred to PPSC.

Regardless of when the consultation takes place, if investigators have concerns about the advice they receive from PPSC, they must (in consultation with their team leader, manager and/or the Assistant Director, Criminal Investigations) send a memo to the Investigations Advisory Services Section. The Criminal Investigations Directorate will then be responsible for handling communications with PPSC headquarters.

Consulting PPSC Prior to Referral

The following are some examples of when Criminal Investigations Directorate may approve consultations with PPSC before the case is referred to PPSC:

- If the case involves a confidential or anonymous informant and the Investigations Advisory Services Section recommends seeking PPSC advice on how to deal with this in the Information to Obtain a warrant or production
- If Investigations Advisory Services Section determines that the investigator must use a Mutual Legal Assistance Treaty request to obtain foreign evidence (instead of other methods such as a Tax Treaty);
- If PPSC advice is required to determine whether there is a Jarvis issue such as when the CRA's audit or civil review became a criminal investigation and what information can or cannot be used to advance the investigation;
- To obtain advice on organizing the evidence and preparing for disclosure;
- If the investigation is considered a mega case according to the criteria in section 4.4 of the Criminal Investigations Manual.

Before investigators consult with the Public Prosecution Service of Canada (PPSC) they must:

- 1) be fully aware of CRA and Criminal Investigations Program policies and procedures with respect to the matter in question;

- 2) seek advice from their team leader, manager and/or Assistant Director, Criminal Investigations and;
- 3) seek the approval of the Criminal Investigations Directorate (Partnership and Workload Development Section and/or Investigations Advisory Services).

Depending on the issue, the Criminal Investigations Directorate may already have obtained legal advice from PPSC or CRA Legal Services. Investigators, team leaders, managers and Assistant Directors, Criminal Investigations should not consult CRA Legal Services directly on issues unless advised to do so by the Criminal Investigations Directorate.

After considering all applicable CRA resources and previous PPSC legal opinions, the Criminal Investigations Directorate may approve early consultation with local PPSC. To ensure CRA receives consistent advice from PPSC across Canada, the Criminal Investigations Directorate will ask investigators for a summary of the issue and the PPSC's response. This will also allow the Criminal Investigations Directorate to determine if the same issues are recurring and should be addressed with PPSC headquarters.

Consultations with PPSC after the case is referred

Investigators do not need the Criminal Investigations Directorate's consent to consult with the PPSC lawyer assigned to the case once it is referred to PPSC.

Accounting for PPSC time

Whenever investigators consult PPSC and/or refer the case to PPSC, they must provide the PPSC with the related case number. This will allow PPSC to accurately account for the time charged to CRA cases.

If Assistant Directors, Criminal Investigations are considering inviting PPSC to team meetings or training events, they should first contact the Policy and Training Section at headquarters to discuss what topics they would like PPSC to present. The Criminal Investigations Directorate may already have training material on the topics.

An agreement in writing should be reached as to how much time PPSC will charge to the CRA to prepare for and participate in the event. The agreement should also stipulate that PPSC will provide CRA with a copy of the material.

Solicitor client privilege

PPSC legal advice is protected by solicitor-client privilege. It must not be disclosed to the taxpayer under investigation. Legal advice may lose its privilege if it is widely distributed. Investigators should not mention legal advice or legal opinions in their reports.

1.13 Arrest and Return of Subject by RCMP

The RCMP is responsible for accompanying an arrested subject from the place of arrest to the appropriate jurisdiction. Travel costs of the RCMP and the individual arrested will be paid by the CRA, the amounts to be in accordance with Treasury Board policy. In circumstances where it is anticipated that the amount involved will be substantial (over \$5,000), an analysis of those costs should be sent to Headquarters so that the appropriate persons may be notified. The RCMP should be advised of this policy in writing at the time their assistance is requested. Refer to chapter **13.5.3 Witness Fees and Conduct of Money**.

1.14 Mail, Email, Facsimile and Secured Shared Drives (1) Mail

To meet the security requirements of the Criminal Investigations Program, mail between Tax Services Offices and HQ will be forwarded in sealed envelopes, stamped "confidential", in the following manner:

- a) All mail for one destination will be sealed in an envelope before leaving the controlled premises of the Criminal Investigations Division;
- b) Envelopes destined for HQ will be addressed to the Director General, CID, the Director, Policy, Planning and Informatics Division or the Director, Criminal Investigations Division;
- c) Envelopes destined for the TSO Criminal Investigations Division, will be addressed to the attention of the Assistant Director, Criminal Investigations Division;
- d) Incoming envelopes will be delivered by the mailroom unopened;
- e) Individual memoranda within the envelopes will be addressed to the attention of the officer assigned to the matter;
- f) All correspondence sent via mail must adhere to the CRA Procedures for the Secure Mailing of Information, Security Volume, Finance and Administration Manual which can be found at: <http://infozone/english/r2822200/FAM/security/c7papa-e.asp> **(2) Email**

Investigators will not transmit or communicate electronic information concerning a case under investigation unless it is encrypted with Entrust, an agency wide encryption tool. All communication concerning cases under investigation must be documented and available for disclosure in court. All correspondence sent via email must adhere to the Communications Security Policy, Security Volume, Finance and Administration Manual which can be found at:
<http://infozone/english/r2822200/FAM/security/c23p-e.asp>

(3) Facsimile

The TSO, HQ and the regional offices will use the "Secure Mode" for the transmission of protected or classified information. Additional information is available in the Security Standards for Facsimile Networks, Security Volume, Finance and Administration Manual at:
<http://infozone/english/r2822200/FAM/security/c23appc-e.asp>

(4) Secured Shared Drive

Transmission of sensitive or classified information can also be done through the secured shared drive. The secured shared drive should be used to transmit search warrants, production orders and their respective "Information to obtain" to the Criminal Investigations Division at HQ.

(5) Protected and Classified Information

- a) There are two categories of information that require protection when handled and transmitted:
 - Classified information that is *Confidential*, *Secret* or *Top Secret*.
 - Protected information is designated as "Protected "A", "B" or "C". The appropriate category is determined based on the degree of potential injury if compromised:
 Protected A - low injury; Protected B - medium injury; Protected C - high injury.
- b) The difference between classified and protected information is in the potential consequences if the information is compromised. If classified information is compromised, it can cause injury to Canada. For example, submissions or proposals to the Treasury Board and documents from the Canadian Security Intelligence Service are classified information. When protected information is compromised, it can cause injury to a person, an organization or a business. Taxpayer/client personal information falls under the category Protected "B". Personal information about an informant or any information that could be used to identify an informant is considered Protected "C". If this information is compromised, the informant could be endangered and the CRA could be subject to civil litigation for damages.
- c) Further details can be found in Identifying Protected and Classified Information and Assets Guidelines, Security Volume, Finance and Administration Manual
http://infozone/english/r2822200/FAM/security/c5papa-e.asp#Classified_Information

1.15 Delegation of Powers

The various Acts administered by the CRA contain provisions vesting powers in the Minister of National Revenue. Most of the legislation allows for the delegation of the Minister's powers to designated officials. These officials are authorized to exercise powers or perform duties and functions of the Minister of National Revenue through administrative delegation instruments signed either by the Minister or by the Commissioner. Ministerial powers related to the Criminal Investigation Program are delegated to various officials under the ITA/ETA. These powers include applying for a search warrant and certifying copies of documents.

The following is a link to the CRA external website and the current delegations:

<http://www.cra-arc.gc.ca/tx/tchncl/dlgtfpwrs/mnstr/nstrmnts-eng.html>

Note: The titles of many positions in the Criminal Investigations Program have changed as result of the reorganization announced in June 2012. The delegations referring to Enforcement or Enforcement and Disclosures Directorate (including division names) remain in effect pending the official update of the names in the delegation instruments.

1.16 Security

The following security standards will be maintained by Criminal Investigations Divisions in Tax Services Offices:

Controlled access to work and storage areas

- (A) Offices with "open concept" work areas must ensure that access is restricted and controlled and that any meetings on cases are held in secure premises;
- (B) Locked cabinets within the secured premises are to be used for classified material;
- (C) Access to Criminal Investigations Division servers is controlled by the Technology Support Division of the Business Transformation and Corporate Management Directorate of Compliance Programs Branch who will provide the appropriate procedural and security guidelines.

Network security

- (A) Only CRA authorized software is to be used on Criminal Investigations Division computers;
- (B) The use and testing of seized software is restricted to Regional Informatics Investigators and other specially trained and authorized investigators. These activities will take place within a controlled environment, on computers that will be quarantined, until sanitized;
- (C) Criminal Investigations Division employees are not to use personally owned computers in the performance of their duties, unless specifically authorized by management;
- (D) In cases where the CRA is supplied with media from an outside source such as the subject or accountant, it is imperative that it be screened for viruses before they are used. This software is available from the Security Directorate if not already installed.

1.17 Access to Information and Privacy Acts

- (1) The *Access to Information Act* provides Canadian citizens as well as persons and corporations present in Canada with the right to obtain copies of federal government records that are not of a personal nature. The *Privacy Act* gives Canadian citizens and people present in Canada the right to obtain copies of their personal information held by the federal government.
- (2) The Access to Information and Privacy (ATIP) Directorate of the Public Affairs Branch is responsible for fulfilling all legislative requirements for the CRA pursuant to the *Access to Information Act* (ATIA) and the *Privacy Act* (PA). In addition, the ATIP Directorate provides guidance, policy advice, and training to Agency employees on their obligations under these Acts.
- (3) ATIP processing units in Ottawa (HQ), Vancouver and Montreal (satellite offices), are responsible for processing ATIP requests for the CRA within the legislated time limits prescribed by the ATIA, PA and their regulations. The ATIP Directorate mandate is to ensure greatest possible access to Agency records while maintaining the confidentiality of taxpayers' information, informing clients of their rights of recourse with the Offices of the Information and Privacy Commissioners of Canada, and negotiating with officials of the Offices of the Information and Privacy Commissioners of Canada regarding the resolution of complaints filed by clients.
- (4) Any matter arising under either one of these statutes or which requires further clarification can be referred to the ATIP analyst whose name and phone number appears on the request for information. Criminal Investigations Division employees may contact Criminal Investigations Directorate staff for assistance with ATIP requests.
- (5) Both the ATIA and the PA have sections allowing the Minister of National Revenue to exempt certain information from being released. Criminal Investigations Divisions can recommend exemptions, but the Director, ATIP Directorate (and certain Assistant Commissioners) are the only officials delegated by the Minister to apply the exemptions. Criminal Investigations Division and Criminal Investigations Directorate employees have no authority to apply the exemptions and they may not withhold any documents from the ATIP analyst pertaining to a request.
- (6) The CRA's current Designation Order for the ATIA and PA were signed by Gail Shea, Minister of National Revenue, on June 8, 2011. The schedules associated with the orders identify the specific provisions of the ATIA and PA and their regulations that the Minister has delegated to various positions within the CRA.
- (7) Generally, the ATIP Director, assistant directors, and managers of the production units sign off on ATIA and PA requests. Delegations are extended to assistant commissioners, although exercised only in exceptional cases, to enable them to make decisions about information under their respective mandates.

- (8) The ATIP Directorate provides guidance for CRA employees on the policies and procedures involved in ATIA/PA requests. They are available via the CRA Infozone:
<http://infozone/english/r1713497/pa/org/pstg-e.html>

1.18 Section 8(2)(e) of the *Privacy Act*

- (1) This section of the PA provides for the exchange of information between investigative bodies. The Criminal Investigations Directorate at HQ is designated as investigative body for the purposes of paragraph 8(2)(e) of the *Privacy Act*. The designation means that Criminal Investigations Directorate at HQ may request personal information from other federal government institutions listed in Schedule II of the Privacy Regulations. The most recent listing for Criminal Investigations Directorate is Audit Directorate, *Department of National Revenue (Taxation)*. The ATIP Directorate is responsible for updating the Regulations.
- (2) A request under paragraph 8(2)(e) for information held by another federal institution must be made in writing (by the Criminal Investigations Directorate), and must state the purpose and nature of the information requested. The information must be necessary for a lawful investigation pertaining to the enforcement of any law of Canada or a province. Section 8(2)(e) does not create any mandatory right of access to the information. The decision to disclose is left entirely to the discretion of the party holding the information. Refer to **Chapter 16 Exchange of Information** for further procedures.

March 2014

Chapter 2 – Authorities and Powers

2.1	Statutes Administered by the CRA
2.2	Administrative Powers
2.3	Offences and Powers
2.4	Search and Seizure Powers
2.5	Criminal Code Provisions and Offences

- (1) Investigators, in the planning and conducting of fraud investigations, must exercise and use the powers and authorities delegated to them. Some of these powers, such as the use of search warrants and to conduct inquiries will require prior approval from designated officials.
- (2) Once the Canada Revenue Agency (CRA) officer has reasonable and probable grounds that an offence has been committed, use of administrative powers to obtain evidence from a potential accused are not permitted. The CRA officer must always make sure that the Canadian Charter of Rights and Freedoms is not violated. Refer to the Criminal Investigations Manual, **Chapter 9 Interviews**.
- (2) As a result of the 2002 Supreme Court of Canada decisions in Jarvis and Ling, any section of the ITA or ETA that compels either the taxpayer or a third party to answer questions and/or to provide documents cannot be used if the predominant purpose of obtaining the material is for penal consideration CRA investigators must always make sure that the Canadian Charter of Rights and Freedoms is not violated. Refer to **Chapter 9 Interviews and other communication with taxpayers and third parties**.
- (3) If a decision is made not to proceed with the investigation for reasons such as lack of evidence, mens rea, etc., the Criminal Investigations Division will return the file to the appropriate Audit section for the purposes of completing the civil (re)assessment.

2.1 Statutes Administered by the CRA

The CRA has the authority to administer Acts and statutes under the program legislation. The "program legislation" under the *Canada Revenue Agency Act* means any other Act of Parliament or any instrument made under it, or any part of such an Act or instrument:

- That the Governor in Council or Parliament authorizes the Minister, the Agency, the Commissioner or an employee of the Agency to administer or enforce, including the Excise Tax Act and Income Tax Act; or
- Under which the Minister or another minister authorizes the CRA, the Commissioner or an employee of the Agency to administer a program or carry out an activity.

2.2 Administrative Powers

- 1) Section 5 of the *Canada Revenue Agency Act* describes the mandate of the CRA: (5)(1) The Agency is responsible for
 - (a) supporting the administration and enforcement of the program legislation;
- 2) The CRA program legislation is defined in section 2 of the *Canada Revenue Agency Act* and it includes the *Excise Tax Act* and the *Income Tax Act*. The Minister of National Revenue is responsible for the administration and enforcement of the program legislation. The Commissioner and Chief Executive Officer of the CRA is a member of the Board and responsible for the CRA's day-to-day

- operations. The authorization to exercise powers or perform duties of the Minister of National Revenue is available at the following site: Delegation of Ministerial powers, duties, and functions.
- 3) Subsection 220(1) of the *Income Tax Act* and subsection 275(1) of the *Excise Tax Act* make the Minister of National Revenue responsible for the administration and enforcement of each Act respectively and state that the Commissioner may exercise all the powers and perform the duties of the Minister. Subsection (2) of these provisions respectively authorizes a designated officer or agent of a class of officers to exercise the powers or perform duties of the Minister.
 - 4) Pursuant to subsection 220(2) and correspondingly subsection 275(2) of the *Excise Tax Act*, CRA investigators are authorized to enforce the *Income Tax Act* and the *Excise Tax Act* by virtue of being appointed or employed as investigators by the Canada Revenue Agency.
 - 5) Pursuant to subsections 220(5) of the ITA and 275(4) of the ETA, the TSO Director may designate investigators to administer oaths and receive affidavits for the purposes of enforcing the ITA and ETA.

2.3 Offences and Powers

- (1) Every person who commits an offence under subsection 239(1) of the ITA or subsection 327(1) of the ETA is guilty of an offence, and in addition to administrative penalties, is liable on **summary conviction** to a fine of not less than 50% and not more than 200% of the amount of the tax that was sought to be evaded, or to both fine and imprisonment for a term not exceeding two years. Every person who obtains or claims a refund or credit, to which the person is not entitled, is also liable for a fine and imprisonment as stated above, under subsection 239(1.1) of the ITA and paragraph 327(1)(d) of the ETA. Refer to **Chapter 15 of the Criminal Investigations Manual** for more information on fraudulent returns and fraudulent refunds.
- (2) Every person who is charged with an offence may, at the election of the Attorney General of Canada, be prosecuted on **indictment** and, if convicted, in addition to administrative penalties, be liable to a fine of not less than 100% and not more than 200% of the tax evaded (or amount of refund or credit claimed), and imprisonment for a term not exceeding five years as per subsection 239(2) of the ITA. Subsection 327(2) of the ETA is similar to subsection 239(2) of the ITA, however, a person may be liable to a fine of not less than \$2,000 and not more than \$25,000 where the amount that was sought to be evaded cannot be ascertained.
- (3) Where a person is convicted under section 239 of the ITA or 327 of the ETA, administrative penalties cannot be applied unless the person is assessed for the penalties before the information or complaint is laid or made as per subsection 239(3) of the ITA and subsection 327(3) of the ETA.
- (4) Where a corporation commits an offence, the officer, director or agent of the corporation who directed, authorized, assented to, acquiesced in or participated in the commission of an offence, is a party to and guilty of the offence. The officer is liable on conviction to the punishment provided for the offence, whether or not the corporation has been prosecuted or convicted. Refer to section 242 of the ITA and section 330 of the ETA.
- (5) Section 244 of the ITA and section 332 of the ETA deals with the limitations for prosecution periods as well as evidence. It should be noted that subsection 244(4) of the ITA and 332(4) of the ETA set out the limitation of prosecutions and states that an information or complaint relating to summary convictions, in respect of an offence under the ITA or the ETA must be laid or made on or before the day that is 8 years after the day on which the matter of the information or complaint arose. When the charges are laid under indictment, the time limitation does not apply.
- (6) Offences and Powers - Legislation Comparison

Provision	Income Tax Act	Excise Tax Act
Failure to file a return or failure to comply with an obligation	238(1)	326(1)
Failure to make books and records available	238(2)	326(2)
Court order for compliance	238(2)	326(2)

False or deceptive statements	239(1)(a)	327(1)(a)
Destruction of records	239(1)(b)	327(1)(b)(i)
False entries	239(1)(c)	327(1)(b)(ii)
Omission from records	239(1)(c)	327(1)(b)(ii)
Wilful evasion	239(1)(d)	327(1)(c)
False refund or rebate	239(1.1)	327(1)(d)
Conspiracy	239(1)(e)	327(1)(e)
Prosecution by indictment	239(2)	327(2)
Communicating information	239(2.2)	328
Administrative penalty on conviction	239(3)	327(3)
Stay of Appeal	239(4)	327(4)
Failure to pay/collect/remit		329(1)
General offence		329(2)
Officers of corporations	242	330
Power to decrease punishment	243	331
Information or complaint	244(1)-(2)-(3)	332(1)
Period of limitation for prosecution	244(4)	332(4)

2.4 Search and Seizure Powers

- (1) A search warrant may be obtained on ex parte application, to enter and search a building or place for records that may afford evidence as to the commission of an offence under various Acts administered by the CRA. The power of authorizing search action is delegated to the Director of the TSO. Warrants are obtained under section 487 of the Criminal Code for all tax and GST/HST cases. The search provisions under section 231.3 of the ITA and section 290 of the ETA are presently not being used by CRA officers.
- (2) The Minister may for the administration or enforcement of the various Acts administered by the CRA, conduct an inquiry under subsection 231.4(1) of the ITA and subsection 276(1) of the ETA. Power to authorize an inquiry is not delegated below the Assistant Commissioner. Refer to **chapter 10 of the Criminal Investigations Manual** for more information on Inquiries.
- (3) Where a search location includes a lawyer's office, CRA investigators should review **Chapter 8 of the Criminal Investigations Manual**. The legislation under which the warrant has been authorized should also be reviewed as well as applicable case law such as the Supreme Court of Canada's (SCC) decision in *Lavallée, Rackel & Heintz v. Canada* (2002 SCC 61).
- (4) Search and Seizure Powers - Legislation Comparison

Provision	Income Tax Act	Excise Tax Act
Search warrant	231.3(1)	290(1)
Information on Oath	231.3(2)	290(2)
Issue of warrant	231.3(3)	290(3)
Contents of warrant	231.3(4)	290(4)
Seizure of things not specified	231.3(5)	290(5)

Retention of things seized	231.3(6)	290(6)
Return of things seized	231.3(7)	290(7)
Access and copies by vendor	231.3(8)	290(8)
Authority to make copies	231.5(1)	291(1)
Compliance/obstruction	231.5(2)	291(2)
Solicitor-client privilege	232(2)	293(2)

2.5 Criminal Code Provisions and Offences

Provision	Criminal Code
Use of force	25
Bribery	120
Breach of trust	122
Perjury	131
Obstruction	129
Fraud, defraud the public	380

Disclosure of income tax information	462.48
Information for search warrant	487
General Warrants	487.01
Production Orders	487.012
Seizure of things not specified	489
Detention of things seized	490
Detention without application where consent	490(3.1)
Evidence on Commission	709

June 2014

Chapter 3 – Workload Selection for the Criminal Investigations Program

- 3.1 National Workload Selection**
- 3.2 Sources of Workload**
- 3.3 Referrals to the Criminal Investigations Division**
- 3.4 If Partnerships and Workload Development Section recommends rejecting the referral**
- 3.5 If Partnerships and Workload Development Section recommends a detailed review of the referral**
- 3.6 Review of Referrals for Potential Charter Violations**
- 3.7 The Criminal Investigations Division's recommendations**
- 3.8 Partnerships and Workload Development Section Review of the Case Development Proposal**
- 3.9 Preliminary Investigation**
- 3.10 Civil Assessments**
- 3.11 Communication with Auditors**
- 3.12 Access to Information the Taxpayer Provides to Auditors after the Case is referred to the Criminal**

Investigations Division

3.13 Closing a Case in the Investigation Stage

3.14 Roles and responsibilities

Partnerships and Workload Development Section, Criminal Investigations Directorate
 Assistant Director, Criminal Investigations Division
 Investigator, Criminal Investigations Division Liaison officer, Criminal Investigations Division

3.1 National Workload Selection

- 1) The Criminal Investigations Directorate operates a national workload selection process. The Partnerships and Workload Development Section (PWDS) at headquarters will review all cases before they are assigned to investigators to ensure they meet the CRA's priorities.
- 2) To complement the national workload selection process, the Criminal Investigations Divisions in six Tax Services Offices (TSO) have a liaison program whose role is to promote referrals from CRA program areas and external partners.

3.2 Sources of Workload

- 1) Referrals to the CRA's Criminal Investigations Program come from the following CRA program areas:
 - Audit
 - Small and Medium Business Audit Program
 - Office Examination Program
 - Tax Avoidance Program
 - Aggressive GST/HST Planning and Refund Integrity
 - Large Business Audit Program
 - Scientific Research and Experimental Development Tax Incentive Program
 - Business Returns
 - Individual Returns and Compliance
 - Assessment and Benefits Services
 - Revenue Collections and Client Services
- 2) The PWDS at headquarters and the liaison program in the Criminal Investigations Divisions in the TSOs will also promote and review leads from external partners such as:
 - RCMP
 - Provincial police forces
 - Municipal police forces
 - Other law enforcement agencies
 - Federal government departments and agencies
 - Provincial government departments and agencies
- 3) Self-generated cases: Tax fraud does not generally stop at one person but often involves associates, customers, suppliers, etc. Investigators should be aware of the potential for one case to develop into several related cases and the added impact on non-compliance that such cases could have in any given area or industry. CRA investigations may begin as a result of public reports from securities commissions, newspaper articles, Internet, radio and television reports about fraud, unreported income and suspected tax evasion.

3.3 Referrals to the Criminal Investigations Division

- 1) Auditors (and other CRA employees) refer files to Criminal Investigations by completing Form T134 and sending them to the PWDS

(CP-PO_T134_Referrals-PEC_Renvois_T134)

- 2) The PWDS will make a preliminary assessment of the referral based in part on the following factors:
 - The type of fraud
 - The countries involved
 - Where the offence was committed
 - Where the subject of the referral lives
- 3) The PWDS will then forward the referral to the appropriate Criminal Investigations Division along with a recommendation to either conduct a detailed review of the referral or to reject the case.
- 4) The PWDS will send written acknowledgement to the area that referred the case explaining that the file has been forwarded to the Criminal Investigations Division in a specific TSO.

3.4 If Partnerships and Workload Development Section recommends rejecting the referral If the PWDS recommends rejecting the referral, and the Criminal Investigations Division in the TSO agrees, the PWDS will complete the remaining steps including contacting the referring section to inform them of why the case was not accepted.

3.5 If Partnerships and Workload Development Section recommends a detailed review of the referral

- 1) The investigator who could eventually be assigned the case if it is accepted should review the referral. The purpose of this approach is two-fold:
 - a. the investigator assigned the case will obtain first-hand information from the referring auditor
 - b. the auditor who referred the case will not have to answer the same questions from two investigators

The Assistant Director, Criminal Investigations should consider the Criminal Investigations Case Assignment Grid and guidelines when determining which investigator should review the referral.

- 2) Some of the steps to take and the criteria that the investigator should consider when reviewing the referrals are:
 - a) Review the referring auditor's material (or that of the official who referred the case)
 - Determine what offences are alleged
 - Determine the *actus reus* (the scheme – or how the taxpayer committed the offence such as using fictitious entities, false Input Tax Credits and expenses, omitting sales)
 - Is the taxpayer promoting one scheme or a number of schemes?
 - How many taxpayers are involved in the scheme as perpetrators, as followers, as students or as clients (victims)?
 - What is the breakdown of the alleged quantum? What is the quantum of the scheme claimed on the victims and/or the perpetrator(s) and the unreported taxable income, HST and/or GST by the perpetrator in carrying out the overall scheme(s)?
 - b) Interview the referring auditor and prepare a witness report
 - Determine the *mens rea* (the intent to commit tax evasion)
 - Determine what evidence is available, how to obtain it and how it will prove that the taxpayer under investigation intended to commit the offence
 - Will the case require innovative investigative approaches?
 - Are there any legal issues to consider regarding how the alleged offences were detected?
 - c) Is this a compliance problem in your region? If the CRA prosecutes this case, will it send a strong compliance message to the public?
 - d) Is there an increased level of interest in this type of case by the media?

3.6 Review of Referrals for Potential Charter Violations

- 1) When a referral is received, the investigator's review must not only cover the file potential but also any possible violations of the taxpayer's rights under the Charter of Rights and Freedoms during the civil process.

- 2) The investigator's review should include, among other things, all steps that the referring auditor undertook especially ones that occurred after the auditor suspected fraud. Did the auditor deviate from the original audit plan? Are the reasons documented?
- 3) Investigators should make sure that auditors have documented the information that they have prepared and gathered to the point when they referred the case (or considered referring the case) to Criminal Investigations. This snapshot will help demonstrate what information the CRA collected using its authorities under the ITA/ETA and what information investigators obtained using the tools that they are permitted to use once a criminal investigation has begun.
- 4) If investigators, in consultation with their team leader, are uncertain as to whether the taxpayer's rights may have been violated, they should discuss the situation with the PWDS.

3.7 The Criminal Investigations Division's recommendations

- 1) For referrals where the PWDS recommends a detailed review of the referral, the Criminal Investigations Divisions, in consultation with the PWDS, will respond to a referral within sixty days from the date the Form T134 was received. Together, the TSOs and PWDS will ensure that this turnaround time is respected or that an extension has been agreed upon between the TSO and the referring area, if necessary.
- 2) The investigator, in consultation with his/her team leader will within forty five days of the date of the referral recommend rejecting the case or accepting it for preliminary investigation.
- 3) If investigators recommend rejecting the case, they will prepare a Rejected Referral Report and submit it to PWDS for approval CP-PO_Workload_Dev_Charge_Travail. Once PWDS approves the recommendation, the investigator will send a copy of the Rejected Referral Report to the area that referred the file along with the completed Form T134.¹ The investigator and his/her team leader should contact the referring auditor and his/her team leader to discuss the report. The PWDS will also use Rejected Referral Reports to prepare strategic reports for the referring areas.
- 4) If investigators recommend accepting the case, they will prepare a Case Development Proposal for their team leader and manager's review and then submit it to PWDS (CP-PO_Workload_Dev_Charge_Travail) for review and approval.
- 5) Investigators should not begin writing a primary report or an Information to Obtain Search Warrants/Production Orders until they receive approval from PWDS to proceed with the case.

3.8 Partnerships and Workload Development Section Review of the Case Development Proposal

- 1) The PWDS will review the Case Development Proposal, (usually within ten days) and determine if the case should move forward as a criminal investigation.
- 2) The following are some of the factors that PWDS will consider:
 - Do we have similar cases already under investigation that would take away from the impact of any additional convictions on that specific scheme?
 - Is there a related investigation already underway in another office and this new information should simply be added to the ongoing investigation?
 - Are there any foreseen legal impediments to pursuing this case?
 - Is CRA truly the victim of the fraud or are the investors/clients/students the victims? Would compliance be better served if the case remained in audit and civil penalties applied? The case could be considered a low priority if the Criminal Investigations Program's (CIP) involvement would be to simply assist the defrauded individuals in recovering their money.
 - Will there be any resourcing issues? Is there a need to manage or coordinate nationally?
 - If it is a valid case, should the number of entities be reduced or increased?
 - Does the case fall under the best case concept and therefore move forward?
- 3) If the PWDS agrees with the recommendation to accept the case, it will inform the Assistant Director, Criminal Investigations Division to proceed.
- 4) The Assistant Director, Criminal Investigations Division or designate will send written acknowledgment to the referring area that the case has been accepted for investigation.

3.9 Preliminary Investigation

- 1) When the Assistant Director, Criminal Investigations Division assigns the case to an investigator, it moves to the preliminary stage.
- 2) The investigator will prepare a case plan (short and long term) to ensure the case progresses on a timely basis. The approved Case Development Proposal will provide a good starting point for the case plan.
- 3) If investigators recommend closing the case in the preliminary stage, they will prepare a preliminary abort report setting out:
 - The investigative steps taken (in general terms);
 - The reasons for aborting the case;
 - Any additional civil tax adjustments determined during preliminary investigation.
- 4) At the end of the preliminary investigation, if the case advances to the investigation stage investigators will prepare a primary report to record the facts of the case known at that point. Investigators will also update their case plan.

3.10 Civil Assessments

- 1) Although auditors are responsible for issuing the Notice of (Re) Assessment to the taxpayer under investigation; the precise time to do so will vary from case to case. It is important for investigators to keep the auditor up to date on the status of the case. To impose civil penalties under section 162 or 163 of the ITA and sections 283 to 285 of the ETA, auditors must issue the (re)assessment before charges are laid. Therefore, investigators will make sure that auditors have processed the civil assessment before they lay charges.
- 2) For self-generated criminal cases or when the investigation begins as a result of a lead from outside the CRA, the Criminal Investigations Division will provide the relevant information to the appropriate Business Intelligence and Quality Assurance program for Audit.

3.11 Communication with Auditors

- 1) For various reasons (such as health and safety, applying civil penalties) it is important for auditors to be aware of the status of the investigation. Therefore, investigators should contact the referring auditor at the following stages of the investigation:
 - after receiving the referral;
 - after deciding to accept or reject the case;
 - when investigators know the day of the search or when investigators officially notify the taxpayer that he/she is under criminal investigation if no search is required;
 - at least one month before laying charges;
 - as soon as investigators learn the dates when the auditor has to testify;
 - on the final disposition of the case (guilty plea/guilty verdict/acquittal).
- 2) This is not an exhaustive list. Investigators should contact the referring auditor (and/or the respective Audit Division team leader and assistant director, Audit) whenever they feel it is reasonable to update them on the status of the investigation.
- 3) Investigators must document all discussions they have with the auditor.

3.12 Access to Information the Taxpayer Provides to Auditors after the Case is referred to the Criminal Investigations Division

- 1) In general, investigators should not review information that the taxpayer provides to CRA auditors once the case is referred to Criminal Investigations (the beginning of the criminal investigation).
- 2) The onus is on the investigator, in consultation with his/her team leader and the Investigations Advisory Services Section, to determine the appropriate method to review any new information that auditors have obtained since the case was referred to Criminal Investigations.

3.13 Closing a Case in the Investigation Stage

- 1) If after accepting a case for a full scale investigation, the investigator determines that the case should not be continued, they must prepare an Investigation Abort Report. The report outlines the

investigative steps taken, any income or tax adjustments determined during the investigation that were not included in the original referral and the reason for closing the case.

- 2) The investigator should contact the referring auditor and the Audit team leader to explain the reasons for closing the investigation.

3.14 Roles and responsibilities

Partnerships and Workload Development Section, Criminal Investigations Directorate

- Receiving Form T134 Referral to Criminal Investigations
- Completing background checks on the subject of the investigation
- Forwarding the referral (within five days of the date of the referral) to the appropriate Criminal Investigations Division
- Acknowledging receipt of the referral and informing the referring CRA official that the case is being considered by the Criminal Investigations Division in a particular TSO
- Approving (within ten business days) the TSO Case Development Proposal or Rejected Referral Report
- Liaise with other HQ program areas to promote CIP and to provide generic feedback on referrals to CIP

Assistant Director, Criminal Investigations Division

- Ensuring referrals are reviewed by an investigator as soon as they are received (preferably the one who will eventually be assigned the case)
- Ensuring the investigator reviewing the case prepares a Case Development Proposal or a Rejected Referral Report within forty five days of the date of the referral
- Assigning cases to investigators in accordance with the Case assignment grid and guidelines
- Ensuring that he/she or a designate:
 - Contacts the referring auditor and sends written confirmation that the referral has been accepted for preliminary investigation
 - Sends a copy of the rejected referral report to the referring auditor and contacts him/her to discuss the report
 - Contacts the auditor who referred the case to explain why a case was not accepted for investigation or was closed without prosecution

Investigator, Criminal Investigations Division

- Reviewing referrals and preparing a Case Development Proposal or a Rejected Referral Report within forty five days of the date of the referral
- Interviewing the referring auditor and any other officials involved in the decision to refer the case to Criminal Investigations
- Preparing a case plan and reports and forms associated with the preliminary investigation stage
- Providing the referring auditor with as much notice as possible that:
 - the taxpayer knows he/she is under investigation.
 - investigators are about to lay charges (at least one month's notice)
 - the dates the auditor has to testify
 - the taxpayer plead guilty, was convicted, acquitted or PPSC rejected the case

Liaison officer, Criminal Investigations Division

- Receiving T134 referrals from PWDS.
- Ensuring [in consultation with the Assistant Director, Criminal Investigations (or designate)] an investigator reviews the referral (preferably the one who will eventually be assigned the case) within forty five days of the date of the referral.
- Participating in conference calls with PWDS.
- Developing and maintaining relationships with internal (Audit, TSDMB, Appeals, etc.) and external (RCMP, other law enforcement and government agencies) stakeholders.
- Being the CRA's representative with local law enforcement agencies including:
- Promoting CRA and the Criminal Investigations Program (CIP).

- Receiving all leads from a criminal and civil perspective.
- Attending meetings with law enforcement agencies as well as regional organized crime conferences.
- Liaising with the local law enforcement agencies (including financial crime units) in order to identify potential files/subjects for CIP or related to the National Anti-Drug Strategy (NADS).
- Providing assistance to other law enforcement agencies (i.e., section 241, 462.48 requests, etc.) while following the procedures (Chapter 16 - Exchange of Information).
- Ensuring that other law enforcement agencies are aware of procedures to request taxpayer information and what types of information could be available to them through CRA.
- Tracking the assistance and answers provided to law enforcement.
- Testifying in court as to information provided to law enforcement and/or preparing affidavits under the Canada Evidence Act, ITA or ETA, when required.
- Working with the Priority Assessment Working Group on potential priority files and coordinating priority assessment files where cash discovered through illegal activities is brought to the attention of the CRA through law enforcement and keep track of the cases.
- In collaboration with PWDS, assess all leads received from law enforcement agencies for CIP potential, using workload selection criteria, by searching the various CRA and external databases.
- Tracking all leads received from law enforcement agencies in a Lead Referral Register. • Reporting all leads with no CIP potential on Form T133 and sending them to PWDS or entering them in the right database depending on the type of lead.
- Regularly communicating with the Audit division to determine their priorities, thereby enhancing the assessment of files to be referred.
- Providing awareness sessions to internal and external partners.
- Discussing with PWDS whether to submit Voluntary Information Records (VIRs) to FINTRAC on potential CIP cases.
- Working with team leaders to ensure that the FINTRAC disclosures referred to their TSO are reviewed in order to assess potential for CIP cases. FINTRAC disclosures with no CIP potential should be returned to PWDS for further action.
- Preparing reports for senior management, both at the regional level and HQ, on liaison activities.
- Staying informed on trends identified in the local and regional offices, assist HQ in various risk assessment evaluations and, support HQ when questions regarding these trends are raised.
- Receiving CIP related requests for assistance from other regional offices and work in collaboration with team leaders in order to respond.

July 2009

Chapter 4 – Case Planning

4.1 4.1.1 4.1.2
4.1.3
4.1.3.1 4.1.3.2
4.1.3.3 4.1.3.4

Purpose of Case Planning

Effective Case Planning
Advantages of a Formal Case Plan
General Outline of Case Planning
Investigator's Plan Time
Commitment
Concurrence with Plan
Execution of Plan

4.2 Long Term Case Planning By Case Stages

4.3 Monthly Case Plans

4.4	4.4.1	Mega Case Plans
	4.4.1.1	Operational Plan
	4.4.1.2	Responsibility for the Preparation of the
	4.4.1.3	Operational Plan
	4.4.1.4	Objectives
4.4.2		Process and Timeframes
		Updates
		Sample Mega Case Operational Plan

4.1 Purpose of Case Planning

- (1) The purpose of case planning is to decide in advance what must be done to achieve or reach a particular goal. It is an important function demanding a high level of self-discipline and accountability. Case plans assist management to ensure that:
 - Investigations are carried out as efficiently as possible from the point of view of elapsed and applied time;
 - The quality of investigations is high and that early decisions are being made; and – Staff is being developed to their fullest potential as quickly as possible.
- (2) It is imperative that a case plan is prepared for every investigation. By deciding in advance what must be done and when, then setting down a course of action, objectives are defined and the means of attainment plotted.

4.1.1 Effective Case Planning

An effective case planning system includes, as a minimum, the written plan, an estimate of time requirements, the actual time consumed, a work completion date, a review date and the supervisor's comments on review of the plan and the results. It may vary from one office to another because of the differences in the organizational makeup of some divisions. However, regardless of variances in format, any case planning system now in use or to be developed must meet the criteria cited for effective case planning.

4.1.2 Advantages of a Formal Case Plan A good case plan:

- Encourages a methodical and logical approach to the investigation;
- Assists management in co-ordinating the activities of the group or division;
- Is an effective tool for monitoring the progress of an investigation and controlling the expenditure of time;
- Provides a written historical record of actions planned and taken, which will ensure continuity of the investigation where cases are re-assigned; and
- Can form the basis of employee evaluations. **4.1.3**

General Outline of Case Planning

The following is a general outline of a case planning system for investigators: **4.1.3.1**

Investigator's Plan

The investigator is responsible for preparing a written plan of action on each case. The steps to be taken are to be set out in a logical sequence and coordinated in order to minimize delays at later stages of the investigation such as waiting for information to be received from an external source. Only a natural series of actions, with a clear objective, beyond which it would not be advisable to go without examining results, should be planned at any one time. Case plans should be flexible enough to allow investigators to alter, delete or add to any steps in the plan, which in their judgement will produce better results.

4.1.3.2 Time Commitment

An estimated time is to be allotted and target dates set for the completion of each series of planned actions. The time "targets" should be realistic, challenging and, where circumstances demand it, adjustable.

4.1.3.3 Concurrence with Plan

Investigators will review their plans of action, their immediate objective(s), and their time targets with their team leaders and will consult with them in instances where changes to the existing plan are necessary. While the experience of the investigator and the complexity of the work will, to a degree, dictate the frequency of the reviews, reviews should be completed, at a minimum, on a quarterly basis. The team leader will act as guide and consultant throughout the planning process by assisting investigators, concurring with actions planned and targets set, and/or proposing alternative approaches or steps. As the case progresses, the investigator and the team leader will review the

results of actions taken and discuss the future planned actions. The team leader will make comments, arising from the review, on the case plan and will date and initial their comments after each review. The case plan is to be maintained in the control file.

4.1.3.4 Execution of Plan

It is the supervisor's responsibility to periodically monitor progress toward work goals and objectives and to evaluate results. As the work progresses, the team leader and the investigator will review the results of actions taken and discuss the future planned actions. These reviews will be occasions for both the investigator and the team leader to come to an agreement on achievements, performance and on the pace and direction of the work. The team leader can add their comments to the case plan to facilitate the preparation of the investigator's performance review at a later date.

4.2 Long Term Case Planning By Case Stages

The investigator will prepare a long term case plan by case stages or portions thereof. At or near the completion of a stage, the investigator will then plan for all or part of the next stage. Careful planning to reach each of the decision points in an investigation on a timely basis will maximize the utilization of time and effort and will ensure adherence to the early decision principle.

4.3 Monthly Case Plans

Monthly case plans have been shown to be an effective way for supervisors to manage their operations. It does not replace the need for long-term case plans. One monthly case plan per investigator provides an overview of the work to be performed during the month. It is also easier for the supervisor to compare the investigator's case plan for the coming month, to see if it is feasible considering his other cases

4.4 Mega Case Plans

- (1) There is a real need to flag mega cases at the earliest possible moment. The benefit of early identification enables all parties to identify pressures (both resourcing and case load) and to develop a plan for the office to manage mega cases in relation to the balance of its workload. The identification of these cases could be done before the completion of the primary report. In some cases, an operational plan can be prepared at this point in time. However, in most cases the operational plan will be completed at a later date.
- (2) The criteria establishing a mega case will determine when an operational plan is required. The criteria were identified by the mega case sub-committee and adopted by the National Joint Implementation Committee (NJIC), and includes a combination of any of the following indicators:
 - Complex tax schemes;
 - Inter-jurisdictional issues;
 - Witness issues;
 - Documentary issues;
 - Legal issues;
 - Disclosure issues;
 - Other issues.
- (3) The operational plan is an evolving document that requires updating as significant events in the investigation and/or prosecution occur.

4.4.1 Operational Plan

An operational plan is the combination of an investigative plan and a prosecution plan. **4.4.1.1**

Responsibility for the Preparation of the Operational Plan

- (1) The preparation of the initial operational plan is the responsibility of the Assistant Director, Criminal Investigations of the Canada Revenue Agency (CRA).
- (2) Updates to the operational plan will remain the responsibility of the Assistant Director, Criminal Investigations until the case is referred to the Public Prosecution Service of Canada (PPSC), at that time responsibility for the maintenance of the operational plan will switch to the PPSC.

- (3) It is incumbent on the Assistant Director, Criminal Investigations and the PPSC, to ensure that a viable and realistic operational plan is created and all necessary updates meet the requirements of the CRA's investigative plan and the Deputy Director of the PPSC's prosecution plan.

4.4.1.2 Objectives

- Strategic case planning;
- Identification of human and physical resources required to investigate the case and additional resources required;
- Preparation of an investigation plan, which can be reviewed;
- Risk Management tool, which identifies the legal, strategic, human resources and financial risks associated with a case;
- Succession Planning for both the CRA and the PPSC (there needs to be a range of investigators and prosecutors assigned to this case to ensure the case survives changes within an organization).
- To ensure the provision of timely PPSC advise;
- To meet the objections of the memorandum of understanding 4.4.1.3

Process and Timeframes

- (1) Upon completion of the operational plan and/or updates, the Assistant Director of the responsible TSO, will forward the operational plan to the Regional Joint Implementation Committee (RJIC), then the Assistant Director will forward this plan to the Director General of the Criminal Investigations Directorate and Deputy Director of the PPSC, for presentation to the NJIC.
- (2) A response from the Director General and the Deputy Director will confirm that it has been received and advise the authors of the time frames for a full response or decision. As time is of the essence, it is recommended that the NJIC convene a special meeting, to deal with the operational plan.

4.4.1.4 Updates

- (1) When updating, the operational plan, the portions that have been deleted or added, must be highlighted. In addition a new signature page will be required.
- (2) It is a best practice to attach a memo that identifies where the updates has occur. (3) As an alternative it would be acceptable to report updates by way of an appendix.

4.4.2 Sample Mega Case Operational Plan

Sample Mega Case Operational Plan

March 2014

Chapter 5 – Case Selection and Assignment Guidelines

5.1	Case Selection
5.2	Early Decision Principle
5.3	Best Case Concept
5.4	Health and age of the taxpayer under investigation
5.5	Case Assignment
5.6	Decision Not To Prosecute
5.7	Taxpayer under investigation leaves or is about to leave Canada
	Preliminary Stage Investigation
	Stage Court Stage

5.1 Case Selection

- (1) The selection process of CIP workload is coordinated nationally in order to enhance strategic file selection taking into consideration local, regional, national and government priorities.
- (2) Cases are selected within the terms of the Criminal Investigations Directorate's national priorities, the Best Case Concept and the Early Decision Principle. Other factors CRA will consider before selecting a case include whether the proposed subject of the investigation is:
 - a repeat offender
 - a person with a history of non-compliance with the CRA's mandate,
 - a person who earns income from illegal activities
 - in poor health (see further guidelines in section 5.4)
 - unable to pay the criminal fine for the alleged offences
- (3) The CIP addresses non-compliance by promoting the message that tax fraud is a criminal offence that will be prosecuted and that public awareness of prosecutions will be pursued.
- (4) Only cases with a prosecution potential will be selected for full-scale investigation. The end results should be clearly taxable and not open to interpretation.
- (5) CRA criminal investigations cases will be completed to the highest possible degree of quality. This high standard of quality will apply to all investigative matters including obtaining, preserving and presentation of evidence at trial.
- (6) Evidence of guilt beyond a reasonable doubt to support the charges intended to be laid will be accumulated before recommending prosecution and referral to the PPSC. The evidence itself will be relevant, credible and of such sufficiency, as to prove the alleged offences beyond a reasonable doubt.

5.2 Early Decision Principle

- (1) The early decision principle means continually assessing the evidence that has been gathered and the evidence that is likely to be gathered in order to make timely decisions as to the direction and scope of the investigation. This includes deciding, as early as possible, whether the case still warrants investigating or whether it should be closed.

- (2) Early decisions ensure an effective use of time and the proper case management. Cases that lack prosecution potential are closed before spending substantial resources.

5.3 Best Case Concept

- (1) The Criminal Investigations Program (CIP) requires that cases move through the investigation stage as soon as possible. In order to achieve this and maintain a high quality investigation, it is necessary to select years/periods or prosecution items, which appear most promising for prosecution. These are normally the most recent years/periods or items for which evidence may be more readily available. The increased deterrent effect achieved by prosecuting additional years/periods or items, seldom justifies the additional investigative time and costs involved.
- (2) Adoption of this principle permits earlier recommendations for prosecution. Time saved in preparing fewer years/periods or prosecution items to the prosecution standard can then be applied to other investigations. If there is an early decision as to which specific charges will be laid, it allows the investigator to concentrate on gathering only the evidence required to prove those charges. It avoids spending time gathering evidence to prove charges that will never be laid.
- (3) The "best case" is the one that can be successfully prosecuted and which will produce the desired deterrent effect, but which is restricted to the more significant or major fraud items, or fewer years or periods.
- (4) The best case also involves not spending extra investigative hours and money pursuing evidence which, although "nice to have", may not really be necessary to obtain a conviction.

5.4 Health and age of the taxpayer under investigation

- 1) If at the preliminary investigation stage it is apparent that the subjects' health is such that it impairs their ability to manage their affairs on a day-to-day basis or that they will be unable to withstand the emotional and public pressure of a full scale investigation and prosecution, the case should be closed.
- 2) Where the subjects demonstrate an ability to competently manage their business affairs and the investigator is satisfied that the case merits a full-scale investigation, age should not be a major consideration unless so advanced that it may become a significant factor at the prosecution stage.
- 3) The decision to continue the investigation should be approved by the Assistant Director, Criminal Investigations. After the seizure of the taxpayer's records, the subject's health alone is not to be considered justification for aborting the case. The Assistant Director, Criminal Investigations must exercise discretion in all cases where the age and health of the subject may be an issue in determining the most appropriate use of resources.
- 4) The health and age conditions of the subject will be covered in the Prosecution Report and will be considered by the Attorney General of Canada in exercising his discretion as to whether or not to proceed with the prosecution.

5.5 Case Assignment

- (1) Assistant Directors, Criminal Investigations will use the CRA Criminal Investigations Case Assignment Grid to evaluate all the factors of a given case to determine how to rate and assign it.
- (2) There is no scoring system attached to the complicating factors outlined within the grid to determine file ranking as no one factor is necessarily more important than another but rather the totality of all the known factors at the time the case is assigned will determine whether it's an AU03, AU04 or an AU05 case.
- (3) In exceptional circumstances, if after assigning the case to an investigator, the Assistant Director, Criminal Investigations determines that because of unexpected or additional significant complexities, the case should be reclassified, it can be reassigned to an investigator with the appropriate classification or the Assistant Director can offer the investigator an acting assignment.
- (4) If a case is not as complicated as anticipated, the case may be re-assigned to an investigator with the appropriate classification.

5.6 Decision Not To Prosecute

If during a full-scale investigation it becomes apparent to the Assistant Director, Criminal Investigations that evidentiary deficiencies will prevent successful prosecution, the investigation will be closed. The investigator will prepare an Investigation Abort report and inform the Audit Division and the person under investigation as soon as practicable that no criminal charges will be laid.

5.7 Taxpayer under investigation leaves or is about to leave Canada

Preliminary Stage

If at the preliminary stage investigators determine that the taxpayer/registrant has left Canada and all indications are that they will not be returning or the corporation under investigation has no officers in Canada, investigators, in consultation with their team leader, the Assistant Director, Criminal Investigations and the Partnerships and Workload Development Section at headquarters will decide whether to continue the investigation.

Investigation Stage

- (1) If, at the investigation stage, investigators determine that the taxpayer under investigation is about to leave Canada, the Investigations Advisory Services Section at HQ must be informed. In these situations arrangements may be made with the PPSC to lay charges and issue an arrest warrant for the subject. The prosecution report and attachments should be forwarded to the PPSC as soon as possible.
- (2) If investigators determine that the taxpayer under investigation has already left Canada and indications are that the person will not be returning, investigators are to prepare a prosecution report containing the evidence gathered to date and if the case standards are met, refer it to the PPSC.

Court Stage

- (1) If the taxpayer under investigation leaves Canada during the court stage, the procedure will be determined by whether or not charges have been laid.
- (2) If charges have been laid:
 - CRA can ask the PPSC to proceed on the charges in absentia.
 - Upon expiry of any criminal appeal periods, the Appeals Division will be instructed to deal with any civil appeals or notices of objection on their merits.
- (3) If charges have not been laid and a summons cannot be legally served on the taxpayer:
 - The evidence should be preserved by obtaining certified copies, affidavits, sworn statements, etc.
 - The Appeals Division will be instructed to withdraw any subsection 239(4) ITA or 327(4) ETA Stays of Proceedings and to deal with any civil appeals or notices of objection on their merits.
 - The case will be reviewed annually and when it is apparent that:
 - Evidence is no longer available to sustain the charge, or
 - Seven years have elapsed from the date charges were laid and no information concerning the subject's return to Canada is known, and
 - All civil appeals have been finalized,

A report will be submitted to PPSC explaining the change in circumstances and requesting that the charges be withdrawn. The TSO Director must agree with the request. A copy of the report will be forwarded the Director, Criminal Investigations Division at HQ.

October 2014

Chapter 6 – Obtaining and Securing Evidence

6.1

General Remarks

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 - 6.2.2.1 6.2.2.2
 - 6.2.2.3
- 6.2.3 6.2.3.1
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 - 6.2.3.4 6.2.3.5
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- Obtaining the Evidence** Informed
 - Voluntary Consent
 - Obtaining Evidence via Judicial Authorization
 - Search Warrant
 - Production Orders
 - General Warrants
 - Information To Obtain (ITO)
 - General Remarks
 - Form of an ITO Content of an ITO Parts of an ITO
 - Special Circumstances
 - Review by the Assistant Director, Criminal Investigations / Team Leader
 - Search Warrants

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 Can Be Seized? Search
 of Businesses Search of
 Residences Search of
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	Inventory of Records Format
	and Distributions Sorting of
	Records Records Not in
	Boxes
	Indiscriminate Markings
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		Notice of Intention to Destroy Records

Appendix 6.A – Searching a Law Office

Obtaining and Securing Evidence

This chapter reflects the policies and procedures of the Criminal Investigations Directorate pertaining to obtaining and retention of the necessary evidence to successfully prosecute a case. These policies and procedures are based, in part, upon jurisprudence. However, due to regional Public Prosecution Service of Canada (PPSC) preferences and developing case law there may be variations between what is stated in the manual and the actual practices and procedures in a particular region. These variations should be brought to the attention of the Policy and Training Section, Criminal Investigations Directorate.

6.1 General Remarks

- (1) To prove that a taxpayer/registrant willfully evaded the payment of tax and/or fraudulently obtained a refund, an investigator must produce evidence to prove to a Court, beyond a reasonable doubt, that a taxpayer/registrant had knowledge of facts constituting the offence. However, as a result of the Supreme Court of Canada decisions in *Jarvis* and *Ling* on November 21, 2002, the administrative provisions of the Income Tax Act and the Excise Tax Act cannot be used for penal consideration (criminal investigative purposes). Thus, evidence sought in the possession of a taxpayer/registrant or a third party, if not voluntarily provided, must be obtained through the use of judiciary tools.
- (2) There are several methods of obtaining evidence:
 - Search warrant (section 487(1) Criminal Code (CC), section 231.3 Income Tax Act (ITA), section 290 Excise Tax Act (ETA) with or without an assistance order
 - Special search warrants (CC 462.32)
 - Production order (CC 487.012 or 487.013)
 - General warrants (CC 487.01) with or without an assistance order
 - Obtaining evidence seized by other law enforcement agencies (CC 490(15))
 - Informed voluntary consent
 - Inquiry (Section 231.4 of the (ITA) section 276 (ETA))
 - Commission evidence (CC 709)
 - Mutual Legal Assistance Treaty (MLAT) (*Mutual Legal Assistance in Criminal Matters Act*) (MLACMA)
 - Tax Treaty Request
 - United States/Canada Simultaneous Criminal Investigation Program (SCIP) – Surveillance
- (3) While both the ITA (Section 231.3) and the ETA (Section 290) contain provisions for obtaining search warrants, it is the Agency's policy to use the search provisions of the CC to obtain the necessary search warrants. The primary reason is that the CC allows the Agency to allege offences under the ITA, the ETA and the CC, all in one Information To Obtain (ITO), if necessary.
- (4) The policies and procedures pertaining to most of the methods are outlined further in this chapter. Inquiries are covered in chapter 10 Commission Evidence and MLAT in chapter 11 and SCIP in chapter 17. Policy related to special search warrants (CC 462.32) is in chapter 24 Revenue Statutes, Money Laundering and Proceeds of Crime and the policy on surveillance is in chapter 25 Covert Operations.
- (5) In keeping with the **Best Evidence Rule**, the original books and records, documents and things are the best evidence. Therefore, original records are to be secured through one of the methods outlined above. The use of certified copies in lieu of the original documents will be restricted to those instances where the originals have been secreted, destroyed, or otherwise unavailable as evidence for reasons beyond the Agency's control (for example, copies of banking records certified by bank employees pursuant to section 29 of the *Canada Evidence Act* would replace originals).

6.2 Obtaining the Evidence

As stated above, there are several methods of obtaining evidence. This section will deal with the policies and procedures pertaining to the primary methods that the Criminal Investigations Program (CIP) uses. The next topic will be writing an "Information to Obtain" (referred to as an ITO). The reason for this is that in order to obtain a search warrant, a general warrant or a production order the applicant will have to draft an ITO. Finally, the policies and procedures pertaining to search warrants, general warrants and production orders will be outlined.

6.2.1 Informed Voluntary Consent October 2009

- (1) In certain exceptional cases, informed voluntary consent may be obtained from the taxpayer/registrant to obtain the books and records, documents and things for the purpose of a criminal investigation. A situation where this may occur is when a potential accused becomes aware that their fraud has been detected. They may approach the Agency wishing to seek a quick resolution to the matter. As part of this they volunteer to make their books and records etc. available for the purposes of concluding the matter. The method of proceeding will depend on whether we are dealing with the potential accused or a third party.
- (2) With respect to a potential accused, when consideration is being given to obtaining their books and records by way of voluntary consent the following conditions must be present:
 - The taxpayer/registrant must have been informed of their Charter rights;
 - The taxpayer/registrant be strongly advised to obtain legal counsel;
 - The consenter must have the power and authority to release the records and things;
 - In the event that the taxpayer/registrant revokes the agreement, the Agency will be given a time period (normally 30 days written notice) to make a decision as to whether to photocopy the documents or apply for a search warrant to seize the documents;
 - All of the above details must be set out in writing. The consent must be signed by the taxpayer/registrant and witnessed by a third person, preferably, the taxpayer/registrant's representative.
 - Whenever investigators meet with the potential accused, they should do so in the presence of another colleague.
- (3) With respect to a third party, there are three important considerations:
 - Are there any indications that the third party participated in the scheme?
 - Does the third party have the power and authority to release the documents and things?
 - Is the information investigators are seeking likely to be found on the third party's computer? If so, a search warrant may be the best means of securing the data since it will allow CRA informatics investigators to properly extract it from the third party's computer without altering it.

If investigators are seeking hard-copy documents and there are no suspicions regarding the third party's involvement in the scheme and the third party has the authority to release the information to CRA investigators, then consideration should be given to obtaining the information voluntarily or by production order rather than executing a search warrant.

6.2.2 Obtaining Evidence via Judicial Authorization 6.2.2.1

Search Warrant

- (1) A search warrant is the most common judicial tool used by investigators. It allows those named on the warrant to search and seize the books and records and things that were made available during the course of the audit along with items the taxpayer/registrant withheld, such as a second set of books and records, missing cash register tapes etc.
- (2) In order to obtain a search warrant the investigator must have reasonable grounds to believe that an offence was committed, that records or things that are evidence of the offence exist and are to be found in a particular location.

6.2.2.2 *Production Orders*

A Justice of the Peace (JP)/Judge may order a person who is not under investigation to produce documents or copies of documents certified to be true copies to a peace officer or public officer within a time frame and place to be named in the order.

6.2.2.3 General Warrants

A general warrant can only be used for situations when there is **no other provision under the Criminal Code or any other Act of Parliament** that would provide for a warrant, authorization, or order permitting the technique, procedure or device to be used or the things to be done. In most cases, a search warrant or a production order pursuant to the CC can be obtained to secure the necessary evidence.

As previously stated, in order to obtain a search warrant, production order or a general warrant, investigators will have to prepare an ITO. The next section will outline the policies and procedures pertaining to the preparation of an ITO.

6.2.3 Information To Obtain (ITO) 6.2.3.1

General Remarks

- (1) An **affidavit** (commonly referred to as an Information to Obtain) is required, under section 487 of the CC, to obtain a search warrant, general warrant and/or a production order. The ITO must be objective, disclosing all the significant and relevant facts that came to light during the investigation. All material facts must be disclosed, not only those that support the allegation that an offence has been committed, but any facts that may point to the contrary.
- (2) As a rule, the JP/Judge will decide whether or not to grant the application based on the information contained in the ITO. In rare situations, the JP/Judge may seek verbal clarification. But, for the most part, the decision will be based on what is contained in the ITO.
- (3) The usual language of the taxpayer/registrant/third party subject to the search should be determined in order to prepare the documentation in one of the official languages. Although investigators may write the ITO in their language of choice, it is preferable to use the language of the subject of the search. The warrant must be written in the official language of the subject of the search.
- (4) To comply with the provisions of the CC relating to a search warrant, general warrant or production order the ITO must contain the following information:
 - a) A listing of the things to be searched for (487 search warrants), documents or data to be produced (for 487.012 production orders), names or account numbers to be produced (for 487.013 production orders) or the investigative technique or procedure to be used (for 487.01 general warrants);
 - b) The alleged offence(s);
 - c) The place(s) to be searched (for search warrants) - the place where the special technique will be used (for general warrants), the person who has possession or control of the documents or data to be produced (for 487.012 production orders) or the institution, person or entity who has possession or control of the account number or name to be produced (for 487.013 production orders);
 - d) Grounds for belief (for 487 warrants, 487.01 general warrants and 487.012 production orders) and grounds to suspect (for 487.013 production orders) including:
 - A link or nexus between the things to be searched for, documents, data, account number, name to be produced or the special techniques to be used and the offence(s). That is, it is important to show a connection between them, or how the things, documents, data, account number or name will be needed to prove the offence(s),
 - A link or nexus between the things to be searched for (search warrants), the special techniques to be used (for general warrants) and the place(s). That is, it is important to show a connection between them, or where the things to be searched for will be found.
 - A link or nexus between the documents or data to be produced (for 487.012 production orders) and the person who has possession or control of them.
A link or nexus between the name or account number to be produced (for 487.013 production orders) and the institution, person, or entity who has possession or control of them.

Table 6.1

	Search Warrant	487.012 Production Order	487.013 Production Order	General Warrant
Things to be searched for	Yes	N/A	N/A	N/A
Documents or data to be produced	N/A	Yes	N/A	N/A
Account number or name to be produced	N/A	N/A	Yes	N/A
Investigative technique or procedure to be used	N/A	N/A	N/A	Yes
Alleged Offence(s)	Yes	Yes	Yes	Yes
Places to be searched	Yes	N/A	N/A	N/A
Person who has possession or control of the documents or data to be produced	N/A	Yes	N/A	N/A
Institution, person or entity who has possession or control of the account number or name to be produced	N/A	N/A	Yes	N/A
Place(s) where the investigative technique or procedure will be used	N/A	N/A	N/A	Yes
Grounds for Belief	Yes	Yes	N/A	Yes
Grounds to suspect	N/A	N/A	Yes	N/A

6.2.3.2 Form of an ITO

- (1) The investigator in charge of the case will have to swear before the JP/Judge their belief that the facts set out in the ITO are true to the best of their knowledge. Their belief will usually be based on two things:
 - The facts obtained from the referring person (auditor). This information will be disclosed as third party information. A statement to the effect that the investigator believes in the truthfulness of the information supplied by the referring person **must** be included in the document;
 - The investigative work carried out by the investigator during the preliminary investigation.
- (2) The format to be used is that of Form 1 of the CC, with the necessary changes as dictated by local practice. Not all JPs/Judges agree as to the form, content and style, therefore each office should be aware of the requirements of the various JPs/Judges. HQ should be advised accordingly.
- (3) In the Quebec region, investigators should use the appropriate form as recommended by Justice Québec. Form SJ 579B *Information to Obtain a Search Warrant* includes the ITO, the Appendix to the ITO, the Warrant to Search and the Report to a Justice. Form SJ 932A *Application to Obtain a Production Order* is for 487.012 production orders and contains the ITO, the Production Order and the Report to Justice. Form SJ 933A *Application to Obtain a Financial or Commercial Information Production Order* is for 487.013 production orders and includes the production order.
- (4) ITO samples for a variety of circumstances are on the Criminal Investigations Directorate common drive

6.2.3.3 Content of an ITO

In preparing an ITO, investigators must be cognizant of their obligations under section 241 of the ITA and section 295 of the ETA. Once a search warrant, production order and/or general warrant has been executed and a Report to a Justice is made, the ITO supporting a warrant(s)/order(s) becomes a public record, unless investigators (through the PPSC) apply for and obtain an Order to Seal the ITO pursuant to section 487(3) of the CC. Additionally, the ITO is subject to disclosure obligations. Accordingly, investigators must consider the content of the ITO. In some circumstances, it may be advisable to prepare separate ITOs for the different search locations with the Grounds for Belief limited to specifics relevant to the issue at hand.

6.2.3.3.1 *Search of a Third Party*

When a search of the premises of a third party, such as a supplier or client of the taxpayer or registrant is to be conducted, investigators should consider preparing a separate ITO for each location. Taxpayer or registrant information must not be provided to third parties other than what is essential to obtain the warrant/order. The ITO must not include information that would or could be interpreted to be a breach of the confidentiality provisions of the Acts administered by CRA.

6.2.3.4 *Parts of an ITO*

- Heading
- Overview
- Identification of the investigator
- Things to be searched for
- Offences
- Places to be searched
- Grounds for belief
- Request for warrant
- Swearing/affirming of Information 6.2.3.4.1

Heading

The heading states the relevant search section of the CC. 6.2.3.4.2

Overview

Give a brief description of the alleged fraud scheme and the main characters. The overview gives the reader an idea of what to expect in the paragraphs that follow.

6.2.3.4.3 Identification of the investigator

- (1) Identifies the person who is going to swear to the ITO. Use the investigator's full given name.
- (2) The address of the investigator is limited to the city and province of residence. The city and province of the TSO can be used if there is concern over identification of the investigator.
- (3) All employees of the Agency shall be referred to as public officers and investigators with the Canada Revenue Agency, attached to a particular Tax Services Office. The acronym CRA should not be used in this part of the document but may be introduced and used in the Grounds for Belief.

6.2.3.4.4 Documents or Things To Be Searched For/Produced

- (1) Where practical, classes of documents should be grouped together. For example, the books and records of the business would be grouped together while the banking records would form part of another group of items. Also, business records should be listed separately and apart from personal records and things.
- (2) Each description of documents or things should include a reference to a time period, **which cannot go beyond the periods investigated, unless reasons to go outside the period are stated in the "Grounds For Belief" section.** Documents or things to be seized should also relate to specific individuals and/or corporations.
- (3) Where computer generated records or equipment will form part of the documents or things to be searched for, refer to **Chapter 19 Forensics and Informatics Services Section** for the detailed description to be incorporated in the relevant paragraphs of the ITO.
- (4) Appropriate paragraphs must be included in the "Things to be Searched For" and "Grounds for Belief" sections of the ITO when seizing non-documentary "things" such as handwriting samples,

printers, typewriters, fax machines, etc. that may be required to perform forensic tests to reveal evidence pertaining to the named "Offences".

- (5) This section of the ITO should conclude with a statement as to why the things are needed. There should be separate paragraphs for the ITA and the ETA.
- (6) The names of the corporations and/or individuals set out in the Offence Section have to be stated along with the relevant time periods. There should be a paragraph stating that these things will afford evidence of an offence and against which Act(s).

6.2.3.4.5 Offences

- (1) The description of the offences should follow the wording of the section of the respective Act(s) creating the offence, to the greatest extent possible. It should clearly state the name of that statute, the name of the person(s) suspected of having committed the offence(s), and a description of the offence(s), including the time period of the offence(s). Where a corporation is involved, the name of the responsible officer, director or agent suspected of causing the corporation to commit the offence(s) should be included.
- (2) Only offences that are supported by evidence in existence at the time of the writing of the ITO should be listed. The most commonly cited offences are:
 - With respect to the ITA,
 - 239(1)(a) filing of a false statement or return
 - 239(1)(d) evading the payment of taxes
 - 239(1.1)(a) making a false statement to obtain a fraudulent refund or credit
 - 239(1.1)(e) wilfully in any manner obtaining a fraudulent refund or credit
 - With respect to the ETA,
 - 327(1)(a) – filing of a false statement
 - 327(1)(c) – evading the payment of taxes
 - 327(1)(d) – obtaining a fraudulent refund or rebate

- (3) If Criminal Code offences are being considered, they may be included in the ITO. 6.2.3.4.6 Place(s) to be Searched

- (1) Place(s) to be searched must be accurately described, and do not include a person's body.
- (2) Describe all buildings, outbuildings, receptacles, sheds, garages, etc. known to exist on the property in question. The authority of a warrant to search a personal residence would not extend, for example, to a commercial enterprise in the adjacent garage. A separate warrant would be necessary for such a building.
- (3) The addresses of the locations to be searched should be checked both at the time of preparation of the ITO and immediately prior to the execution of the warrant. An improper address for a place to be searched will invalidate the warrant.
- (4) In situations where it is necessary to search a vehicle, a separate warrant should be sought, thereby allowing for the search of the vehicle regardless of its location.
- (5) For each location named in this section the reasonable grounds for believing that the said documents and things are located at the named place(s) must be set out in the "Grounds For Belief" section.

6.2.3.4.7 Grounds For Belief

- (1) This section represents the main portion of the ITO. In it, there must be an evidentiary link between the things to be searched for and the offences and a factual link between the said things and their presence at the listed place(s) to be searched.
- (2) The investigator will spell out the results of the CRA's audit or administrative review, the steps taken during the preliminary investigation, what was learned as a result of these steps and the investigator's conclusion.

- (3) The section should begin with an overall summary containing the following:
- A paragraph identifying the name and address of the person(s) under investigation. The full and exact name of the taxpayer/registrant should be used. In the case of a corporation, enter the name appearing on its charter, or if this is not available, use the name as it appears in the latest entry from CRA records or systems.
 - The next paragraph should provide the name of the investigator, and state the following:
 "I am the person in charge of the investigation file pertaining to this matter and as such have full knowledge of the matters and facts contained herein except where indicated to be on belief and where so indicated, believe them to be true. I was assigned the investigation on"
- The purpose of this paragraph is for the investigator to advise the JP/Judge that he/she believes the facts/information obtained from others (i.e. auditor, witnesses).
- These paragraphs will provide a simple, short summary of the alleged offences. The objective is to state the allegations so the reader can understand the details in the paragraphs to follow in relation to the overall picture.
 - The final part of the summary for the JP/Judge should contain a brief description of the alleged scheme.
- (4) In order to clearly spell out the case to the JP/Judge, the facts of the case should then be set out in a chronological sequence beginning with the referring person's work, in most instances, it will be the auditor. Therefore, there should be a paragraph stating:
- who referred the file,
 - the section that they work in,
 - the time period covered by their review/audit
 - the reasons for the referral.
- (5) The investigator must establish that there has been non-compliance with the Act(s) (actus rea). To do this the investigator needs to provide the following information:
- The registered business names;
 - The type of business;
 - The interest of each of the partners of a partnership in profits, losses, and capital;
 - The person(s) responsible for day-to-day operations; and,
 - The person(s) maintaining the books.
 - Set out the audit steps taken
 - List the books, records and documents audited/examined
 - Provide details of all relevant interviews by the referring officer and all officers that had anything to do with the referral
 - Show how income was reported and/or expenses claimed
 - Show what was not reported and/or personal and/or fraudulent expenses claimed
 - Show how the investigator knows this utilizing the information set out in (f) to (h) above
 - State or at least be able to state that all plausible explanations have been considered; adjusting entries to revenue and expenses examined; shareholders loan account checked for adjusting entries
 - If a corporation is involved, the names of the shareholders and directors;
 - The details of any changes to the directorship of the corporation during the time periods under investigation to assist in determining potential liability;
 - The fiscal year-end of each of any relevant businesses and corporations ;
 - The date of incorporation, establishment, or registration of all the relevant entities;
 - Show that the shareholders have not reported a benefit on their T1s
- (6) It is not necessary to record all the details of every conversation and/or audit step taken, only those that are relevant and material to the allegation whether inculpatory or exculpatory.
- (7) The investigator should list the documents, books and items of the taxpayer or registrant under investigation that the auditor has already examined. The investigator must indicate who had

possession of the items, where they can be found, and the period covered by each record, document, and return. This will assist in establishing the reasonable grounds to believe where the things to be searched for may be found.

- (8) The periods of examination mentioned must at least cover those periods during which the alleged offence took place. Where additional periods are to be included, yet no audit/review has been done and the use of an indirect verification technique such as a Net Worth or Projection method is being relied upon for the additional periods, a strong basis has to be established with respect to the audited/reviewed periods.
- (9) Appendices to the ITO should be the exception rather than the rule. They should be limited to items that are necessary to form the reasonable grounds to believe that an offence has occurred. If an appendix is referred to in the Grounds for Belief, each page must be stamped and numbered accordingly.
- (10) It is permissible to include **hearsay evidence** in the ITO. The investigator should swear to their belief in the truth of the things asserted in the ITO and mention the source of any information that amounts to hearsay.
- (11) In a separate paragraph(s), if applicable, investigators must describe anything that the auditor informed them of during any interviews that were not disclosed in the Auditor's audit file. List all dates of these interviews and the dates and details of the event(s) that took place.
- (12) In a separate paragraph(s), if applicable, investigators must explain anything that the auditor did that they do not agree with or are changing and completely explain the differences.
- (13) **Identity of a Third Party Informant.** If investigators are relying on information from an informant who wishes to remain anonymous, great care must be taken not to reveal their identity or any other facts and details that could indirectly reveal their identity. Minor details such as the time, date or location from which the information was supplied could reveal the person's identity.
- (14) The next step is for investigators to summarize what they know as a result of their review of the auditor's work. Use of the expression "I know" must be limited to facts within the personal knowledge of the investigator. Use of "I know" must be limited to what the investigator personally saw, touched, felt, tasted or heard. However, the investigator can use "I know" to describe the contents of a document that was examined. Example: "I know that ABC LTD's charter indicated it was incorporated on December 12, 2005."
The key word is "indicated". This conveys that the knowledge is based on reading the document, not on other knowledge.
- (15) The expression "I have reasonable grounds to believe" will be used in all cases where the affiant has described the facts and observations and has drawn a conclusion. Example: "As a result of my examination and enquiries mentioned in paragraph 4 of this Information, I have reasonable grounds to believe that the gross income reported in the 2005 return of income is based on bank deposits."
- (16) The investigator must present to the JP/Judge the facts that provide the investigator with reasonable grounds to believe that an offence has been committed. It is not sufficient to rely upon the fact that there has been non-compliance (actus reus). The investigator must demonstrate the mens rea, the existence of intent to accomplish a fraudulent scheme.
- (17) Investigators may **include conclusions and theories** in the ITO provided that there remains sufficient material for the JP/judge to be satisfied that there are reasonable grounds to believe that evidence with respect to the offences will be found as alleged. The conclusions must not be presented in such a way that they taint the material so that the JP/judge would be unable to form a reasonable independent conclusion.
- (18) The information conveyed in paragraph 5 should explain the investigator's reasonable grounds to believe that the alleged offence(s) occurred and that books, records or things listed do exist at the named locations(s).

- (19) In the case of a corporation, it is necessary to include the relevant facts to establish that one or more officers, directors or agents were the **guiding mind(s)** of the corporation and involved the corporation in the commission of the offence.
- (20) If the "Things to be Searched For" section includes a reference to *non-documentary evidence*, then the "Grounds for Belief" section should include a similar reference.
- (21) When the search location is a lawyer's office, special wording is required to be inserted in the ITO. See **Appendix 6.A**.
- (22) A concluding **paragraph(s)** should state that the investigator has reasonable grounds to believe that income was unreported, GST/HST was not remitted and/or fictitious claims were made.
- (23) If the "Things to be Searched For" section includes a reference to computers, then the "Grounds for Belief" section must include an applicable paragraph. Consult the respective Regional Informatics Investigator. Refer to **Chapter 19 Forensics and Informatics Services Section** to ensure proper wording is used in the paragraphs supporting the seizure of computer records and equipment.
- (24) There must be paragraph(s) establishing reasonable grounds for belief that the things to be searched for will be found at the place(s) to be searched. Include the results of any discrete inquiries and/or recent "drive-by's" of the locations.
- (25) There should also be a paragraph stating that as a result of information in certain numbered paragraphs the investigator has reasonable grounds to believe that the offences described under the heading **Offences** have taken place.
- (26) There **must** be a paragraph establishing why the things to be searched for are needed. The investigator will state what is required and then list the investigative steps to follow. Typically this would include:
 - a) The need to analyse and reconcile taxable income and supplies, as well as Income tax/GST/HST payable and/or refundable in the returns of the person under investigation.
 - b) The determination of sales, supplies, expenses, various credits, and deductions.
 - c) The identity of those participating in the alleged scheme.
 - d) The identification, nature and details of the alleged fraudulent scheme.
- (27) The final paragraph before the Prayer for a warrant shall state that the investigator believes that the records exist, are at the named locations and will afford evidence of the named offences.

6.2.3.4.8 Request

The investigator asks that a search warrant be granted to search the places for the things. 6.2.3.4.9

Swearing/affirming the ITO

- (1) The ITO may be sworn as follows:
 - The JP/Judge being requested to issue a section 487(1) CC search warrant will usually be the one receiving the oath of the investigator in relation to the Information.
 - Where the search warrant is to be executed in a different territorial division, the oath will be administered as usual, but the search warrant will have to be endorsed by a justice having jurisdiction in the other territorial division (Form 28).
- (2) The investigator signs above the jurat and should sign so that their signature includes at least an initial for each of the names stated at the beginning of the ITO. At this time, the investigator could be asked to initial each page of the ITO.
- (3) The investigator should anticipate who is going to administer the oath and properly describe that person in the jurat. The person administering the oath signs below the date and over the appropriate description. For ease of identification, the official's name should be printed below the signature.
- (4) The jurat should not be set out alone on the last page. The latter part of the text must be carried into the last page to establish continuity.
- (5) The person administering the oath, not the investigator, must sign the stamp that indicates a numbered appendix is attached to the Information.

- (6) If an investigator objects to swearing an ITO, he/she may give a solemn affirmation, and the jurat will be replaced with "Affirmed" rather than Sworn.

6.2.3.5 *Special Circumstances*

6.2.3.5.1 Relationship between Personal and Business Records

Where personal items such as spending vouchers, bank statements and credit card statements are listed to be seized, it is necessary to explain how the personal items relate to the fraud. This should be set out towards the end of the Grounds For Belief in the section dealing with why the documents to be seized are needed. The most common reason is for Net Worth purposes and to quantify the amount of the fraud.

6.2.3.5.2 Net Worth

- (1) Local practices will dictate how the Net Worth statements are set out in the ITO, whether they are appended or included in the main body of the Grounds for Belief. The reasons for using the Net Worth method of determining quantum must be spelled out.
- (2) Separate statements should be prepared for each enterprise owned by the taxpayer or registrant under review, but only Consolidated Net Worth Statements need to be attached to the ITO.
- (3) Where a referral to PPSC is based solely on a net worth, in certain regions, it is suggested that regional PPSC be contacted beforehand for their opinion on the viability of the prosecution. Net worth evaluations are often complex in criminal court because of the issue of proving the taxable status of the revenues used to acquire the assets and the base year assets and liabilities.

6.2.3.5.3 Fraudulent Claims

- (1) Pertaining to fraudulent entities, there are two objectives of the search. The first is to prove that the alleged accused is the one filing the claims. Secondly, that the businesses do not exist. In trying to prove that the business does not exist the investigator will be in fact, searching for negative evidence.
- (2) The "Things to Be Searched For" will include such items as GST/HST Registration Forms, copies of returns and correspondence from the CRA. While there may not be a legitimate business operation, the business may exist as a legal entity. Therefore "The things To Be Searched For" should include articles of incorporation etc.
- (3) Whether or not the business is a legal entity or carrying on business, books, records or documents may have been created to satisfy an Agency review or audit. Therefore, when it is suspected that there is no legitimate operating business, the "Things To Be Searched For" section should contain a listing of the books and records that would normally be maintained by a legitimate business conducting that type of commerce.
- (4) The fact that records were searched for and not found would be circumstantial evidence that may reinforce the conclusion that the business exists for the sole purpose of committing GST/HST fraud. The rationale should be spelled out in the "Grounds For Belief Section".
- (5) With respect to fraudulent refunds (Child Tax Benefits, ITA), the same general objectives as stated above apply.

6.2.3.5.4 Forensic Evidence Samples

When there are reasonable grounds to believe that handwriting samples or other "things" (printers, typewriters, fax machines, etc.) will be required to perform forensic tests as part of the investigation, and that the forensic tests are likely to reveal evidence pertaining to the named "Offence(s)", appropriate paragraphs must be included in the "Things to be Searched For" and "Grounds for Belief" section of the ITO. The Forensics Sciences Division of the CBSA Laboratory and Scientific Services Directorate should be contacted.

6.2.3.5.5 Isolated Transactions

- (1) Establishing the fraudulent aspect of an isolated transaction requires stronger evidence than in usual cases. As the infraction is committed only once, the task of proving intent becomes difficult. The ITO must therefore detail very clearly all the facts proving the commission of the infraction, the intent and the result of the transaction.

- (2) If corporate groups are involved, it will be necessary to clearly establish the position of each of the corporations within its group.

6.2.3.5.6 Search of a Lawyer's Office

Refer to the proposed wording in **Appendix 6.A – Searching a Law Office**, to be inserted in the warrant and in the ITO a search warrant to search a law office. It is designed to incorporate the principles of the Supreme Court of Canada's 2002 decision in *Lavallee et al.* The principles, nevertheless, are the overriding authority in the area.

6.2.3.6 Review by the Assistant Director, Criminal Investigations / Team Leader

- (1) The Assistant Director, Criminal Investigations, team leader and/or designate is responsible for reviewing the ITO prepared by their investigators. This function is of great importance and includes ensuring that:
 - The facts and details contained in the ITO agree with the supporting documents that were available to the investigator at the time of its preparation, i.e.: dates, reporting years, additions, figures, etc.;
 - Interview notes in the master file should support any statement attributed to a taxpayer/registrant referred to in the ITO;
 - The principles and guidelines referred to in this chapter have been duly complied with;
 - The request for a search warrant, production order or general warrant is justified;
 - The facts detailed are relevant and material to the alleged offence(s);
 - No facts or details mentioned in the ITO conflict with those set out in the Primary Report.
- (2) Once the Assistant Director, Criminal Investigations, team leader or designate has reviewed the search documents, they will be forwarded to Headquarters for review. The Headquarters review process will identify and address any potential legal and policy issues that the investigator in charge of the case should consider. Once the HQ review process is complete and a comfort letter has been issued, the final approval on whether or not to obtain search warrants rests with the respective TSO Director.

6.2.4 Search Warrants

- (1) There shall be one warrant for each location to be searched. Refer to Form 5 of the CC for general form and content.
- (2) The warrant shall be addressed to the named officers of the CRA. The names of the assisting police officers will not usually appear in the warrant because their involvement is limited to keeping the peace and it is not necessary to personally name peace officers.
- (3) The sections of the warrant entitled "Offences" and "Places To Be Searched" will be the same as in the ITO. The "Things To Be Searched For" will also coincide with those listed in the ITO for that particular location indicated, on the warrant, where the things or documents are expected to be found.
- (4) Some jurisdictions include a time period (e.g. 15 days) during which the warrant may be executed. It can only be executed "by day", (between 6AM and 9PM) as defined by Section 2 of the CC unless the JP/Judge authorizes otherwise in the warrant. The ITO should set out the reasons for wishing to execute the warrant outside the normal hours.
- (5) The warrant will authorize the officers to enter the said premises and places and to search for and seize the said documents or things and to bring them or make a report to the justice who issued the warrant or some other justice if he is unable to act. The warrant is dated and signed by the JP/Judge.

6.2.4.1 Officers Participating in the Search

- (1) The names of the CRA officers taking part in the search should be listed in the warrant, each name being exactly as shown on the CIP investigator's badge and accompanying identification card, or for officers from other CRA program areas, their RC121A Authorization Card.
- (2) In cases where jeopardy procedures have been implemented and a seizure of assets is planned at any search location(s), it is recommended that that portion of the jeopardy action be delayed until at least the day after the execution of the search warrant(s).

- (3) An informatics investigator should be added to the search team to search for electronic evidence when the taxpayer or registrant uses a computer. Refer to **Chapter 19 Forensics and Informatics Services Section**.
- (4) The investigator in charge of the case is responsible for contacting the appropriate RCMP office to request their assistance. If searches are planned and the RCMP is not available, the TSO should seek the assistance of the police force that has primary CC jurisdiction in the area of the search action. The police should attend the pre-search briefing where they will be provided the names of the individuals and business(es) whose premises will be searched and the names of company officials who are involved in the case and likely to be encountered during the search. The police should be made aware of search locations involving the accused and those involving third parties. If the police are unable to attend the general pre-search briefing, then the investigator-in-charge of the case should make arrangements to have a separate meeting with the police where the above details will be discussed.
- (5) If evidence is found relating to an offence not covered by the Acts administered by the CRA, and the attending police officer decides to seize the items, it is the police officer's responsibility to seize the items, take them into police custody and report the seizure to the appropriate judicial authority.

6.2.4.2 *Supplementary Warrants*

- (1) If during the execution of a search, a member of the search team discovers a new location where some of the items listed in the original warrant can be found, a supplementary warrant must then be obtained.
- (2) In the supplementary warrant, the **Things to be Searched For** section will be restricted to those things for which there are grounds to believe will be found at the additional location. The list of things to be seized from the original warrant should not be copied in whole unless the additional grounds so permit.
- (3) The Offences will not change, as the investigator of the new ITO will adopt the content of the original warrant.
- (4) In the **Grounds For Belief** portion of the ITO, the original Information will be mentioned and attached as an exhibit. The investigator must adopt the facts and findings in the original ITO as the basis for believing that the offences took place, etc, without repeating the whole ITO. The facts relating to seeking an additional warrant are spelled out and the normal concluding paragraphs included.
- (5) The affiant for the additional ITO need not be the original affiant as long as he/she states that they have reasonable grounds to believe as per **section 6.2.3.4.6**.

6.2.5 **Production Orders**

- (1) A production order is a court order that compels a third party, who is not under investigation, to produce certain things to a peace officer or a public officer.
- (2) There are two types of production orders:
 - general production order under section 487.012 of the Criminal Code
 - specific production order under section 487.013 of the Criminal Code
- (3) To obtain a 487.012 production order, investigators must satisfy the issuing justice that there are reasonable grounds to believe that an offence has been committed, the person subject to the order has possession and control of the documents or data and that the documents or data will afford evidence of the alleged offence. The standard of proof for 487.013 production orders is reasonable grounds to suspect.
- (4) Sections 487.014 through 487.017 apply to both types of production orders as do the definitions found in section 487.011.

6.2.5.1 *487.012 Production order*

- (1) Section 487.012 provides that a JP/Judge may order a person (other than the person under investigation) to produce documents or data or certified copies or to prepare a document based on existing documents or data to a peace officer or public officer within a specific time frame.

- (2) A 487.012 production order could be used to obtain bank account statements, cancelled or cleared cheques, deposit slips, withdrawal slips, Large Cash Transaction Reports, loan or mortgage applications, signature cards, account applications, ATM transactions, ATM video footage, International Wire Transfer Records or Electronic Funds Transfer Records. These are only a sample of records maintained by financial institutions. Investigators should consult with senior investigators, subject matter experts and bank security officers in order to determine which records are the most relevant to their investigation.

6.2.5.2 487.013 Production order

- (1) Pursuant to a 487.013 production order, a justice or judge will order a financial institution not under investigation to produce in writing:
- the account number of a person named in the order, or
 - the name of a person whose account number is specified in the order, and
 - the status and type of the account and the date upon which it was opened or closed.
- (2) In situations where investigators don't know the bank account number or the account owner(s), they could seek a specific production order under section 487.013 before they can obtain a general production order under 487.012.

6.2.5.3 Is a production order necessary?

- (1) In accordance with section 487.014 of the Criminal Code, investigators do not need a production order to obtain information from third parties as long as the information is not reasonably worthy of privacy protection.
- (2) Sales invoices, purchase agreements, work orders and similar documents or data that a vendor, supplier or customer obtained or created as a result of doing business with the target of the CRA investigation are not confidential or private information. Investigators can ask the third party to provide these documents voluntarily. Guidelines on interviewing third parties and privacy legislation can be found in **chapter 9**.
- (3) However, records held by banks and health care providers are examples of information in which the person under investigation has a reasonable expectation of privacy. The Supreme Court of Canada has ruled that this type of information can only be obtained by judicial authorization such as a production order or search warrant.

6.2.5.4 Legal terms concerning production orders

- (1) 487.012 production orders must be served on a "person". Section 2 of the Criminal Code says a "person" includes "an organization". It defines an organization as a public body, body corporate, society, company, firm, partnership, trade union or municipality, or an association of persons that is created for a common purpose, has an operational structure, and holds itself out to the public as an association of persons.
- (2) Examples of organizations include any business, union, professional association, financial institution, municipality, government body or non-profit society.
- (3) 487.013 production orders must be served on a "financial institution" as defined in section 2 of the *Bank Act* or a "person or entity as defined in Section 5 of the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act (PCMLTFA)*." The PCMLTFA definition also covers money services businesses, currency exchanges, casinos, which also may hold "accounts" for their clients.
- (4) Investigators should not name an employee or a manager of a bank or financial institution in a production order. Use the legal name of the organization or entity. The legal names of banks can be found in the three schedules to the Bank Act, available on the Department of Justice Website: <http://laws-lois.justice.gc.ca/eng/acts/B-1.01/page-362.html#h-237>
- (5) The legislation also requires that a public officer who will pick up the requested information be named in the order. There is no restriction on the number of officers who can be named. Therefore, a good practice is to provide two or three names so that the third party can produce the documents to the second CRA officer if the investigator who requested the order is not available. CRA investigators should consider personal pick-up as the preferred method.

- (6) Section 487.011 defines "document" as any medium on which is recorded or marked anything that is capable of being read or understood by a person or a computer system or other device. Given this definition, an investigator could seek more than paper "documents" with a production order.
- (7) Section 487.011 refers to section 342.1(2) for a definition of data. Data means representations of information or of concepts that are being prepared or have been prepared in a form suitable for use in a computer system.
- (8) Section 487.012(5) and 487.013(5) provide that the issuing justice or judge may revoke, renew or vary the order upon application by the peace or public officer named in the order.

6.2.5.5 *Two tiered approach to production of bank documents or data*

- (1) The number of production orders to obtain will depend on the facts in a given case. Where there is one person under investigation and investigators are seeking the details of one bank account that the individual holds, one order supported by one ITO is sufficient.
- (2) If the person has a company and investigators have reasonable grounds to believe that the company has unreported income, which was appropriated by the individual and there are bank accounts for the individual and company at one branch, then one order and one ITO should also suffice.
- (3) As the facts expand to include bank accounts of additional parties, such as partners or third parties, then investigators should consider separate production orders, although possibly within one ITO. If there are accounts at more than one branch investigators should obtain orders for each branch.
- (4) Most banks prefer that monthly statements be produced and reviewed by the investigator in order to determine what source documents are really needed, and then obtain a separate production order for the specific source items identified on the statement.
- (5) This two-stage approach to record production tends to speed up the process rather than slow it down: the bank only needs to search for records actually relevant to the investigation thereby reducing costs, and the investigator can significantly reduce the number of exhibits and material associated to his/her file.
- (6) An exception to the two tiered approach is if investigators limit the production of source documents to transactions that exceed a specific threshold such as all transactions over \$250, \$500 or \$1,000. In these circumstances, investigators could use one production order to request all the bank statements and source documents at once. The banks will produce the complete statements for the period in question but they won't have to look for and produce all the source documents – only the ones that meet the threshold.
- (7) Provide a cover letter to the financial institution describing the documents requested to help them comply with the order.

6.2.5.6 *Amount of time to comply*

- (1) CRA investigators should contact the security official from the financial institution to discuss the type of information they are seeking and the anticipated amount of time required to find it prior to drafting their ITO and production order.
- (2) For 487.012 production orders on financial institutions, CRA investigators have traditionally used 45 and 75 days within a two-tier approach (tier 1= statements; tier 2= source documents). This is a standard approach that is not always applicable to each case. The terms and conditions of each production order must be reasonable. This is why CRA investigators should contact the bank security official in each case before they specify a time to comply in the order.
- (3) The time required for the third party to satisfy the order is expressed as a number of days from the date the order was signed. To calculate the date of compliance, start the count the day after it is signed and include the last day. As an example, 45 days from an order signed September 1, 2012 will expire on October 16, 2012. The order should be dated the day it is signed.
- (4) For 487.013 production orders, the time required for the financial institutions to find names or account numbers may be less than the time it takes to obtain documents or data pursuant to a 487.012 production order. CRA investigators should contact the bank security official to discuss the

approximate time it will take for the bank to find the account information the investigator is seeking. When serving the production order, investigators should give the financial institution the Social Insurance Number (SIN) and the dates of birth of the taxpayer/registrant to properly identify the customer. The SIN should not be included in the production order.

6.2.5.7 *Objections to production orders*

- (1) Section 487.015 allows the third party subject to a production order to apply to a judge or justice for an exemption to the order, upon notice to the peace or public officer named in the order, within 30 days of the date of issue and before it expires on the basis that:
 - the documents sought are privileged or otherwise protected from disclosure;
 - that it is unreasonable to produce the documents or;
 - that the documents, data or information are not in the possession or control of the third party.
- (2) **Section 487.012** provides that conditions be imposed to protect solicitor-client privilege. Therefore, if the third party is a lawyer, investigators should review **Chapter 8 Solicitor Client Privilege** and must consult with Investigations Advisory Services before preparing an ITO for a production order on a lawyer. Depending on the advice of Investigations Advisory Services, investigators will have to consult PPSC before submitting the ITO to Investigations Advisory Services for review.

6.2.5.8 *Serving Production Orders on Entities in another Province or Territory*

One of the major differences between search warrants and production orders is that there are no "backing" or endorsement provisions for production orders. This means that if CRA investigators in Province A wish to serve a production order on a third party, financial institution or entity in Province B, they should discuss the following options with their team leader:

- Travel to Province B and obtain the production order there
- Ask an investigator from Province B to obtain the production order
- If the third party, financial institution or entity has a legal presence in Province A (such as a subsidiary office or a branch), serve it on that office.

6.2.5.9 *Reports to Justice and Detention Orders*

- (1) Production orders issued under sections 487.012 and 487.013 of the Criminal Code have many similarities to other warrants and orders under the Criminal Code. A major difference with production orders is that investigators often only seek copies of documents or data. The legislation stipulates that copies of documents need not be returned, which means detention orders are not required if investigators only obtain copies of documents, data or account information.
- (2) However, CRA investigators must file a Report to Justice for every production order – regardless of whether they obtain copies or originals.

6.2.6 **General Warrants**

- (1) Situations where a 487.01 general warrant *may* be required are:
 - Taking photographs or videotapes on searches for evidentiary purposes;
 - Recording of serial numbers or the documentation of assets;
 - Counting cash as evidence of unreported income;
 - Listing the contents of a safety deposit box.
- (2) This policy may vary depending on the opinions of the regional PPSC. Therefore, investigators should consult with their regional PPSC prior to deciding whether this type of warrant is appropriate.
- (3) **A general warrant is issued to a peace officer** with the investigator responsible for drafting and swearing the Information in support of it. Arrangements should be made with the RCMP to obtain a peace officer.

Note: Designated investigators named as "supernumerary special constables" and used temporarily to obtain general warrants prior to September 15, 2004 are no longer available.

- (4) The application for a general warrant has to be made to a provincial court judge or a superior court judge under section 487.01, rather than a Justice of the Peace under section 487 of the CC.

- (5) The grounds for belief listed in the ITO for a section 487 CC search warrant, already executed, may form the factual basis for any subsequent section 487.01 CC general warrant. Further grounds supporting the need for the general warrant are then added. If the general warrant is being sought at the same time as the standard warrant, one ITO containing all the necessary details could be considered. In such a case, the section 487 warrant would be issued by the same judge as that for the 487.01 warrant and not by a justice of the peace.
- (6) The peace officer named in the warrant will familiarize himself with the ITO, serve the warrant, be involved with the activities associated with its execution, and cause those records to be placed in the custody of the investigator.
- (7) The detention of the thing(s) seized and the reporting obligations are identical to those applying to a standard search warrant except where specified otherwise (e.g. when sections 29 and 30 of the *Canada Evidence Act* apply).

6.2.7 Assistance Orders

An Assistance Order, issued pursuant to section 487.02 of the CC, is available in circumstances where assistance is needed to have access to the records, such as a storage area or when specialized equipment is needed in the execution of the warrant. It can also be issued with a conventional 487(1) search warrant to ensure that assistance will be obtained from the people located in the search area. Justifiable grounds must be indicated in the ITO.

6.2.8 Access to Anything Seized 490(15)

- (1) This section of the CC pertains to applications to obtain an order to examine or take copies of books and records previously seized under search warrant by the RCMP or other police agencies. Subsection 490(15) is permissive in the sense that it does not mandate that access to seized documents can only be obtained by court order. Accordingly, CRA investigators may request access to documents or a summary of documents seized by a police agency without making a subsection 490(15) application.
- (2) The purpose in requesting informal access is to determine if CRA's Criminal Investigations Program has an interest in the seized documents. Information learned through informal access will thereafter provide the foundation for any subsequent subsection 490(15) application. Access to the documents is the first step in order to make an informed decision whether or not to pursue an order under subsection 490(15).
- (3) When applying for a subsection 490(15) order, the applicant must demonstrate three elements:
 - the CRA is an interested party;
 - there is a basis for CRA interest; and
 - access, or copies, are required for the administration of CRA statutes.
- (4) An order under subsection 490(15) is not required for an investigator to access information gathered or seized by the CRA.

6.2.9 Headquarters Review of the Documents Requiring Judicial Approval

- (1) ITOs, warrants and production orders are subject to mandatory review by Headquarters with the following exceptions:
 - (a) Pre-search review would not apply in circumstances where new locations to be searched are identified during a search and the additional search warrants will be executed on the same day or the following day.
 - (b) Headquarters will review the first ITOs for 487.012 and 487.013 production orders in each case. Subsequent production orders in the same case do not require headquarters review.
- (2) This process is in place to provide advice and guidance on the quality and legal aspects of ITOs, warrants and production orders and to address any policy issues that should be considered.
- (3) While the Headquarters review process is mandatory, it is not the final approval process with regards to proceeding with the execution of a search warrant as that is the responsibility of the director of the TSO.

6.2.9.1 *Review Process Procedures*

- (1) Once the ITO has been reviewed and approved by the Assistant Director, Criminal Investigations or his/her designate, save a copy of it onto the Headquarters common drive. An email should be sent to the designated contact officer in the Criminal Investigations Division, at HQ to advise him/her to review the ITO.
- (2) A copy of the Primary Report signed by the Assistant Director, Criminal Investigations and the TSO Director as well as a Case Complexity Rating Form T20CR should accompany the ITO if they are not already on file at Headquarters.
- (3) In some cases where a search warrant and/or production order is required during the preliminary stage of the investigation, an interim primary report will be sufficient. The investigator, team leader and Assistant Director, Criminal Investigations must sign the interim report. Any factors related to the search or production order, favourable or not, should be reported so that a complete review can be made.
- (4) Submit the ITO for review well in advance of the planned search action or the issuance of the production order. Enough time should be allotted to reply to Headquarters' comments or to address recommended changes. The submission should include the intended date of the search or the desired date that the third party will produce the documentation.
- (5) When the HQ contact officer is away from the office, a manager will assign the file to another contact officer. Investigators should contact the appropriate manager to ensure that the file is reassigned.
- (6) Headquarters will contact the investigator (or team leader in his/her absence) within three-business days of receiving the ITO. Depending on the nature of the case, there will be instances where the turnaround time can be accomplished within a shorter timeframe. Conversely, there may be instances where more time will be required if significant legal and policy issues exist. The review of the ITO will be treated as priority work at Headquarters, so as to prevent undue delay to the submitting office. The timeframe for review can be compressed to accommodate extraordinary circumstances requiring immediate attention. However, every attempt should be made by the investigator to notify Headquarters that an urgent submission is forthcoming.
- (7) After all revisions have been finalized, copies of the revised ITO shall be forwarded to Headquarters to be placed on the applicable case file. All copies received prior to the finalized documents are draft documents and will not be retained by Headquarters. Investigators should only keep copies of the final version of the ITO.
- (8) Once Headquarters completes its review of the ITO, the advisory services officer will then request copies of the corresponding search warrant(s) and/or production order(s).
- (9) A copy of the search warrant(s) and/or production order(s) should be saved directly on the HQ common drive and an e-mail sent to the designated contact officer.
- (10) Once the review of the warrant(s) is completed, a manager in the Criminal Investigations Division will fax a comfort letter to the investigator advising that Headquarters has reviewed the ITO and warrant(s) and supports the form and content. The original comfort letter is sent to the Assistant Director, Criminal Investigations by way of internal mail. The Assistant Director, Criminal Investigations is responsible for advising the Regional Assistant Commissioner's office of the execution of the search.
- (11) Comfort letters are not prepared for production orders. Once the Headquarters review of the ITO and production order(s) is completed, the advisory services officer will simply contact the investigator by telephone or e-mail.

6.2.9.2 *Informing the Criminal Investigations Directorate and Regional Issues Management Sections of upcoming searches*

- (1) Every region has a regional issues management process, which includes the obligation to be made aware of upcoming searches. However, given the sensitive nature of searches the Criminal Investigations Division should not disclose specific details such as the names of the taxpayer(s) under

investigation or the addresses of the places to be searched until after the searches are completed. Investigators should prepare a memo to the Regional Issues Management section for the Assistant Director, Criminal Investigations' signature providing details of the upcoming search with the date, city or town and the number and nature of the places being searched (residence, business, accountant, etc). Details should also be provided as to the possibility of media attention. Once the search is executed, more specific details can be provided, if warranted.

- (2) Assistant Directors, Criminal Investigations are responsible for providing the Regional Issues Management section with a contact person in the Criminal Investigations Division for the day of the search in case the Regional Issues Management section receives questions about the search.
- (3) Once the Regional Issues Management section is informed of the date of the search, investigators must send a copy of the memo to the Director, Criminal Investigations Division and to the Investigations Advisory Services Section. This way the Criminal Investigations Directorate is aware of any issues that may come up and can quickly answer questions about the search.

6.2.10 Judiciary Approval

- (1) Before swearing an ITO, all efforts must be made by the investigator in charge of the case to ascertain that the targeted location are exact and still occupied by the subjects(s) named in the warrant and that the address of each location remains as described in the search documents.
- (2) An original ITO and two copies of the warrant(s) will be provided to the courts together with additional copies as local court practices dictate.
- (3) The original sworn ITO and a copy of the warrant will remain with the court, as directed by the justice.
- (4) The original signed warrant will be returned to the investigator for its execution. Following execution of the warrant, the original executed warrant will then be returned to the justice of the peace. Different arrangements may be applicable in some provinces or regions.
- (5) One copy of the executed warrant and sworn ITO will be returned to the Director, Criminal Investigations Division in Headquarters, when the investigator in charge submits a search report after the search.
- (6) If JP/judge imposes any restrictions or conditions, or alters the warrant from the format previously received by Headquarters, the investigator should communicate the change(s) to Headquarters immediately and follow-up with a detailed account of the meeting with the justice.

6.2.11 Challenge to an ITO

- (1) An investigator's accountability for the ITO does not end when the justice signs the search warrant(s), general warrant(s), production order(s) and/or Assistance Order(s).
- (2) A copy of the ITO may be provided to the taxpayer/registrant against whom the offence has been alleged **after** the execution of the search warrant, provided that there are no restrictions from doing so by the regional PPSC. It is recommended that each TSO consult with their regional PPSC representative to establish local policy as to when the ITO should be provided and to whom. Third parties, requesting a copy, would have to apply to the courts. A copy will normally be provided only after the investigator has filed the Report to a Justice. The sealed portion of a search ITO containing confidential information about or from an informant should never be provided.
- (3) A challenge of the ITO and search warrant takes the form of a motion involving Crown and defence counsels. It is up to the defence to first present their allegations to challenge the ITO or the conduct of the search. Crown counsel submits evidence to a justice, then arguments for or against the search or seizure actions.
- (4) Investigators must be prepared to assist and guide Crown counsel through any court challenge and be ready to explain to counsel the reasons justifying the seizure of each type of document or things.

6.3 Conduct of Searches

The execution of a search is one of the most invasive ways to obtain information from a person. Professionalism, politeness and respect must be exercised towards the persons present at the locations being searched, while care and caution must be used when handling their goods and property.

6.3.1 Planning Searches

- (1) Effective planning is one of the most essential aspects of a successful search. The investigator in charge of the case is responsible for the over-all planning of the search and its successful execution.
- (2) On the day of the search, a senior investigator will remain in the office to act as the office coordinator to give advice and instructions when required. The coordinator must keep detailed notes of all conversations with search team leaders and other search personnel.
- (3) A search team will be comprised of as many investigators and other staff as is needed to do the job quickly and efficiently. There should not be so many as to create the impression of an invasion. Search teams should also be a mix of experienced and new investigators. It may be necessary to make arrangements with other functional areas (e.g. Audit, Revenue Collections, etc.) to obtain necessary resources. At residential locations there should be at least one female investigator assigned.
- (4) Arrangements will be made, if applicable, for an informatics investigator to search for computerized data.
- (5) In general, all places to be searched should be searched simultaneously. This will avoid the possibility of records being destroyed in one place, as a result of a search at another location.
- (6) Search warrants may be executed any day of the year, including statutory holidays. The investigator should properly plan for available resources for the search so that the search may begin and be completed within the time allowed by the CC. Pursuant to Sections 2 and 488 of the CC, searches must be conducted during the day (6am to 9pm) unless a justice is satisfied that there are reasonable grounds for the search to be executed by night. Accordingly, the grounds must be set out in the ITO.
- (7) A plan of the premises to be searched should be prepared whenever possible. Such a plan can be useful in
 - allocating search personnel,
 - labelling and identifying where records were found and seized, and –
 - ensuring that all areas are covered in the search.
- (8) An experienced investigator will be assigned the responsibility of the execution of the search as the search team leader for each location and will answer questions from the occupants and from search team members at that location. The search team leader will be provided with a signed search warrant and other applicable supplies. The search team leader must inform the co-ordinator on entry and upon completion of the search at the location for which they are responsible, and indicate if the evidence believed to be at that location was found and seized.
- (9) During the planning process, an estimate should be made of the anticipated volume of records to be seized so that boxes can be ordered, transportation can be arranged, and storage space be allotted. Identification stickers and labels should be prepared in advance for boxes, envelopes and notebooks. Arrangements should also be made at that time for specific types of clothing and items such as coveralls, notebooks and gloves.
- (10) Search team leaders should ensure that they have all of the necessary supplies to seal records subject to solicitor-client privilege including boxes, envelopes, cellulose tape, and seals. This applies to all search locations, not only ones involving lawyers' offices.
- (11) Once the search warrant has passed through the Headquarters approval process, additional "drive-bys" of the locations should be considered. This will ensure that the places to be searched are still occupied by the subject(s) named in the warrant and that the address of each search location remains as described in the search documents.

- (12) When searches are being conducted at locations outside the territorial area of the TSO, an investigator from the TSO conducting the investigation should travel to the assisting office at least the day before the search. This will allow time to brief the search party and ensure that all search documents are in order. The briefing should include details about which search locations involve third parties and which ones involve suspects. This will include briefing the local RCMP or municipal police force assisting on the search..
- (13) The **Imaging Technology Centre** is an integral part of the Criminal Investigations Directorate, providing imaging technology services to all Criminal Investigations Divisions at no extra cost to the TSO. Prior to the search, the investigator in charge of the case should contact the Imaging Technology Centre in order to obtain general guidelines regarding the scanning process, so that he/she can provide specific directions to the searchers, thereby facilitating the scanning process. For more information, refer to the Imaging Technology Centre website. <http://infozone/english/r6001000/ed/informatics/imagetech/imagetechctr/imagingtechctrh-owtouseitcentre-e.html>

6.3.2 Threat Risk Assessment

- (1) A threat / risk assessment should be conducted prior to executing a search.
- (2) Gather current intelligence on all occupants at the location, where appropriate. Background checks should be performed on all persons against whom allegations are being made as well as all individuals who occupy or are expected to be present at personal residences to be searched.
- (3) Where local management determines that there is a risk to search team members if they use their personal vehicles during the execution of the search, the use of rental vehicles or Agency owned vehicles should be considered.
- (4) Ensure that search locations are covered by an ambulance service or there are other suitable means of transporting an injured or ill employee to a medical treatment facility; and that cellular phones or other means of quickly summoning the ambulance service are operable at each search location.
- (5) Ensure that an adequate number of qualified first aid attendants are available to render first aid to employees.
- (6) CRA employees on search teams will wear the vests and caps issued by the Criminal Investigations Directorate. The exception is if the place being searched belongs to an independent third party such as a lawyer's office or an accountant's office and the investigator in charge of the case and the CIP team leader, in consultation with the assistant director, Criminal Investigations, determine the threat risk to be low.
- (7) CRA investigators may only wear the vests and caps issued by the Criminal Investigations Directorate.

6.3.3 Meeting of Search Teams

- (1) Prior to the search, a briefing meeting of all participants including assisting police officers (if any) should be held. The case file investigator should explain the plan in detail, assign individuals to their respective search teams and issue any other necessary instructions. The background of the case should also be discussed as well as the evidence needed to prove the alleged offences and the evidence expected to be found in each location. It is essential that every search team member be familiar with the documentation that may afford evidence of the alleged violation(s).
Note: It is recommended that, prior to the briefing, all search leaders read the ITO in order to familiarize themselves with the case and sign a schedule acknowledging having read the ITO. It is further recommended that all searchers sign the back of a copy of the search warrant on which they are scheduled to assist. This practice will ensure that all participants have been duly informed of the contents of the search warrant(s). It is also be a good practice to note who attended the briefing session, since all of the items to be seized, from the various locations, are usually discussed during this meeting. A searcher may be required to attend another search location; therefore it is prudent to inform them of the things to be searched for at the other locations.
- (2) Search team members will be instructed on the procedures to follow if they discover:

- Evidence listed in the warrant, especially items of specific importance;
- Evidence not listed in the warrant but applicable to the offences listed;
- Evidence listed on another warrant;
- Evidence of an offence not listed in the warrant;
- Documents subject to solicitor-client privilege.

This would include advising the search leader of it and packing the evidence in a separate box.

Generally, search team members will be searching for and seizing what is specified in the warrant. However, should a searcher come across indications of a safety deposit box, information revealing another potential search location, crucial documents and/or other unknown businesses, they should inform the search leader. Any questions as to the validity and legality of seizing anything outside of the scope of the warrant should be directed to the search leader.

- (3) Specific search location teams should meet separately to finalize all details of the search at their respective location and to ensure that any inexperienced personnel are made aware of their roles and responsibilities.
- (4) Immediately prior to the search, a short briefing should be conducted for the benefit of all members of the search parties, including the attending police officers. At this meeting the search leader will ensure that all search team members are present and that any last minute questions, concerns or adjustments relating to the search action are dealt with.
- (5) At the time of the execution of the warrant, the original warrant signed by the Justice will be shown to the taxpayer or registrant being investigated to initiate the search. It must remain in the control of the Agency at all times and **never** leave the location being searched. A copy will be left, after the search is completed, with the taxpayer/registrant or, in their absence, the person in authority at the search location.
- (6) The original ITO will be filed with the court. Once the search has been completed and a return pursuant to section 489(1) of the CC has been made, the TSO may give, upon request, to the alleged offender(s) or their authorized legal representative, a copy of the Information used to obtain the warrant. A copy of the ITO should not be given to third parties whose premises have been searched, (e.g. accountants, lawyers); they should be directed to the court instead.

6.3.4 RCMP or Police Force Assistance

- (1) It is standard practice when executing a search warrant, particularly at a residence, to request the assistance of an officer from the RCMP or a local police force. The role of the police officer, when assisting us in a search, is limited to peace officer duties. Any request for assistance should be made in writing well in advance of the search.
- (2) It is important to consider the need for police presence for each search location, especially third parties who are not suspected of having participated in the scheme. Consideration should be given to whether police officers be in uniform or plain clothes with marked or unmarked vehicles.
- (3) In the event that the use of force becomes necessary, either in gaining entrance or during the search, the initiative and the responsibility for taking appropriate action rests with the police.
- (4) The assisting police officers should be invited to the pre-search briefing session to ensure they are acquainted with the scope of the search.
- (5) The search team members should be told that it is the responsibility of the police officer to decide whether or not to seize evidence of a criminal offence uncovered during the conduct of the search which does not fall within the mandate of the CRA.

6.3.5 Access to Premises

- (1) The search leader makes the initial approach, along with a search team member and a police officer (if applicable at the location). Usually, the investigator in charge of the case will be at the location where the subject is expected to be present. The search team leader should present their badge and accompanying identification card, introduce the other members of the entry team (who in turn produce their identification) and then ask for the person under investigation.

- (2) The search leader will serve the search warrant upon the named subject or, in his/her absence, to a person in authority or in charge of that location. A copy of the warrant will be shown and its nature and purpose explained. All details regarding the entry into the specified location must be clearly and accurately reflected in the officers' notebooks. If the person served is the subject of the investigation, ensure they are informed that they have the right to counsel, are not being detained, and are free to leave at any time. If the subject of the investigation provides any information about the case, they must be given the formal Criminal Caution pursuant to the *Canadian Charter of Rights and Freedoms*. If, during the execution of the search, the accused makes spontaneous admissions, they should be cautioned in the same manner.
- (3) Where the premises to be searched are occupied, the officers will usually gain access following presentation of proper identifications and a reasonable explanation. Circumstances where the door is not opened after showing proper identification are extremely rare and considerable judgment is required in deciding whether to force entry. Proper restraint must be exercised to ensure that all reasonable alternatives to the use of force have been explored. If the use of force is deemed necessary, it is the duty of the accompanying peace officer to gain entry in a manner reasonable in the circumstances. Once entry has been gained, the CRA officers assume responsibility.
- (4) When searching large buildings, such as a combined office and factory, the search team leader must ensure that all exits and entrances are secured and under observation prior to gaining access to the location. Once the location is under control, these other exits and entrances can be secured from inside. If enough personnel are available, an officer should be posted at each entry and exit to ensure no document or evidence is removed. Entry should be made as quietly as possible without causing alarm.
- (5) On entry, the search leader should deal with the most responsible person present. Discussing the grounds of the search warrant should be avoided until the search is completed.
- (6) The initial entry team must determine if there are any weapons or other potential hazards on the premises, identify all occupants on the premises and secure the premises.
- (7) If any potential hazards are identified, the search leader should devise a plan to deal with the situation, brief the search teams on the appropriate actions to take and obtain any necessary equipment to safely execute the search.
- (8) If the premises are unattended, it must be demonstrated that every reasonable attempt has been made to locate and contact the subject or another party who may have a key, such as a relative or the landlord. If entry cannot be gained with the use of a key, the premises should be placed under surveillance and the services of a locksmith be obtained to gain access and to re-secure.
- (9) Only after entry has been properly gained and control over the location has been attained, can the remainder of the search team enter and commence the search. If the subject or the person in charge at the location wishes to contact a lawyer, an accountant, or a spouse, sufficient time will be provided to do so. Very often, assurances by one of these parties are sufficient to overcome the initial reluctance and the search action may start.
It must be clearly explained to the person on site that the search will take place whether or not they are able to contact the other party.

6.3.6 Telephones

- (1) The search warrant does not authorize us to prohibit anyone from using the telephone. It is advisable however, to discourage the use of the telephone for a brief period at the commencement of a search to provide time for all search members to gain access to their respective areas to be searched. The exception to this is a call to a lawyer.
- (2) Where a call to a lawyer is made, the search should be held in abeyance until the person has spoken to counsel, but only if strict control can be maintained over the premises. Lawyers may ask to have the search warrant read to them and should then instruct the client to cooperate. If lawyers, acting for the taxpayer/registrant, should come to the premises, search team leaders may discuss the warrant with them. The search team leader should produce the search warrant and answer any

reasonable questions, but lawyers should not impede the search. Once the search warrant has been executed, the search must continue until its completion.

6.3.7 Note Taking

- (1) Note taking is a fundamental aspect of an investigation. Each search member must take the time to write notes. The notes represent what the searchers personally did, said, or heard. They include the facts, incidents, special circumstances, observations and reasons for their actions. They will note what was personally seized, from where and at what time. They must be written independently of anyone else. Investigators should familiarize themselves with the local procedures in use, to ensure they are followed.
- (2) Generally, bound notebooks are handed out at the briefing meeting prior to the search.
- (3) They are particularly useful in situations where items not described in the warrant are seized following instructions from the search leader. They can then serve to explain the investigator's reasonable grounds to seize these items.
- (4) Most importantly, notes must be complete and must represent your personal knowledge of events that took place during the search and may include information in favour of the taxpayer or registrant under investigation. Notes must be written either during or very shortly after the event they describe. This will ensure the events were fresh in the investigator's mind when they were written down, and as a consequence, will improve the testimony should a prosecution ensue. If called to testify in court, the notes will be used as a memory aid for the search member.
- (5) Each searcher should prepare a typed search report from their notebook and memory, providing a more detailed account of the search. The notebook and signed Search Report should both be given to the investigator in charge of the case as soon as possible after the search, for safekeeping and to allow the investigator in charge to familiarize themselves with their content. See section 6.3.22 Written Reports by Search Team Members.

6.3.8 Extent of Search 6.3.8.1

General Remarks

- (1) Search team members must examine the material before seizing it to ensure that it falls within the scope of the warrant. The seizing officer must ensure that the documents being seized are within the period, listed on the search warrant, and relate to the individuals or corporations named on the search warrant. Specific notes must be kept for each item seized, describing the time and place of seizure and the legal justification for seizing the documentation. If there is a large quantity of documents to be seized, it may be sufficient to document this information on the outside of seizure envelopes. Any documents not listed on the warrant, that affords evidence of an offence, must first be discussed with the Search Leader prior to being seized. When seizing documents not listed on the warrant, the seizing officer must note the reasonable grounds for seizing the records. They will be used later to show the reasonableness of the seizure.
- (2) All search team members have a responsibility to be alert to potential hazards. Do not handle hazardous or illegal items such as unsecured weapons or drugs. Instead, immediately contact the search team leader. The search leader should also be advised if the taxpayer or anyone on the premises is verbally or physically abusive. The search leader will then obtain assistance from the police who are responsible for handling these situations. If the police have left the premises they should be contacted and asked to return.

6.3.8.2 What Can Be Seized?

- (1) This is described in the section of the search warrant and its supporting ITO entitled "Things To Be Searched For". This section contains a description of the things and documents that should be sufficiently precise to permit the search team members to identify the items during the execution of the search.
- (2) In addition to the documents or things listed in the warrant, section 489(1)(c) of the CC permits the seizure of anything that the person executing the warrant believes, on reasonable grounds, may

constitute evidence of the commission of an offence under the Acts administered by the Agency, under the Criminal Code or any other Act of Parliament.

- (3) If, during the execution of the warrant, search team members come upon other documents or things not listed in the warrant, which they believe, on reasonable grounds, will afford evidence of the offences listed in the warrant or evidence of other offences under the Acts administered by the Agency, such documents or things may be seized following instructions from the search team leader. All the reasons for seizing the items will be included in the seizing officer's notes as well as the usual information about the location, time and date of the seizure. The seizing officer must consult the search team leader when seizing documents not listed on the warrant. Both parties would also take note of this in their respective books.
- (4) If search team members discover items unrelated to the CRA investigation but which may afford evidence of an offence under another Act of Parliament, they should notify the search team leader. The search team leader may advise the police of the discovery if the disclosure is authorized pursuant to section 241 of the ITA or 295 of the ETA.
- (5) Search team members may discover documents subject to solicitor-client privilege when executing searches beyond a lawyer's office such as the subject's residence, business premises, or an accountant's office. In these circumstances, investigators could ask the taxpayer to waive privilege, but such a waiver has to be explicit and informed. Therefore, if a document in issue has the potential to be privileged, it is best to not examine it, seal it and go through the privilege motions.

6.3.8.3 *Search of Businesses*

- (1) The entire premises should be systematically searched. The private offices of the principals should be searched first, followed by other key areas of the business location. Search team members should keep all other areas and offices to be searched under surveillance until additional search team members become available
- (2) When books are seized, they should be assembled in a central place. Then, a senior employee, who has knowledge of the said books, can be asked to identify them and provide the name of the person(s) who made the entries. This will be particularly helpful in the event that the records are produced in court. It can also save considerable time and confusion where the records of several companies have been seized from the same premises.
- (3) All seized records should be placed in boxes with labels properly identifying the place where they were found. When an important piece of evidence is found it is imperative that it be specifically identified as to the place of seizure, the time of seizure, the date and the name of the seizing officer.

6.3.8.4 *Search of Residences*

- (1) A person whose residence is being searched should be given the opportunity to be present during the search. If the person is not at home but wishes to be present, the search of the residence should be delayed for a reasonable period of time until that person arrives, providing full control is maintained over the premises by the search team. Any occupants present at the residence at that time should remain with the search team members until the taxpayer or registrant being investigated arrives.
- (2) In the event that the person being investigated is at another location, it is up to the search team leader for that location to notify the team at the residence and advise whether or not the person will be returning to the residence. The person should be encouraged to speak to the spouse or any other occupants at the residence, to re-assure them that the searchers are there under proper authority.
- (3) Care should be taken not to disturb the daily routine of the home. If, for instance, a member of the family is known to be ill and confined to bed, that room should not be entered unless there are strong grounds for believing documents of value to the investigation may be found there.
- (4) The residence must be left in the same condition, as it was when the search team entered. When the search team is ready to leave, the search team leader should tell the person(s) present that the search has been completed.

6.3.8.5 *Search of Persons*

- (1) CRA officers are not authorized to search persons. If, during the course of a search, a person attempts to prevent a search team member from carrying out his duties, or removes anything which was in any place open to search and places it in the person's pocket, handbag or mouth, the police officer should be informed immediately. The police officer can then inform the person that they may be charged with wilfully obstructing a public officer in the execution of his/her duty, contrary to section 129 of the CC. The assisting police officer would then be allowed, as part of the arrest, to search the person and retrieve the item.
- (2) Once the person is made aware of these serious consequences, the usual response is to return the item to its original location.

6.3.8.6 Search of Vehicle

When a vehicle is involved, we recommend you consult with your regional PPSC. Some offices contend that personal automobiles parked on the property are not covered by the warrant and a separate warrant should be obtained when there are grounds to believe that records are in the vehicle. Others contend that a separate warrant is not required when the vehicle is located on the premises (i.e. – driveway and/or garage of the residence) where another search warrant is being executed. Depending on the location of the search and importance of the vehicle, it is preferable to obtain a separate search warrant. In any case, if a separate warrant for the vehicle is to be obtained there must be grounds to believe that records to be searched for are kept in the vehicle.

6.3.8.7 Search of a Lawyer's Office

- (1) Investigators must always consider obtaining a production before searching a lawyer's office. If a search warrant is necessary, investigators must satisfy the issuing justice that there exists no other reasonable alternative to the search. Search warrants for a lawyer's office must be sworn before a Judge of a Provincial Court and the grounds for the ITO must indicate why there exists no other reasonable alternative to the search.
- (2) All searches of law offices should comply with the ten general principles below. **As a precaution, investigators should consult with the PPSC prior to searching law offices.**

6.3.8.8 Minimum Requirements to Search Law Offices

As a result of the decision of the Supreme Court of Canada (SCC) in *Lavallee, Rackel & Heintz v. Canada* 2002 SCC 61, the SCC set out the following ten principles for law enforcement officials to follow when proposing to search law offices:

- (1) **No search warrant can be issued with regards to documents that are known to be protected by solicitor-client privilege.**

It is imperative that investigators seeking to search law offices only request authority to seize non-privileged documents and their grounds should include information about *why* the documents sought are *not* solicitor-client privileged.

- (2) **Before searching a law office, investigators must satisfy the issuing justice that there exists no other reasonable alternative to the search.**

Searches of law offices should be a last resort. Investigators must exhaust all alternative locations first. The issuing justice *must* be satisfied that there exists no reasonable alternative to the search. The grounds for the warrant must explain why no reasonable alternatives to the search exist.

- (3) **When allowing a law office to be searched, the issuing justice must be rigorously demanding so as to afford maximum protection of solicitor-client confidentiality.** The conditions of execution and post-execution must be specifically addressed in the search warrant so as to ensure that solicitor-client privilege is not compromised. Such conditions could be *suggested* in the Information sworn in support of the warrant and should reflect the guidelines set out in this case.
- (4) **Except when the warrant specifically authorizes the immediate examination, copying and seizure of an identified document, all documents in possession of a lawyer must be sealed before being examined or removed from the lawyer's possession.**

Note that there is an important exception to this new rule. A search warrant may authorize the immediate examination, copying and seizure of a specifically identified document.

It may be appropriate to request such permission in exigent circumstances, where sealing the document(s) pending judicial determination of the privilege issue would compromise the integrity of a serious criminal investigation, and the delay would result in a safety risk or irreversible harm. The grounds supporting the request should be clearly set out in the Information.

- (5) **Every effort must be made to contact the lawyer and the client at the time of the execution of the search warrant. Where the lawyer or the client cannot be contacted, a representative of the Bar should be allowed to oversee the sealing and seizure of documents.**

Depending on the circumstances, there may be some need to use assistance orders pursuant to section 487.02 of the CC. The Law Society is also another possibility.

- (6) **The investigator executing the warrant should report to the justice of the peace the efforts made to contact all potential privilege holders, who should then be given a reasonable opportunity to assert a claim of privilege and, if that claim is contested, to have the issue judicially decided.**

In addition to making a report pursuant 490 of the CC, investigators are now required to report back to the justice or judge who issued the warrant on their efforts to contact potential privilege holders. Since the form for this report is unspecified, an affidavit or letter should suffice. The phrase "reasonable opportunity" is also not defined. It is suggested that a flexible interpretation be applied and the investigator be guided by the individual circumstances of the case.

- (7) **If notification of potential privilege holders is not possible, the lawyer who had custody of the seized documents, or another lawyer appointed either by the Law Society or by the court, should examine the documents to determine whether a claim of privilege should be asserted, and should be given a reasonable opportunity to do so.**

The phrase "Reasonable opportunity" is not defined and will vary with the individual circumstances of the case.

- (8) **The Attorney General may make submissions on the issue of privilege, but should not be permitted to inspect the documents beforehand. The prosecuting authority can only inspect the documents if and when it is determined by a judge that the documents are not privileged.**

This guideline removes any discretion for the presiding judge to permit the Crown to see documents, even where it may materially assist in the determination of the application. This makes it difficult for the Crown to make submissions regarding privilege claims. It will be important to provide the judge determining the privilege issue with a full understanding of the alleged criminal offence and how the document(s) tie in with the allegations made.

- (9) **Where sealed documents are found not to be privileged, they may be used in the normal course of the investigation.**

Once a determination is made that documents are not privileged, they may be provided to the Crown and used in the normal course of the investigation and prosecution.

- (10) **Where documents are found to be privileged, they are to be returned immediately to the holder of the privilege, or to a person designated by the court.**

This guideline contemplates the immediate return of all documents determined to be protected by solicitor-client privilege.

6.3.8.9 When a Lawyer is Subject to an Investigation

The documents, without being examined or copied, will be placed in a package, sealed and properly identified. The package(s) will be placed in the custody of the sheriff, or other acceptable custodian that may be agreed upon in writing, until the claim of privilege is settled. Lawyers may wish to consult with their provincial law society (or the "*Chambre des notaires*" for Quebec notaries) for advice. The investigators should inform the Criminal Investigations Division, at HQ as soon as possible after the search of law offices.

6.3.8.10 Search of an Accountant's Office

- (1) If the accountant is not a suspect, the search of the premises will usually be limited to files and documents pertaining to the person whose affairs are under review. Accountants are usually

cooperative in locating the pertinent files and records and making them available to investigators once they are satisfied that the warrant is valid.

- (2) If an accountant is the principal under investigation or a suspected accomplice, then investigators may conduct the search in the same manner as other businesses under investigation. It would not be appropriate to solely rely on the accountant in these circumstances to locate the pertinent files and records. The search team may search the premises to determine the location of the things to be searched for. However, the search team leader for the location must determine the most reasonable approach to take given the circumstances of the case.
- (3) The CRA does not recognize solicitor-client privilege claims made by accountants in relation to documents or communications between the accountants and their clients. Accounting records, working papers and adjusting entries kept by the accountant are considered to be an extension of the taxpayer's or registrant's books and records. The documents are required to be produced by the accountant upon exercise of statutory authority by the CRA.
- (4) However, solicitor-client privilege will be extended to copies of the lawyer's correspondence when seized from the accountants or their clients and the privilege issue will be resolved in court. Privilege would also apply to the lawyer specializing in fiscal law and working in an accounting firm, especially if a member of a Bar Association.

6.3.9 Search Team Members Conduct during the Search

- (1) Searchers should work in pairs. Every effort should be made to avoid situations where a searcher is left alone in a room. Footwear should always be worn to prevent injury or in the event a quick exit is required.
- (2) All officers participating in a search must conduct themselves in a professional and courteous manner at all times. Do not discuss the investigation or the search with anyone, especially with the taxpayer or registrant under investigation. Refer the person to the search team leader. Do not joke with the taxpayer or registrant, the employees or other members of the search party. A search is a serious situation and joking or laughing could be misinterpreted.

6.3.10 Handling Seized Documents, Records and Things during the Search

- (1) Search team members should be alert to the dangers related to mould, insects and rodent droppings. These items can represent a health risk, one that can be particularly serious for individuals who suffer from environmental sensitivities. When dealing with records that have been stored in unsanitary conditions, gloves or even masks may be necessary to minimize the risks.
- (2) A supply of labels and envelopes should be available, pre-stamped or typed to include:
 - Case name and/or number
 - Code identification of container
 - Premises from which seized
 - Point of seizure (e.g. desk of general manager)
 - Date of seizure
 - Seizing officer
 - Officer in charge
- (3) The seizing officer is the search team member who first locates and places the records in containers. The name of the "Officer in charge" would be the search team leader for those premises or in that area.

6.3.11 Illness or Emergency during a Search

- (1) During a search, if a person (other than a search team member) becomes ill, nothing should be done which might delay medical attention or endanger the person's life. Search action should cease until the doctor or the paramedics arrive and have taken charge of the patient. Consideration for the person and the situation must always take precedence over the search action.
- (2) If a search team member becomes ill, is injured or is subjected to undue risk, they should immediately notify the search team leader. CRA employees are required to report all accidents or cases of threats,

stalking and assaults, at the earliest opportunity. The search team leader can then alert the other search team members to potential areas of risk.

6.3.12 Safety Deposit Boxes

- (1) If the investigator has knowledge of the location of a safety deposit box at the time the ITO is prepared, it should be included in the "Places to be Searched" if there are reasonable grounds to believe that the safety deposit box contains documents or things that may afford evidence of an offence.
- (2) Search members should be alert to any evidence showing that the person rents a safety deposit box. Indicators would include finding keys or charges listed in bank records. If any such evidence is located, it should be brought to the attention of the search team leader, so that access to the safety deposit box can be arranged, if needed.
- (3) The search team leader will report the findings to the search coordinator and a decision will be made to either:
 - Discuss with the taxpayer the possibility of gaining access to the safety deposit box, without an additional warrant.
 - When the location is known and if reasonable grounds exist, obtain a supplementary search warrant to examine and if necessary seize the content of the safety deposit box.
 - Make note of the existence of the safety deposit box, without any further action. Consult with your regional PPSC for guidance.
- (4) When a search warrant is obtained authorizing the search of a safety deposit box, access to the said box is to be made on the day of the search of the other premises, and not postponed. Concurrent with the commencement of the search action, the bank will be visited and the bank manager made aware of the impending search of the box. The manager will be asked to retain the signature card or contract card for the box to prevent access to it, until it is opened by force or by the person. The person under investigation will be advised of the warrant relating to the safety deposit box, and may be requested to cooperate in opening it. If there is cooperation, access will take place either during or after the search is completed at the main search location. If there is no cooperation, the person will be advised that the lock will be drilled. If the existence of a safety deposit box is discovered during the execution of the search, a supplementary warrant should be obtained while additional search team members go to the bank to speak to the manager about securing the safety deposit box until the new warrant is issued.
- (5) When a safety deposit box is opened and its contents examined, two search members along with the person under investigation or an authorized representative should be present.
- (6) In all cases where a safety deposit box is opened under the authority of a search warrant, a signed inventory listing the items contained in the box at opening time will be made in duplicate by one of the seizing officers and a copy provided to the subject or to the taxpayer's or registrant's representative. The inventory should also indicate those witnesses to the opening and examination of the contents of the box. Items should be adequately identified to preclude any subsequent challenge as to the content of the box just before the search began. This is in addition to the inventory of seized material that will have to be prepared by the seizing officer(s) for the Report to the Justice. If a box is found to be empty, that fact should be recorded and witnessed.
- (7) The bank manager or an official acting in that capacity is to be advised that investigators are acting under the authority of a CC search warrant and informed that, pursuant to the confidentiality provisions of the Acts, they cannot discuss nor disclose the contents of the safety deposit box. The search members must restrict conversations to procedures only, and ensure that all the items from the box are properly identified and listed without commenting on them.
- (8) Where force is necessary to gain access to the safety deposit box and search its contents, any items not seized will be placed in a new safety deposit box registered in the subject's name. The bank will ensure that the number for the new box is placed on the subject's original signature card. A set of keys for the new box must be delivered to the person personally or as otherwise directed. A receipt

for any seized items plus a listing of contents must be provided to the subject. If an empty box has been opened, no action will be taken to obtain a new box.

- (9) Should there be a requirement to drill the lock of the safety deposit box to gain access, the cost of drilling the box will be paid by the CRA. However, the Agency will not pay for replacing it.

6.3.13 Cash or Negotiable Securities

- (1) The following guidelines apply to searches pursuant to CC 487 search warrants. For guidelines on seizing cash, negotiable securities and other property under the authority of a special search warrant (CC section 462.32), please refer to **chapter 24 Revenue Statutes, Money Laundering and Proceeds of Crime**.
- (2) The authority to search premises must not be used to seize cash or negotiable securities for the purpose of satisfying a possible tax liability. If there will be a substantial tax liability and the CRA has any suspicion that collection may be in jeopardy, an attempt should be made to persuade the taxpayer or registrant to deposit the funds to the credit of the Receiver General or deposit them to a personal account and issue a certified cheque to the Receiver General for a substantial amount. Alternatively, the taxpayer or registrant could agree to place the funds in trust, jointly with the CRA.
- (3) All currency or negotiable securities found in the course of executing a search warrant should be listed (with full details as to ownership, transfers, dates, serial numbers, etc.) in the presence of another search team member and with the owner of such property or the owner's representative. After listing, the currency or negotiable securities should be left in the custody of the owner or representative and the owner or representative should certify the lists as being property in his possession on the date of the search. Upon completion, a copy of the signed cash count sheet should be provided to the taxpayer.
If the cash count sheets and listings are not covered by the search warrant and are to be used as evidence, a general warrant should be obtained after consulting with regional PPSC.
- (4) Cash should only be seized when it is known that a considerable amount of cash is part of the scheme and may be used as evidence of an offence. When investigators wish to seize cash during the execution of a search warrant, they must have reasonable grounds to believe that cash will be found at a search location and that it will afford evidence of an offence. Cash must be described as "currency" under the title of "Things To Be Searched For" in the ITO. The Criminal Investigations Division at HQ and the PPSC must be consulted for approval on a case-by-case basis. When cash is discovered during the execution of a search warrant and it is determined that it could be used as evidence, Criminal Investigations Division at HQ must be contacted and PPSC consulted before seizing the currency in those instances when it is not listed in "Things to be Searched For" in the search warrant.
- (5) There may be situations where investigators are aware of the serial numbers of monetary instruments such as cash or securities used in specific transactions involving the subject of the investigation. Where it can be established that the bank notes or securities found during the execution of a search warrant are the identical ones used in the transaction(s), the monetary instruments may be considered evidence of tax evasion and seized pursuant to Section 489(1)(c) of the Criminal Code. In addition, the denomination, packaging, materiality of the amount and location of the currency discovered during the execution of the search could be indicative and supportive of a scheme, and may be considered evidence of tax evasion and seized pursuant to Section 489(1)(c) of the Criminal Code.
- (6) The RCMP may have Currency Record and Tracing System (CRATS) machines to count and analyse the cash removed from the premises. A "CRATS" machine scans currency and compares the serial numbers to a national database that keeps track of currency used in undercover operations or that was previously seized, thereby permitting a trace of origin.
- (7) Shares and certificates of closely held corporations and certificates of privately held or closely controlled corporations would not be included in the designation of "Negotiable Securities". When such shares, certificates, share registers or other documents, which may afford evidence of ownership of a corporate entity, material to the investigation, are found, they should be seized if

covered by search warrant. In instances when the items are not listed on the search warrant, consideration should be given to seizing the items pursuant to section 489(1)(c) of the CC. The location where the shares or certificates were found should be noted, especially shares or other documents not signed (in blank).

6.3.14 Taking of Photographs and Videotaping

6.3.14.1 Taking Photographs in Documenting Search Action

- (1) The taking of still photographs (either conventional or digital) during the execution of a warrant may be deemed necessary to provide visual proof for the following reasons:
 - Act as an "electronic notebook" to assist investigators in documenting the search action;
 - Show the exact location where various items were seized;
 - Support continuity of possession of seized items;
 - Show the state of the search premises both before and after the search has been conducted in order to protect the search members from false accusations; and
 - Refresh the memory of the seizing officers when called to testify years later.
- (2) The taking of photographs during the execution of a search warrant for purposes of documenting the conduct of the search is optional and should be left to the judgment and discretion of the Assistant Director, Criminal Investigations or designate. As long as the purpose for taking photos is to document the search and not for gathering evidence, no special judicial authority is required to use this technique.
- (3) Any photographs taken during the conduct of search action will be subject to disclosure to defence in the same manner as search notes, reports, etc.

6.3.14.2 Taking Photographs and/or Videotaping for Evidentiary Purposes

- (1) In exceptional circumstances, the taking of photographs at a residence, place of business or other search location may be undertaken in order to obtain evidence to prove an offence.
- (2) If the taking of photos is deemed necessary as a technique for gathering evidence it must be supported in the ITO and be done pursuant to a section 487(1) warrant or a general warrant issued pursuant to section 487.01 of the CC, after consulting with regional PPSC. The ITO in support of the general warrant must provide adequate grounds to justify its inclusion. This practice would then provide a basis for tendering the photos as evidence at trial.
- (3) Some advantages for taking photographs as evidence are:
 - To provide visual evidence of the existence and possession of assets;
 - To provide the best evidence in court, rather than witnesses' statements or investigators' notebooks;
 - To support other evidence being used to prove the alleged offences.
- (4) The taking of video images for evidentiary purposes is not common practice. However, this investigative technique may be used in exceptional circumstances to obtain evidence of an alleged offence and through the authority of a **general warrant** pursuant to section 487.01 of the CC. The ITO in support of the general warrant must provide adequate grounds to justify videotaping.
- (5) If a video camera is used during the execution of a search the sound should be turned off to prevent the recording of background sounds such as employee conversations that are not authorized by the search warrant. **Any video images taken during the conduct of search action will be subject to disclosure to defence for the same reasons that documentary evidence is required to be disclosed.**

6.3.14.3 Procedures during a Search for Any Purpose

- (1) The use of still photos or videotaping during a search as an investigative technique to gather evidence should only be considered in consultation with the Assistant Director, Criminal Investigations or designate when other less intrusive techniques are not considered adequate or sufficient to gather the evidence necessary to prove the alleged offences.
- (2) The person taking photographs or videotaping should be assisted by another individual who will take clear notes on each picture taken or, during the course of the videotaping, to document the

process. Search members, employees or other persons present at the search location are not to be photographed or videotaped.

- (3) In any event, the taking of photographs or the use of a video camera **for evidentiary purposes** during a search should be discussed with the Criminal Investigations Division at HQ before the search warrant and its supporting Information are authorized.

6.3.14.4 *CRA Criminal Investigations Program employees being videotaped by taxpayers*

The following guidelines focus on CRA investigators executing search warrants but the general principles apply to interviewing the target of an investigation or witnesses at their home, place of business or other private or public places.

The Law

During the execution of a search warrant, CRA investigators are given judicial authority to go onto private property to search for things and seize them.

CRA investigators are public officers and their actions while performing their official duties are not considered private. While executing a search warrant CRA investigators (and the police) have no authority to:

- stop someone from recording;
- seize someone's recording device (unless it is listed as a thing to be searched for on the warrant or it is seized under section 489 of the Criminal Code);
- delete the images from a person's recording device;

A person who is legally on the property does not require the CRA investigators' consent to record them performing their duties. However, CRA investigators are not required to answer anyone's questions while they are executing a search warrant – even if they are being recorded. All questions should be addressed to the search team leader.

Obstructing or Hindering an Officer

If a person prevents officers from performing their duties, he/she could be arrested for obstructing or hindering an officer. Since CRA investigators are public officers with no powers of arrest, the CRA search team leader should ask the police for help in such situations. Arrests for obstructing or hindering an officer should only be made as a last resort and only if the elements of the offence are present. The fact that someone is recording the search does not interfere or hinder CRA investigators from performing their duties. An unreasonable arrest will jeopardize the CRA case and leave CRA investigators vulnerable to lawsuits.

Before the Search:

The investigator-in-charge of the case should discuss this issue with the police officers who will be helping the CRA with the search. This discussion should take place well before the search. If the police agency has conflicting guidelines or procedures on this issue, the CRA investigator should discuss them with his/her team leader, Assistant Director, Criminal Investigations and Investigations Advisory Services at the Criminal Investigations Directorate and seek an approach that will meet both agencies' concerns.

During the pre-search briefing, the investigator-in-charge of the case should tell the search team members what to do if someone starts recording them. Tell search team members that they should not try to deal with the situation themselves but to inform the search team leader. **During the Search:**

If a person starts recording search team members, the search team leader may ask the person to stop recording. If the person refuses, the search team leader (or the police officer) should tell him/her that if they obstruct, interfere or hinder the search team members they could be arrested. CRA search team members should act professionally and focus on their duties and not engage with the person(s) recording the search.

After the Search:

The investigator in charge of the case must report such incidents to their managers and the CRA local security official. The CRA's Security Incident Reporting and Management Directive contains further guidelines and procedures on how to report security incidents. If investigators see a copy of the recordings on the Internet or elsewhere in the public domain, they must tell the investigator in charge of the case who

must report the matter to their team leader, Investigations Advisory Services representative at CRA local security official.

6.3.15 Wills

It is the Agency's policy to treat wills as protected by solicitor-client privilege. Therefore, if an investigator wishes to examine a will, it should be sealed and treated in accordance with the applicable procedures in paragraph 2(a) of **Appendix 6.A**.

6.3.16 Use of Force

- (1) Subsection 25(1) of the CC provides that everyone, who is required or authorized by law to do anything in the administration or enforcement of the law as a peace officer or a public officer is, if acting on reasonable grounds, justified in doing what is required or authorized to do, and in using as much force as is necessary for that purpose.
- (2) Should it become necessary to use force to gain entry, it will be the duty of the peace officer to gain entry in the most reasonable manner. Once inside the search team leader will assume responsibility.
- (3) Should a situation be encountered where access to a locked desk or filing cabinet cannot be gained, every effort should be made to persuade the person to produce the key before resorting to forceful access. When a locked box is found and the subject claims he does not have a key, the service of a locksmith should be obtained to open the container.
- (4) The Agency is responsible for any costs associated with gaining entry to locked items, i.e. box, door, desk, etc.

6.3.17 Identification of Records

- (1) It is essential that seized material is clearly identified and that reference be made to the specific point of seizure, date, and the name of the seizing officer. The importance of making a precise diagram of the location being searched will prove beneficial in ensuring the seized records are accurately identified.
- (2) Key records and documents being seized should be documented in notebooks and if clarification is required, the search team leader should be contacted and he/she may approach someone at the search location who may be knowledgeable about the records or documents. If there is a large quantity of key documents to seize, the information can be documented on the outside of the seized envelopes instead of a notebook.
- (3) The search team leader may also decide whether to approach the subject under investigation (after providing the criminal warning) to seek clarification of a particular record or document. The names of potential witnesses should also be recorded in the searcher's notes.
- (4) Whenever possible, it is expedient to have the employees identify books and records such as ledgers, synoptic journals, cash journals, etc., at the time of seizure. Frequently, these records of account do not bear the name of the firm or business to which they relate.

6.3.18 Interviews

- (1) The taxpayer or registrant being investigated may be interviewed at the time of the search as long as they are properly cautioned regarding their right to remain silent pursuant to the Charter. The results of any interview conducted during the search must form part of the search report and the details of such interviews must be included in the search officer's notebooks.
- (2) If possible, the investigator in charge of the case should be responsible for conducting any interview and another investigator should assist to note and record the results or statements. If the person being questioned chooses not to respond or states that they will not answer any questions, respect their choice and do not pursue the matter any further. These situations should be noted in the notebook, as should any other statement.
- (3) If the person under investigation is not being interviewed but spontaneously starts making admissions at the time of entry or as a result of discoveries made by search team members, then they must be properly cautioned and notes should be taken regarding statements they made.
- (4) The search action presents a prime opportunity to conduct interviews with employees in order to obtain explanations of records, assistance on the location of records sought, and identify who is

responsible for the entries made in such records. Officers conducting the search cannot force employees or a potential accused to answer questions but it is proper to ask questions and give the person an opportunity to respond, if they desire.

6.3.19 Completion of the Search

- (1) Once the search of an area is complete, the seized records should be moved to a supervised central location, along with the records seized from all the other areas of that location. An inventory of the number of boxes should be taken before boxes are loaded into vehicles for transportation to the office, and again when they are placed in the designated storage facility. A member of the search team should oversee and supervise the loading and transport of the seized records. The person designated for this task will stay with the records until they have been safely stored at the assigned storage area. This is essential, not only to ensure the safe arrival of the records, but also to **prove the continuity of possession** of such records. The investigator must be able to testify that the seized records remained under their control from the time they left the searched premises until they were placed in the designated storage area.
- (2) The search team leader should not be directly involved with the actual search and seizure of records but confine his activities to directing, supervising and maintaining control over the premises as well as answering any questions by the subject, the search team members, or any other occupant at the location.
- (3) After all records have been removed from the premises and the searched areas returned to their original state, the search team leader shall:
 - Advise the subject that the search is completed;
 - Walk through the premises to ensure that it has been left in good order, and also to ensure that nothing is inadvertently left behind;
 - Ask the person in control of the premises about any concerns regarding the conduct of the search party members or the condition of the premises;
 - Provide the name of the Assistant Director, Criminal Investigations and case investigator to the subject or person in authority, to ensure the subject is aware of whom to contact at the TSO;
 - Advise the search co-ordinator that the search is complete so that a decision can be made as to any re-assignment of the search team members to other locations. If no re-assignment takes place, search team members can be released from the search party to go back to their regular duties.

6.3.20 Transfer of Records

- (1) The search team leader for each premises or location should delegate to a search team member the responsibility of ensuring that boxes of seized records are taken off the premises, loaded, and kept under supervision. In other words, a custodian of seized boxes should be identified for each search location.
- (2) To avoid the possibility of being challenged as to continuity of possession, a member of the search party must accompany the hired assistants at all times, including the transportation time from the searched premises to the TSO. It is also imperative that boxes be properly sealed or that large ledgers be securely wrapped or parceled to prevent observation by the assisting persons. All boxes must be accounted for at all times; before, during and after the move.
- (3) It has always been CRA's policy to maintain continuity of possession by having a search team member ride as a passenger in a contracted vehicle. If that kind of arrangement cannot be made, sealing, locking or surveillance of the truck must be such that, in the opinion of the Agency, establishing continuity of possession will not be a problem.
- (4) Where records are seized at locations outside the territorial jurisdiction of a TSO, it is the investigator from the TSO conducting the search action that will be responsible for all seized records. The investigator should make adequate arrangements for transporting the records back to his TSO.

6.3.21 Receipts for Records

The subjects should be informed that a copy of the detailed inventory of the seized items will be provided following the search. They should also be advised as to where the records will be stored and the conditions of access.

6.3.22 Written Reports by Search Team Members

- (1) Immediately following the search, all search team members will prepare a search report, from their notes and memory, outlining the times of entry and departure, their actions, the reactions of persons present at the search, details concerning continuity of seized evidence including the name of the officer who took possession of the seized evidence and any unusual or concerning incidents.
- (2) Type written search reports help the investigator in charge find key items/documents that have been seized and will also help search team members prepare to testify in a contested case.

6.3.23 Search Report to Headquarters

The investigator in charge of the case will prepare a concise search report, setting out the results achieved and detailing any incident or other important issues that came about during the search, and submit it to Headquarters as soon as possible after the search. A copy of the executed warrant(s) and sworn ITO should be attached to this report. This report will enable Headquarters to provide any report required by senior management as well as answer any representations the subject of the search may have about the search action. Any serious incidents, such as the use of force to gain entry, should be reported to Headquarters by telephone as soon as possible after the occurrence. See Chapter 14.1.3 Search Reports (to headquarters).

6.4 Detention of Seized Documents 6.4.1

Report to a Justice

- (1) After a warrant has been executed, the things seized must be brought before the justice who issued the warrant or another justice having jurisdiction in the same territorial division. When the things seized are not physically brought to court, a report similar to Form 5.2 of the CC indicating what has been seized and who is detaining it will be made. This step must be taken as soon as is practicable after the seizure, even when nothing is seized.
- (2) Under paragraph 489.1(2) of the CC, anything seized not listed in the warrant will also form part of the report to the justice. If it is done by way of a report, the items should be listed separately and need only be referred to as "**seized items not listed in the warrant**".
- (3) Under subsection 489.1(1) of the CC, a peace officer is entitled to return documents to the person lawfully entitled to its possession, however under subsection 489.1(2) of the CC, any other person must first make a Report to Justice and deal with the seized items in accordance to subsection 490(1) of the CC. In other words, public officers must first obtain the authorization of a Justice, prior to returning anything seized.

6.4.2 Detention of Things Seized

- (1) Section 490 of the Criminal Code governs the procedure when seized items are brought before a justice or a report is made and further detention of these items is required. Pursuant to subsection 490(1) investigators must apply for an order from a justice to detain the seized items. The first detention order is good for three months from the date of the seizure. Investigators should apply for the detention order at the same time they make their report to justice pursuant to subsection 489.1(2). The report to justice must be made as soon as is practicable after the seizure. In other words do not wait three months after the date of the seizure to file this report. The party whose items have been seized and/or the owner of those things, if a different person, are not entitled to a notice for the first detention order hearing.
- (2) In most CRA cases, investigators will need an order for further detention pursuant to subsection 490(2). Investigators must give "three clear days' notice" to the person from whom the items were seized before applying for an order for further detention. Three clear days means you do not count the day you serve the notice or the day the application is heard. Therefore, if you serve someone with notice on a Monday, you have to wait until Friday to hold the detention hearing. Do not include holidays and weekends as part of the three days.

- (3) Investigators can obtain more than one order for further detention under 490(2)(a) but the cumulative period of detention cannot exceed one year from the date of seizure.
- (4) Investigators may apply for a further detention order beyond one year pursuant to section 490(3)(a) but they will have to satisfy a judge (not a justice) that they need more time because it is a complex case. Reasons such as a large amount of seized items and/or not enough people or resources to analyze the seized items are insufficient to obtain an order for detention beyond one year.
- (5) If the period of detention is about to expire and investigators cannot satisfy the conditions for obtaining a detention order under 490(2)(a) or 490(3)(a), their options are:
 - a. Obtain an order to return the seized items to the lawful owner
 - b. Lay charges (in consultation with the PPSC)
 - c. Obtain the lawful owner's consent in writing to keep the seized items pursuant to section 490(3.1)
 - d. Copy the documents pursuant to section 490(13)
- (6) There is no statutory imposed form for an application or an order for detention.
- (7) Investigators should apply for detention orders well before the detention period expires because it may take some time before a justice decides on a 490(2) or 490(3) application. For example, the person whose things have been seized may need time to arrange for a lawyer and that lawyer may ask for an adjournment. It may take time for the lawyers to call evidence and make submissions and the proceedings may be interrupted or adjourned. There is case law that says as long as investigators apply for the 490(2) or 490(3) order before the original detention period expires, an order for further detention (that comes after the expiry date) is still valid.
- (8) Instructions for the detention of computer records and equipment can be found in Chapter 19.2.8 Inventory of Seized Things.

6.5 Availability of Seized Records

6.5.1 Advice to Persons under Investigation and Authority Cited

The policy of the Criminal Investigations Directorate is to make seized records available for examination by the person from whom they were seized or an authorized representative. The taxpayer/registrant or their representative will be advised at the time of seizure, and by letter following the seizure, that the CC is the authority under which the records were seized. They will also be informed that they may examine the seized records at the TSO during regular business hours and under supervision.

6.5.2 Access to Records

The Agency should be prepared to cooperate, within reason, when the subject of the search or the representative visits the office to examine or to extract data from records, which cannot be returned due to their evidentiary value. An investigator must be present at all times to ensure continuity of possession and also that no seized material is removed, altered or defaced during examination. The person examining the documents should be cautioned that no alteration of any kind should be made to the documents. Investigators may also give the formal criminal caution in the event that the subject wishes to discuss the case or makes spontaneous admissions. In such cases, the investigator accompanying the taxpayer should request the assistance of another colleague to act as a witness.

6.5.3 Provision of Copies

- (1) The CC is silent on providing copies of the documents seized. The Agency's practice is, however, to allow access to and provide a free copy of all individual documents specifically identified by the person, from whom they were seized or their representative, within a reasonable time.
- (2) Where a request for wholesale copying of seized records is made, the person making the request should be reminded that it would be more purposeful to identify the documents needed, rather than asking for a copy of every seized item. If some of the documents requested are immediately required for the continued operation of the person's business, the CRA will try to provide a copy of the specified documents as soon as possible.
- (3) The documents to be examined or copied for the person from whom they were seized *do not include borrowed or seized records from third parties* that are in the Agency's possession. Whether or not

the request for access is accompanied by written permission from the third party, the person should be advised that it is preferable to have the third party come to the office to obtain the desired information.

6.6 Collection and Preservation of Evidence

- (1) Following a search, the investigator in charge of the case should contact the Imaging Technology Centre in Ottawa to determine whether the case will benefit from the research capabilities derived from the imaging technology process. At that point, arrangements will be made to have the seized records scanned.
- (2) If the seized records were found in unsanitary conditions and/or represent a health risk, the investigator in charge of the case should advise their team leader before handling the records.

6.6.1 Control of Records

- (1) The collection and preservation of records, by the Criminal Investigations Division, is done to ensure the admissibility of such records as evidence in criminal cases. The manner in which such records are acquired make proper control of these records essential.
- (2) The control standards are as follow:
 - a) There *must* be an accurate and reasonably detailed list of the records held by the Criminal Investigations Division for each case.
 - b) It must be possible to identify, in general terms, the point from which specific records were taken, e.g. desk of J. Smith, accountant.
 - c) It must be possible to establish continuity of possession of the records held. It starts when the seizing officer takes possession of the records and ends when the said records are returned to the person from whom they were seized. The records cannot leave the Criminal Investigations Division's control. If they are to be examined while the Criminal Investigations Division has control of them, an official of the CRA must be present at all times during the examination.
 - d) Such records must be kept under secured conditions.
 - e) The same standards of control should prevail in any criminal case, whether the case is finalized by civil assessment or by prosecution.
 - f) The same standards of control will extend to records seized by search, or otherwise obtained from third parties.
 - g) A master file (case file) will be maintained for every case, and will include copies of all correspondence, reports, memoranda, notes, etc., but will not include returns or applications. The file should be considered confidential and, as such, not leave the Criminal Investigations Division's premises. Refer to **Chapter 14.2 Maintenance of Investigations Case Files**. The original returns/applications must, at all times, be kept separated from any other working document(s), investigative reports, file(s), etc.
 - h) In order to maintain the continuity of possession of the returns/applications of a taxpayer or registrant being investigated, only photocopies of these returns/applications will serve as working papers when used outside the Criminal Investigations Division's premises. Once the prosecution is completed, ensure that all changes made to the photocopies are reflected on the original documents as well.
- (3) Local conditions and practices may influence the procedure set out above. However, these procedures are practical, adequately safeguard the interests of the CRA and are, in broad terms, adaptable to all offices.

6.6.2 Inventory of Records 6.6.2.1 *Format and Distributions*

- (1) Control of records must involve a careful accounting of what is actually in the possession of the Agency. A properly prepared inventory is essential, and will prove useful at disclosure time.
- (2) The inventory should be completed as soon as possible after seizure. Separate inventory sheets are made up for each container and as a minimum should provide the information listed in **6.3.9 – Handling Documents, Records and Things during the Search**.

- (3) The preparation of the inventory is the responsibility of the investigator in charge of the case. As soon as possible after the completion of the search, the investigator in charge of the case, alone or with the assistance of co-workers will create an inventory of the seized records.
- (4) The people taking the inventory should write their name next to the items that were inventoried by them. We recommend that you verify your local procedures as the method and content of taking inventory may vary from case to case and your office might have specific procedures in place. The investigator in charge of the case is responsible for ensuring that the inventory is taken in a timely basis and to print the inventory listings.

6.6.2.2 *Sorting of Records*

Records having obvious evidentiary value should be segregated and put in envelopes for storage in separate "evidence" boxes or in cabinets designated for this use. Records having clearly no value should be returned. Any repacking that is needed should be done and any damaged boxes replaced. Notes to that effect should be kept on file for future reference. One must be able to account for the total number of boxes/containers seized at all times.

6.6.2.3 *Records Not in Boxes*

The size and format of certain books precludes us from placing them in boxes. They should then be stored loose on the shelves and labelled appropriately.

6.6.3 **Indiscriminate Markings**

6.6.3.1 *Records Kept in Original Condition*

- (1) While items of actual evidence and books of account should be marked for identification, indiscriminate markings should not be made on seized records.
- (2) The seizing officer must be able to state that any document entered as a court exhibit is in the same condition as when it was seized, with the exception of the identifying marks. Tick marks, ringed entries or other defacements made after seizure seriously lessen the evidentiary value of a document. Such markings may necessitate calling all persons who marked the exhibit to the witness box. Even then, the court might still consider the document questionable.

6.6.3.2 *Use of Copies*

When dealing with documents, which may be used in court, photocopies should be used as working papers. If this cannot be done, "Post it" type notes should be attached to the documents without mutilating it (such as by stapling). Tick marks can be made on the strips, which are to be removed before the documents are entered as exhibits.

6.6.4 **Security**

6.6.4.1 *Location of Records*

- (1) Seized records are to be kept in a secured records room.
- (2) The secured records room should provide maximum security for the records held there. If there is an officer having general control of seized records, the secured records room should be his responsibility. Entry should be restricted to Criminal Investigations Division employees or to persons under their control or supervision. Only the actual records being worked on at the time should be taken from the records room. They should never be left unattended, and should be returned as soon as their purpose has been served. The room should be locked when not in use.

6.6.4.2 *Responsibility for Evidence*

Documents segregated because of their possible value as evidence are the personal responsibility of the investigator in charge of the case.

6.6.4.3 *Third Party Records*

Third party records stored in boxes in the bond room should be properly labelled to identify the source of the records and the investigator in charge. All third party records should be entered in the Criminal Investigations Division's third party register and the Criminal Investigations Division's master control register.

6.6.4.4 *Storage of Working Papers*

Working papers of finished cases are stored in numbered boxes. Refer to the permanent register of files to locate a working paper number; for example, John Doe papers are identified as being in Investigations Working Papers Box # 5. Examination of this box should disclose the required working papers. In future, when sufficient working papers have accumulated to fill one box, the box will be packed and numbered. It is vital that the person who packed the box place the box number on the register system.

6.6.4.5 Storage Room Key

It is vital that proper controls be used to control Criminal Investigations Division keys, including the one for the bond room. If the key is loose, be sure that it is returned to its proper location and not carried away by accident after use. The last person out of the room should lock the premises and ensure that the storage room key is returned to its proper location.

6.6.4.6 Occupancy of Spaces

If a box is removed from its proper place on the shelf, this should be indicated by placing a marker to indicate that the space is occupied, in order that the space will not be expropriated by someone else seeking storage space. Prior to expropriating a storage space, we recommend that you see the person responsible for maintaining the vault register up to date, to verify if the storage space is available. If unsure, you should contact the person who last had the space.

6.6.5 Return of Records 6.6.5.1

Records Not Needed

Where documents seized pursuant to section 487(1) of the CC are no longer required for the investigation or proceeding, an application must be made to a justice before they may be either returned to the person from whom they were seized, to the person entitled to possession, or forfeited to the Crown. Subsection 490(5) even suggests that a notice of the application be given to anyone who claims to be the lawful owner of, or claims entitlement to the records, and of course, to the person from whom they were originally seized. The CRA's policy is to return records at the earliest possible date, and to obtain a detailed receipt acknowledging the return of the material. Each time a detention order is sought, the opportunity to return records no longer required should be pursued to lessen the volume to be disclosed should the case proceed to trial. Voluntarily surrendered documents, which are to be returned, are not subject to the noted provisions of the CC.

6.6.5.2 Bulk Records No Longer Required

When the bulk records are no longer required, that is, after criminal proceedings and criminal appeals periods are over, they can be returned in the storage boxes or containers used by the search team when they were seized. Those items segregated for evidence or other purposes should be returned to the box and/or envelope it was taken from. Arrangements should be made to ensure the presence of the person from whom they were seized or that a responsible corporate officer is available when records are returned.

6.6.5.3 Receipt for Returned Records

A receipt should be obtained, if possible. Where a proper inventory of the seized items is available, only a short reference to the inventoried items in the text of the receipt will be necessary.

Completed receipts are to be placed in the "records" file of the case.

6.6.5.4 Refusal to Sign Receipt

If nobody in authority will sign the receipt, the circumstances of that refusal should be the subject of a report by the investigator in charge of the case, and kept on file for future reference.

6.6.5.5 Return in Person

Records seized from a taxpayer or registrant, are not to be returned by mail or courier. An officer of the Agency accompanied by another employee should deliver them personally.

6.6.5.6 Partial Return of Records

The list with the boxes should show the particular item stroked out, and the date of the transmittal letter or receipt. The remaining copy (or copies) should later be brought up to date before final return of records.

6.6.5.7 *Final Return*

At this stage the investigated person's name and address may be added to the box(es) if required and returned. Refer to **6.7 – Return or Destruction of Records Held in Custody**.

6.6.6 **Records Seized on Behalf of another TSO**

6.6.6.1 *Attendance by an Investigator from the Other TSO*

Where a search is to be executed on behalf of another TSO, an investigator from that TSO will be named in the search documents and be in attendance at the search.

6.6.6.2 *Return of Records*

It is good practice to have the investigator from the initiating TSO attend with a local investigator when returning the seized records.

6.6.7 **Records Removed from Storage**

- (1) The movement of books, records and other evidence to and from a court, the PPSC, legal agents, Headquarters and the TSO will be by the most efficient and economical means of transport available. If using public transportation, investigators will ship the material in locked containers or sealed mailbags, addressed to them at the desired destination.
- (2) Control of records outside the TSO will be maintained through the use of locked containers, briefcases, attaché cases, sealed boxes, etc.
- (3) The investigator will maintain custody and control by controlling all keys to the containers.
- (4) Removal for Scanning, Photocopying etc: It may be necessary to remove seized records from storage and send them to the CRA Imaging Centre, a commercial firm for photocopying or other types of processing. In such circumstances, an investigator, preferably the investigator in charge of the case, is responsible for ensuring the continuity of possession and should be prepared to testify accordingly.
- (5) Forensic document examination: refer to **Chapter 7 – Document Examination**.

6.6.8 **Control of Third Party Records**

Attempt to secure all the information required to preserve evidence from being destroyed. 6.6.8.1

Receipt to Third Party

The investigator should prepare a receipt in duplicate, listing the items taken, giving the original to the third party and retaining the duplicate for office purposes. The documents should be initialled and dated by a person who has knowledge of the document's preparation and use, which then makes him competent to introduce them in court. If this is not the same person to whom the receipt was given, have the potential witness check off the items against those listed on the duplicate receipt and date and initial it. A further precaution is to obtain a statement or a signature to your notes of the interview, as these steps may aid in the introduction of the person's evidence, should there be a lapse of time or memory. If the third party is reluctant to release the originals, it is usually sufficient to make certified copies. However, the third party should be cautioned that he could receive a subpoena to produce the originals in court later on.

6.6.8.2 *Storage and Return of Third Party Documents*

Records from third parties are stored and handled exactly the same as those held under seizure.

When a request from a third party or a representative is made for return of the records, the investigator in charge of the case should try to establish the reason for the request and try to persuade the third party to accept photocopies. If not successful, the records are to be photocopied and certified before they are returned. The third parties should then be informed of their responsibility for the safekeeping of the originals, as they may be required to be produced in court. There is no objection to returning third party records by mail or courier after their purpose has been served; but documents of value to the third party should be returned *registered*.

6.7 **Return or Destruction of Records Held in Custody**

Inability to Return Records

Occasionally, it is not possible to return records in the possession of the Agency, because the person to whom the records belong has left the country, has moved and the new address is unknown, or the

company has been wound up or for other reasons. Such records must not be destroyed as part of a routine destruction program. The court's permission will be required as indicated in subsection 490(9) of the CC.

6.7.2 Disposal of Records

In situations where the detention periods are over and criminal proceedings have not been instituted, subsection 490(6) of the CC creates a legal obligation for the custodian of the records to apply to a justice of the court who made the detention order, for disposition of the records pursuant to subsection 490(9) of the CC. This would usually result in the judicial approval for the return of the records to the person(s) from whom they were seized.

6.7.3 Notice of Intention to Destroy Records

- (1) Where permission to destroy seized records is sought from the court, the application should demonstrate that the CRA is the custodian of seized items that are no longer required, and give the reasons why they cannot be returned and should be forfeited to the Attorney General for destruction.
- (2) The CC does not call for a notice to be served although subsection 490(6) refers to the "circumstances set out in paragraph 490(5)". This would mean that, depending on the scenario, and relying on the information on file, it may be required to notify known representatives of an accused or, if a business is in bankruptcy or wound up, the liquidator, receiver or official trustee, of the impending request to the court.

Appendix 6.A – Searching a Law Office

Proposed wording regarding Searching a Law Office, to be inserted in the warrant and in the Information to obtain a search warrant to search a law office. It is designed to incorporate the principles that the Supreme Court of Canada set in its 2002 decision in Lavallee et al. The principles, nevertheless, are the overriding authority in the area.

- (1) For the purposes of ensuring the continued maintenance of solicitor-client privilege to the fullest extent possible, I make the following Assistance Orders, terms and conditions:
- (2) Should the warrant be granted to search the law office, the warrant contains specific provisions requiring that the following procedures (and/or any other provisions that the granting Judge might deem appropriate in the circumstances) be followed:
 - a) Before attending at the premises named in the Search Warrant (the "Warrant"), the officer in charge of executing the Warrant shall advise the Law Society of _____, of the name and location of the premises to be searched (the "Premises") and the time and date of the search in order that the Law Society of _____ may designate a representative to attend on its behalf at the search, if it sees fit to do so.
 - b) Immediately after arriving at the premises, the officer shall advise the solicitor upon whom the warrant is executed (the "solicitor") that he or she may immediately contact the Law Society of _____, and/or his or her own counsel, for guidance regarding the solicitor's obligations arising from the execution of the Warrant.
 - c) The officers executing the warrant (the "Officers") shall defer their search of the premises and shall not remove anything from the premises until the solicitor has had a reasonable opportunity to confer with a representative of the Law Society of _____ and/or the solicitor's own counsel regarding his or her obligations arising from the execution of the warrant, and if desired by the solicitor, await the arrival of a representative of the Law Society of _____ at the premises. The officers executing the warrant may, however, take such steps as necessary to secure the premises to prevent the removal or destruction of anything from the premises.
 - d) The premises shall be searched by a partner of the law office other than the solicitor, or his or her designate, for the items set out in the warrant. Any items found shall be provided in a format suitable for use in evidence, which may include an affidavit under section 30 of the Canada Evidence Act.
 - e) Regardless of whether solicitor-client privilege is claimed, anything seized pursuant to the warrant (the "seized items") shall be dealt with in the following manner:

- (i) The seized items shall be placed in packages or envelopes without being examined or copied by the officers.
 - (ii) The packages or envelopes shall be marked for identification and sealed.
 - (iii) The sealed packages and envelopes shall be delivered forthwith into the custody of the _____, by the officer, accompanied, if desired, by the solicitor, or his or her designated representative.
 - (iv) Whether or not a claim of privilege is made in respect to any of the seized items, none of the seized items may be released to the officers, or any persons designated by them, unless a Judge of the Court of _____ is satisfied that reasonable steps have been taken to notify the clients to whom the seized items pertain of the seizure and that they may have privileged solicitor-client communications within the seized items.
 - (v) Any of the seized items found not to be subject to solicitor-client privileged may be used in the normal course of the investigation.
 - (vi) Any of the seized items for which a claim of solicitor-client privilege is being made shall be determined by application to a Judge of the Court of _____.
 - (vii) Any of the seized items found to be subject to solicitor-client privileged, shall be returned to either the solicitor, the holder of the privilege, or to a person designated by the court.
- f) The Director of the local office of the Public Prosecution Service of Canada, the solicitor, and any client who may have claim of solicitor-client privilege over the seized stems may apply to the Court _____ for directions as may be required on notice to the parties.
- g) The Director of the local office of the Public Prosecution Service of Canada may make submissions on the issue of privilege, but shall not be permitted to inspect the items beforehand. The prosecuting authority, the Public Prosecution Service of Canada, can only inspect the items if and when it is determined by the Court that the items are not privileged.

November 2012

Chapter 7 – Forensic Document Examination

7.1	Forensic Document Examiners
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7.3.12	Expert Testimony

EXHIBIT–7.A THE CANADA LETTER

Chapter (7) FORENSIC DOCUMENT EXAMINATION

- (1) The purpose of this chapter is to provide instruction and information concerning the forensic examination of documents during a Canada Revenue Agency (CRA) criminal investigation.
- (2) The Canada Border Services Agency (CBSA) Forensic Document Examination Section is not accepting CRA cases directly from Criminal Investigations Divisions without the prior approval from a Manager – Advisory Services Section, Criminal Investigations Division, Criminal Investigations Directorate. After approval, exhibits can be sent directly to the Forensic Document Examination Section by the investigator. The exception to the above is ink-dating cases or the ink-dating portion of cases.
- (3) Criminal Investigations Directorate will prioritise which cases are to be sent to CBSA and the order in which they will be analysed by CBSA. Criminal Investigations Directorate and CBSA will strive to provide accurate time deadlines for case completion.
- (4) It is imperative that CBSA be informed when a case is settled prior to them completing their document analysis. If a case will not be pursued or a guilty plea is obtained the investigator must notify the lab in a timely manner that the analysis is no longer required.

7.1 Forensic Document Examiners

- (1) The Forensic Document Examination Section of the Science & Engineering Directorate of the CBSA provides professional forensic document analysis and support services to CRA. For further

information concerning this division visit the website:

http://www.gcpeia.gc.ca/wiki/CBSA_Forensic_Document_Examination_Section

- (2) Submissions may be made in person or by personal receipt courier services to: Forensic Document Examination Section
Science & Engineering Directorate Canada
Border Services Agency 14 Colonnade Road
Ottawa ON
- (3) In all instances, forensic document examiners will examine or analyze the documents submitted to them and will report the results of their examination/analyses back to the CRA investigator. In appropriate situations, they will also give expert testimony at trial in respect of the documents they examined.

7.1.1 Prior Discussion with the Forensic Examiner

- (1) Because of the various analyses and examination processes and techniques that are currently available and which are continually evolving, the investigator is encouraged to discuss with the forensic examiner, the particular documents and what his suspicions or questions are regarding those documents. Contact information of the forensic examiners is available at the website listed above in 7.1. This discussion may be held in person with the subject documents on hand or if that is not feasible or appropriate, it may be held by telephone.
- (2) The document examiner will refer to the documents submitted for examination as "Exhibits".

7.1.2 Potential Forensic Findings

Forensic document examiners, by employing a variety of scientific and other techniques and methods, may be able to:

- Establish that a person did or did not, as the case may be, author a handwritten or hand printed document or a part of that document;
- Establish whether a signature on a document is real or forged;
- Establish whether or not a document was created on a specific piece of equipment, e.g., a typewriter, printer, photocopier etc.;
- Establish the approximate age of a document, or parts of a document, as applicable;
- Determine if a document is from a particular source, e.g. a book, writing pad etc., or country of origin;
- Establish whether there has been tampering, alterations, erasures or obliterations in a document;
- Determine from any indentations in a document what writings may have been made on another document that was once on top of the subject document;
- Decipher the writings on charred paper;
- Determine what writing instruments or media was used to create a document;
- Establish that a document is authentic and is not a fabrication or a counterfeit of a real document;
- Determine, from any tears or perforations in a document, whether it was previously attached to, or formed part of, another document;
- Determine whether rubber-stamping on a document matches a specimen rubber stamp;
- Decipher writings on carbon paper or on ribbons, e.g. typewriter or dot-matrix ribbons;
- Determine other factors related to the document that may be possible, depending on the document to be examined and the nature of the case under investigation.

7.2 Documents – General

- (1) Documents (exhibits) to be submitted for forensic examination are either "questioned" or "known". Questioned exhibits are those, which the investigator seeks to identify or to question in some way. Known exhibits are those, which the forensic examiner uses, for comparison purposes, when analyzing the questioned ones.

- (2) Subject to sub-paragraph (5) below, only those questioned documents offering the greatest evidentiary potential, and known documents having the greatest value, will be selected and provided to the forensic laboratory as exhibits for examination.
- (3) Original documents should be submitted whenever possible. If the analysis is to determine ink dating, originals are the only ones that can be used.
- (4) For some analyses, copies of documents do have value. This would be particularly true, of course, if the analysis was to identify the copier equipment used to create the copy.
- (5) It will sometimes occur that the only exhibits obtainable fall short of the desired standards. Under such circumstances, it is strongly suggested that, if an expert opinion on the subject documents would be of value to your case, they be referred to the laboratory. The document examiners have, in the past, provided good service and cooperation to CRA's Criminal Investigations Program. Wherever possible, they will make every effort to arrive at a definitive conclusion, even under less than ideal circumstances.

7.2.1 Documents – Handling and Preparation

- (1) Documents, particularly questioned documents, must be preserved in the same condition as when acquired by the investigator. The following precautions should be taken:
 - Do not punch holes in the documents, nor use staples or pins for attaching to other documents, e.g. a covering letter, or attaching to file folders, etc.;
 - Do not fold the documents. Keep them flat, but do not compress surfaces excessively;
 - Do not attempt to repair tears or damaged areas of documents. Do not paste a torn or fragile document to another piece of paper for support. If the documents are damaged, submit in damaged state, properly protected from further damage;
 - Do not place photocopied or faxed documents into plastic folders, use paper folders or envelopes instead. Ink dating items must go in paper envelopes, not plastic;
 - Keep documents in envelopes or protective folders, preferably transparent envelopes. Should there be any possibility or suggestion that the questioned documents might be contaminated by being in contact with the known documents, e.g. offsets, ink, etc., or may have been in contact with other material, the questioned documents should be placed in a sealed envelope and separated from those other documents or materials.
- (2) If the age of the document is to be determined, it is imperative that it be submitted to the laboratory immediately. One of the possible dating processes is ink analysis. If a document is not submitted for analysis immediately, there will have been increased drying of the ink, and the likelihood of an accurate dating result is diminished.
- (3) The investigator will identify each document to be submitted for examination with a "K" number for the known documents and with a "Q" number for the questioned ones as follows:
 - (A) Questioned documents will be identified as Q.1, Q.2, and so on; known documents will be identified as K.1, K.2 and so on;
 - (B) Where more than one set of exhibits are sent to the laboratory in a given case, the coding in the second set should continue from where the first set left off. For example, if set one ended with Q.4, K.4 then begin the second set with Q.5, K.5.
- (4) To identify the document, discreetly initial it with a unique number in a non-essential spot e.g. the back lower left corner. Do not use same number twice;
- (5) The documents are then listed on an explanatory letter, showing a description of each document together with its "Q" or "K" number.

7.2.2 Proving the Known Exhibits

- (1) The CRA investigator must ensure that the known exhibits can be proven. Obviously, if the specimen cannot be proven to be "known", any document analysis, which relied on that specimen, is worthless. As a consequence, before making any submissions to the forensic laboratory, the investigator must be satisfied that all known exhibits are provable as such.

- (2) In the case of handwriting or hand printing documents, this proof may be established through evidence given by:
 - (A) A person who saw the writing executed;
 - (B) A person who heard the writer admit authorship;
 - (C) A person who has previous knowledge of the writer's writing, acquired by: – Having at any time seen that person write;
 - The receipt of written communications purporting to be in the writer's handwriting in reply to documents addressed to him by, or on behalf of, the person; or
 - Having observed, in the ordinary course of business, documents purporting to be in the writer's handwriting;
 - (D) Other means acceptable to the court, e.g. specimen writing obviously written by the individual, such as writings contained in a personal notebook carried on his person or found on his premises;
 - (E) With regard to methods C and D, great care must be taken to establish that all the specimen writings and parts thereof were, in fact, written personally by the party, and are not writings by another individual for the party.
- (3) In the case of known specimens produced mechanically, (e.g., by a typewriter, printer, cash register, etc.), the proof may be through the testimony of a person who:
 - (A) Personally obtained the specimen from that particular mechanical device,
 - (B) Observed, in the ordinary course of business, production of the specimen by that particular mechanical device.

7.2.3 Transmitting the Exhibits

- (1) When making a request for examination or analysis, the investigator must ensure that the reasons for the requested examination are clearly stated and that the documents are clearly identified. It is important that the request is stated objectively and is not biased in favour of some desired findings.
- (2) Documents for examination should normally be sent directly to the laboratory by the Tax Services Office Criminal Investigations Division involved. This makes it easier to maintain continuity of possession over the documents.
- (3) CBSA does not have a transmittal form for requests to its laboratory; everything is done by a covering letter of explanation. A copy of this letter must be retained by the investigator for control purposes.

7.2.4 Continuity of Possession

- (1) For identification purposes, the documents for examination should have been initialled and dated by the investigator, when they come into the investigator's possession. These notations should be in pen using blue ink (to distinguish it from a photocopy), and so placed as to avoid any obliteration of the text.
- (2) The documents (exhibits), grouped together as appropriate, are to be placed in envelopes, and the envelopes are to be sealed and initialled and dated by the investigator across the sealed flap. The envelopes must only include the exhibits for examination; they are not to include explanatory letters.
- (3) The sealed envelopes are to be labelled "Evidence – Exhibits for Examination or Analysis – Do Not Open". It is important to label the envelopes prior to putting documents inside in order to minimize the risk of adding latent impressions to the documents.
- (4) The sealed envelopes are to be placed in a covering envelope, for mailing. Also placed in this covering envelope are any related covering or explanatory letters. The outside envelope should bear the investigators' return address with proper courier postal code and phone number.
- (5) The investigator must use a full audit courier (signature required) for transport of evidence to laboratory. Such services provide a waybill number for audit and tracking purposes. Such services are provided by the courier companies such as Purolator and Federal Express. Delivery by hand to the laboratory is also accepted; please call the lab for such arrangements. DO NOT USE

INTERNAL MAIL OR ANY CANADA POST SERVICE FOR TRANSPORT OF EVIDENCE TO LABORATORY.

- (6) The investigator must make detailed notes regarding this submission of documents and ensure they are retained, along with the courier receipt and a copy of the covering letter of explanation. These notes are to be updated when the documents are returned.
- (7) When the documents are returned from the laboratory, the envelopes containing the documents must be opened by the investigator. These envelopes should be considered as potential evidence to establish continuity of possession, and must therefore be retained.

7.3 Purpose and Requirements for Specific Examinations 7.3.1

Handwriting and Hand printing Examinations

- (1) The purpose of these examinations is to identify the person who did, or did not, author a document.
- (2) For these examinations, it is very important that known specimens of handwritings and hand printings be submitted in generous quantity, wherever possible.
- (3) Specimens of known handwritings and hand printings are either "Collected Writings" or "Requested Writings".
- (4) Collected Writings:
 - (A) These are writings executed in the ordinary course of social or business activity when the writer could have no idea that they might be used for purposes of comparison. They may relate to any subject and need have no connection with the matter under investigation, e.g. personal letters, business letters and records, statements, school notebooks, diaries, recipe books, cancelled cheques, signature cards, receipts, application forms, etc.;
 - (B) In the selection of Collected Writings, the following should be observed:
 - a) Date of Execution – The collected writing should include writings which have been written as close to the date of the questioned writing as possible;
 - b) Style – The style of writing of the collected writings should duplicate that of the questioned writings as closely as possible, i.e., extended handwriting for comparison with questioned extended handwriting, specimen signatures for comparison with questioned signatures, hand printing specimens for comparison with questioned hand printing, etc.;
 - c) Amount – Obtain as much writing as possible;
 - d) Writing Instruments and Media – Those documents should be selected which duplicate, as closely as possible, the type of writing instrument and media used in the questioned writing, i.e. if questioned writing is in pencil, obtain pencil specimens, if in pen and ink, obtain pen and ink specimens, etc.;
 - (C) The foregoing suggestions incorporate the ideal or desirable type of collected standards. Often these standards are not obtainable. The fact that a collected writing does not embody these desirable qualities should not be a deterrent to the submission of those specimens that are available.
- (5) Requested Writings
 - (A) These are writings executed at the request of an investigator. These writings should be obtained in such a manner as to duplicate the text and writing conditions of the questioned document as closely as possible. Where requested writings are from a potential accused and the investigator has grounds to believe that the person has committed an offence, a caution should be administered before the writings are taken; (B) In the preparation of request writings, the following should be observed:
 - a) Dictation and Speed
 - Text should be dictated with no suggestion or assistance in the matter of arrangement, spelling, capitalization, punctuation, etc.;
 - Dictate mainly at the writer's normal writing speed. Alternately, speed up and slow down rate of dictation for short periods of time;

- Interrupt dictation, from time to time, with rest periods, questions or casual comments, which tend to take the subject's mind off the writing act. Take specimens on different days, if practicable;
- Remove each specimen from writer's view as completed;

b) Style

- Request the writer to write in the same style as the questioned documents, i.e., extended handwriting for comparison with questioned handwriting, hand printing for comparison with questioned hand printing, etc.;
- If it is thought that the disputed document might have been written with the hand not usually employed by the writer, some specimens from this hand should be requested;
- If it is suspected that the writing in the questioned document may have been distorted, either intentionally or otherwise, such as changing the slant of the writing, writing against a wall or on a high counter, writing without adequate support of the writing surface or writing under duress or in haste, a request should be made for some, but not all, of the specimens to be written under similar unusual conditions;

c) Text

- If not prejudicial to the investigation, use the same text as in the questioned document;
- If this is not advisable, compose a text for dictation using the same words, phrases and letter combinations as in the questioned document but having a different context;
- Use some standard form of text incorporating portions of the questioned document therein. See **The Canada Letter Exhibit 7-C The Canada Letter** for an example of standard text. In the standard shown, the names of individuals and places, the address, the dates and monetary amounts should, where possible, be substituted with comparable items from the questioned text. This should be written from dictation. It is also advisable to contact a forensic examiner prior to having the written text completed for guidance;
- If a writer wishes to volunteer a statement or is completing a written statement, request that he writes it in his own handwriting, arranging for the inclusion of all or part of the questioned text therein as much as possible;
- In a signature analysis situation, request the writer to fill out a number of blank cheques from dictation, completing all details as to date, amounts etc. and using the questioned signature, not the writer's own signature, as the payee's, payer's and endorser's signatures. These cheques should be marked "Specimen only" or "Not Negotiable";
- If blank cheques are not available, have the writer write the signature in question on separate slips of paper of the same width as the questioned cheque or confined to the same space as the questioned signature;

d) Amount

- Obtain as much request writing as is practicable;
- Signatures – fifteen signatures as a minimum;
- Extended writings – two or three pages of extended writing;

e) Paper

- Size – cut or select paper of same size as the questioned document, confining the specimen writing to the same space as the questioned material;

- Ruling – If the questioned writing is on ruled or dotted lines, duplicate these conditions in the paper supplied to the writer;
- Texture and colour – These features in the paper of the questioned document should be duplicated, as closely as possible, particularly the texture;

f) Writing Instruments and Media

- Try to duplicate the writing instrument and media as closely as possible, e.g., conventional straight pen, stub, fine, resilient, etc.; conventional fountain pen, stub, fine, resilient, etc.; pencil, hard, soft, medium indelible, coloured, etc.; ball-point pen, similar type, where possible;
- Supplement pencil and ballpoint pen specimens with the conventional, split-nib pens, if possible, in order that location of shading, pen position, etc., may be determined.

7.3.2 Signatures

- (1) The purpose of these examinations is:
 - (A) To determine whether a signature or writing is genuine or otherwise; (B) If the signature or writing is not genuine, to determine authorship;
- (2) The investigator must obtain the following:
 - (A) Authentic signatures of the person whose signature was forged – collected and request writings, as outlined above;
 - (B) The authentic signatures submitted as standards should include signatures, which may have been used as models, either by tracing or free hand simulation methods to effect the forgery;
 - (C) Specimens of the signatures in question, written by the person suspected of forging the questioned signature – collected and request writings as outlined above;
 - (D) Submit any other materials, e.g. carbon papers and practice writings, which may be related to or used in execution of the forgery;

7.3.3 Mechanically Produced Documents

- (1) The purpose of the examination of mechanically produced documents is:
 - (A) To determine if a document was produced on a particular device, e.g., a typewriter, printer, fax machine, photocopier etc.;
 - (B) To determine the probable type, make and model of the device on which it was produced;
- (2) Mechanically produced documents, may also be examined for the purpose of:
 - (A) Identifying counterfeited or mechanically forged documents;
 - (B) Determining the type of printing or duplication process employed in the counterfeiting;
 - (C) Comparing and relating counterfeited documents with authentic documents, plates, negatives, etc., that may have been copied or employed in the counterfeiting;
 - (D) Identifying suspected alterations and additions to documents;
- (3) Documents containing cheque-writer impressions may be examined for the purpose of:
 - (A) Determining the make and model of the cheque-writer responsible for impressions of unknown source;
 - (B) Comparing questioned impressions on a questioned document with specimen impressions from a suspect cheque-writer;
- (4) Questioned rubber stamp impressions can be compared with specimen impressions from a suspect rubber stamp or be compared to other impressions to determine if they were made using the same stamp.
- (5) Printed and duplicator copies, e.g., Mimeograph, Ditto, etc., can be examined for the purpose of
 - (A) Determining the type of printing or duplication used;
 - (B) Determining whether suspected documents are copies from the same source, i.e., stencil, "master", plate, etc.;

- (C) Comparing printed or duplicator copies with specimen impressions from machines, instruments or type i.e., typewriters, print type, etc., used to prepare the duplicating medium, i.e. stencil, "master", plate, etc.;
- (6) For any of these examinations, submit specimen standards from the suspected machine or preferably the machine itself, when practical. It may be possible for the document examiner, for example, to associate a rubber stamp or cheque writer with a suspect text by a study of the "setting" of the stamp or machine when seized or by a study of those characters, which have been subject to inking. Likewise, typewriters and printers have distinguishable characteristics, which a document examiner could identify if the machine was available for examination. It would be wise, therefore, for an investigator to consider the potential danger for the subject to destroy this type of evidence, should you undertake to obtain specimens rather than submitting the device itself for examination.
- (7) Standards of comparison required for printed or typewriting examinations are as follows:
- (A) For non-ribbon type printers (bubble-jet, laser etc.) specimens consisting of several pages of extended writings printed on the suspect printer;
- (B) For ribbon type devices e.g., typewriters, dot matrix printers etc.:
- a) Ribbon Impressions – These are the normal specimens taken from the typewriter or printer;
 - b) Direct Carbon Impressions – These are impressions obtained by typing so that the metal faces of the keys come in direct contact with the back of a new carbon paper which is placed immediately above the paper receiving the specimen impressions. The typewriter ribbon should be placed in "stencil" position or removed entirely from those machines, which do not have a "stencil" position;
 - c) The fact that the ribbon in a typewriter or printer may bear direct evidence of some incriminating text having been typed thereon should always be borne in mind. If such a possibility is felt to exist, the ribbon should be removed from the machine prior to the obtaining of any specimen material from the machine. This ribbon may then be submitted for examination and possible deciphering of any such text;
 - d) Both "ribbon" and "direct carbon" impressions should be obtained of the following:
 - Several imprints, separated by single spaces, of all type characters on the machine;
 - Several paragraphs - a total of twenty to thirty lines, using the text of the questioned documents, if possible, the paragraphs to be repeated three times.
- (8) The type of equipment, make, model and serial number of the equipment from which the specimens were taken should be reported either in the covering letter or preferably on the sheets upon which the specimens were taken.
- (9) Should the alleged date of execution of a questioned document be several years prior to the date of obtaining the specimen impressions, "collected" specimens produced about the same date as the questioned document should be submitted, if available.

7.3.4 Writing Instruments and Media

- (1) Written material can be examined with a view to establishing the writing media (fluid ink, ball-point ink, pencil, crayon, etc.) with which it was produced and may be compared with known or suspected media to determine any similarity as to type. Likewise, written material can be examined for the purpose of establishing the writing instrument (pens of various types) with which it was written and comparisons made with writing produced by known and suspected writing instruments to establish the presence of similar characteristics.
- (2) Documents may be examined for the purpose of deciphering writing, which has become illegible through age, fading or exposure to heat, light or water. They may also be examined to detect and decipher invisible writing.
- (3) An examination may be made to determine the sequence of crossed strokes in written or printed material.

- (4) Offsets, i.e., writing which has been transferred accidentally or deliberately from the medium on which it was originally executed to another medium, may be examined for the purpose of deciphering them and making comparisons with suspected sources.
- (5) The requirements for any of these examinations are:
 - (A) Submit both questioned documents and known standards to the laboratory without delay, preserving them in the same condition as when acquired and protecting them against further exposure to light, heat and moisture;
 - (B) Include any details in the covering letter concerning the conditions to which the questioned document was subjected or is alleged to have been subjected;
 - (C) Indicate in the covering letter if exhibits may be subjected to all tests, including chemical treatment, or to only those tests not altering the document's appearance or condition.

7.3.5 Approximate Age of a Document

- (1) The approximate age of documents can be determined by an examination of either "dated" inherent features within or "dated" material associated with the questioned document, e.g., writing instruments, media, typewriter impressions, watermarks in paper and by ink analysis.
- (2) For such an examination, submit both the questioned documents and any known standards available to the laboratory, without delay, preserving them in the same condition as when acquired and protecting them against further exposure to light, heat and moisture. Include any details in the covering letter concerning the conditions to which the questioned document was subjected or is alleged to have been subjected.

7.3.6 Paper Examination – General

- (1) The purpose of an examination of paper is:
 - (A) To examine and compare paper in order to identify similar types of paper, i.e., size ruling, appearance, composition, watermarks, etc.;
 - (B) To determine if a paper is from a particular source e.g., book, writing-pad, note-book, diary;
 - (C) To "date" a document on the basis of the date of manufacture of the paper;
 - (D) To determine, from watermarks or composition, the manufacturer and therefore the country of origin of the paper.
- (2) The requirements for such an examination are:
 - (A) Submit possible sources of the document as standards for comparison, e.g., book, writing-pad, notebook, diary, envelopes;
 - (B) Protect the document, particularly corners and edges from damage.

7.3.7 Tampering, Alterations, Erasures & Obliterations

- (1) The purpose of these examinations is:
 - (A) To determine the presence, or otherwise, of any alterations, erasures or obliterations;
 - (B) To decipher the original texts which have been mistreated;
 - (C) In alleged abstractions from the mail, to determine if tampering has occurred, if so, the circumstances surrounding them.
- (2) In the covering letter accompanying the exhibits, indicate if an exhibit may be subjected to all tests, including chemical treatment, or only to those tests not altering the document's appearance or state and indicate the areas of the suspected tampering.
- (3) In alleged abstraction cases, precautions must be taken to preserve the original condition of the letter as received at its destination. Special care should be taken not to attempt to lift any of the flaps or seams of the envelope. The correspondence and any other enclosures within the envelope should be submitted for examination, along with the outer envelope. In addition, any relevant materials, which may be used as standards, such as similar specimen envelopes, sealing wax, sealing dies, and postmark stamps, should be submitted, where available.
- (4) In cases of erasures, submit any paper surfaces, which may have been in contact with the erased areas prior to erasure, in an effort to locate and decipher "offsets" of the original writing.

7.3.8 Indented Writings and Indentations

- (1) The purpose of these examinations is:
 - (A) To decipher from indentations the text of the written or impressed material executed on the sheet above, e.g., investigation of anonymous letters, post office cancellation impressions, erasures, etc.; and
 - (B) To match complete or fragmentary indentations of strokes on an under sheet from the writing on a particular document, e.g., to prove that a certain document was written while in contact with a suspected pad, book, paper, etc.
- (2) When submitting exhibits for such an examination, do not compress or fold the paper surfaces in unprotected folders, to protect the document from further indentation in handling and mailing.

7.3.9 Charred Paper

- (1) These examinations can be conducted only in respect to charred paper, not with paper that has been burned to ashes. The purpose is to determine the nature of a charred document and to decipher the written or printed material originally on the document. Charred paper should be handled carefully, avoiding sudden drafts of air.
- (2) Ship charred material in a box between layers of soft tissues, which are supported on either side, by layers of teased-out absorbent cotton. The inner box should be enclosed in an outer box containing resilient packing material on all inner surfaces. Indicate "Fragile Contents" on outside of exhibit wrapper.

7.3.10 Miscellaneous Examinations and Functions

The examinations and functions listed hereunder are also undertaken at the laboratory: –

- Physical matching of torn papers and perforations;
- Deciphering written texts on carbon paper;
- Deciphering or matching offset impressions on blotters or other documents to establish an "association" between two or more documents;
- Determining sequence of folds and writing lines;
- Making clear an image that is blurred (for example, in a blurred photograph) or making readable, the words made unintelligible by security patterns and overprinting;
- Recomposing shredded paper; and –
- Enhancing audiotapes.

7.3.11 Fingerprinting Documents

- (1) Fingerprinting of documents is not a function of forensic document examiners, but rather, it is done by members of the RCMP.
- (2) In the event that documents are to be fingerprinted and also examined by a forensic document examiner, the investigator is advised to discuss this with the document examiner at the outset. Fingerprinting a document can alter the document such that a document examiner may no longer be able to obtain any useful readings from it.

7.3.12 Expert Testimony

- (1) The forensic examiners will give expert evidence in court with respect to material submitted to them for examination. When this is required, the laboratory will require advance notification of the impending prosecution to arrange for attendance of the appropriate forensic examiner and to prepare for testimony.
- (2) The CBSA examiner will require a subpoena to attend court proceedings. **EXHIBIT-**

7.A

"The Canada Letter" 1953 51st Ave.
West, Toronto 6, Ontario, August
27, 2002

Mr. and Mrs. W.E. James,
c/o Gold Medal Hospital X-ray Department, Lincoln
Road,
Postal Zone "B",

New York City, N.Y., U.S.A. Dear Vera and Eric:

We are enjoying a quiet and lazy Canadian holiday. Following a visit with Dr. Harry Young at Eric Beach from the 18th to the 20th of July, we journeyed to Sarnia and London. After six days in that zone, we went on to Niagara Falls via St. Thomas for a change of scenery. There we met John Oliver and Ken Guest, both of whom are presently working for Upper Canada Insurance Co. Last time I saw Ken was in 1999, I believe. Do you remember him? He has deserted the X-ray field to become a salesman.

Quite recently, we heard from Murray Robertson who has gone "down under". He is flying now for United Airlines Ltd.; Flight No. 600. I think, out of New Zealand. Incidentally, Murray sold us his car for eight hundred dollars and seventeen monthly instalments of twenty-five dollars and fifty cents (total price \$1,241.50). His interest rate was 6 1/2%.

Remind George that I haven't heard from Jean or him for seven or eight months. Presently we are at 6465 Queen St., Toronto. Our mail could be forwarded here for the next two or three weeks, if you wouldn't mind. Very truly yours, Bob.

Note: the names of individuals, places, address, dates and monetary amounts should, where possible, be substituted with comparable items from the questioned text

December 2012

Chapter 8 – Solicitor-Client Privilege

8.1	Solicitor-Client Privilege
8.2	Solicitor-Client Privilege Claims
8.3	Searching premises belonging to the taxpayer under investigation
8.4	Searching premises belonging to a third party (other than a lawyer)
8.5	Searching a Law Office Prior to Executing Search of Law Office Procedures to Execute Searches of Law Offices Electronic Records at Law Office
8.6	Dealing with Potential Solicitor-Client Privileged Records at Other Search Sites Sealing Documents Delivery of Documents to the Custodian Electronic Records
8.7	Court Process to Determine Solicitor-Client Privilege
8.8	Report to Headquarters
8.9	Seeking Information and Documents via Third Party Production Order

8.1 Solicitor-Client Privilege

This chapter contains the Criminal Investigations Directorate's overall policy on solicitor-client privilege as it pertains to CRA criminal investigations. Solicitor-client privilege impacts CRA investigations in various ways:

- Investigators find potentially privileged information when executing a search warrant at the residence or business of the taxpayer under investigation.
- Investigators find potentially privileged information when searching the premises of a third party (other than lawyer) or a CRA office.
- Investigators seek information in the possession of a lawyer.

These guidelines do not apply to other CRA program areas dealing with similar situations in a civil context.

Solicitor-client privilege attaches to oral or written communications between a client and a lawyer in the following circumstance:

- Where a client seeks advice from a lawyer;
- Where a lawyer provides advice in his or her professional capacity;

- Where the communication between the client and the lawyer relates to legal advice;
- Where the communication between the client and the lawyer is made in confidence.

If there is any indication that a particular document may be subject to solicitor-client privilege CRA investigators must not unilaterally decide on the privilege. **Only a judge can decide what documents or records are subject to solicitor-client privilege.**

Clients have the right to communicate with their lawyer in the utmost confidentiality. The root of this principle is found in the 16th century when the courts first recognized the privilege as a rule of evidence [*Berd v. Lovelace* (1577), 21 E.R. 33; *Dennis v. Codrington* (1580), 21 E.R. 53]. This rule of evidence has been confirmed on various occasions as a "fundamental and civil right"[see *Solosky v. The Queen*, (1980) 1 S.C.R. 821 at p.839; *Descôteaux et al. v. Mierzewski*, (1982) 1 S.C.R. 860, at p.870, *Lavallée, Rackel & Heintz v. Canada* (2002 SCC 61), *Maranda v. Richer*, (2003 SCC 67).

The decisions of the Supreme Court of Canada have consistently strengthened solicitor-client privilege. The court no longer considers solicitor-client privilege merely as an evidentiary or procedural rule and but rather a fundamental civil and constitutional right.

A lawyer owes a duty of confidentiality to every client. The lawyer's obligation to confidentiality prohibits disclosure of confidential information, as this is fundamental to the relationship between a lawyer and his/her client.

When determining whether something is protected by solicitor-client privilege, a judge will consider the following four conditions:

1. There must be a communication, whether written or oral;
2. The communication must be of a confidential nature;
3. The communication must be between a client (or his/her agent, such as an accountant) and a legal advisor;
4. The communication must be related to the seeking, formulating or giving of legal advice. The courts have made it clear that communications between an accused and their counsel are to be accorded the highest level of protection and confidentiality. In addition, they have commented that "solicitor-client privilege must be as close to absolute as possible to ensure public confidence and retain relevance. As such, it will only yield in certain clearly defined circumstances and does not involve a balancing of interests on a case-by-case basis."

Despite the importance placed on solicitor-client privilege it is not an absolute and is subject to a very few limited exceptions. One of the exceptions is that solicitor-client privilege does not apply to communications between a lawyer and his/her client with the intention of assisting the client in committing a crime or fraud. An exception may also be made for documents stored at a lawyer's office for the purpose of avoiding seizure.

8.2 Solicitor-Client Privilege Claims

Investigators and searchers must allow the accused, their lawyers or other third parties to claim solicitor-client privilege on any document that is seized under the authority of a search warrant. The issue of whether a particular document is covered by solicitor-client privilege will be resolved through the courts.

CRA searchers must identify any documents or records that could potentially be subject to solicitor-client privilege. The documents or records must be brought to the attention of the search leader who will give the accused, their lawyers or other third parties the opportunity to claim solicitor-client privilege.

If the accused, their lawyers or other third parties are not available to determine whether a claim for solicitor-client privilege should be made then the search leader should err on the side of caution and seal the document or record in accordance with procedures outlined below under Sealing Documents.

If during the course of reviewing seized documents the lead investigator finds documents or records that may be subject to solicitor-client privilege, regardless of the location they were seized from, then they must seal the document or record as described below.

If during the processing of seized electronic items there are documents discovered which are potentially solicitor-client privileged regardless of the location they were seized from, then the procedures outlined below under Electronic Records must be followed.

Only the client can waive solicitor-client privilege. An investigator must not presume that solicitor-client privilege has been waived on any particular document simply because the taxpayer did not explicitly make a claim. This is especially true on the day of a search action when the taxpayer may not be fully aware of their right to solicitor-client privilege.

The courts have held that privilege does not attach to legal advice used in the furtherance of a fraud or an illegal act. Where fraud is present, no privilege can be found for communications relating to the alleged fraud. It is not necessary to show that the lawyer knew that the advice would be used for this purpose. The mere allegation of fraud however is not sufficient to displace privilege; sufficient evidence must be introduced to show that the allegation is made seriously and on sound grounds. If an investigator has suspicions that the legal advice was used in the furtherance of a fraud or illegal act this should be brought to the attention of the assigned Public Prosecution Service of Canada lawyer.

8.3 Searching premises belonging to the taxpayer under investigation

When investigators search a taxpayer's home or office and find legal correspondence, bills, receipt of payment acknowledgement or invoices from a lawyer to the taxpayer, they are dealing with information that is potentially protected by solicitor-client privilege.

The approach to be taken is to not examine the documents any further and treat the documents as if a claim has been made that they are protected by solicitor-client privilege.

Financial instruments such as bank statements, cheques and credit card statements that contain payments to lawyers are not privileged communications. These are items over which privilege is lost because they are not confidential and have been shared with other parties.

If the taxpayer waives privilege, investigators must note the facts surrounding the waiver. The notes and a subsequent report should specifically refer to the time, date, place, witnesses present and the manner in which the privilege was waived.

If the taxpayer claims privilege on documents that do not appear to be privileged, CRA investigators should honour the claim and let a judge make the determination.

8.4 Searching premises belonging to a third party (other than a lawyer)

If investigators discover copies of legal correspondence between the taxpayer under investigation and his/her legal counsel while searching the premises belonging to a third party, they should treat the documents as being potentially protected by solicitor-client privilege.

Solicitor-client privilege does not normally extend to documents or communications between accountants and their clients. Accounting records, working papers and adjusting entries kept by the accountant are deemed to be an extension of the taxpayer's books and records. However, solicitor-client privilege may extend to an accountant's work and advice where that accountant works as an agent or representative of the client for the purpose of seeking, receiving or implementing legal advice in conjunction with a lawyer.

If a claim of solicitor-client privilege is made on the documents, CRA investigators should honour the claim and let a judge make the determination.

8.5 Searching a Law Office

Prior to Executing Search of Law Office

Before seeking a search warrant for a lawyer's office investigators must consult with Criminal Investigations Directorate, Investigations Advisory Services and the Public Prosecution Service of Canada (PPSC).

The Supreme Court of Canada has indicated that there is a duty to minimize the impairments of solicitor-client privilege when a search in a law office is authorized and executed. This duty rests with the investigator who applies for the warrant, the authorizing judge and those executing the warrant.

Investigators must be aware of the general principles articulated in *Lavallee, Rackel & Heintz*, supra, at paragraph. 49, relating to search warrants to be executed at law offices which can be found in **chapter**

6.3.8.8 Minimum Requirements to Search Law Offices.

Investigators must satisfy the issuing justice that there are no other reasonable alternatives to obtaining the records from the law office. Search warrants for law offices must be sworn before a Judge of the Provincial

Court and the grounds for the Information to Obtain must explain why there exists no other reasonable alternative. Refer to **chapter 6.3.8.7 Search of a Lawyer's Office and 6A – Searching A Law Office**. An investigator may not seek documents that he knows are protected by solicitor-client privilege. The Supreme Court found in *Maranda* that as a general rule any information and documents that reveal the amount of fees paid to a lawyer by a client will be protected by solicitor–client privilege. This is confirmed at paragraph 33:

"Because of the difficulties inherent in determining the extent to which the information contained in lawyers' bills of account is neutral information, and the importance of the constitutional values that disclosing it would endanger, recognizing a presumption that such information falls prima facie within the privileged category will better ensure that the objectives of this time-honoured privilege are achieved. That presumption is also more consistent with the aim of keeping impairments of solicitor-client privilege to a minimum, which this Court forcefully stated even more recently in *McClure*, supra, at paras. 4-5."

The *Maranda* decision did leave open the possibility that an investigator could request that the Judge allow CRA to seize documents that would disclose information about fees paid to a lawyer as follows at paragraph 34:

"..when the Crown believes that disclosure of the information would not violate the confidentiality of the relationship, it will be up to the Crown to make that allegation adequately in its application for the issuance of a warrant for search and seizure. The judge will have to satisfy himself or herself of this, by a careful examination of the application, subject to any review of his or her decision."

Procedures to Execute Searches of Law Offices

Before attending at the premises named in the warrant the officer in charge of executing the warrant shall advise the law society in the relevant province of the name and location of the premises to be searched and the time and date of the search in order that the law society may designate a representative to attend on its behalf at the search, if it sees fit to do so. The lead investigator should contact the PPSC to obtain information on the procedures used in the province that the warrant will be executed.

Immediately after arriving at the premises, the officer in charge shall advise the solicitor upon whom the warrant is executed that he or she may immediately contact the relevant law society, and/or his or her own counsel, for guidance regarding his/her obligations arising from the execution of the Warrant.

In addition, the client whose records are the subject of the warrant must be advised, if possible, of the warrant and execution of the search action. This should be done shortly after the initial discussions with the lawyer.

The officers executing the warrant shall defer their search of the premises and shall not remove anything from the premises until the lawyer has had a reasonable opportunity to confer with a representative of the law society and/or their own counsel regarding his or her obligations arising from the execution of the warrant, and if desired by the lawyer, await the arrival of a representative of the law society at the premises. The investigators executing the warrant should take such steps as necessary to secure the premises to prevent the removal or destruction of anything from the premises.

The premises shall be searched by a partner of the law office or his or her designate, for the items set out in the warrant. The partner or his or her designate and the officer in charge of the search should establish a protocol for the search that allows the lawyer to gather together the files and other documents of the relevant client. The officer in charge must be satisfied that all relevant evidence has been collected.

If a lawyer at the firm is the subject of the investigation it is advisable to have a lawyer assigned by the relevant law society to carry out the search.

Regardless of whether solicitor-client privilege is claimed, anything seized pursuant to the Warrant shall be dealt with as if a solicitor-client privilege claim has been made.

In the *Lavalee* judgment the court emphasized that every effort must be made by all relevant players (the issuing justice, the police(CRA criminal investigators), the lawyer, the Law Society) to ensure that the encroachment on solicitor-client privilege that flows from any law office search must, to the greatest extent

possible, be minimized. Fundamental to this principle is the idea that the enforcement agency should not seize more documents than authorized by the warrant.

In *Maranda* the Supreme Court of Canada was highly critical of a police search of a law office where it was apparent that the police had seized many more documents than were justified by the scope of the warrant. In order to preserve solicitor-client privilege searchers at a law office must not seize any documents or records that are not covered in the warrant.

Electronic Records at Law Office

The partner, their designate or the law society representative shall search the law office's computer systems to search for the items set out in the warrant or if they wish they may appoint a person knowledgeable in the law office's computer systems to do so.

The Informatics Investigator (II) will advise the person on the best techniques to be used to search and if necessary seize the document or media found at that location.

The examination is made by or under the control of the partner, their designate or the law society representative. The examination aims at determining if the media or part thereof should be seized. The lawyer, their designate or the law society representative informs the II if the media contains documents that pertain to the warrant or the case.

The II determines the best way of seizing the document or media covered by the warrant. Electronic records seized at a lawyer's office will be sealed as outlined under Sealing Documents below.

8.6 Dealing with Potential Solicitor-Client Privileged Records at Other Search Sites Sealing Documents

When seized documents are potentially subject to solicitor-client privilege investigators should place the documents in sealed envelopes or other sealed containers. Separate envelopes or containers should be used for each client. With the lawyer's consent, the seizing officer may assist in counting and recording the number of pages or documents contained in the envelope or container.

The seizing officer and, when possible, the lawyer should affix their signatures to the seal of the package or envelope enclosing the documents as a means of ensuring that the documents will not be removed from the sealed package or envelope until they have been produced to a judge. **Delivery of Documents to the Custodian**

The sealed packages and envelopes shall be delivered forthwith into the custody of the Court Registry, Sheriff or a mutually agreeable custodian by the CRA investigator, accompanied, if desired, by the lawyer, or his or her designate.

Whether or not a claim of privilege is made in respect of any of the seized items, none of the seized items may be released to the CRA unless a Judge is satisfied that reasonable steps have been taken to notify the clients to whom the seized items pertain of the seizure and that they may have privileged solicitor-client communications within the seized items.

The investigator must notify PPSC that items have been seized and placed with the custodian because the documents may be solicitor-client privileged. It is imperative that Crown counsel be assigned promptly to the case in order to allow them to deal with the issue of solicitor-client privilege claims in a timely manner.

Electronic Records

If during the course of processing the electronic media the II identifies records that are potentially subject to solicitor-client privilege they should cease with processing the media. They should then contact the investigator and inform them that he has identified potentially solicitor-client privileged documents. The investigator, II or Regional Informatics Investigator may contact PPSC to obtain guidance on how to deal with the media or follow guidance given previously by local PPSC counsel.

The II should follow procedures and guidance given by the Criminal Investigations Directorate, Forensics and Informatics Section in formulating and executing a plan to deal with creating images of seized and sealed electronic items.

The II may be required by the court to attend the custodians' location and create images of the seized items. The images will be distributed as per instructions from the Judge, however, must not be provided to the investigator without the expressed order of the Judge.

8.7 Court Process to Determine Solicitor-Client Privilege

All potential privilege holders must be contacted by the investigator, PPSC or the court and given a reasonable opportunity to assert a privilege claim. The court may appoint a monitor/referee to provide the appropriate notification on its behalf.

The client, lawyer or another appointed lawyer will have an opportunity to inspect the sealed items. It will be up to them to decide whether to pursue the solicitor-client privilege claim. Regardless of whether they are pursuing the claim or not the sealed items cannot be released to the CRA investigator unless expressly ordered by a Judge.

The Crown, the lawyer, and any client who may have a claim of solicitor-client privilege over the seized items may apply to the court for direction on how to deal with the potential solicitor-client privileged items.

Notice must be given to all parties that may have an interest in asserting a solicitor-client privilege claim that a hearing will take place.

The Crown may make submissions on the issue of privilege, but shall not be permitted to inspect the items beforehand. The Crown can only inspect the items if and when it is determined by the Court that the items are not privileged.

The Judge will make a determination whether any or all of the sealed documents are subject to solicitor-client privilege based on a review of the documents and submissions by interested parties.

Any of the seized items found not to be subject to solicitor-client privilege may be used in the normal course of the investigation.

Any of the seized items found to be subject to solicitor-client privileged, shall be returned to either the lawyer, the holder of the privilege, or to a person designated by the Court.

Any documents determined not to be protected by solicitor-client privilege but subject to the "Things To Be Searched For" become part of the seized items that were initially seized pursuant to the search warrant and remain subject to the rules relating to detention orders.

8.8 Report to Headquarters

Within two weeks of a search the lead investigator should forward a Search Report to the Director, Criminal Investigations Division, Criminal Investigations Directorate as per **chapter 14.1.3 Search Report**. The report should include an outline of the circumstances of the solicitor-client privilege claim.

8.9 Seeking Information and Documents via Third Party Production Order December 2012

Before seeking a production order for a lawyer to produce documents or information, investigators must consult with Criminal Investigations Directorate, Investigations Advisory Services and the PPSC. All Informations to Obtain Production Orders for a law office are to be reviewed by Criminal Investigations Directorate.

The first two principles articulated in *Lavallee, Rackel & Heintz*, supra, at paragraph. 49, relating to search warrants also apply to production orders. In the Information to obtain investigators will have to satisfy the judge or justice that the documents or data are not protected by solicitor-client privilege and that there are no other ways to obtain the documents or data.

The other principles in *Lavallee* do not apply to production orders since the third party (the lawyer) subject to the order may object pursuant to section 487.015 to the disclosure of documents or information protected by solicitor-client privilege.

However, if investigators identify documents or data that are potentially privileged that they received through a production order, they must follow the procedures set out in section 8.6 and 8.7.

October 2013

Chapter 9 – Interviews and other communication with taxpayers and third parties

9.1 Purposes

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Appendix 9.1 Caution

Appendix 9.2 Procedures - Videotaped statements under oath or affirmation (KGB Interview)

Appendix 9.3 Federal and Provincial Privacy Legislation

9.1 Purposes

- (1) Interviews with the person under investigation and third parties are one of the most important aspects of an investigation. Interviews may uncover information that exonerates the person under investigation or demonstrates he/she likely committed an offence.
- (2) Interviews give the person under investigation an opportunity to provide explanations before charges are laid.
- (3) Other forms of communication with the person under investigation or third parties include:
 - contacting the person under investigation or a third party by telephone or in writing to request an interview;

- officially notifying the person under investigation (and/or their legal representative) that they are under investigation and the results of the investigation.
- (4) This chapter contains guidelines for CRA investigators on the legal and practical aspects of interviews and other forms of communication with the person under investigation and third parties.

Investigative Interviews

- (1) CRA investigators interview the person whose affairs are under investigation and third parties who may have information related to the case. CRA auditors and other officials may interview the same individuals during an audit or review of their tax affairs. However, the difference between the two types of interviews is that investigators must always be conscious of how the Canadian Charter of Rights and Freedoms (Charter) impacts on the interview.
- (2) Section 7 of the Charter refers to the "principles of fundamental justice". The Supreme Court of Canada interprets this as the right to be free from "self-incrimination". For CRA investigators, this means that they cannot use the authorities under the ITA or ETA to compel someone to provide information if they are conducting a criminal investigation. This applies to the person under investigation and third parties.
- (3) Whenever CRA investigators interview the person under investigation for the purposes of obtaining evidence, they must give them the caution (see Appendix 9.1).
- (4) CRA investigators are public officers with no authority to arrest or detain a person except for ordinary powers of citizen's arrest, which will not normally be applicable. If a person is not arrested or detained, there is no *Charter* requirement for CRA investigators to provide the person with a formal right to counsel. However, providing the right to counsel is a reasonable practice to inform the person that they can speak to a lawyer if they wish to do so.
- (5) The CRA caution does not include references to duty counsel or legal aid programs. These provincial programs are only available to persons charged with an offence, arrested, detained or taken into custody. The references to duty counsel and legal aid do not normally apply to CRA interviews. However, investigators should have the legal aid and duty counsel information for their region available in case the person they are about to interview requests it, or cannot contact a lawyer or they interview someone who is arrested or detained by the police. This is not a legal requirement but another reasonable practice to demonstrate to PPSC, defence and the courts that CRA investigators respected the rights of the person under investigation.
- (6) During CRA interviews, the person being interviewed is free to leave at any time. It is important for CRA investigators to make sure that the person being interviewed understands that they are not under arrest or detention.
- (7) The caution only applies to persons who have been or may be charged with a criminal offence. Investigators should not caution third parties unless they intend to use the information they obtain from them as evidence against them in a criminal prosecution.
- (8) As with most aspects of a criminal investigation, the manner in which the caution is given may be challenged in court. Investigators should be prepared to explain the caution in terms that the interviewee understands. A translator may be required. These issues should be addressed when planning the interview.
- (9) It is extremely important that investigators document how they determined that the interviewee knew that they were not under arrest or detention and did not have to answer the CRA investigator's questions. Failure to do so may result in the exclusion of the direct evidence obtained during the interview and any derivative evidence obtained as a result of the interview.

Contact from the person under investigation

The following general practices should be considered when the person under investigation contacts a CRA official:

- (1) Audit staff should follow the guidelines in the Audit Manual: 10.11.8 Referrals to Criminal Investigations Program, Taxpayer / Registrant Contact Guidelines.

- (2) If the person under investigation contacts the investigator in charge of the case to ask about his/her file, tell him/her that you are reviewing the file. If the person wishes to discuss the case, try and arrange an interview. If the person under investigation continues to speak about the case over the telephone, read him/her the caution.
- (3) If a case goes to trial, investigators must be prepared to explain how they told the persons under investigation their Charter rights and how they knew that the person understood these rights.

9.2 Interviews of the Person under Investigation Procedures

The following procedures should be followed when investigators interview the person under investigation:

- (1) Identify yourself as an investigator and present your badge and authorization card.
- (2) Tell the person that they are under criminal investigation, read the caution, before asking any questions that may lead to information that can be used as evidence against them.

Executing Search Warrants

- (1) Executing search warrants often lead to contact with the person under investigation. Whether or not you wish to interview the accused will depend upon the circumstances of the case. Each case must be addressed on its own merits and this decision will rest with the investigator and his/her team leader.
- (2) When serving a search warrant on a person under investigation, investigators usually ask administrative questions that do not relate to whether that person committed an offence. Therefore, as a general rule, **investigators should not read the caution to the person under investigation as soon as they serve him/her the search warrant.** If the person under investigation spontaneous says something that can be used as evidence, then investigators must read him/her the caution. The caution should be read immediately before investigators intend to ask the person under investigation questions that will elicit information that will be used as evidence.
- (3) If the person under investigation is expected to be interviewed on the day of the search, part of search plan should include deciding who will conduct the interview. The timing of the interview will vary from case to case. It may begin immediately after the warrant is served (and the person is cautioned) or it may be after certain evidence is found. All search team members should be on the alert for documents or records that are eligible to be seized that may be useful in the interview. A system should be worked out in advance for bringing such evidence immediately to the attention of the interviewers.

Representations during the Investigation

- (1) A person under investigation is entitled to provide explanations during an investigation. Whenever the person under investigation wishes to discuss issues of the case, investigators must give them the caution.
- (2) A person under investigation or representative may contact investigators at any point in a case, either to protest the investigation, to cooperate or to seek early resolution. They should be listened to courteously and all comments should be noted and kept with the case file. Refer to the CRA's Early Resolution Policy for more guidelines on early resolution.

Statements from the person under investigation

- (1) Statements are very valuable in an investigation. They may offer a possible defence, which can be addressed early in the investigation. Statements given by a person under investigation will be subject to a *voir dire* (trial within a trial) to determine admissibility if the Crown wishes to tender them as evidence. The trial judge will determine whether it was made voluntarily and whether investigators respected the person's Charter rights. The circumstances leading up to the statement, details of the place where the statement was taken, the number and location of everyone present, and the overall dynamic of the exchange are items that a judge will consider in determining whether the statement was given voluntarily.

- (2) The preferred method for taking a statement from a person under investigation is a video taped (or digitally recorded) statement. Audio taped statements are also an option available to CRA investigators. Written statements should only be taken as a last resort if electronically recorded statements are not possible.
- (3) Investigators must give the person under investigation the caution before asking for information that can be used as evidence. The investigator should be accompanied by another investigator who will serve as a witness to the proceedings. If the statement is being videotaped, the second investigator can observe from the adjacent video and audio equipment room. Investigators taking part in an interview should take notes regarding the circumstances surrounding the taking of the statement. Refer to the Interview Notes section of this chapter and Chapter 13 of the Investigations Orientation Course for more guidelines on how detailed the notes should be.
- (4) If the person under investigation is accompanied by a lawyer, investigators can ask the person under investigation if they can speak in private and explain that he/she can stop the interview and seek advice from his/her lawyer at any time. If the person under investigation insists that his/her lawyer accompanies them in the interview room, allow them this courtesy. Investigators should not let the lawyer control the interview or speak on behalf of the person under investigation.

Procedures for taking recorded statements from the person under investigation

The following are general procedures to ensure that video or audio recorded statements from a person under investigation are admissible. Investigators should also refer to the Investigations Orientation Training Course, Chapter 15 Interviewing Techniques:

- If the person under investigation brings a lawyer to the interview, explain the following at the outset.
 - you will be talking with the person under investigation about the criminal investigation into his/her tax affairs
 - ask the person under investigation if he/she consents to disclosure of his/her taxpayer information with this legal representative
 - read the caution
 - get verbal confirmation that the person under investigation understands it
 - obtain consent from the person under investigation to record the interview
 - capture the consent to record the interview on camera (or audio) at the start of the interview
- If a lawyer does not accompany the person under investigation to the interview:
 - read the person the caution
 - get verbal confirmation that he/she understands it
 - obtain consent to record the interview
 - capture all of this on camera (or audio) at the start of the interview

The assisting investigator who is monitoring the interview may observe from the adjacent video room. The assisting investigator should also note potential follow-up questions and non-verbal reactions that the person under investigation makes. One-on-one interviews help build rapport between the investigator and the interviewee, which is a very important factor in successful interviews. However, if the lead investigator prefers having a second investigator in the interview room, then they may do so.

9.3 Final interviews with the person under investigation *Scheduling*

Final Interviews

- (1) If the case will be referred to the PPSC, the investigator in charge of the case should invite the person under investigation to an interview to discuss the possible criminal consequences of the investigation. The final interview should take place before investigators issue the criminal proposal letter. Exceptions to final interviews are in paragraph 5.
- (2) Sufficient notice of the final interview should be given to allow the person under investigation a reasonable time to prepare if they wish to attend. The invitation should be made either verbally or in writing after the investigation is complete and while the investigator is finishing the prosecution report.

- (3) If the person under investigation accepts the invitation, whatever he/she says in response to the allegations should form part of the referral to the PPSC. Investigators must tell the person under investigation this during any discussions regarding representations.
- (4) If the person under investigation declines the invitation to a final interview or if mutual arrangements cannot be made for a suitable date or where promised representations are not forthcoming within a reasonable time, investigators should complete the prosecution report and ask the TSO Director to refer the case to the PPSC. If there is no final interview, investigators will tell the person under investigation in writing, of the referral to the PPSC (exceptions to written notice are in paragraph 5).
- (5) If the Assistant Director, Criminal Investigations believes that inviting the person under investigation to a final interview is not appropriate (such as the invitation itself may cause the person under investigation to flee Canada or otherwise jeopardize the prosecution), then there should be no offer of a final interview.
- (6) If investigators, in consultation with their team leader and Assistant Director, Criminal Investigations, decide not to refer the case to the PPSC, they must tell the person under investigation in person or in writing that no criminal charges will be laid.

Final Interview Procedures

- (1) The procedures for final interviews with the person under investigation should generally be the same as those described in section 9.2. Investigators should attempt to videotape or audiotape the final interview.
- (2) Investigators must be able to document that the person under investigation knows that the interview is voluntary and that the person under investigation may end it at any time.
- (3) Read the person under investigation the caution before asking any questions that may lead to information that could be used as evidence.
- (4) Tell the person under investigation what issues will be dealt with civilly and what ones will be the subject of the proposed criminal charges.
- (5) If not already provided, give the person under investigation information and schedules to support the proposed referral to the PPSC.
- (6) Do not disclose sensitive material and evidence such as witness statements until formal disclosure is made through PPSC.
- (7) Investigators must record whatever the person under investigation says in response to the allegations and these representations will form part of the referral to the PPSC.
- (8) If the person under investigation(s) wishes to present written representations after the interview, they should be encouraged to submit them directly to the investigator who will forward them to the PPSC on their behalf. Investigators must make sure that the person under investigation knows that the representations will be forwarded to PPSC.
- (9) A memo outlining details of the final interview must be prepared as soon as possible after its conclusion. Prior to placing it on the person under investigation's file, it will be reviewed, signed and dated by the CRA officials who were present.

Proposal Letters—Criminal

Unless the Assistant Director, Criminal Investigations believes that written notice will jeopardize the prosecution, notify the person under investigation by registered letter (and send a copy to the legal representative) that the case will be referred to the PPSC. The letter should outline the proposed referral date, the number of years involved, the alleged unreported income, taxes evaded, the offences and the person under investigation's representations to the allegations. If the representations come after the referral is made, they should be forwarded to PPSC upon receipt. ***Representations Concerning the Decision to Prosecute or***

Penalize

- (1) If a person under investigation tells investigators that he/she will contact the Minister, Commissioner, or other senior CRA or government official, he/she should be told that they have every right to do so and that such representations will be forwarded to the PPSC. The investigator should tell the person

under investigation that providing any new information directly to the investigator in charge of the case may save time.

- (2) If the person under investigation tells investigators about taking such action, investigators should notify the Director, Criminal Investigations Division, Criminal Investigations Directorate.

9.4 Interviews with Third Parties

- (1) CRA investigators should interview persons who may have knowledge of the business and financial affairs of the person under investigation or who were parties to transactions with or on behalf of the person under investigation or who may possess documents or information that may be evidence of the offence.
- (2) The objective of interviews with third parties is to determine:
 - what evidence is available from these sources (documentary and oral);
 - who possesses the evidence and who can introduce it in court;
 - The best person who can speak to each document and transaction(s).
- (3) The caution does not apply to third parties unless investigators wish to use the information they obtain from the third party as evidence that they also committed a criminal offence.
- (4) When seeking information or permission to examine books or original documents belonging to third parties, investigators should properly identify themselves as CRA investigators. The approach to take will vary from case to case. For example, it may be best to speak to a third party in private before showing your identification card and badge.
- (5) The easiest way to obtain cooperation is to identify yourself as an investigator with the CRA and to say, "I would like to ask you a few questions." Use words like "assist", "help" and "request". Do not use words such as "comply" or "require".
- (6) Tell third parties that they are not under investigation. This assurance is not just to put the third party at ease; it is also to clarify their role and that of the investigator.
- (7) At the beginning of the interview, it is not necessary to ask the third party to sign a form stating that his/her statement is voluntary. Later on, if you determine that the witness has relevant information, take a statement from the third party, which will include an acknowledgement that it is provided voluntarily. If the interview is video or audio taped, you should explain this at the start and ask the witness to acknowledge that he/she is there voluntarily.
- (8) The amount of taxpayer/registrant information to disclose to the third party is restricted by what "can reasonably be regarded as necessary for the purposes of the administration or enforcement of this Act" pursuant to section 241(4)(a) of the Income Tax Act and/or 295(5)(a) of the Excise Tax Act. For example, in order to obtain information from third parties about certain transactions they had with the person under investigation, they may only need to know the name of the taxpayer/registrant and the dates of the transactions and no further details of the investigation.
- (9) Investigators should also be prepared to explain to third parties that section 487.014 of the Criminal Code authorizes people to voluntarily cooperate with public officers. This section says a person can provide documents, data or information to investigators as long as they are not prohibited by law from doing so.
- (10) Business and accounting records, in general, are not considered to contain biographical coreⁱⁱ¹ information about the person under investigation. Therefore, third parties who possess normal business and accounting records are not prohibited by law from providing them to a CRA investigator. However, if investigators are seeking banking records or other types of sensitive information to which the person under investigation has a reasonable expectation of privacy, then they must use a production order or warrant to obtain this information.
- (11) Investigators should review the relevant federal and provincial privacy legislation and be prepared to show the third party the section that says private sector organizations may share information they collect with law enforcement agencies. See Appendix 9.3 for an overview of the legislation.

Keeping the third parties personal tax situation separate from the criminal investigation (1) The third party's personal tax situation must be kept separate from the criminal

investigation and this must be made clear in all correspondence and interviews with the third party. Any letters investigators issue to third parties or any discussions they have with third parties should contain very clear and detailed explanations delineating the civil from the criminal.

- (2) Regardless of the approach taken to arrange the interview (one letter, two letters, cold call), it must be clear that the assessment position of the third party is a separate civil matter and that the investigator is focused solely upon gathering evidence against the person under investigation and seeking the voluntary cooperation of the third party.
- (3) Investigators must be able to demonstrate (through notes, reports, memos, letter, digital recordings) that the third party did not feel threatened or coerced into cooperating in the criminal investigation on the understanding they will be treated more leniently from a civil reassessment standpoint.

Examples of third parties in a CRA investigation: External Accountant

This includes the person who prepared the returns. The reasons for making adjustments and setting out information in the returns must be determined, and any oral or written instructions received from the subject must be obtained.

Employees

There may be employees who can identify records and may be able to explain business processes and operations or disclose transactions or schemes used to perpetrate the fraud or assist in locating evidence of the offence. Employees are usually valuable witnesses in cases involving destruction of records.

Impartial Witnesses

These are customers or suppliers who will usually co-operate in providing information.

Hostile or Reluctant Witnesses

Some third parties may resist providing information or documents if they are closely associated with the person or fear being involved in the case. The investigator must determine how important the information they are seeking is and the best method to acquire it. There are various methods available to obtain evidence, such as production orders, search warrants and inquiries under section 231.4 of the ITA or subsection 276(1) of the ETA.

Accomplices

An accomplice is one who participates in an offence. For example, the target of a CRA investigation has business dealings with employees, accountants, bookkeepers, customers, banks, clients, vendors and suppliers. These other persons may have participated in the offence by recording the transaction differently than it occurred or issuing the invoice to a business instead of the person under investigation. In doing so, they may have committed an offence under 239 of the Income Tax Act and/or 327 of the Excise Tax Act or an offence under the Criminal Code. Investigators should always consult with their team leader and consider the Best Case Concept before expanding the investigation to include secondary targets.

Prior to the interview, investigators should decide whether to consider the accomplice a secondary target or a witness. If the accomplice is considered a target, then investigators must caution them before taking a statement. Investigators cannot induce the accomplice to provide information by saying that they will not be prosecuted (or audited) if they give a statement. Similarly, investigators cannot threaten to prosecute (or audit) the accomplice or to review their civil tax affairs if he/she refuses to give a statement.

Interview Notes

- (1) Investigators should take notes of who is present, the time the interview began and when it finished, questions, responses and other observations. All notes of interviews must be kept and disclosed if charges are laid. **The notes should cover the entire interview and not just selected portions.**
- (2) If the interview is audio or video recorded, investigators should take notes of who is present, the date, time, place, who is operating the recording equipment, when the recording started and stopped and the identification label that is affixed to the original audio or video tape.

- (3) Notes may also help investigators identify issues to address later in the interview or items to resolve after the interview. Investigators must prepare a witness report for all witnesses – including those who are recorded on audio/video.
- (4) Refer to chapter 13 of the Investigations Orientation Training Course for further information on note taking. The next sections of this chapter and Appendix 2 contain further policy and procedures on electronically recorded interviews

Witness statements

- (1) Witness statements provide an official record of what was said during the interview. If the case goes to court, witness statements show PPSC what evidence is available from a witness, they may help witnesses refresh their memory and could be used to cross-examine witnesses if they change their testimony.
- (2) The decision to take a formal statement from a witness will depend on whether the witness has relevant and material evidence to give about the case. Once a formal statement is taken, potential witnesses are held to this testimony. Witnesses should only be asked to report what they saw, heard, said or did to their best recollection. Investigators should make every effort to obtain explanations for any known discrepancies.
- (3) Witness Reports will be prepared for all witnesses as detailed in **Chapter 13 Witness Reports**.

Electronically Recorded Witness Interviews

- (1) Videotaped interviews should be considered for all witnesses in a CRA case. Not all videotaped interviews are so called "KGB interviews". Some of the differences are that KGB interviews are taken before a commissioner of oaths and witnesses are warned that they can be charged with obstructing justice, perjury or fabricating evidence if they give false evidence during the interview.
- (2) Whether or not to hold a "KGB" interview will depend on such factors as how important the witness is to the case, where and when the interview will take place, and the availability of a commissioner of oaths. However, even if a KGB interview is not possible, investigators are still encouraged to videotape the interview.
- (3) A videotaped interview (and to a lesser extent an audio taped interview) allows investigators a better opportunity to compare answers to those of other witnesses. Investigators, CIP team leaders and PPSC can use the video to assess the reliability and credibility of a witness.

Videotaped interviews taken under oath or affirmation (KGB interview) (1) A

"KGB interview" should be considered for the following persons:

- Key witnesses
 - Witnesses who are ill or unavailable when the case goes to court
 - Family members, employees, business associates, partners, accomplices and co-conspirators
- (2) At a "KGB interview" the witness swears or affirms to a commissioner of oaths or a justice that he/she will tell the truth. If the case goes to court and the witness recants or is not available to testify, the Crown may apply to introduce the videotaped statement as evidence.
 - (3) The term KGB comes from the 1993 Supreme Court of Canada (SCC) decision in *R .v. B (KG)*. The SCC ruled that pre-trial videotaped statements can be introduced in court as the true testimony of the witness even if the witness recants their earlier statement at trial. Before allowing the videotape into evidence, the trial judge will review the tape and consider all the circumstances surrounding the taking of the statement. Where the judge is satisfied the statement depicted on the video is reliable, the court can either accept the present recantation of the witness as truthful or accept as truthful the statement recorded on videotape.
 - (4) In order to rely on the videotaped statement, the Crown must demonstrate that the statement is reliable. Reliability is established where: (a) there is a visual record of the statement or interview; (b) the statement was taken under oath or affirmation and; (c) the witness is told the consequences of offences in connection with perjury and providing false evidence.

- (5) Procedures for taking videotaped interviews under oath or affirmation (KGB interviews) are in Appendix 9-2.

Videotaped statements without a commissioner of oaths

The following is an approach to consider when recording an interview by video or audio without a commissioner of oaths:

- Soon after investigators introduce themselves and deal with any administrative matters (washrooms, parking, water), they should say something like "for your protection and mine, this interview is being recorded on video." If the person refuses to allow the interview to be electronically recorded, investigators can consider obtaining a written statement.
- Tell the person they are not under investigation. If the person is under investigation or says something during the interview that leads investigators to consider investigating him/her for a criminal offence, then they must be given the caution before continuing with the interview.
- Briefly explain the purpose of the interview and ask the person to talk about the issues or transactions being investigated.
- This should be done before asking detailed questions. The purpose of this approach is to avoid contaminating the interview by telling the interviewee what you know, what you do not know and what you want to know. This encourages them to tell investigators more details of their involvement in the case and not just the ones they think are important to the investigator.
- Once the person gives their version of the events, the investigator can then ask follow-up questions. Investigators may refer to documents or facts that the person may be able to introduce in court. They should provide them with a copy of any document they refer to during the interview.
- The interview should be concluded by asking the person if there is anything that they wish to add, delete or clarify. Thank them for their assistance and cooperation and escort them out of the interview room.
- The tape should be turned off only after everyone has left. The tape itself must be stored and handled like any exhibit to protect and preserve continuity. Crown lawyers will later request copies be made of the tape as part of mandatory Crown file disclosure to the person under investigation if and when charges are laid.

Written witness statements

- (1) There are two approaches to consider if investigators wish to obtain a written statement from a witness:

- (i) ask witnesses to write out the statement themselves or
- (ii) the investigator writes a summary of what the witness said during the interview

(2) Regardless of the approach, the lead investigator should be accompanied by another employee who takes notes of the interview. The other person should be thoroughly briefed on the case. The other employee's purpose should be explained to the witness at the beginning of the interview.

Third party provides a written statement

- (1) Once all the administrative matters are dealt with, briefly explain the purpose of the interview and ask the person for a written statement about their involvement in the matters under investigation. This should be done before asking detailed questions about these matters. Once the person finishes writing his/her statement and signs it, investigators can review it and ask follow-up questions.
- (2) Investigators may refer to documents or facts that the person may be able to introduce in court. They should provide a copy of any document they refer to during the interview. Key documents should be photocopied and attached to the statement as an exhibit
- (3) When the interview is over, investigators should ask the person to review their statement and make any changes or qualifications and initial each page and any changes that have been made.

Investigator prepares a statement

- (1) If investigators decide to prepare a statement for the third party, the other investigator assisting with the interview should take detailed notes of the witness' opening account and the follow-up questions

and answers. The lead interviewer then prepares a statement based on these notes. The statement should contain the third party's knowledge of the transaction or document, using, whenever possible, their own words and phrases. It should also include an explanation as to how the third party acquired this knowledge. The statement should refer specifically to documents or facts that he/she is able to introduce or speak to in court. Key documents should be photocopied and attached to the statement as an exhibit

- (2) Once it is prepared, the statement should be given to the third party for him/her to read and to make any changes or qualifications. Investigators should then ask the third party to sign the statement and to initial each page as well as any changes that have been made.
- (3) If they refuse to sign the statement, ask them why and add the reply to the statement. If they say the statement is inaccurate, ask them to explain what needs to be corrected, deleted and/or added. If they still refuse to sign the statement, the investigator should write this at the end of the statement and sign it and ask the assisting CRA investigator to sign it as well.

Appendix 9.1 Caution

You are not obliged to say anything.

You have nothing to hope from any promise of favour and nothing to fear from any threat, whether or not you say anything.

Anything you do say may be used as evidence. You are not under arrest or detention.

You are free to seek advice from anyone at any time, including a lawyer. Do you understand?

If the person wishes to speak to a lawyer but cannot contact one or asks the investigator about duty counsel and/or legal aid, investigators should be prepared to provide these numbers. There may be situations where CRA investigators interview someone who was previously cautioned such as when they join an interview after it starts or during a search if the person spontaneously says something that can be used as evidence. In these situations investigators will either give the person a "secondary warning" or the formal caution.

Secondary Warning

You were advised previously by _____ that you need not say anything. That warning still applies.

No threats or inducements made to you by anyone associated with this investigation since you received that warning should make you feel compelled to say anything at this time.

Do you understand?

Appendix 9.2 Procedures - Videotaped statements under oath or affirmation (KGB Interview)

Preparation:

1. The witness should be invited to the office at a mutually convenient time and date. A dedicated interview room should be used if available. In the alternative, any room with good lighting will be sufficient. Be sure to position the camera and arrange the seating to best achieve a clear and unimpeded view of the front of the witness and the interviewer. The videotape machine should have a time-date stamp feature that should be turned to the "on" setting prior to the commencement of the interview. The investigator should then test the machine and satisfy him/herself that the equipment is functioning properly. This involves running the machine for a brief period to ensure all audio and visual functions are operational. Do not rewind the tape after you have performed the test. The test will be included as part of the tape and it is evidence Crown lawyers can use to demonstrate to the court that the equipment used to record the statement is reliable.
2. A Justice of the Peace or a Commissioner for the taking of Oaths and Affidavits should be available to "swear the witness". Arrangements should be made well in advance. If a Justice is not available, a Crown lawyer may act.
3. If documentary or other exhibits are to be presented to the witness during the interview, the items should be identified in turn by the witness during the course of the interview by having the witness

place the date and their initials on the reverse side of the document or some other inconspicuous place. In the alternative, an exhibit stamp could be used with wording following the format below:

THIS IS

EXHIBIT ____ TO THE VIDEOTAPED
STATEMENT OF _____ MADE BY
ME THIS _____ DAY OF _____
_____ SIGNATURE
OF WITNESS

The Video Statement:

4. The video camera should be turned on before the parties enter the interview room so that it can record them as they enter and capture all conversation that occurs prior to the beginning of the interview.
5. **The investigator** should identify himself/herself, the date the time and the place. Any other persons present in the interview room should then be identified. The investigator who will observe the interview for safety reasons may do so from the adjacent video and audio room (unless the lead investigator prefers that he/she be in the interview room). Ask the person being interviewed to state his or her name in an audible manner. A test should again be performed on the camera to ensure the machine is making a clear voice and visual recording.
6. **The investigator** should ask the person(s) being interviewed to acknowledge that he/she understands that the statement is being video and audio taped and that he/she consents to this procedure. This can be accomplished through the following statement:

Investigator:

"I ask that you acknowledge that you understand that this statement is being video and audio taped and that you consent to such a tape being made." Then ask "is that all right?"

7. At this point **the investigator** should remind the witness of the nature of the offences being investigated, the significance of their statement in the context of the investigation and the importance of being truthful and the potential for prosecution in the event of a false statement. This can be accomplished in the following form:

Investigator:

"As you are aware, I am investigating an allegation of _____ against _____ Your statement is an important part of the investigation and I appreciate your cooperation in coming in to speak to me today. For your protection and mine, I would like to speak to you on videotape and under oath. The statements you make today may become part of the evidence even if you later decide to deny or change the version of events you may give today. As well, I must tell you that if what you tell me is not true and you know that it is not true you may be charged with Fabricating Evidence, Perjury or Obstructing Justice."

Fabricating Evidence happens when a person, intending to mislead, makes up or fabricates anything intending it to be used as evidence in court at any time. A conviction of this crime carries a penalty of up to fourteen years in jail.

Perjury is when a person solemnly declares, or swears under oath to a person by law entitled to administer oaths, a false statement that the person intends to be misleading while knowing the statement is false, whether or not it is done in a court before a judge. A conviction of this offence can result in a penalty of up to fourteen years in jail.

Obstructing Justice happens when a person deliberately attempts to obstruct, pervert or defeat the course of justice. The term "course of justice" includes trying to obstruct, pervert or defeat a lawful investigation, a trial, or any other kind of court action. A conviction of this crime carries a penalty of up to ten years in jail.

Do you understand all of what I have just told you? _____ You should know that there is no legal requirement that you give me a statement. It is your choice and you are free to leave here at any time.

Now that you understand, will you give your statement to me?

8. If the witness has any questions or does not understand, **the investigator** (not the justice or commissioner) should try to explain, and invite the justice or commissioner to confirm the accuracy of the explanation. If the witness still does not understand and appears to have lingering concerns, the investigator may inquire whether the witness wants a chance to speak to someone before going on.

9. Once the witness has acknowledged an understanding of the seriousness of making a deliberately false statement, the witness should be sworn **by the justice or commissioner**. The witness should be asked to swear or solemnly affirm the truth of the statement they are about to make. A bible should be used if an oath is administered. The oath or affirmation should be in the following terms: **Justice or**

commissioner:

"I am now going to take your oath before you begin your statement. Do you choose to make your oath before God on the Bible or do you choose to solemnly affirm, understanding that both forms of Oath are equally binding in a court of law?"

"Do you _____ Of _____, Province of _____

swear that the statement you are about to make is the truth, the whole truth, and nothing but the truth so help you God."

OR

"Do you solemnly affirm that the statement you are about to make is the truth, the whole truth, and nothing but the truth."

Sworn or solemnly affirmed to before me this _____ day
of _____, 20____

at or near _____

Province of _____

Signature

of Witness

10. The interview should then proceed. Remember that the video camera is running and everything done or said is being recorded. Where a gesture is used as a form of communication, ("he threatened his partner like this"), the investigator should ensure that the gesture is captured on camera
11. The interview should be concluded by asking the witness if there is anything that they wish to add, delete or change. The witness should then be thanked for their assistance and cooperation and escorted out of the interview room.
12. The tape should be turned off only after the witness has left. The tape itself must be stored and handled like any exhibit to protect and preserve continuity. Crown lawyers will later request copies be made of the tape as part of mandatory Crown file disclosure to the accused.

Appendix 9.3 Federal and Provincial Privacy Legislation

Federal - Personal Information Protection and Electronic Documents Act

The *Personal Information Protection and Electronic Documents Act* (PIPEDA) sets out ground rules for how private sector organizations may collect, use or disclose personal information in the course of

commercial activities. The Act applies to personal information collected, used or disclosed by the retail sector, publishing companies, the service industry, manufacturers and other provincially regulated organizations. Generally, private sector organizations may not disclose the information they collect about consumers unless they have the consent of the person to whom the information relates. However, there are exemptions for law enforcement purposes that CRA investigators should understand and be able to explain to third parties when necessary. **Exemption to allow private sector organizations to disclose information to CRA investigators**

7(3) For the purpose of clause 4.3 of Schedule 1, and despite the note that accompanies that clause, an organization may disclose personal information without the knowledge or consent of the individual only if the disclosure is

(c) required to comply with a subpoena or warrant issued or an order made by a court, person or body with jurisdiction to compel the production of information, or to comply with rules of court relating to the production of records;

(c.1) made to a government institution or part of a government institution that has made a request for the information, identified its lawful authority to obtain the informationⁱⁱⁱ² and indicated that

(ii) the disclosure is requested for the purpose of enforcing any law of Canada, a province or a foreign jurisdiction, carrying out an investigation relating to the enforcement of any such law or gathering intelligence for the purpose of enforcing any such law, or

(iii) the disclosure is requested for the purpose of administering any law of Canada or a province;

PIPEDA applies to all organizations engaged in commercial activities unless the federal government exempts an organization or activity in a province that has substantially similar legislation to the Act. British Columbia, Alberta and Quebec are the only provinces with laws recognized as substantially similar to PIPEDA. These laws regulate the collection, use and disclosure of personal information by businesses and other organizations and provide individuals with a general right of access to, and correction of, their personal information. Ontario, meanwhile, has adopted privacy legislation to protect personal health information which has been recognized as substantially similar.

The provincial legislation contains similar restrictions on the collection, use and disclosure of personal information as the federal PIPEDA. They also contain exemptions for law enforcement. **Alberta - PERSONAL INFORMATION PROTECTION ACT**

(Applies to businesses, non-profit organizations, and professional regulatory organizations operating in Alberta)

20 An organization may disclose personal information about an individual without the consent of the individual but only if one or more of the following are applicable:

(e) the disclosure of the information is for the purpose of complying with a subpoena, warrant or order issued or made by a court, person or body having jurisdiction to compel the production of information or with a rule of court that relates to the production of information;

(f) the disclosure of the information is to a public body or a law enforcement agency in Canada to assist in an investigation

(i) undertaken with a view to a law enforcement proceeding, or

(ii) from which a law enforcement proceeding is likely to result;

British Columbia - Personal Information Protection Act

18 (1) An organization may only disclose personal information about an individual without the consent of the individual, if

(i) the disclosure is for the purpose of complying with a subpoena, warrant or order issued or made by a court, person or body with jurisdiction to compel the production of personal information,

(j) the disclosure is to a public body or a law enforcement agency in Canada, concerning an offence under the laws of Canada or a province, to assist in an investigation, or in the making of a decision to undertake an investigation,

(i) to determine whether the offence has taken place, or

(ii) to prepare for the laying of a charge or the prosecution of the offence,

Quebec - An Act respecting the protection of personal information in the private sector 18. A person carrying on an enterprise may, without the consent of the person concerned, communicate personal information contained in a file he holds on that person (3) to a body responsible, by law, for the prevention, detection or repression of crime or statutory offences who requires it in the performance of his duties, if the information is needed for the prosecution of an offence under an Act applicable in Québec;

November 2012

Chapter 10 – Inquiries Under 231.4 ITA, 276 ETA

10.1	WHEN AN INQUIRY IS JUSTIFIED 10.1.1
	Report to Headquarters
10.2	AUTHORIZATION FOR AN INQUIRY 10.2.1
	Letter of Authorization for an Inquiry
10.3	POWERS OF A PERSON APPOINTED AS HEARING OFFICER
10.3.1	The Role of the Inquiry Officer and His/Her Counsel
10.4	SUMMONING WITNESSES
10.5	SETTING THE STAGE
10.6	CONDUCTING THE INQUIRY
10.7	COMMUNICATION WITH THE CRIMINAL INVESTIGATIONS DIRECTORATE

The policies and procedures in this chapter may also apply to other Divisions and Branches of the Canada Revenue Agency (CRA) when conducting an inquiry.

10.1 WHEN AN INQUIRY IS JUSTIFIED

- (1) An inquiry may be conducted as a means of strengthening the case under investigation. Witnesses whose evidence is material to a case are examined under oath to determine what they will say in court. Documents may also be obtained from the witnesses and the inquiry may assist in gathering evidence to prove the alleged scheme. An inquiry is less intrusive to the person under investigation as only third parties are called to testify and produce documents. It is a valuable tool available to the investigator that can save months of investigation time.
- (2) An inquiry can also address situations in which it has been very difficult to secure voluntary cooperation from witnesses, or if it would be unreasonable to anticipate such cooperation in the circumstances of the case under investigation. It can be a valuable tool in any investigation which has reached a stalemate and risks not going forward due to lack of evidence.
- (3) The following types of witnesses may be questioned under oath to draw out the facts not otherwise obtainable. This is not an exhaustive list:
 - Witnesses known to have information material to the case, who have not and will not divulge it in a voluntary interview;
 - Witnesses, perhaps friendly to the person under investigation, who will not reveal what they know in an interview;
 - Witnesses who are impartial but who are most reluctant to become involved; and
 - Witnesses whose evidence is required to fill in major gaps in the documentary evidence available.

10.1.1 Report to Headquarters

When investigators have analyzed the elements of the case and are of the opinion that an inquiry would materially further the case, the first step is to send a report to the Director General, Criminal Investigations Directorate. The report recommending that an authorization be obtained for an

inquiry under sections 231.4 of the Income Tax Act (ITA) or 276 of the Excise Tax Act (ETA) should include:

- a synopsis of the case;
- the reasons that make an inquiry appropriate and necessary, taking into consideration the magnitude of the case, the costs of an inquiry, the opinion of the local PPSC office;
- what evidence is being sought through an inquiry;
- the witnesses and documents that are to be subpoenaed and
- what is hoped to be accomplished by an inquiry.

10.2 AUTHORIZATION FOR AN INQUIRY

- (1) The report will be reviewed by the Criminal Investigations Division at the Criminal Investigations Directorate and if it is agreed that an inquiry should be held, an authorization will be drawn up in the name of the Minister, for the signature of the Commissioner of the CRA. The authorization must be limited to the tax affairs of the taxpayer. Care must be taken to ensure that the terms of reference of the inquiry are not phrased in an overly broad manner.
- (2) After authorizing the inquiry, the Commissioner will apply to the Tax Court of Canada for an order appointing a **hearing officer** before whom the inquiry will be held pursuant to subsections 231.4(2) of the ITA and 276(2) of the ETA. The application is *ex parte*, which means that the CRA does not provide the taxpayer with notice of the application before bringing it before the Tax Court. The selection of a hearing officer is entirely at the discretion of the Tax Court. Neither the CRA nor the Public Prosecution Service of Canada (PPSC) make submissions to the Tax Court in that regard.
- (3) The original document authorizing the inquiry will be forwarded to the local Tax Services Office (TSO) when completed. The Criminal Investigations Directorate will advise the office of the name of the hearing officer as soon as the appointment takes place.

10.2.1 Letter of Authorization for an Inquiry

Download Form

IN THE MATTER OF the (named Act), (citation),
as amended

AND IN THE MATTER OF Vancouver Company
Limited and John Gray, both of the City of
Vancouver, Province of British Columbia.

TO WHOM IT MAY CONCERN:

WHEREAS it is provided by subsection [231.4(1) of the Income Tax Act or 276(1) of the Excise Tax Act] that the Minister of National Revenue may, for any purpose related to the administration or enforcement of the [Income Tax Act or Excise Tax Act], authorize any person to make such inquiry as he may deem necessary with reference to anything relating to the administration or enforcement of the said Acts.

AND WHEREAS I, the undersigned, William Baker, Commissioner of the Canada Revenue Agency deem it necessary for purposes relating to the administration or enforcement of the [Income Tax Act or Excise Tax Act] to make an inquiry to investigate the financial affairs of Vancouver Company Limited and John Gray, for the years 1996 to 1999 inclusive.

NOW THEREFORE, I, the said William Baker, hereby authorize Robert James Brown, an officer of the Department of Justice, to conduct an inquiry as to the financial affairs of the said Vancouver Company Limited and the said John Gray, and in particular and without limiting the generality of the foregoing, into the sales and the disposition of the proceeds thereof, of the said corporation and the said individual for the years 1996 to 1999 inclusive.

Dated at Ottawa, this day of AD 20. "(Sgd)
William Baker"

William Baker
Commissioner

Canada Revenue Agency

10.3 POWERS OF A PERSON APPOINTED AS HEARING OFFICER

- (1) The powers extended to a **hearing officer** are set out in subsections 231.4(3) of the ITA and 276(3) of the ETA. They state that the hearing officer has all the powers of a commissioner under **sections 4 and 5 of the *Inquiries Act***.
- (2) Section 4 of the *Inquiries Act* gives the commissioner the power of summoning any witnesses, requiring them to give evidence on oath orally or in writing, and to produce such documents and things as deemed requisite.
- (3) Section 5 of the *Inquiries Act* extends to the commissioner the same power to enforce attendance of witnesses and to compel them to give evidence as is vested in a civil court of record.
- (4) Section 11 of the *Inquiries Act* authorizes the commissioner to engage the services of technical experts, court reporters and assistants as deemed necessary, as well as counsel to aid and assist in the inquiry.
- (5) The role of the hearing officer is further discussed in Section 10.6. **10.3.1 The**

Role of the Inquiry Officer and His/Her Counsel

The person authorized by the Minister to make an inquiry is called the **inquiry officer**, and will usually be a lawyer. The principal duties of the inquiry officer and his/her counsel include:

- Preparation and serving of subpoenas;
- Provision of witness fees and conduct money;
- Review and organization of exhibits;
- Arrangements for a competent court reporter in order to obtain accurate transcripts of proceedings;
- Advising hearing officer of any special considerations and/or anticipated problems with witnesses and/or logistics;
- Examining witnesses upon the commencement of the inquiry.

10.4 SUMMONING WITNESSES

- (1) Witnesses whose attendance is required are summoned by the hearing officer by *ex-parte* subpoena. Subpoenas must be in the form used by the local Superior Court. Investigators are responsible for providing the hearing officer with the full names and addresses of the witnesses. A notice of the possibility that the location, date and time of the hearing might change during the inquiry should be included in the subpoenas. If such is the case, the investigator must contact all witnesses involved to ensure that they are aware of the changes.
- (2) The CRA will make the payments to the witnesses with respect to their attendance at the inquiry, based upon witness fees set out under the rules of the local Superior court. Witnesses who reside out of town are entitled to "conduct money" in addition to witness fees. The securing and payment of such monies is discussed in chapter **13.5.3 Witness Fees and Conduct Money**

10.5 SETTING THE STAGE

- (1) The rooms to be used should be in a neutral setting and available over the entire period of the inquiry. Arrangements should be made, through the hearing officer for the services of an official court reporter qualified to take civil dispositions in the province in which the inquiry is taking place.
- (2) A registrar should be appointed to provide administrative services with respect to the inquiry. The registrar should be selected in consultations with the hearing officer.
- (3) The hearing officer administers an oath to swear in the court reporter and registrar before the witnesses are heard.

- (4) Witnesses give evidence under an oath administered by the hearing officer. (5) Subsections 231.4(5) of the ITA and 276(5) of the ETA entitle witnesses to be represented by counsel and, upon request made by them to the Minister, to receive a copy of a transcript of the evidence given by them. The Minister pays the costs of preparing and delivering copies of transcripts to witnesses or their counsel. Copies of the transcript may also be given to the persons under investigation or their legal representatives in all situations where they were present during the proceedings. The transcript is not available to any other person except officers of the Canada Revenue Agency.
- (6) Subsections 231.4(6) of the ITA and 276(6) of the ETA entitle any person whose affairs are investigated in the course of an inquiry to be present and to be represented by counsel throughout the inquiry, unless the hearing officer appointed, on application by the Minister or a person giving evidence, orders otherwise in relation to the whole or any part of the inquiry, on the grounds that the presence of the person and counsel, or either of them, would be prejudicial to the effective conduct of the inquiry. Accordingly, notice must be given to the person whose affairs are the subject of the inquiry. Section 13 of the Inquiries Act requires that such person receive notice of the inquiry and an opportunity to be heard in person or by counsel. However, the person cannot be compelled to answer any questions.
- (7) The hearing officer may conduct proceedings in camera. Proceedings that are conducted in camera are closed to the public, and the hearing officer may exclude everyone from the room in which the inquiry is taking place except the inquiry officer, witnesses and their counsel, the court reporter and any other person whose presence is necessary in the opinion of the hearing officer. The terms of reference should be drafted in such a manner as to state that the hearing officer has discretion to conduct all or part of the proceedings in camera.

10.6 CONDUCTING THE INQUIRY

- (1) The **hearing officer** is responsible for conducting the inquiry in a formal and impartial manner and has all the powers conferred on a commissioner under the Inquiries Act. He/she exercises powers similar to those of a judge and cannot be influenced by anyone. It is anticipated that, in most cases the hearing officer will have a strong legal or judicial background, such as a retired judge.
 - (2) After a witness has been sworn in, counsel for the inquiry officer questions the witness. (3) Where a witness refuses to answer a question, the hearing officer may order the witness to answer that question or face penalties such as those that a court could impose for contempt of court. The authority of the hearing officer to impose such penalties is set out in subsections 231.4(4) of the ITA and 276(4) of the ETA. The permission to exercise this authority must first be obtained from a judge of a superior court. The hearing officer must provide 24 hours notice to the witness of the application to the Judge for permission to exercise such authority, or such shorter notice as the Judge deems reasonable.
- (4) The inquiry officer has no authority under 231.4(4) of the ITA or 276(4) of the ETA with regards to a witness who refuses to answer. It is the responsibility of the hearing officer to take appropriate action, which may include making an application to the Superior Court for an order that the witness be detained until he or she no longer refuses to answer.

10.7 COMMUNICATION WITH THE CRIMINAL INVESTIGATIONS DIRECTORATE (1)

- Any unusual developments in the course of an inquiry will be reported immediately to the Director, Criminal Investigations Division, Criminal Investigations Directorate. This would include such developments as a witness refusing to answer.
- (2) When all witnesses have been questioned and the inquiry finally adjourns, a report will be sent to the Minister of National Revenue care of the Director General, Criminal Investigations Directorate. This report should be general and outline the main points brought out by the inquiry and the future actions proposed. An official transcript should accompany the report.

- (3) The transcript can be used in a criminal prosecution, but an accused in any criminal proceeding may object to the use in that proceeding of any portion of the transcript containing evidence he or she gave under subpoena at the inquiry on the grounds that it is self-incriminating evidence.

October 2014

Chapter 11 – Commission Evidence, Mutual Legal Assistance Treaties (MLAT) and Extradition Proceedings

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11.1 Application

This policy applies to the Criminal Investigations Program only.

Whenever CRA investigators are considering obtaining foreign evidence, they must first consult with Investigations Advisory Services.

11.2 Commission Evidence

This procedure is used for collecting evidence from a witness who is unable or unwilling to attend at trial. If a witness cannot or will not come to court, the Court will sometimes go to them. Section 709 of the *Criminal Code* (CC) provides that a party, usually the Crown, may apply for a commission order, if it can be established that a witness is not likely to be able to attend the trial, by reason of physical disability, illness or some other good and sufficient cause. This section also applies to witnesses who are out of Canada when it can be demonstrated that the witness is unable or unlikely to come to Canada for trial or that their attendance cannot be assured. The majority of Canada Revenue Agency (CRA) cases involving an application for a commission order will occur when a witness(s) outside of Canada refuses to attend for trial.

Section 709 of the CC contemplates an application for a court order appointing a commissioner to preside over a hearing during which witnesses named therein will be asked to provide evidence. The examination of

witnesses can take place either in Canada or in the country where the witness(s) reside(s). The commission order stipulates that witnesses are to be examined under oath. Increasingly, orders provide that witness testimony must also be recorded by audio-visual equipment. The order usually allows for the attendance of the accused or his/her counsel. The Crown will usually pay for reasonable expenses incurred by the accused, including counsel fees. Letters of request are used when the assistance of a court in a foreign jurisdiction is necessary to compel the attendance of a witness who refuses to attend voluntarily for examination before the commission. The letter of request is written by a Canadian court asking a foreign court or other authority for assistance and is usually included as part of the court application to the jurisdiction where the witness is located. Experience suggests that letters of request are needed in most cases where a commission is sought in a foreign jurisdiction.

Section 712 of the CC provides that evidence gathered before a commission may be admitted as evidence in proceedings.

According to the Federal Prosecution Services(FPS) Deskbook requests for commission evidence in criminal matters are, by practice, transmitted on behalf of the Canadian requesting authority by the Minister of Justice through diplomatic channels to the foreign state.

11.2.1 Application to Court

An application for a commission order can be made in advance of the trial or after the trial begins. The crown counsel would be expected to make the arrangements to proceed with an application. However, the lead investigator and his/her supervisor will be involved in the process and it is therefore important that they be familiar with this chapter. Prior to making an application to obtain a commission order, several factors must be considered including:

- Is the witness's testimony essential to the case;
- Are the witnesses prepared to come to Canada to testify;
- Will the witnesses voluntarily testify before a commission held in the country where they currently reside;
- Will the witnesses testify only if compelled to do so.

Once a decision is made to proceed, Crown counsel will make an application to the appropriate court requesting that the court appoint a commissioner, usually a Canadian judge or lawyer. The commissioner's role is to preside over the hearing and ensure the proceedings are conducted in accordance with Canadian laws and principles of fairness.

The application will normally include an affidavit from the investigator in charge of the case. The affidavit must set out sufficient facts to justify holding a commission. The affidavit must demonstrate not only that the witness is out of the country and unable or unwilling to attend, but also that the witness would likely provide material evidence if he/she was to testify in court. The following list is by no means exhaustive but intended as guidance concerning some of the issues the affidavit should address:

- Why the witness cannot attend;
- The efforts, if any, that have been made to procure the witness's attendance;
- Whether the witness is prepared to testify voluntarily or must be compelled; and
- The nature of the evidence that the witness will provide and why this evidence is important to the case.

NOTE: The sufficiency of the information contained in the investigator's affidavit has been the subject of several court challenges. Accordingly, it is recommended that the affidavit be prepared under the direction of Crown counsel.

The investigator should be familiar with the type of evidence being sought and the witness best suited to introduce that evidence. If documents are being sought, the investigator should contact the foreign entity holding the documents and try to determine not only the identity of the person who actually made or maintains the records but also the person who is knowledgeable about their contents and can speak to the manner in which documents are created, used and stored. In some situations it may therefore be necessary to name more than one witness from the same organization in order to ensure that Canadian rules of evidence are observed.

On the date set for the hearing to determine if a commission will be held, both parties will appear before the judge and call evidence in support of their respective positions. The accused has the right to cross-examine the investigator(s) involved in the case or involved in preparing the affidavit material in support of the application. Both parties will then argue whether a commission order should be issued. The application may be vigorously opposed since holding a commission might be the only means of gathering important evidence from parties who are otherwise unavailable. If defence counsel succeeds in challenging an application for a commission order, this could have a profound impact on the outcome of the case.

11.2.2 Commission Hearing – Procedure and Product

Usually the lead investigator and/or a senior member of the Criminal Investigations Program of the Investigations Division will attend at the commission hearing to assist Crown counsel. The accused has the right to be present or represented at the hearing, and to cross-examine the witnesses. Keep in mind that the evidence collected by the commission can be introduced in proceedings.

In a case from the Alberta Court of Appeal, *R. v. Beck* (1996), 108 C.C.C.(3d) 385, the Court found that the evidence taken by a commissioner in the absence of the accused could only be admitted at trial if the accused was voluntarily absent from the proceedings or was otherwise disqualified from exercising his right to attend (e.g. accused is wanted in the foreign state and would be arrested upon entry). While the commission order will usually provide for attendance by the accused, the commission can proceed in the absence of the accused, where appropriate. Where witnesses are willing to appear voluntarily, they attend before the commission and provide their testimony under oath. If they are not agreeable to appearing voluntarily, the letters of request from the Canadian court are filed with a Superior Court of the foreign state and a subpoena is issued compelling the witness to appear. In the latter case, the judge issuing orders based on the letter of request will examine the request to ensure it complies with local law. Assuming compliance, the judge may then appoint a commissioner other than the one appointed by the Canadian court and the hearing continues before the appointed representative.

Canadian legislation contains provisions that require Canadian courts to respond in a similar fashion when representatives from a foreign state file letters of request in Canada. Our courts will agree with the request only if the proposed hearing will be conducted in accordance with Canadian law and principles of justice. For instance, Canadian courts have refused requests to compel the appearance of persons accused of an offence since they may be required to incriminate themselves.

11.2.3 Objections Raised During Hearings

The commissioner can deal with objections raised during the commission hearings and will apply the rules of evidence to the proceedings. However, to avoid the time and expense of having to go back for further questioning, the commissioner may grant the parties greater leeway in the breadth and scope of their examinations. It remains for the trial judge to ultimately determine the admissibility of the commission evidence when it is tendered at trial in Canada.

11.2.4 Conclusion

A commission hearing under sections 709 to 714 of the CC is an effective method of obtaining testimony from witnesses in other countries. Without this procedure, important evidence might never be heard since witnesses outside Canada cannot be compelled to testify in a Canadian court.

Due to the costs related to carrying out a Commission it is imperative that the Director, XXX Criminal Investigations Division, Criminal Investigations Directorate authorize that the proceedings be initiated.

11.3 Mutual Legal Assistance Treaties – Obtaining Evidence in Criminal Matters

When investigators are considering obtaining evidence by Mutual Legal Assistance Treaty

(MLAT), they must first consult with Investigations Advisory Services. This consultation must occur before investigators contact the Public Prosecution Service of Canada (PPSC) to seek their assistance in drafting the MLAT request. Once PPSC has completed its review, the MLAT request must be reviewed by Investigations Advisory Services, and approved by the Director, Criminal Investigations Division at HQ, prior to being forwarded to the Department of Justice for processing.

11.3.1 Mutual Legal Assistance in Criminal Matters Act and MLATs

In the course of an investigation evidence and information may be obtained from foreign jurisdictions through a MLAT request. In proceedings of a criminal nature, Canada and the other country may proceed under a MLAT, if one exists. This form of treaty provides for the gathering of information, documents, evidence and addressing such matters as search warrants and witness testimony, etc.

MLATs constitute international agreements and, hence, create contractual obligations, which permit parties to seek and/or render assistance in criminal matters. The treaties require that the contracting countries fulfill certain procedures requiring the issuance of court orders, in furtherance of criminal investigations and prosecutions.

Canada has entered into numerous bilateral MLATs and is also party to a number of multilateral conventions that have a mutual legal assistance in criminal matters component. Refer to <http://www.treaty-accord.gc.ca>. All of Canada's MLATs cover federally enacted indictable offences punishable by more than one year in jail which includes offences under the Income Tax Act and the Excise Tax Act.

The Mutual Legal Assistance in Criminal Matters Act (MLACMA) is Canada's domestic legislation for implementing its mutual legal assistance treaties. The following provisions are worthy of note:

Subsection 3(1)

In the event of any inconsistency between the provisions of this Act and the provisions of another Act of Parliament, other than the provisions of an Act prohibiting the disclosure of information or prohibiting its disclosure except under certain conditions, the provisions of this Act prevail to the extent of the inconsistency.

Subsection 3(2)

Nothing in this Act or a treaty shall be construed so as to abrogate or derogate from an agreement, arrangement or practice respecting co-operation between a Canadian competent authority and a foreign or international authority or organization.

Refer to: <http://laws.justice.gc.ca/eng/acts/M-13.6/index.html>

The provisions contained in Part II of the MLACMA govern the admissibility in Canada of evidence obtained abroad pursuant to an agreement. Subsections 44(1) and (2) deal with privilege of foreign records.

MLATs create a channel for obtaining a broad range of legal assistance in criminal matters such as:

- Examining objects, sites and immobilizing assets;
- Exchanging information, documents and objects;
- Locating or identifying persons;
- Serving documents (subpoenas, notice of criminal proceedings, etc.);
- Compelling witness evidence (such as testimonies and statements) including via video link;
- Providing documents, records and articles of evidence;
- Transferring sentenced persons in custody to give evidence or assist in investigations;
- Executing search and seizure warrants; and
- Enforcing foreign fines (limited).

11.3.2 The International Assistance Group

The Minister of Justice is the competent authority in Canada for mutual legal assistance matters. The International Assistance Group (IAG), created in 1988, is part of the Department of Justice, Litigation Branch. As the Minister's delegate, the IAG serves as the Canadian authority through which all incoming and outgoing requests for mutual legal assistance are presented.

The IAG is responsible for the following activities:

- Reviewing and coordinating mutual legal assistance requests to ensure they comply with treaty provisions and any other international standards that may be applicable;
- Helping foreign and domestic authorities gather evidence for criminal cases;
- Negotiating Canada's MLATs in partnership with the Department of Foreign Affairs; • Representing the Department of Justice on interdepartmental activities;
- Developing policy on mutual legal assistance in consultation with other branches of the Department of Justice and other interested government departments.

The IAG only deals with requests for assistance in criminal matters. Civil matters are handled through the Department of Foreign Affairs and International Trade or the Constitutional and International Law Section of the Department of Justice.

11.3.3 MLAT Request or Tax Treaty Request

Whenever CRA investigators are considering obtaining foreign evidence, they must first consult with Investigations Advisory Services before they seek advice or assistance from PPSC, the CRA's Competent Authority Services Division and/or the Department of Justice's International Assistance Group.

Investigations Advisory Services, in consultation with CRA's Competent Authority Services Division and the International Assistance Group will determine whether to proceed with an MLAT request, a Tax Treaty request or a Tax Information Exchange Agreement.

- Which option to proceed with depends upon the kind of information, documents or actions that is required.
- If the other country's tax authority can obtain all the information and documents needed and perform the actions requested then a Tax Treaty request or a request pursuant to a Tax Information Exchange Agreement could be made.
- If the country's tax authority is unable to perform all the requested actions or demands then a MLAT request will be necessary.
- When dealing with the United States, an MLAT is required if the file has been referred to the PPSC and if a third party has the evidence that CRA investigators are seeking. If the IRS has the information, then a Tax Treaty request should be made.

Further guidelines on Tax Treaty requests and Tax Information Exchange Agreements are in Chapter 16 – Exchange of Information, 16.15 Specific Requests for Information from Countries with Tax Treaties or Tax Information Exchange Agreements.

11.3.4 Content of MLAT

The responsibility for approving MLAT requests to foreign jurisdictions rests with the IAG. All written requests for an MLAT must conform to the mandatory headings as follows:

- Caution;
- Introduction;
- Summary of the law;
- Summary of Investigation and allegations;
- Request Portion;
- Certification;
- Time Constraints;
- Confidentiality;
- In this section, explain that the requested information is required for a criminal investigation but with the other country's permission it may also be shared with CRA officials who administer the civil aspect of the *Income Tax Act* and/or the *Excise Tax Act*.
- Contact names.

A request may be denied because it is not made in conformity with the provisions of the MLACMA.

Contact Investigations Advisory Services at HQ for further guidance and direction. **11.3.5 Process of CRA MLAT Requests**

All MLAT requests must be first discussed with the Investigations Advisory Services Section at HQ. Once Investigations Advisory Service agrees with the approach, investigators must ask their local Public Prosecution Services Canada (PPSC) office to review the draft MLAT. After the PPSC reviews the draft MLAT the request must be forwarded through the Assistant Director, Criminal Investigations to the Director Criminal Investigations Division, at HQ for review before it is submitted to the IAG to be processed.

Investigations Advisory Services at HQ will ensure that the format and quality of the requests are consistent, meet the standards established by the IAG and that all the relevant information is included and clearly stated, in order for the receiving country to understand what information is being requested and why. Investigations

Advisory Services at HQ may contact the investigator as part of the review process to obtain further information or to discuss amendments to the MLAT request.

Once final approval has been given by the Director, Criminal Investigations Division at HQ the request will be sent with the approval letter to the IAG. The IAG will review and approve the request, subject to any amendments that the IAG may make. The IAG may contact the investigator to get clarification on specific details contained in the request but IAG must first contact the Criminal Investigations Directorate's Investigations Advisory Services Section. Any changes that IAG requests must be approved by PPSC and the Director of the Criminal Investigations Division at HQ.

The IAG will send the MLAT request to the foreign state. The IAG will send a copy of the approved request to the Director Criminal Investigations Division at HQ, and the assigned PPSC counsel.

11.3.6 Taking of Evidence in a Foreign State

A party can be compelled by subpoena to testify or produce documents, etc. in the foreign state in accordance with the laws of the foreign state. The foreign state is under an obligation to provide copies of publicly available documents/records of government departments and if not publicly available, the foreign government is subject to the same conditions as if the enforcement authorities of its own country were requesting them. Copies of documents will be authenticated in a manner which conforms to our system. With some exceptions, our rules of evidence do not allow records and documents to be introduced as evidence based on the finding that they are hearsay evidence.

The MLACMA provides that if the record/document is accompanied by an affidavit/certificate or other statement pertaining to the record/document, made by a person who has custody or knowledge of the record, the court cannot find the evidence inadmissible by reason only that the statement is hearsay or opinion. In the absence of evidence to the contrary, the affidavit, certificate or statement is proof of the statements contained in the record/document without having to prove the signature or official character of the person appearing to have signed it.

11.3.7 Search and Seizure in a Foreign State

Any request for a search and seizure will be executed in accordance with the requirements of the law of the foreign state and no item seized will be provided to us until we have agreed to such terms and conditions required by the foreign state to protect third party interests in the items transferred. The foreign state is under an obligation to provide such certifications, as we require concerning but not limited to, the circumstances of the seizure, the identity of the item seized and the integrity of its condition and the continuity of possession of the item. The comments with respect to an affidavit/certificate or other statement are equally applicable under this section.

11.3.8 Exhibit – Request For Assistance

OFFICIAL REQUEST BY CANADA

TO

FOR TREATY ASSISTANCE (TREATY ARTICLE)

REQUEST FOR ASSISTANCE

CAUTION

All requests for assistance must contain a general caution and an abbreviated footnote caution. The suggested wording for the cautions are as follows:

(For pre-charge cases)

This Letter of Request is made to assist an ongoing criminal investigation being undertaken by a Canadian investigative agency. All information contained in this request is provided from the investigation and consists of unproved allegations which the investigator believes merit investigation. No charges have been laid and all persons named in this letter are presumed innocent under Canadian law. The consideration of charges will only take place at the conclusion of the investigation. All information in this request is confidential. All statements or information contained in this request must be read as a whole in the context of the investigative nature of this request.

All pre-charge requests must be identified as such in the request and the covering letter by the law enforcement officer submitting the request.

(For post-charge cases)

This Letter of Request is made to assist an ongoing criminal investigation by a Canadian investigative agency and/or to gather evidence for use in the corresponding criminal prosecution currently being conducted by the relevant Attorney-General's Office. All information contained in this request is provided from the law enforcement agency's investigation and consists of unproven allegations. While charges have been laid, under Canadian law, those charged are presumed innocent until proven guilty. All information in this request is confidential. All statements or information contained in this request must be read as a whole in the context of the investigation nature of this request.

INTRODUCTION SUMMARY OF

THE LAW

In this section, identify and set out the full text of all relevant provisions under investigation and/or prosecution

For example: The relevant Canadian statutory provisions are set out below. Section 239 of the *Income Tax act* states that:

SUMMARY OF INVESTIGATION AND ALLEGATIONS

This section should briefly describe the theory of the case that is the nature of the investigation or proceedings, and a summary of the relevant allegations.

The summary should clearly convey the investigatory nature of the request. Care should be taken to ensure that the request does not contain statements that are inconsistent with the investigatory nature of the request, in particular, statements which might erroneously suggest that conclusions or findings of guilt have been made by any Canadian authorities.

REQUEST PORTION

The competent authority [insert name of competent authority] requires the following assistance: This section should set out, in specific terms, exactly what you are seeking to obtain, including certification needs.

CERTIFICATION

The Canada Evidence Act permits the introduction into evidence before a Canadian Court, of records created in the usual and ordinary course of business of an entity located in a foreign jurisdiction under certain conditions. Although original records are preferable, copies may be produced if the originals cannot or cannot practicably be produced. Computer-generated records are also admissible under the Canada Evidence Act. The records must be accompanied by explanatory documents setting out certain basic information about the institution at which the record was generated and about the record itself. The person completing the form must either swear as to the truth of the contents of the form or state that his or her statement is made in conformity with the laws of the requested state.

TIME CONSTRAINTS

Please identify any time limit within which compliance with the request is desired and the reason for the time constraints. If you face limitation periods, please set out the precise dates and indicate this in the cover letter, as well.

CONFIDENTIALITY

The need and the reasons for confidentiality should be expressly set out.

All requests for assistance to and from Canada are confidential State-to-State communications. Ask for permission to share some or all of the information with CRA civil areas. For example: "Although this request is to obtain information to further a CRA criminal investigation, the CRA requests permission to share the information with CRA officials who administer the civil aspect of Canada's tax system."

CONTACT NAMES

In order to expedite the execution of your request, you should include the names and contact numbers for key Canadian and foreign law enforcement/prosecution authorities' familiar with the file. You should include

your name and contact number in the event the foreign authority wishes to contact you for the purpose of clarification or obtaining additional information.

Dated at Ottawa, Ontario, this _____ of _____

Counsel
International Assistance Group For the
Minister of Justice of Canada

Canada may pursue having persons outside of Canada extradited to Canada pursuant to the Extradition Act. Refer to <http://laws-lois.justice.gc.ca/eng/acts/E-23.01/FullText.html>

Canada has negotiated extradition agreements with many countries. Many of the Treaties contain sections that could be used to seek extradition of persons charged with, or convicted of tax evasion offences. It is important to note however that some treaties do not provide for extradition for tax offences. New Treaties are negotiated and others are updated periodically. The following link provides the most current versions of the Treaties:

<http://www.treaty-accord.gc.ca/search-recherche.aspx?lang=eng>

Canada does not have negotiated Extradition Treaties with members of the Commonwealth. However, the members of the Commonwealth are considered designated extradition partners by virtue of Section 9(1) of the *Extradition Act*. The result is that individuals may be extradited from Commonwealth countries in the same manner as countries with a signed extradition treaty. The International Assistance Group (IAG), created in 1988, is part of the Department of Justice, Litigation Branch. The IAG acts on behalf of the Minister of Justice in seeking the extradition of individuals from foreign states. At the request of the PPSC or correctional authorities in Canada, the IAG will seek the extradition of an individual found outside of Canada who is wanted for prosecution, imposition of a sentence or enforcement of a sentence. The investigator should review the applicable Treaty to ensure that it may be used to extradite tax offenders.

All of the treaties apply retroactively. Consequently, they would include persons who have committed an offence and fled Canada before a treaty came into force.

11.4.1 Location of Fugitive

In order to start the extradition process it must be known in which country the person is residing. It is not necessary that the person be in custody, however it must be known with virtual certainty that the person is in a particular country.

If the location of the fugitive is not known INTERPOL may issue a Red Notice to notify foreign jurisdictions that the person is wanted in Canada. A notification to Canada from a foreign country that an individual has been located will result in the initiation of the extradition process by Canada.

11.4.2 Red Notice Issued by INTERPOL

The legal basis for a Red Notice is a Canada wide arrest warrant issued by a Canadian court. In order to proceed with a request for a Red Notice an arrest warrant must be issued by a judge. The RCMP acts as the gateway for Canadian law enforcement to pursue assistance in apprehending fugitives outside of Canada. RCMP - INTERPOL - Ottawa, also known as the Canadian National Central Bureau (NCB), represents the interests of the INTERPOL organization in Canada.

The PPSC will be the primary contact point with the RCMP to get a Red Notice issued. CRA investigators will be required to provide all necessary information and assistance to the PPSC to proceed with a request. The PPSC in consultation with the investigator will prepare an INTERPOL Red Notice Application Form. The following documents will be required by INTERPOL Ottawa: • A

copy of the Canada wide arrest warrant;

- A copy of the Information with all charges;
- A signed letter from PPSC indicating that the Crown will extradite the subject back to Canada and that all costs will be covered. Ultimately it is CRA that covers the costs associated with the extradition;
- Specific countries where the subject is believed to have travelled; The

following should be provided if available:

- A photograph of the subject
- Fingerprints of the subject
- FPS Number (Fingerprint Section)

The IAG reviews all Red Notices prior to them being sent to INTERPOL by INTERPOL -Ottawa.

Some, but not all, countries will arrest a fugitive based on an INTERPOL Red Notice. If the fugitive is not detained the foreign country will initiate the process to alert Canada, through INTERPOL, that the person has been found in the country.

11.4.3 Provisional Arrest Warrant

The IAG is responsible to deal with foreign countries in seeking the issuance of a provisional arrest warrant in a foreign jurisdiction. A provisional arrest warrant is sought when there is an urgency to have the fugitive arrested in the foreign country. The primary reason to seek a provisional arrest warrant is that the fugitive is a flight risk from the foreign country.

If the person is in custody in the foreign country but will be released before extradition proceedings can be completed then a provisional arrest warrant may be sought.

PPSC counsel will be the primary contact with the IAG. The IAG will require PPSC, with input from the investigator, to prepare a "Request for a Provisional Arrest Warrant" form. When the IAG is satisfied that they have all of the required information they will contact the foreign country authorities to initiate the process. Refer to Exhibit in 11.4.7.

An arrest warrant must have been issued for the individual in Canada prior to initiating the process.

11.4.4 Criteria for Determining to Pursue Extradition

Extradition can be a lengthy and costly process. Treaties invariably require an offence to be punishable by a sentence of more than one or two year's imprisonment, in order to pursue extradition. The offences described in subsection 239(2) of the ITA and subsection 327(2) of the ETA include the possibility of imprisonment for a term not exceeding five years when proceeding by indictment.

Extradition will only be requested in the most serious cases. To assist in making this decision, the criteria will normally be the same as that for indictment proceedings, as set out in section 5.6.1 Prosecution by Indictment of the Criminal Investigations Manual.

The existence of an extradition treaty should not influence the decision whether to continue an investigation when a person under investigation leaves Canadian jurisdiction. Policy covering such cases is set out in section 5.11 Subject Leaving Canadian Jurisdiction of the Criminal Investigations Manual.

11.4.5 Contents of an Extradition Request

Requests for extradition should include the following information:

- The present address of the accused and any details available as to his means of entry into the foreign country, the addresses of any known relatives or acquaintances in the area, and the means of obtaining such information;
- A full description of the person to be extradited, including all available information or documents such as photographs, passports, handwriting examples, social insurance numbers or any other types of identification;
- A copy of the sworn charges and arrest warrant;
- An overview of the evidence available for a successful prosecution, with appropriate comments on the strength of the evidence, particularly if witnesses are no longer available;
- An explanation of the offence, emphasizing in particular the fraudulent scheme(s) and some of the more "criminal elements" of the fiscal fraud; and

Any change in the status of the case subsequent to its referral to PPSC; for example, death or relocation of witnesses, loss or destruction of evidence, availability of new evidence, etc. **11.4.6 Procedures for Requesting Extradition**

Requesting Extradition

Due to the sensitive nature and costs related to the arrest and extradition of fugitives it is imperative that the Director, Criminal Investigations Division at HQ authorize that proceedings be initiated. The request must be made in writing and include all information and documents that will be submitted to PPSC, IAG and/or INTERPOL. The authorization must be sought prior to contacting IAG or initiating a Red Notice.

The Director, Criminal Investigations Division at HQ must be provided with an estimate of the costs associated with the proposed extradition. After being authorized by CRA the PPSC will contact the IAG to discuss and initiate extradition proceedings.

The investigator will provide the PPSC and the IAG all necessary information and documents in order to proceed with an extradition. The investigator will not be directly involved in the discussions with the foreign country. The IAG will contact the foreign country and provide all the required information and documents to them.

When a fugitive is in custody in a foreign country an extradition proceeding must be initiated within the time prescribed in the applicable treaty.

11.4.7 Exhibit – Request for a Provisional Arrest Warrant

NOTE: All requests for provisional arrests to and from Canada are confidential State-to-State communications. However, practically speaking, it is recognized that the process of executing such a request may require its disclosure. For instance, a copy of the provisional arrest request may be filed in open court in support of an application to have a provisional arrest warrant issued. Particularly sensitive information or any confidentiality issues should be clearly identified when submitted to the International Assistance Group, so that confidentiality concerns are properly addressed and be further discussed prior to their dissemination.

1. Request by: 2. Date:
3. Subject: (a) Name:
(b) Date & Place of birth:
(c) Citizenship:
(d) Description: Height: Weight: Eyes: Hair:
Marks:
(e) Photograph availability and location *include copy: Fingerprints
availability and location *include copy:
(f) Present location/address of person sought:
4. If provisionally arrested, extradition will be requested within a prescribed number of days: Yes / No
5. Wanted in Canada: to stand trial to serve sentence for sentencing other: _____
6. List of alleged Offence(s) and Penalties (including section numbers): Identify and set out the full text of all relevant law provisions. Copy of the corresponding Criminal Code provisions or pertinent text of laws should be appended.
7. Particulars of the Information(s) or Judgment of Conviction(s) and Sentence(s) (i.e. date issued, by whom, name of court, etc.): *include copy
8. Particulars of the Warrant of Arrest (i.e. date issued, by whom, name of court): * include copy
9. Synopsis of the alleged Facts:
10. Prosecuting Attorney Name & Phone Number:
11. Law enforcement contacts in Canada and in the foreign State :
12. Grounds for urgency: (be as specific as possible)
The summary should clearly convey the investigative nature of the provisional arrest request. Urgency and public interest grounds to arrest the person sought on a provisional arrest warrant such as to prevent the person from escaping or committing an offence should be articulated.
13. CPIC check done: YES / NO *include copy

October 2014

Chapter 12 – Law, Evidence, Court Procedures & Jurisprudence

12.1

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12.2.5

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12.6 Case Jurisprudence – Criminal Investigations Directorate's Library

12.1 Conduct of Investigations

- (1) Planning and conducting investigations involve application of knowledge of criminal law found in the *Criminal Code* and related acts, tax laws found in the tax acts administered by the Canada Revenue Agency (CRA), the rules of evidence, and related jurisprudence.
- (2) The more commonly used terms and definitions are set out below. These are guides only, for the specific use of investigators and under no circumstances is the text to be used as a basis for discussion or debate with persons other than officers of the CRA. The subject matter is basically correct, but the law varies with statutory changes and court decisions. For more precise application, a current law reference publication should be consulted.

12.2 Knowledge of Law and Evidence 12.2.1 The

Law

Laws are rules of conduct prescribed or formally recognized as binding and enforced by a governing power.

12.2.1.1 Common Law

Common law comprises the various principles and rules of action related to government and security of a person and property, which derive their authority solely from usage and custom or from court judgements recognizing, affirming, and enforcing such usages and customs. 12.2.1.2 *Statutory Law*

Statutory law refers to laws enacted and established by a legislative body. All federal offences are statutory, but recourse is frequently made to common law to define words used in the statute. For example, paragraph 239(1)(d) of the *Income Tax Act* (ITA) and paragraph 327(1)(c) of the *Excise Tax Act* (ETA) provide for prosecution of a person who "wilfully, in any manner, evaded or attempted to evade, compliance with this Act or Part.", but the acts do not define the terms "wilfully", "evaded" or "attempted to evade". The meaning attached to these words is found in common law or in the dictionary of common usage.

12.2.1.3 Criminal Law

Criminal law is the branch of law, which defines crimes and provides punishments. 12.2.1.4

Civil Law

Civil law relates to the establishment, recovery, or redress of private and civil rights.

12.2.2 Offences

- (1) An act is an offence if it is committed, or omitted, in violation of a statute forbidding or commanding it, or is in violation of a regulation having legislative authority.

- (2) Offences are classified in the *Criminal Code* as summary conviction or indictable offences. Summary conviction offences generally are those which are the least serious with lesser penalties attached and can be heard by a summary conviction court. Indictable offences, which provide significant penalties, always include a jail term and offer the accused the option of having the trial by judge or a judge and jury.
- (3) Subsection 239(2) of the ITA and subsection 327(2) of the ETA provide for prosecution of offences by indictment, which offences would otherwise be prosecuted by summary conviction. For purposes of tax fraud cases, the power to elect trial by indictment rests with Crown. Refer to chapter 5.6 **Consideration for Indictment or Jail Sentence.**

12.2.3 Parties to an Offence

- (1) A person is guilty as a principal, if the person:
- Actually commits an offence.
 - Engages in the commission of an offence in association with others.
 - Agrees that an offence should be committed, or
 - Causes or counsels another to commit an offence.
- (2) A person who assists in the commission of an offence may be convicted, even if the individual primarily concerned has not been charged, tried, or convicted. A principal is not liable for an offence committed by an agent, solely because of the relationship. The principal is liable only if the act of the agent is done with the principal's knowledge or consent. The agents are criminally responsible for their own actions.
- (3) A corporation can be prosecuted for the criminal acts of its officers with respect to corporation affairs, but the only possible punishment is by fine. The officers themselves are criminally liable for these same acts.

12.2.4 Definitions of Evidence

The following are definitions of a number of legal terms relevant to the collection of evidence in an investigation:

12.2.4.1 Facts

The investigator should be concerned only with the collection and reporting of evidentiary facts. – A **fact** is something a witness has seen, heard, felt, smelled, or tasted. A **relevant fact** relates to the issue in question and is usually admissible. – **Circumstances** are collections of facts or adjuncts of fact.

- **Conclusions** are not facts and are generally inadmissible.
- **Evidentiary facts** are those tending to prove or disprove the principal fact, i.e., tax fraud, which is the issue in question.

12.2.4.2 Mens Rea (Criminal intention)

A blameworthy condition of the mind. This is an essential ingredient in tax fraud prosecutions. 12.2.4.3

Inference

Proving one fact by another fact or facts. A conclusion based on data or premise. 12.2.4.4

Probative value

Value as proof.

12.2.4.5 Direct evidence

Proof of existence of a given thing by its actual production, or by the testimony or admissible declaration of one who has personally seen it. Direct evidence is generally superior to other divisions of evidence, as it admits only one chance of mistake: error of assertion.

12.2.4.6 Circumstantial Evidence

Facts presented from which the existence of the main fact may be logically inferred. Circumstantial evidence admits two chances of mistake: error of assertion, error of inference. 12.2.4.7

Statement made by witnesses under oath or affirmation. 12.2.4.8

Documentary Evidence

Evidence in the form of letters, vouchers, books of account, etc. 12.2.4.9

Real Evidence

Real evidence is a broad term covering physical evidence presented in court for inspection. In tax fraud cases, this is nearly always in the form of documents and is, otherwise, termed documentary evidence.

12.2.4.10 Positive or Negative Evidence

- (1) Evidence may be either positive or negative in assertion. Evidence is positive when it concerns proof that an act did or did not happen. It is negative when the witness states no knowledge of the happening or existence of a fact. Examples of negative evidence follow:
 - Testimony that the Tax Services Office (TSO) records do not show the person to have filed a return.
 - Testimony that the investigation has not revealed additional assets of the person.
- (2) Positive evidence is stronger than negative, but some facts can be shown only by negative evidence. For example, it has been held that proof of a probable source of unreported income/taxable supplies is not necessary, when all possible sources of non-taxable income/supplies have been negated. Nevertheless, it must be accepted that a negative cannot be proven.

12.2.4.11 Relevancy

The quality of relationship in some logical way to the principal fact or having a traceable and significant connection with the principal fact. Relevancy is established if the evidence in question is one link in a chain, or if it relates to facts that would constitute circumstantial evidence that a fact in issue did or did not exist. If the fact is logically relevant, it is **legally** relevant, unless barred by some rule of evidence.

12.2.4.12 Materiality

Evidence is material if it tends to throw light on the matter in dispute, to affect the outcome of the case or to help in establishing the guilt or innocence of the person. Not all relevant evidence is material, but all material evidence is relevant. For example, if the person acknowledges their own handwriting, proof of that handwriting by expert evidence would be relevant, but not material. Conversely, proof of the person's signature on a return is material where the person will not acknowledge their signature.

12.2.4.13 Competency

Legal admissibility. Relevant evidence may be incompetent and, hence, inadmissible because it is hearsay or not the best evidence available.

12.2.4.14 Admissibility

Whether or not evidence is admissible is usually determined by the court. Generally, relevant, material, and competent evidence is admissible. The investigator should keep in mind that admissibility does not imply probative force.

12.2.4.15 Credibility

The credibility of witnesses depends upon their knowledge of the facts, their intelligence, disinterestedness, integrity, and veracity. The weight the witness' testimony will be given by the court is in direct proportion to these qualities. Fortunately, testimony in tax fraud cases is usually limited to identification of documents or to other documentary evidence. It has been repeatedly shown in the criminal courts that testimony by honest, unbiased eyewitnesses is often completely unreliable and misleading, and that a case should be based on the physical evidence.

12.2.4.16 Presumptions of Law

These are arbitrary consequences associated under the law to particular facts. They may be conclusive or refutable. An example of the former is section 13 of the *Criminal Code*: "No person shall be convicted of an offence in respect of an act or omission on his part while that person was under the age of twelve years". An example of a refutable presumption of law is subsection 244(7) of the ITA and subsection 335(3) of the ETA. This is evidenced by the words "prima facie" therein.

12.2.4.17 Presumptions of Fact

These are inferences the mind logically draws from given facts. They are always refutable. For example, it is presumption of fact that a letter seized from a person is within their knowledge. However, the person might be able to produce evidence that they had never read the letter and, thus, rebut the presumption.

12.2.4.18 Judicial Notice

Judicial notice is recognition by the court of certain matters so notorious or clearly established that evidence of their existence is considered unnecessary. For example, subsection 244(12) of the *Income Tax Act* provides that judicial notice shall be taken of all orders or regulations made under that Act.

12.2.4.19 Burden of Proof

- (1) The guiding principle is: "The burden of proof lies on him who affirms a fact, not on him who denies it."
- (2) The term "burden of proof" has two distinct and frequently confused meanings:
 - In the sense that the prosecution must prove all essential factors of the case, the burden of proof never leaves Crown.
 - In the sense of adducing evidence, the burden of proof may shift from Crown to Defence, according to the weight of evidence at any given time in the proceedings. The burden of proof in this sense rests upon the person who would fail if no evidence, or no additional evidence, as the case may be, were to be given by either side.
- (3) In other words, **before** any evidence is advanced, it rests upon the person asserting the affirmative of the issue. **After** evidence has been considered, it rests upon the person against whom the court, at the time the question arose, would give judgement, if no further evidence were to be adduced. Where the Crown has established such facts that would justify the court in finding the accused guilty, the accused is not entitled to acquittal, unless the accused satisfies the burden cast upon them. The extent of that burden is not to prove innocence, but simply to raise a reasonable doubt as to guilt.

12.2.4.20 Hearsay

- (1) Hearsay evidence is that which does not come from the personal knowledge of the witness, but is merely repetition of what the person has heard others say. It extends to the offering by a witness of a document prepared by another person. It is, essentially, second-hand evidence and is generally excluded. The reason for its exclusion is that no opportunity is given to cross-examine the person responsible for the statement.
Cross-examination is essential as a test of the truth of the facts offered. It provides the opportunity to examine the credibility of the witness, their powers of observation, memory, bias, prejudice, and possible error. It also subjects the witness to the penalties for perjury. In the interests of equity and justice, there are certain exceptions to the rule excluding hearsay evidence. These include:
 - Admissions and confessions.
 - Business or public records; those may be admissible under section 30 of the *Canada Evidence Act*.
 - Expert opinions; conclusions of a person qualified as an expert in their field. – Character evidence and evidence respecting mental and physical condition.
- (2) The hearsay rule excluding statements of one person as to what another said or did, does not extend to remarks of, or acts by, the accused, whose words or actions on material points can only be proven by those who heard or observed them.

12.2.4.21 Primary Evidence

Primary evidence is the best or highest type of evidence that affords the greatest certainty of the fact in question. Examples are: production of the original document; admission of the contents of a document by the party against whom it is tendered.

12.2.4.22 Secondary Evidence

Secondary evidence is inferior or substitution evidence which, by its very nature, indicates that better evidence does or did exist. Examples are:

- a copy of a document;
- testimony of a witness who has read the document.

12.2.4.23 Admissions

- (1) An admission is a statement, in oral or written form, that a fact or allegation against the person making it is true, without any acknowledgement of criminal intent. An admission may be inferred by conduct, such as remaining silent when accused of an offence an innocent person would deny. A **judicial admission** is one made in the course of judicial proceedings, by pleading or otherwise. It may be used against the person in the same manner as any other evidence. An **extra-judicial admission** is anything said outside the court, which is inconsistent with pleadings or testimony in court. Competent, material, and relevant statements of fact, made by a person **before** the alleged commission of an offence, are admissible against the person. Admissions, made as part of the act of committing an offence, are also admissible.
- (2) Example: in a prosecution based on understatement of business receipts, the cost of goods sold, as shown on statements submitted with the return, are admissions which need not be corroborated, unless their accuracy is challenged by either party.

12.2.4.24 Confessions

- (1) A confession is the statement of a person that the person is guilty of an offence. It may be oral or in writing. It may be merely an acknowledgement of guilt or it may be a full statement of the circumstances. It is essential that a confession be voluntary. An involuntary confession is one obtained either by threats or coercion or by promise of immunity or reduced punishment. A confession is not invalidated because the person's lawyer was not present when it was made, but this might be a consideration as to its voluntariness. An expression such as "We want the truth," could create controversy because it may be perceived as an implied threat or intimidation during questioning.
- (2) If a verbal confession is involved, the persons should be formally cautioned that they are not obliged to answer questions and that, if they do, their statements may be used as evidence.
- (3) The recommended caution, as outlined in **Exhibit 9.1 – Caution**, informs the person of their right to remain silent. It enhances the probability of the admissibility of any statements made by the accused in a subsequent proceeding.
- (4) If a written confession is obtained, it is advisable to have the person write it, prefaced by the statement that the person is making it freely and voluntarily, and has been fully advised of their legal rights to counsel.
- (5) As with admissions, a confession must be examined by a court as to the truth of its contents and to its voluntariness through the legal process known as a "voir-dire", when it is tendered at trial and before it can be entered as evidence. Confessions, made to persons in authority, are always scrutinized by the courts before they are accepted. Accordingly, reliance should not be placed solely on such evidence.

12.2.4.25 Documents

Much of the evidence in tax cases is in documentary form.

(1) General

Documents cannot be cross-examined; they speak for themselves. Oral evidence may be necessary to prove genuineness, authorship, date of execution, or other points bearing on the validity of the documents. However, generally speaking, oral evidence is not admissible to add to, vary, or contradict a written transaction.

The law acknowledges a rule that requires the best evidence to be put forward. This means the original document, if available. Specific exceptions to the best evidence rule are contained in the *Income Tax Act*, subsection 231.5(1) and in the *Excise Tax Act*, subsection 291(1) which permits copies of documents to be introduced in evidence, provided they are properly certified by authorized officers of the CRA. The common law rule relating to copies is addressed in the BC Court of Appeal decision in *R. v. Betterest Vinyl Manufacturing Ltd.* 52 C.C.C. (3rd) 441. However, the best evidence rule is to be followed in preparing and presenting evidence for tax evasion cases.

Note: With the Ling and Jarvis decisions in November 2002, it would be rare at the moment, under the Criminal Investigation Program (CIP), to use the audit powers under subsection 231.5(1) to

photocopy and introduce documents in evidence. Subsections 490(13) and (14) of the Criminal Code are available to investigators.

Regardless of the rules, any document may be entered as a court exhibit, without a witness, if Defence agrees to its production. Sections 29 and 30 of the *Canada Evidence Act* discussed below also address the subject of copies of documents.

(2) Documents seized from the accused

Any document found in possession of the accused or any document voluntarily surrendered is presumed to be within their knowledge. This is a presumption of fact that is refutable; the accused may actually never have read the document in question.

Documents, so obtained, can be used against the accused provided they are produced in court by the officer who seized them. The seizing officers must be in a position to identify them, to state how they came into their possession, and to testify that they are in the same condition as when seized except for identifying marks. Employees of the accused may be called to place in evidence the records they maintained or have knowledge thereof.

(3) Documents obtained from third parties

These records must be identified by the person to whom they belong. If they are corporation records, a responsible officer must be called as a witness. If the case is being contested, it may be necessary to call the person who was involved in the transaction, actually made the accounting entries, and/or a person within the firm who has knowledge and control of the records. Business records fall under the rules of Section 30 of the *Canada Evidence Act*. If bank records are involved, the evidence from the branch manager or accountant would normally be obtained by affidavit, pursuant to section 29 of the *Canada Evidence Act*.

(4) Documents introduced by affidavit

Subsection 30(3) of the *Canada Evidence Act* allows copies of business records to be introduced as evidence in those situations where it is not possible or reasonably practicable to produce the original. A copy of the record can be produced if accompanied by an affidavit. This subsection outlines what information is to be contained in the affidavit and care should be taken to ensure that preparation is in accordance with these instructions.

In order to introduce as evidence the tax filing history and information from a person's returns, which are no longer available, a TAPMA Historic Master File printout and a supporting affidavit are required. A TAPMA printout and affidavit may also be obtained to show there is no record of returns filed by a specific person for specified periods.

For GST returns, computer printouts supported with an affidavit can be obtained from the Summerside Tax Centre. The request for both the printout and the applicable affidavit must be routed through the Criminal Investigations Division at HQ and should include the following information:

- Full name;
- Social insurance number/corporation number; business number or registration number
- Years/periods to be covered in the affidavit.

The Criminal Investigations Directorate will obtain the necessary documentation from the Information Technology Branch. Where affidavit evidence will be required at trial to prove filing information of a person, the request should be made at least 60 days beforehand to ensure the affidavit is on hand before trial and is included in the notice and documents for disclosure to Defence within the appropriate statutory time periods. In those circumstances, where a historic TAPMA master file printout is required only for assessing purposes and no affidavit is necessary, such printout may be requested through the Tax Centre servicing the Tax Services Office.

12.2.4.26 Expert or Opinion Testimony

- (1) Expert testimony reflects the opinion of witnesses skilled in a subject upon which competency to form an opinion can only be acquired by special study or experience. It is introduced to assist the court in understanding certain evidence. In tax fraud cases, expert evidence can include handwriting analysis presented by the Canada Border Services Agency (formerly the CCRA Forensic Laboratory) forensic laboratory staff with respect to the examination of questioned documents. Occasionally,

services of a professional accountant may be used to introduce expert opinion evidence in the field of accounting and similarly, experts may be engaged, from time to time, in many other professional fields.

- (2) In all cases requiring the employment of an expert witness, it is necessary that an agreed contract be negotiated prior to the rendering of the service. The Tax Services Office contemplating such contracts of service should discuss the matter with the Criminal Investigations Directorate as these costs are charged its legal budget. The Tax Services Office will prepare the contract in accordance with the current Finance Directorate directive. After the contract has been approved and signed by the contracting parties, a copy of the signed contract will be forwarded to the Criminal Investigations Directorate for budget control purposes. Expenditures incurred under the contract will be journal vouched to headquarters by the local finance officer after payment.

12.2.4.27 Privilege

A Privilege in the law of evidence means the right of some person or state to withhold evidence, otherwise relevant and admissible, from a court of law. Common law recognizes a number of privileges, such as Crown privilege, spousal privilege, privilege against self-incrimination, and solicitor-client privilege. Wills are also privileged documents. The recommended procedures for dealing with solicitor-client privilege claims are outlined in chapter 8.

12.2.4.28 Husband and Wife

A person and his or her spouse are neither competent nor compellable witnesses for Crown against each other. This incompetence does not extend to a common-law relationship. A husband and wife are, however, competent witnesses for the Defence. Divorce restores competency as a witness for Crown.

12.2.4.29 Reputation, Mental and Physical Condition

Evidence of good character is admissible on behalf of the defendant through testimony as to their reputation in the community. Witnesses, however, cannot testify as to their own personal opinion of the defendant. Once the matter of the defendant's character has been placed in issue (but not before), Crown can introduce evidence of bad character. Similarly, evidence of the defendant's mental or physical incapacity is admissible on their behalf. Once the matter is in issue, Crown may introduce evidence in rebuttal.

12.2.5 Special Rules

SPECIFIC PROVISIONS AFFECTING THE TENDERING OF EVIDENCE		ITA	ETA
A.	Copies of any documents which were seized, inspected, examined or provided under the Act to be entered as evidence, provided they are properly certified by authorized officers of the CRA	231.5(1)	291(1)
B.	Affidavit evidence to show service by mail C.	244(5)	335(1)
	Affidavit evidence to show personal service	244(6)	335(2)
D.	Affidavit evidence of failure to comply with a Requirement	244(7)	335(3)
E.	Affidavit evidence to show time of compliance	244(8)	335(4)
F.	Affidavit evidence to prove copies of documents or records in the custody or control of the CRA and where the records were made by the CRA or made by the person and filed with the CRA	244(9)	335(5)
G.	Affidavit evidence as to non-receipt of appeal H.	244(10)	335(6)
	Irrefutable proof of CRA documents.	244(13)	335(8)
I.	Proof of return, certificate, statement or answer by	244(17)	335(12)

**SPECIFIC PROVISIONS AFFECTING THE
TENDERING OF EVIDENCE****ITA****ETA**

production of the document

and (18)

and (13)

All of the above are refutable, with the exception of items (A) and (H).

12.2.6 Equity

- (1) It is important that the course of any investigation be directed toward assembling all the facts bearing on the matter at issue, not just a cross-section of evidence or certain facts. Investigators should scrupulously avoid pre-judgement.

They should not search just for items of proof consistent with guilt, but also those consistent with innocence.

- (2) The true concept of equity in these matters is that Crown never wins and Crown never loses. It is the responsibility of those serving Crown to see that all available evidence is offered, regardless of the party it may favour. The ends of justice can then be considered served.

12.3 Foreign Based Information

- (1) The authority for swearing affidavits outside of Canada is contained in sections 52 to 54 inclusive of the *Canada Evidence Act*.
- (2) Section 52 lists the classes of persons to whom this part extends. It was amended in February 1995 to include judicial officials in a foreign state.
- (3) Section 53 states that oaths, affidavits, solemn affirmations or declarations administered, taken or received outside of Canada by persons listed in section 52 are as valid and effectual to all intents and purposes as if they had been administered, taken or received in Canada by a person so authorized to administer, take or receive oaths, affidavits, solemn affirmations or declarations.
- (4) Section 54 states that any document that purports to have affixed, impressed or subscribed thereon or thereto the signature of any person authorized by this section to administer, take or receive oaths, affidavits, solemn affirmations or declarations together with their seal or with the seal or stamp of their office to which the person is attached in testimony of any oath, affidavit, solemn affirmation or declaration being administered, taken or received by the person, shall be admitted in evidence without proof of the seal or stamp or of their signature or of their official character.
- (5) The above procedure applies only to those countries in which there is a representative of a class mentioned in section 52. The persons referred to are able to exercise their function only in the country to which they have been assigned.

12.4 Corporations and Appropriations

- (1) Where income of a corporation has been understated in circumstances amounting to tax evasion, charges can be laid against the corporation. Section 242 of the ITA and section 330 of the ETA permit charges to also be laid against a participating officer, director or agent of the company. One global charge may be laid against the company and the officer, director or agent jointly under paragraph 239(1)(d) of the ITA. Another option is to lay 239(1)(a) and (d) charges.
- (2) Shareholders are taxable under section 15(1) of the ITA on any property appropriated by them from a corporation. If the evidence supports income tax fraud, they should be charged for failing to report this income in their personal Income Tax Returns. Normally the following charges would be laid:
 - One charge (global) under paragraph 239(1)(d) against each shareholder personally regarding the appropriations and omission of other income, and
 - Charges under paragraph 239(1)(a) against each shareholder for each year involved.

12.4.1 Limitation of Prosecutions

- (1) Subsection 244(4) of the *Income Tax Act* and subsection 332(4) of the *Excise Tax Act* have an eight-year limitation period for prosecution by way of summary conviction. It commences on the day on which the matter of the information or complaint arose.
 ITA 244(4) Limitation period - An information or complaint under the provisions of the Criminal Code relating to summary convictions, in respect of an offence under this Act, may be laid or made at any time within but not later than 8 years after the day on which the matter of the information or complaint arose.
 ETA 332(4) Limitation of prosecutions - An information or complaint under the provisions of the Criminal Code relating to summary convictions, in respect of an offence under this Part, may be laid

or made on or before the day that is eight years after the day the matter of the information or complaint arose.

- (2) The limitation period does not apply to offences prosecuted by way of indictment.

General Guidelines

- (1) Sections 239, 239(1.1) of the ITA and 327 of the ETA contain offences for destroying records, omitting entries in a record or conspiring with others, all of which for the purposes of evading taxes. The opening date for these offences will depend on what evidence investigators obtained to prove they occurred.
- (2) Investigators and team leaders should establish the period to be considered for prosecution at the preliminary stage. Throughout the investigation they should continually evaluate which years to consider for prosecution keeping in mind the limitations prescribed by the ITA and ETA, the best-case concept and the CRA's policy on which cases to recommend prosecuting by way of indictment.
- (3) The Public Prosecution Service of Canada counsel who is assigned the case has the ultimate decision on what offences to prosecute and the wording of the charges.

Policy for determining opening date for charges

CRA investigators should use the following guidelines to determine the opening date for charges. **If returns have been filed**

- (1) The opening date for charges under ITA section 239(1)(a) and (d), 239(1.1)(a) and (e) and ETA section 327(1)(a), (c) or (d) should be the day the return was filed.
- (2) In cases involving multiple years or reporting periods, [which may extend beyond the 8 year limitation period] use the date the return was filed in the first taxation year under investigation within the 8 year limitation period.

If returns have NOT been filed

In the case of non-filed returns, the date on which the return was due to be filed is considered to be the day on which the matter of the information arose.

12.5 Considerations for Indictment or Jail Sentence

- (1) Concurrent with the referral to the PPSC and when considered appropriate in flagrant cases, the TSO will recommend in a separate memorandum to the Director, Criminal Investigations Division, Criminal Investigations Directorate at Headquarters, those facts which the TSO feel should be brought to the attention of PPSC to assist them in their decision as to the method of proceeding. Headquarters will relate the appropriate facts to PPSC. No recommendation for indictment or a jail sentence should be made in the referral letter to PPSC or the prosecution report. Each case must be decided on its own facts and aggravating factors as outlined below.
- (2) For greater clarity, it should be understood that the purpose of the guidelines is to assist in selecting flagrant cases for the most severe action, thereby increasing the overall deterrent effect of these cases. A regular number of cases taken to court each year, which result in jail terms, should help to maintain the integrity of our system.

Prosecution by Indictment

Consideration for prosecution by indictment should be proposed in cases where:

1. The accused has previously been convicted of tax evasion or conspiracy to evade tax/GST; or
2. A significant amount of tax/GST evaded and at least one of the following aggravating factors is present:
 - a) The evasion scheme was sophisticated or used a multiplicity of methods to evade tax/GST and demonstrated considerable planning;
 - b) The accused counselled others to evade taxes/GST;
 - c) The accused acted as an advisor or consultant to others, who then innocently acted on the advice and unknowingly became involved in the tax/GST evasion;
 - d) An innocent third party suffered significant losses because of the actions of the accused; e) The accused, or someone on the accused behalf, attempted to tamper with important evidence or witnesses;

- f) The accused used intimidation designed to induce others (employees, suppliers or customers) to assist in or acquiesce in the offence;
- g) The accused sold, transferred or placed assets beyond the reach of the authorities to prevent collection of taxes payable; or
- h) Conspiracy charges are considered.

Summary Conviction

- (1) Routine cases will be proceeded with by summary conviction.
- (2) Consideration for prosecution by summary conviction requesting a jail sentence should be proposed in cases where the tax/GST/HST alleged to have been evaded is considerable and an aggravating factor such as those listed above is present, in addition to the principal method of fraud.

12.5.1 Pre-trial Notice and Disclosure

- (1) Section 30(7) of the *Canada Evidence Act* states that no record or affidavit will be entered into evidence under that section unless the party producing the record or affidavit has, at least 7 days before its production, given notice to all parties of the intention to produce it in the legal proceedings. Furthermore, the party must produce it for inspection by these parties within 5 days of issuing the notice.
- (2) In the Supreme Court of Canada decision *R. v. Stinchcombe* 68 C.C.C. (3rd) 1 S.C.C., the court outlined the obligation of Crown under s.7 of the *Charter* to provide Defence with full pre-trial disclosure. This is to ensure the accused knows the case to be met, and is able to make full answer and defence. The disclosure requirements and obligations of Crown include:
 - (A) All evidence gathered during the investigation up to and including the trial, subject to the discretion of Crown counsel to withhold for reasons of privilege, relevance, or witness safety;
 - (B) The disclosure must occur before the accused is called upon to elect a mode of trial or to plead; and
 - (C) Ultimate responsibility rests upon Crown counsel who undertakes the prosecution.
- (3) As a result of the *Stinchcombe* decision, the Attorney General of Canada made a public policy statement indicating that in a criminal matter Crown will disclose evidence which it intends to rely on at trial as well as any evidence which may assist the accused, whether intended to be adduced or not. Crown counsel will make the appropriate decision as to the relevancy of the documents for disclosure purposes. Crown counsel prosecuting the case will provide access to the following information and evidence prior to the time charges are laid in order that they may exercise their duty relating to pre-trial disclosure.
 - (A) A summary of the facts and a synopsis of the evidence of each witness Crown intend to call
 - (B) Documentation:
 - a copy of any document obtained during the investigation;
 - a copy of the charges laid and all the documents relating to the court process (summons, etc.);
 - a copy of the search warrant and search warrant information; – a copy of any expert report; and
 - four copies of all photographs, if any, taken during the investigation.
 - (C) Names of third party witnesses (whether or not they will be called by Crown) and a copy of any written statement and notes of statements (will says).
 - (D) Names of CRA witnesses (whether or not they will be called by Crown) and a copy of any written report plus the officer's hand-written notes.
 - (E) Accused: A copy of any written statement and a summary of any oral statement made by the accused.
 - (F) Miscellaneous: A list of all exhibits and names of persons who will introduce them. (G) Any remarks or commentaries regarding what portions of the above, if any, should not be disclosed and the reasons why.
- (4) The prosecution report will provide a good deal of the information recorded above to the presiding Crown counsel and this document will form part of the disclosure to Defence. The TSO will make

available to Crown counsel the balance of the required documents as described above. The mechanics or procedures for providing Crown counsel access to the investigator's material in each case should be worked out through discussions with the regional Public Prosecution Service of Canada (PPSC) or the agent handling the case.

- (5) From the very outset of the investigation, the investigator must plan for making disclosure. This means the investigator must begin accumulating, in one place, all of the various notes, memoranda, letters and working papers, auditor's notes and working papers, notes etc. of any other CRA officers involved, witness interview notes, audio and video tape recordings, witness statements, affidavits, witness reports, search papers, etc., and all the various exhibits. If these things are not kept in one place, or otherwise properly organized, one runs the risk of forgetting to disclose certain things which may well result in a prosecution being lost for failure to provide full disclosure.
- (6) The investigator should keep an inventory of everything disclosed to Defence and this should include to whom disclosure was made and the date of the disclosure. From time to time after the initial disclosure, additional information or evidence may be disclosed to Defence. If so, an inventory of the additional things disclosed similar to the original disclosure must be kept

12.5.2 McNeil Policy

The Supreme Court of Canada decision in *R. v. McNeil* on January 16, 2009 imposes an obligation on the CRA to provide the Crown with records relating to findings of misconduct by employees involved in the investigation against the accused where

- (1) the misconduct is either related to the investigation or
- (2) the finding of misconduct could affect the credibility of the employee as a witness in the case against the accused.

The onus is on any CRA employee involved in a criminal investigation, as a witness, to make the Public Prosecution Service of Canada (PPSC) aware, in writing, of all items covered by this policy.

The lead investigator will compile a list of witnesses and prepare a package to give to each witness to fulfill their McNeil reporting requirements. The McNeil report package will consist of the following:

- An envelope pre-addressed to PPSC with case name and number
- A blank McNeil report (except for case name and number)
- Instructions on how to fill out the report and the procedures to ensure delivery directly to PPSC counsel assigned to the file or to the chief federal prosecutor of the regional office or their designate

The lead investigator will ensure that each witness is aware of their responsibilities related to the McNeil report and note on the list of witnesses that all relevant information has been given to each witness. The witness will be required to sign the witness list acknowledging that they have received the package and an explanation of the policy. The lead investigator must forward the list of witnesses to the PPSC at the time the case is referred to PPSC. If additional witnesses are identified later then the lead investigator will follow the same procedure with them.

Witnesses will be required to self-identify and report any findings or pending allegations of employer related investigations for work-related misconduct. In addition, they will be required to report any pending charges or convictions under federal or provincial statute which relate to the actual investigation or could relate to their credibility as a witness in the subject proceedings. If they determine that they have an item(s) that should be reported they will be required to fill in a report. **If the witness determines that they have nothing to report then they are not required to prepare a report.** If a witness is unsure whether a particular item should be reported they should contact their local PPSC office for advice.

If a witness is the subject of any work related misconduct allegations and / or convictions or pending charges under a federal or provincial act at any time prior to start of the trial they should refer to the package provided previously by the lead investigator. If they determine that an item(s) should be reported to PPSC then a report should be prepared and forwarded directly to PPSC. If a witness has already made a McNeil report and needs to add items they should contact the PPSC counsel directly to inform them of the additional information. Conversely, if a witness submitted a McNeil report based on outstanding allegations of work related misconduct or criminal charges, and those allegations are dismissed prior to completion of the CRA

case; the witness should prepare a new McNeil report and provide a written explanation of the changes and forward it to the PPSC counsel assigned to the case.

Auditors / Officers who refer cases to the Criminal Investigations Division must be made aware that if a case is accepted for full scale investigation and referred to PPSC they will be required to do a McNeil report if they have items to disclose. The referring auditor / officer will be asked to prepare the report at the same time as others involved in the case.

All CRA employees from outside the Criminal Investigations Division involved in a search must be made aware of the possibility that they will need to make a McNeil report. They should be informed of this possibility prior to their participation in the search.

Descriptions Witness

The following CRA employees will likely be witnesses and will be given a McNeil package:

- Lead investigator (in the case of a team investigation all members of the team)
- Referring auditor
- Referring official from other areas in CRA ex. Non-Filer, Trust Accounts, Collections, Tax Centre
- Investigators involved in witness interviews during the course of an investigation

The following may also be a witness, if determined by the lead investigator or PPSC, and will be given a McNeil package when that determination is made:

- Employees who seized items during the course of a search
- Other employees involved in a search
- Assistant Director, Criminal Investigations and / or Team Leader
- Other CRA staff who have had input in the case
- any CRA employee who will be called as a witness by the defence during court proceedings

The witnesses described above are CRA employees who may be required to submit a McNeil report to PPSC. It is not a list of employees whose items will be disclosed to defence. PPSC will make the determination of what must be disclosed in accordance with the principles set out in the McNeil decision.

Misconduct

The McNeil decision imposed a legal duty on the Crown to disclose to the accused all misconduct that is serious or misconduct that could reasonably impact on the case against the accused. Misconduct relating to the reliability of the witness, such as perjury, obstruction of justice and charges that deal with dishonesty will have an impact on the credibility or judgment of the witness.

CRA's Discipline Policy and Guidelines provides examples of misconduct and suggested disciplinary measures. There are examples of misconduct in the Discipline Policy and Guidelines which do not have to be reported to PPSC in a McNeil report. CRA employees are not required to report oral or written reprimands issued by CRA management for misconduct types in Group 1 or 2 of Table 1 of the Discipline Policy and Guidelines. If a CRA employee is unsure whether a particular incident of misconduct should be reported they should contact their local PPSC office and discuss the matter with Crown counsel. The employee must be able to justify why a particular misconduct incident was not included in a McNeil report.

The following are examples of misconduct listed in the Discipline Policy and Guidelines that **must be included in a McNeil report**:

- Falsification of expense accounts, e.g. improper use of and falsification of taxi chits
- Use of the CRA's electronic networks to participate in or conduct unlawful activities
- Forgery, falsification or suppression of CRA documents
- Obstructing or refusing to co-operate in an investigation (internal)
- Embezzlement
- Misrepresentation for personal gain
- Soliciting or accepting a bribe
- Theft
- Violation of legislation enforced by the CRA
- Obtaining or attempting to obtain leave fraudulently
- Unauthorized disclosure of taxpayer or other sensitive / confidential information

- any other misconduct for which a suspension in excess of 29 days was received

This is not an exhaustive list. Ultimately, what is "serious misconduct", as coined in the McNeil decision, is a judgment call. It will be up to Crown counsel to determine the relevance of the misconduct to the case at hand and whether it must be disclosed to defence counsel.

Any alleged misconduct or discipline that is directly related to the case at hand or as a result of an employee's involvement in a previous investigation must be reported.

Any current investigation being undertaken by CRA and related to the above-noted types of misconduct, which the employee is aware of, must be reported.

A McNeil report concerning misconduct must be made regardless of whether the two year limitation, related to destruction of the documentation, included in collective agreements has expired.

A McNeil report must be completed for any serious misconduct, similar to those listed above, for which discipline was taken against an employee in previous employment outside of CRA regardless of when the misconduct took place. It will be up to Crown counsel to determine the relevance of the misconduct to the case at hand and whether it must be disclosed to defence counsel. If an employee is unsure whether a particular incident of misconduct should be reported they should contact their local PPSC office and discuss the matter with Crown counsel. The witness must be able to justify why a particular misconduct incident was not included in a McNeil report.

Misconduct includes any findings or ongoing investigations of misconduct by a professional body such as the CICA, CGA, CMA or a law society and must be included in a McNeil report. **Convictions or pending charges under a federal or provincial act**

Convictions (unpardoned) and pending charges under the following need to be included in a McNeil Report:

- *Income Tax Act*
- *Excise Tax Act*
- *Criminal Code of Canada*
- *Controlled Drugs and Substance Act*
- Any other federal statute
- Any provincial statute (with the exception of outstanding charges, convictions or findings of guilt for minor traffic infractions or other minor regulatory offences)

Timing of McNeil Reports

McNeil reporting to PPSC should be done, normally, at the same time as the referral of the case to PPSC.

The lead investigator should provide all potential witnesses with the McNeil package at least two weeks prior to the referral to ensure that the completed McNeil reports are received by PPSC at approximately the same time as the referral. PPSC may request that disclosure be made earlier if preliminary discussions have taken place. The lead investigator must also provide PPSC with a list of witnesses, the date they were provided with a McNeil package and a witness signature at the time of the referral.

Privacy of Employee Information

A CRA employee may have a privacy interest in information included in a McNeil report. CRA and its employees differ from police agencies in that police misconduct reviews and discipline imposed are available to the public and attract only a limited privacy interest. CRA misconduct reviews and any discipline imposed are not available publicly and may only be accessed by authorized CRA management and only when appropriate. The privacy interest of an employee in their discipline or personnel file is not waived or lost as a result of the completion of a McNeil report with the exception of when disclosure is made to defence during the course of court proceedings.

These procedures are designed to balance the interests of the employee in protecting their personal and private information with the right of the accused to a fair trial by accessing information necessary to make full answer and defence. Accordingly, the PPSC counsel is responsible to act as the gatekeeper of the information contained in the report and to make a decision whether the contents of the report are relevant to the prosecution and need to be disclosed.

A CRA employee who discloses an item in a McNeil report can inform the PPSC that they wish to discuss the item with PPSC prior to disclosure to defence. They will be given the opportunity to explain why the item should not be disclosed to defence.

If information is released to defence counsel there is a possibility that it will be introduced as evidence in open court during the proceedings.

If CRA management becomes aware of criminal charges or convictions or any prior work related misconduct findings against a CRA employee as a result of court proceedings they are obligated to review the information and determine if it has an impact on the credibility of the employee or if it amounts to improper conduct in accordance with the Code of Ethics and Conduct stipulations.

Roles and Responsibilities Lead

Investigator:

- Prior to executing a search warrant advise all staff from outside the Criminal Investigations Division involved that they may be required to prepare a McNeil report and their obligations if required to do so
- Compile a list of witnesses who may be called upon to testify in the criminal proceeding • Prepare a McNeil package for each witness identified
- Distribute the packages to all witnesses identified
- Provide an explanation to all witnesses identified as to their obligations under McNeil and ensure that the witnesses understand their responsibility
- Note on the witness list when a package and explanation has been given to a particular witness and have the witness sign the list
- Provide to PPSC, at the time of the referral, a list of witnesses who have been given a McNeil disclosure package
- Respond to any queries or requests that PPSC may have related to McNeil issues **Assistant**

Director, Criminal Investigations / Team Leader

- At least once a year review with staff their obligations under McNeil
- Periodically meet with Audit Division and other Tax Service Office staff potentially impacted by McNeil reporting to review their obligations when involved in a criminal investigation or prosecution action
- Review the lead investigator's list of witnesses before it is given to PPSC. In each case ensure that all potential witnesses are identified and have been informed of their responsibilities under McNeil
- If he / she is aware that an employee involved in a criminal tax evasion case has an item for which a McNeil report should be completed ensure that PPSC has received a report concerning the reportable item. The Assistant Director, Criminal Investigations may be aware of the item by virtue of an internal misconduct review, annual code of conduct disclosure or other means
- In instances where an Assistant Director, Criminal Investigations is aware that the contents of a particular CRA employee's McNeil report has negatively impacted a case they must evaluate in collaboration with Human Resources - Staff Relations whether the employee continues to be able to carry out the tasks required to perform their duties, in accordance with Human Resources policies

CRA Employees Involved in CRA Criminal Investigations (auditor or other CRA official who refers a case to CIP, investigators or other CRA officials who seized things during a search or participated in an investigative interview)

- Ensure that they are familiar with their obligations related to a McNeil disclosure
- Do a self-review and assessment of any findings or current allegations of work related misconduct
- Do a self-review and assessment of any convictions or pending charges under a federal or provincial statute
- If unsure whether a particular item should be included in a McNeil report they should contact their local PPSC office for guidance. A witness may, at their discretion, discuss whether an item should be reported with the Assistant Director, Criminal Investigations.

- If required, prepare a McNeil report and forward it directly to PPSC. The witness must retain a copy of the report and proof the report was hand delivered or sent via registered mail to PPSC
- Update or prepare a new McNeil report if any items that must be reported occur prior to the conclusion of any criminal proceedings in which they are or will be a witness and forward directly to PPSC
- Discuss the contents of the McNeil report with PPSC counsel when contacted and provide specific documents if requested by PPSC
- Review the CRA Code of Ethics and Conduct to determine if any items that they need to disclose in a McNeil report are also required to be reported to CRA management as outlined in the Code
- It is the duty of a witness to make a McNeil report, if necessary, and if they fail or refuse to complete it when required to do so it would constitute an act of misconduct (i.e. insubordination) which could attract discipline. The completion of the McNeil report is not a choice, it is a legal requirement

PPSC Counsel (including Crown Agents)

- Act as the "gatekeeper" for all McNeil reports from CRA
- Review all McNeil reports to determine the relevance of the items disclosed to the case at hand
- If necessary, discuss the contents of a McNeil report with a witness and determine if they need to review the underlying file or specific documents related to the incident(s)
- Disclose to the defence items that have been determined to be relevant to the case at hand in accordance with the principles set out in the McNeil decision
- Ensure that the information contained in a McNeil report remains confidential, subject to disclosure in court proceedings
- Inform the witness that information resulting from a McNeil report is being disclosed to the defence
- When an accused is unrepresented, Crown will request that the court impose special conditions on the further dissemination of the private information contained in a CRA's employees McNeil report
- Destroy McNeil reports when no longer required for the particular case for which they were submitted in accordance with PPSC policies and the Library and Archives of Canada Act, the *Security of Information Act*, and the *Access to Information Act and Privacy Act*
- If a case is not accepted for prosecution or does not proceed as a result of the contents of a McNeil report PPSC counsel will inform the Assistant Director, Criminal Investigations that the case has not been accepted for prosecution due to a "McNeil disclosure issue"
- PPSC counsel is not obligated to give the specific details of the McNeil report contents
- PPSC counsel may report to an Assistant Director, Criminal Investigations that they have determined that a particular CRA employee has credibility issues that may affect their ability to act as a witness in criminal proceedings. Existing Human Resource policies will be followed by CRA management in these instances.

12.5.3 Pre-trial Delays

- (1) The Supreme Court of Canada in *R. v. Askov*, 1990 2 S.C.R. 1199 and later in *R. v. Morin* (March 26, 1992) dealt with the S. 11(b) *Charter* issue of what constituted an unreasonable delay between the date charges are laid, setting a trial date or a committal for trial is made, and the commencement of the trial. The court summarized the factors as follows:
 - (A) The length of the delay;
 - (B) Explanation of the delay;
 - delay attributable to Crown;
 - systemic or institutional delay;
 - delay attributable to the accused,
 - (C) Waiver by the accused;
 - (D) Prejudice to the accused.
- (2) A ruling of unreasonable delay results in the acquittal of the accused. Challenges on tax cases have held that a delay of 13.5 months was unreasonable. The TSO should seek early trial dates and be ready to go to trial shortly after charges are laid.

- (3) A second period of delay which faces legal challenges is the period from the time the person is informed of our intention to recommend prosecution to the time the actual charges are laid (pre-charge delay).
- (4) The TSO should monitor the progress of cases after they are referred to the regional PPSC. Regular discussions with the assigned legal officer should take place to ensure that all required information is available and that delays are kept to a minimum.
- (5) Delays incurred during the investigation are also the cause of legal challenges. Investigations managers and team leaders should ensure that there are ongoing activities on the development of each case. Where there are delays, the reasons should be adequately documented (i.e. collecting foreign source information). For example, where the investigator in charge of the case leaves the division or is away for an extended period, the case should be promptly re-assigned.

12.6 Case Jurisprudence – Criminal Investigations Directorate's Library

- (1) The Criminal Investigations Directorate maintains a library of jurisprudence on CRA cases and topics. This information bank (ECASE) is available through an on-line service, having a search and retrieval capacity for a given subject, section of the Act, or topic. Access to E-CASE can be found at: http://sh05cpww0400/apps/case_summaries/English/Main.cfm
- (2) To ensure that the library is up to date and effectively meets the needs of users, TSOs are requested to inform the Criminal Investigations Directorate of ongoing legal challenges with the resulting decisions and other court decisions for input into the system as soon as they are received. Transcripts of important court judgements should be requested and forwarded to the Criminal Investigations Directorate.
- (3) Research of legal issues and copies of judgements can be obtained by contacting the Criminal Investigations Directorate.

November 2012

Chapter 13 – Witnesses and Exhibits

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Exhibit 13.A **Witness List/Exhibit Register**

13.1 Witness Reports 13.1.1

Purpose

- (1) To meet the standard of evidence required for prosecution, cases must be brought to the stage of development where the Crown will be in a position to introduce witnesses whose evidence will, in cumulative effect, prove the guilt of the accused beyond a reasonable doubt.
- (2) In most cases, Crown's witnesses will be CRA employees and other persons (third parties) who are independent of both the CRA and the accused.
- (3) In order to facilitate the development of our prosecution cases along the lines set out in the standard, a witness report should be used by the investigator to record information available. Fillable forms T23 and T23A are available on Infozone, Forms and Publications. These forms can only be printed, they cannot be saved electronically.
<http://infozone/english/r1713497/formpub/form-e.asp?formid=712992824720523>
<http://infozone/english/r1713497/formpub/form-e.asp?formid=761918065159016>
- (4) The purpose of the witness report is:
 - To record the name, address and other pertinent information regarding Crown witnesses so that they can be located readily for trial purposes and served with subpoenas, where necessary.
 - To synopsise the evidence that can be expected from each witness.
 - To provide a record of the progress on each case being prepared for prosecution.
 - To facilitate the preparation of prosecution reports.
 - To provide a basis for briefing counsel.

- For disclosure to Defence.
- To provide a basis for counsel's examination and cross-examination of witnesses. **13.1.2**

Preparation of witness reports

- (1) It is intended that witness reports will be prepared from day to day, as the investigation proceeds.
- (2) The content of the witness report and the use for such content is worthy of review. It is important to record the full identity of the witness, which includes his full name, business address, business telephone number, occupation or position, residential address and telephone number. This information will be essential in the preparation and service of the subpoena for each third party witness and in communicating with your witness to arrange an appointment or date of attendance in court.
- (3) Prior to preparing a primary report and Information to Obtain (ITO), investigators should interview the referring auditor (consider interviewing all CRA officials connected in any way to the T134 referral) and then prepare a "will-say(s)" or witness statement(s) for the referring auditor's (CRA official's) review. The referring auditor (CRA official) should sign (or initial) the statement signifying that they agree with its content (or make the applicable corrections). This will then serve to clarify what information the investigator received from the auditor (CRA official), which will then be included in the primary report and ITO. These procedures should help prevent last minute delays in finalizing ITO's and avoid surprises for the investigator and/or the PPSC in later stages of the investigation. Criminal Investigations Divisions should ensure that any sample case progress sheets they use include this step.
- (4) The first statement any witness makes on entering the witness stand is his full name to the clerk of the court, whereupon they are sworn. It then customarily follows that prosecuting counsel commence their examination-in-chief by having the witness state where they are employed, their position with their employer and any other facts which may be pertinent to establishing the witness as a responsible and knowledgeable person in the eyes of the court. This illustrates why it is useful for counsel to have these pertinent facts regarding the witness's identity at the outset of their brief.
- (5) Age, physical condition and any special comments about the witness should be entered. Remember, however, that this witness report may well be provided to Defence as part of the normal disclosure package. It may, therefore, be advisable to discuss verbally with counsel, a witness' weaknesses and not enter these in the witness report.
- (6) Under no circumstances can weaknesses in the witness' *evidence or credibility* be withheld from the witness report. If the remark block does not provide sufficient space, this information may be added below in the main body of the form.
- (7) Provide, where applicable, any available information concerning any possible relationship between the suspect and the witness, together with an assessment of the significance of the relationship on the alleged infractions and degree of cooperation with the investigation.
- (8) The dates of all interviews held with the witness and the names of all CRA and other officers (e.g. RCMP members) present should be specified. Notes and memoranda of all witness interviews must be readily available for examination by the Crown counsel, in order to facilitate evaluation of the witness and to facilitate disclosure to Defence. In those unusual cases, where a witness was not interviewed, it must be so stated.

13.1.2.1 Form and Content

- (1) As soon as possible after evidence has been obtained from a potential witness, the investigator should proceed to synopsise the evidence available from this individual and record it on a witness report.
- (2) The evidence must be sufficiently explicit and detailed to enable Crown counsel to understand the transaction or event being spoken to, so that they can lead a logical examination of the witness. It should also specify all items of documentary evidence the witness can introduce or speak to in court.

- (3) Any lengthy and complex evidence, detailed in a formal statement and/or memorandum of interview, does not have to be repeated in the witness report; a short summary referring to a copy of the memorandum or statement, will suffice.

13.1.2.2 Non-CRA witnesses

- (1) All evidence gathered from non-CRA witnesses, which is material to the successful completion of the investigation, should be reduced to writing in the form of a statement, in accordance with section **9.4 Interviews with Third Parties** before it is summarized on a witness report.
- (2) In all cases where a statement is obtained from a witness, a copy of the statement, whether formal or informal, must be attached to the witness report. Where possible, a copy of the exhibit evidence, referred to in the statement, should either be appended to the witness report or otherwise provided for review by our legal representative.
- (3) In those exceptional cases, where a statement was not obtained from an important witness, the reason why should be stated briefly on the space provided on the witness report.

13.1.2.3 Documentary Evidence

- (1) In addition to the verbal evidence expected from a witness, the main body of the witness report is meant to detail the documentary evidence the witness is expected to introduce in court or speak to in his testimony.
- (2) Those exhibits will be numbered in the two columns on the right hand side of the page. The "Document Ref." column will number the exhibits the witness can introduce in court.
- (3) The "Cross Reference" column will show the exhibit numbers of documents to be introduced by other witnesses to which this witness will refer in his testimony, and which should, consequently, be available to him.

13.1.2.4 Factual Evidence

- (1) Investigators preparing witness briefs should guard against the tendency to write what they would like the witness to say, rather than what the witness will say. In order to make proper evaluations of evidence, it is essential to record the facts accurately and to have them supported by written declarations for all key witnesses.
- (2) The evidence detailed in the main body of a witness report must be limited to the "factual evidence", as gathered during the investigation.
- (3) A witness report is not the place to interpret or expand on the evidence obtained during the investigation. It should list only the facts that are supportable by corroborative evidence.
- (4) It is recognized that some witnesses will be interviewed several times, with more and more information being extracted on each occasion. Moreover, a witness will sometimes provide information or documents, which eventually prove to be irrelevant or redundant to the case. In such cases, it may be necessary to re-write or edit the witness reports, so that the net result of the evidence obtained from the witness will be clear and readable. It is suggested, that such editing be delayed until the case is being assembled for prosecution report purposes.
- (5) Numbering of the witness reports and the various exhibits each witness will introduce will be done at the conclusion of the case when all the witnesses and exhibits have been identified and you are preparing the prosecution report.

13.1.3 **Third Party Witnesses**

- (1) While preparing a case for prosecution, the investigator is expected to:
 - (A) Interview all relevant third parties in accordance with chapter **9.1.4 Interviews with Third Parties**
 - (B) Identify:
 - a) All evidence available (verbal and documentary)
 - b) The custodian of each item of documentary evidence
 - c) The best available witness(es) to speak from personal knowledge to:
 - Each specific document and its (their) content and to the transaction(s) represented;

- The normal procedure followed in the business, industry, trade or profession to conduct and record the specific transaction(s) under review.

(C) Determine the number of witness(es) required to introduce and explain in court evidence sufficient to prove an alleged offence, beyond a reasonable doubt, and to rebut any possible negating allegations, which could be raised by Defence.

- (2) In most instances you will have obtained the original document from the witness. However, from time to time, the witness may not release the original (banking institutions are an example). If such is the case, a certified true copy must be obtained. There are two reasons for this:
 - (A) If the original were to be lost, you would have lost the benefit of that piece of documentary evidence;
 - (B) The Crown is obligated to make disclosure to Defence of its entire case before the commencement of any trial. This disclosure includes copies of all exhibits. You must therefore have in your possession, at least a copy of any documents you want your witnesses to introduce.
- (3) If a witness will be bringing the original document to court under the subpoena, a special note to this effect should appear on the witness report.

13.1.4 Third Party Evidence

Preparing cases to prosecution standards requires that admissible evidence be on hand or available for introduction by competent witnesses. Meeting this standard has resulted in an increased procurement of third party documents prior to the laying of charges. As improper handling or inadequate identification could place the admission of documentary evidence in jeopardy, it is important to observe certain precautions. The following guidelines are considered a minimum:

- Documents obtained from a third party should be dated and initialled by the person who will be subpoenaed to identify and speak to them. The Investigator should prepare a receipt in duplicate, listing the items taken and referring to the identification on the documents, giving the original to the third party and retaining the duplicate for his file.
- Whether consideration should be given to securing possession of original documentation from a third party or whether certified photostatic copies will suffice is a matter of judgement. Where the security of the original documents is in doubt, it is prudent to have them in your possession. Where expert document examination will be sought it is essential to have the original documents. If it is judged that the third party can be relied upon to produce the originals in Court under subpoena, certified photocopies may be taken. The ways to secure possession of original documentation from a third party are either by borrowing the documents with the consent of the third party or seizure by either search warrant or Production Order. Some third parties will prefer to hand documents over to the investigator, rather than be responsible for their safe retention, until required in Court. In instances where documents are retained by the third party under an agreed arrangement, whereby they will be kept available for future production in Court and, where conclusion of the case was effected without the production of the original third party documents, the third party must be released from his undertaking by formally advising him that production of the documents, as discussed when the arrangement was made, will not be required.
- The Investigator must be satisfied that the third party, if called as a Crown witness, will be able to identify and introduce such documents and testify concerning them. Obtaining a statement from a third party or their signature to your notes of the interview may aid in the introduction of his evidence, should there be a lapse of time or their memory become faulty.
- A request must provide adequate detail to enable the receiving TSO to service the request and should clearly specify whether the requesting TSO wants:
 - A transcript
 - Certified photostatic copies or
 - Original documents.

The servicing TSO will then know to what extent it may use its own judgement and will, in pertinent cases, determine who will be the person to be called as a witness and prepare a witness

report, giving the full name, occupation and title, address and other pertinent information to the requesting office.

- Documents should be transmitted in sealed envelopes clearly marked "Evidence - Do Not Open" and stored under the same security conditions as seized records.

13.1.5 CRA Witnesses 1.5.1

Incidental Witnesses

- (1) Witness reports should be prepared for all staff members who are likely to be called as witnesses. These should be prepared throughout the investigation as each person is identified as a witness.
- (2) It is the responsibility of the investigator-in-charge of the case to ensure that all staff members, who were part of a search team, witnessed a confession or otherwise assisted in the investigation or audit, prepare, sign and date, as soon as possible after the event, a statement as to their potential evidence in the case. Normally, this would take the form of a signature and date on the search report or a signed and dated memo, with respect to other potential evidence. However, this does not preclude obtaining a formal statement, under oath, from any staff member.

13.1.5.2 Investigating Officers

- (1) In most cases, the investigator in charge of the case will be the principal Crown witness. It will not be possible for investigators to prepare their witness report until the investigation is complete. However, the investigator must make and retain notes, memoranda and working papers for the file from day to day, so that there is a record of everything the investigator knows about the case.
- (2) It is expected that the investigator's notes and working papers will be sufficiently complete to enable the investigator to give their evidence and undergo cross-examination in court, without hesitation.
- (3) If the investigator had any communication with the accused, full and complete notes must have been made and retained detailing with when, where and why it occurred, who else was present, whether or not the criminal caution was given, (if not, why not), the response of the accused to the caution, the questions asked and the answers given, as well as any other relevant details. If the communication was by letter, that letter must be similarly retained. The investigator should be prepared to take any such notes and letters to the stand when testifying.
- (4) At the end of the case, the investigator should be in a position to prepare the witness report. It should be a synopsis of the evidence the investigator can give. In a typical case, the following would be outlined:
 - (a) The investigator's identity including the position held with the CRA and the history of the investigator's involvement with the case.
 - (b) The place and date of any seizures and what seized documents the investigator can identify.
 - It is appreciated that often several officers are involved in search parties. However, normally the investigator in charge of the case will have briefed the other members of the search party and will have become custodian of the seized material. The investigator's notes and search report, the notes and search reports of other participating officers and the inventory of seized things, will contain complete details of all the seizures.
 - For purposes of the investigator's own witness report, it will be sufficient for him to state that the investigator can identify or introduce seized material, as a result of having seized it, or as a result of having been custodian of material turned over by the other seizing officers.
 - (c) The reconciliation of reported income and the books of account in outline form. If assistance was received from other officers, the investigator should specify the instructions provided and the results reported back.
 - (d) Details of any analysis work performed such as the analysis of the bank records of the accused, or the preparation of a net worth statement.
 - (e) Details correlating the evidence of other witnesses with the case. For example, if evidence from other witnesses has established that a certain transaction took place, and the investigator has checked the seized records to see if it is recorded, a statement of this fact should be made in the witness report. In many cases, it will be sufficient to state that a given transaction or group of transactions are not

recorded in the records and/or not included in the returns. Details, such as journal page references and checking methods used, should be in the investigator's working papers but need not be included in the witness report.

(f) The method used in the preparation of any schedules the investigator intends to put before the court such as those summarizing the understated incomes, taxable supplies and evaded taxes and duties.

13.2 Witness Folder

- (1) A logical step in the development of the case is to prepare and maintain a witness folder for each witness or potential witness. It will contain all information pertinent to the witness, including strengths and weaknesses, and the contribution this witness is expected to make in proving an offence under the various acts.
- (2) The witness folder will contain memoranda and notes of all interviews with the witness. It will also contain any statements taken from the witness.
- (3) The folder will contain all witness reports prepared for this potential witness (i.e., the original and any subsequent revisions.)
- (4) Where practical, the witness folder will contain a photocopy of the exhibits this witness will introduce in evidence. Crown counsel may request that several photocopies of each exhibit be contained in the witness folder at the time of trial, in order to speed up the proceedings by providing copies to the magistrate and the Defence attorney. (To facilitate control and identification, photocopies should bear your exhibit number).
- (5) The witness folder should contain a copy of a receipt for any documents obtained from the witness, and this receipt should describe the documents. The witness will have initialled and dated each document in order to be able to identify and introduce these documents in evidence, as a Crown witness.
- (6) The number of the witness reports should correspond to the number of the related witness folders.
- (7) A useful device is for the witness folder to contain blank paper on which the investigator can record those questions and answers raised during cross-examination, which require rebuttal.

13.3 Exhibits

- (1) **Exhibit 13.A – Witness List/Exhibit Register** is a sample of a witness list/exhibit register which can be adapted or expanded to accommodate the types of documents involved and to record the Defence witnesses and their exhibits. The preparation of this master register serves the investigator as a control document for the presentation of the case and a basis for the body of the prosecution report. It is also a part of the disclosure package and can be used as an exhibit to the notice given under the *Canada Evidence Act*.
- (2) Where no variation is anticipated in the order of witnesses or introduction of documents, it could be suggested to Crown counsel that he might ask the court to accept our exhibit numbering system. If the court consents to such a request, our numbering system should be prefixed by "P", for prosecution exhibits. Defence documents will be given a "D" prefix by the court (or "A" for Appellant if an appeal). In any event, the investigator should record the court exhibit numbers as assigned by the court on his copy of the exhibit register. Prior to Crown closing its case, the investigator should examine the exhibit register to ensure that no exhibits have been missed such as affidavits under section 29 of the *Canada Evidence Act*, etc.
- (3) A list of Defence witnesses and exhibits should also be made as they come before or are entered in court, as Crown counsel may require reference to them in presenting cross-examination, rebuttal, or argument.
- (4) **Notwithstanding** our desire to eliminate as much paper work as possible for reporting or court preparation, the investigator must respect the wishes of counsel and comply with them. Counsel, due to the complexity of the case being presented to the court, may ask the investigator to prepare several copies of legal binders, which contain copies of substantially all of the proposed evidence except for the bulky items such as the books of original entry. These are used extensively by Crown

for their own case preparation and organization, disclosure to Defence, and lastly as aids to the court during the presentation of the case. Due to the volume of exhibits in tax cases, most judges expect to be presented with a binder or binders containing copies of exhibits where they can make notes during the trial process and which they can use later as a basis of reference when rendering judgements.

13.4 Assistance to Counsel 13.4.1

Responsibility of Counsel

- (1) The application of the law is the responsibility of counsel and, while the investigator's opinions in this area may be welcome, counsel's ultimate decision is what prevails. The law would be considered to include the following:
 - The drafting of the information and all other formal court documents.
 - Determining the admissibility of each item of evidence intended to be adduced. – Choosing the particular evidence to be relied upon by Crown and assessing its sufficiency.
 - Determining the order in which evidence shall be adduced, and
 - Developing and deciding upon the specific "theory of the Crown", i.e. matching the facts with the law and determining the precise basis upon which the prosecution will go forward.
- (2) The decision as to the content and timing of summonses and subpoenas is the responsibility of Crown counsel, although the actual initial preparation and subsequent distribution is invariably delegated to the investigator. The investigator should be cognizant of the timing for the issuance of such legal documents and should be in touch with Crown at an early date to obtain guidance and approval for such actions.
- (3) Counsel is also responsible for making disclosure of the relevant information and evidence to Defence. The investigator, however, will play a vital role in this process.

13.4.2 Role of the Investigator

- (1) The facts and the law are not mutually exclusive categories but overlap to some extent. In this regard, the investigator, who must ultimately bow to the decision of counsel, has a responsibility to at least see that counsel is not permitted to ignore a problem and must ensure that counsel is fully briefed on all the facts.
- (2) To enable counsel to consider and assess the value of the evidence, the investigator must be able to provide all the pertinent facts concerning the development of the investigation, the dates of specific actions, what has been said by persons involved and any other detail requested.
- (3) The investigator should have a disclosure package prepared soon after charges are laid so that Crown can quickly respond if Defence requests disclosure. Refer to **12.5.1**

Pre-Trial Notice and Disclosure.

- (4) Counsel will probably prepare a trial brief or plan to follow in presenting the case to court. The investigator may be asked to provide some assistance in its preparation. The trial brief can be described as an abbreviated statement of the pleadings, proof, and affidavits in any legal proceedings, with a concise narrative of the facts and merits of the case for prosecution, probable Defence and a plan of presentation, to be used by counsel at the hearing. The form of the trial brief in a tax evasion case will vary, in accordance with counsel's preferences and the nature of the case. The prosecution report, together with the supporting schedules and exhibits, is a form of trial brief and, if it is carefully thought out, may be accepted by counsel with only minor alterations.
- (5) Counsel will look to the investigator for assistance during the conduct of the court proceedings. As a result, the investigator should be seated at the side of, or near counsel, to be available for consultation at any time. However, in those cases where the investigator is excluded from the trial until called as a witness, another investigator who is familiar with the case should be assigned to assist counsel. The investigator should control documentary evidence as it is entered, record exhibit numbers and be able to produce or identify any item of evidence referred to at any time, including witness reports, photocopies, and/or original documents, schedules, etc. as the case progresses. The investigator should also closely follow and observe the proceedings and, at convenient times, tactfully advise

counsel of any misconceptions or misunderstandings that may need to be cleared up, whether with witnesses or documents entered in evidence.

13.5 WITNESSES 13.5.1 CRA

Witnesses

It is part of the duties of an investigator to appear as a witness; often as the principal witness for the Crown. Other officers of the CRA may also be called to enter, for example tax returns, or to corroborate evidence, or to testify in fields within their knowledge. An auditor could be called, for example to testify on interpretations, tax calculations, etc. Investigators should not be qualified as experts in assessing or accounting matters. Their job is to give evidence of the investigation and their findings; others should be called upon where expert opinions are desired.

13.5.2 Other Crown Witnesses

- (1) Investigators will be expected to be familiar with the law concerning the calling of witnesses, court procedures and the giving of testimony. They will be expected to effectively assist counsel in seeing that witnesses are available for pre-trial examination and are on hand when required to be called to the stand.
- (2) The *Criminal Code* requires that summonses (sec. 509) and subpoenas (sec. 701) be served by "peace officers". A summons or subpoena, served by a person other than a peace officer, would be invalid and, if challenged, would forfeit the authority to compel the witness to appear.
- (3) Where it is expedient and convenient, the investigator may assist counsel in the preparation and service of subpoenas.
- (4) It is customary to provide an additional officer to check off witnesses, ensure their availability at specified times and to compile and pay their expenses. Expense forms, prepared before the trial, can provide control and saving of time.

13.5.3 Witness Fees and Conduct Money

- (1) Witnesses may be paid fees for the time of their attendance in court or at formal Inquiries. In addition, they are entitled to conduct money i.e. reimbursement of expenses incurred as a result of their required attendance.
 - (A) Witness Fees: These fees are stipulated by order in council in some provinces and by statute in others and may vary from province to province. Investigators should seek advice from the justice representative as to the proper fees, if any, to be paid in their particular province.
 - (B) Conduct Money: Witnesses are entitled to be reimbursed for actual and reasonable out-of-pocket expenses for meals and accommodation, for the period of attendance required, plus the cost of return fare on public transportation or automobile mileage. In practice, it is usually expedient to supply witnesses with tickets (plane, train or bus) and arrange settlement of other expenses with them at the time and place of their attendance.
- (2) As stated above, it is usual to provide an additional investigator to assist at the trial with the timing of attendance of witnesses and to arrange for the payment of their expenses.
- (3) In the case of expert witnesses, it is expected that the contract arrangements, referred to in **12.2.4.26 Expert or Opinion Testimony** would set out the agreed fees and expenses to be paid by the CRA.
- (4) Witness fees and expenses may be paid directly by the appointed agent or by the Tax Services Office. Where the TSO assumes responsibility for paying witness fees and expenses, such payments are to be issued through the CRA bank account and charged to cost centre 6041-101. The TSO budget control officer will then obtain, through a journal voucher, credit from Headquarters for all such expenses. Prior Headquarters agreement is not required by the TSO in paying out any witness fees or conduct money unless it can be foreseen that such expenses will be large (in excess of \$5,000) which would cause an excessive drain on Headquarters' legal budget.
- (5) Where a person has been charged with an offence and has fled the jurisdiction, a bench warrant may be issued for their arrest. The RCMP will bring that person from the place of arrest to the appropriate jurisdiction. Reasonable travel costs of the RCMP and the accused are paid by the CRA (in accord with Treasury Board policy). Payment will be made through the CRA bank account and

charged to cost centre 6041-101; credit will be obtained by the Tax Services Office from Headquarters through a journal voucher. Where it is anticipated that the costs will be substantial (in excess of \$5,000.00) which may cause an excessive drain on Headquarters' legal budget, prior agreement will be required. An analysis of the costs with appropriate explanations should be sent to Headquarters in order that consideration may be given to the action.

- (6) It is understood between U.S. and Canadian tax authorities that all travel expenses, incurred under competent authority requests for special agents to testify in Canada or investigators to testify in the U.S., will be borne by the country supplying the witness.

Exhibit 13.A – Witness List/Exhibit Register

WITNESS	REPORT	WITNESS	CRA	COURT EXHIBIT
NUMBER	NAME	DOCUMENTS BEING	EXHIBIT NUMBER	
		INTRODUCED	NUMBER	
N/A	Crown	E-1 "	Articles of Incorporation	P1
		E-2	2004 T2 Return, Jones Building Products Ltd.	P2
		E-3	2004 T1 Return, Davey Jones	P3

W-1	A. Smith	E-4	Affidavit - CIB of C	P4
			Re: Jones Accounts	
		E-5	Sales Journal	P5
			Jones Building Products Ltd.	
		E-6	Account Payable Ledger Sheet -	P6
			Blow Construction Ltd.	
		E-7	Cancelled Cheque #3381 for	P7
			\$1,879.63 dated June 6, 2004	
			payable Blow Construction Ltd.	
W-10	B. Down	E-67	Cancelled Cheque #531 for	P8
			731.42 dated February 16, 2004	
			Up and Down Ltd. payable to	
			Davey Jones	
W-21	A. investigator		Letter from Dept. dated March	D1
W-21			15, 2004	
			1996 Assessment Notice to	D2
			Davey Jones April 12, 2005	

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Chapter 14 – Investigations Reports and Correspondence

14.1	14.1.1	14.1.2	Case Reports
	14.1.3	14.1.4	Case Development Proposal
	14.1.5	14.1.6	Rejected Referral Report
			Preliminary Abort Report
	14.1.7	14.1.8	Primary Report
			Search Reports (to headquarters)
	14.1.9	14.1.10	Investigation Abort Report (investigation or court stage)
	14.1.11	14.1.12	Prosecution Report
	14.1.13	14.1.14	Communicate Referral to PPSC with the Audit Division or Referring Section
			Report on Completed Prosecutions
			Report on Publicity
			Report on Cases Transferred to Inactive Court Stage
			Other Reports
			Case Transferred to another Tax Services Office
			Reporting on Revenue Losses Due to Fraud
14.2			Maintenance, Retention and Destruction of Files (under review)
	14.2.2		Retention and Destruction of closed Investigation Files
	14.2.3		Retention and Destruction of Exchanges of Information
14.3			Controls on Requests to Other Tax Services Offices 14.3.1
	Bring Forward (B.F.) Copy		
	14.3.2		Detail in Request 14.3.3
			Processing Reply
14.4			Controls on Requests from Other Tax Services Offices
	14.4.1		Register of Requests Received
14.5			Copies of Correspondence to Criminal Investigations Directorate
	14.5.1		Matters of Importance Only

Exhibit 14.A – Results of Criminal Appeals

14.1 Case Reports

14.1.1 Case Development Proposal

When a TSO wants to begin a criminal investigation, they must submit a case development proposal to the Partnerships and Workload Development Section.

Purpose

To provide the Partnerships and Workload Development Section at headquarters with the TSO's rationale for recommending a preliminary investigation.

Timing

The TSO should submit the case development proposal within fifty days of receiving the referral. The decision to accept or reject the case must be made within sixty days of the date of the referral. The Partnerships and Workload Development Section must review and approve the case development proposal within this sixty day period.

Suggested steps to be taken prior to preparing a case development proposal • Search

public sources of information;

- Search CRA systems;
- Contact the referring area to confirm the facts of the case and obtain additional information;
- If the case is self-generated, verify the allegations and accuracy of the information provided by law enforcement.
- Drive by the taxpayer's properties to see if it makes sense (if feasible);
- Interview potential witnesses (if feasible and without jeopardizing the case); and
- Research potentially contentious issues such as unclaimed losses, amended tax returns, and/or whether the income/supplies are clearly taxable.

Content

- Source of the referral (including reasons if a case is self-generated)
- Case number
- Date of the referral
- A brief description of the case:
 - the alleged scheme(s)
 - the number of taxpayers involved in the scheme
 - the type of alleged fraud and possible charges (ITA, GST/HST, Criminal Code)
 - years involved
 - income reported and a comment as to the compliance history of the taxpayer
 - estimated dollars at risk (unpaid tax and/or false refund), including any expected increase/decrease following the investigation
 - egregious circumstances, if any. (i.e., repeat offender, a high profile individual in a community)
- An explanation as to how the case meets one of the Criminal Investigations Program's established priorities. If the case does not fall within one of the priorities, an explanation as to why it should be considered. For example, is it a local or regional issue that needs to be addressed?
- General comment on possible legal or Charter issues, if any. This comment should be based only on the TSO review of the case without consulting the Public Prosecution Service of Canada (PPSC);
- Comments as to expected required resources to take on the case and the availability of these resources within the office;
- Recommendations regarding which taxpayer(s) and what years should be investigated and the reasons;
- Proposed next steps.

The following should not be included in the case development proposal:

- SIN and Date of Birth
- The Criminal Investigations Program's priorities

A team leader and/or manager must review the case development proposal before it is submitted to Partnerships and Workload Development Section. Investigators must not do any more work on the case until the Partnerships and Workload Development Section reviews the proposal (usually within ten days) and determines that it should be accepted for preliminary investigation.

Do not start writing a primary report or an Information To Obtain (search warrant or production order) before the Partnerships and Workload Development Section approves the case development proposal.

14.1.2 Rejected Referral Report

When a TSO wants to reject a referral, they must prepare a report to explain the decision. The report (or memo/letter) must be sent to the Partnerships and Workload Development Section for approval before it is sent to the referring area. The decision to accept or reject the case must be made within sixty days of the date of the referral.

Purpose

To provide the Partnerships and Workload Development Section at headquarters and the referring area with the TSO's rationale for rejecting a referral.

Content

- Case number and name;
- Date the referral was made;
- An acknowledgement for the referral;
- A recommendation that the case be finalized by civil reassessment including penalties where applicable;
- Specific reasons why the case is being rejected including what was missing and what was done well;
- Investigators and a CIP team leader should meet with the referring auditor and his/her team leader in person to explain why the case is being rejected. If a face to face meeting is not practical, it should be done by conference call.

14.1.3 Preliminary Abort Report Purpose

- To inform the Assistant Director, Criminal Investigations, the Criminal Investigations Directorate and officials from the CRA division who referred the case of the facts relating to the decision to abort the case in the preliminary stage.
- To provide a record of the results of the preliminary investigation to the point of the preliminary abort.

Content and Format

- (1) As soon as it is decided to abort the case in the preliminary stage, the Investigator will prepare a report setting out:
 - The investigative steps taken (in general terms);
 - The reasons for aborting the case.
- (2) The Preliminary Abort Report should be signed by the investigator, the team leader (or technical advisor), manager (if one exists in the TSO) and the Assistant Director, Criminal Investigations.
- (3) The signed Preliminary Abort Report will be filed in the investigation case file (master file) as a record of the results of the investigation.
- (4) A copy of the signed Preliminary Abort Report is to be submitted to the Criminal Investigations Directorate.
- (5) If the file was referred to Criminal Investigations from another CRA division (e.g. on form T134) investigators will send a letter or memo to the area that referred the file summarizing the contents of the Preliminary Abort Report by providing the following information:
 - Case Number and name;
 - Date the referral was made;
 - Specific reasons why the case is being aborted. What changed since the case was accepted for preliminary investigation?

- Any additional information that was uncovered during the preliminary investigation that may be of use to Audit for the civil (re)assessments.
- (6) Investigators and a CIP team leader should meet with the referring auditor and his/her team leader in person to explain why the case is being aborted. If a face to face meeting is not practical, it should be done by conference call.

14.1.4 Primary Report Timing

- (1) A Primary Report is to be prepared when the decision is made to move the case into the Investigation Stage.
- (2) The Primary Report is to be submitted to the Criminal Investigations Directorate immediately after the Assistant Director, Criminal Investigations and Director have signed the report and authorized the proposed actions. The report is to be submitted at this time regardless of whether a search will be conducted or not.

Purpose

- To record the source of the case.
- To record the facts and circumstances of the case insofar as they are known at that point and the criteria supporting the selection of the case.
- To outline the plans for development of the case.
- To inform the Tax Services Office Director and Criminal Investigations Directorate of the case facts known to date and to provide a written record of the issues supporting the decision to move the case to the Investigation Stage.
- To provide information as to the scope and sensitivity of the proposed search action and the anticipated number and timing of such search requests.
- To allow the Director to authorize the proposed actions based on the case development to that point.
- To provide background information for internal requests and a basis for informing the Minister, the Commissioner or other senior officials in the event queries are raised in connection with the matter.

Content and Format

The Primary Report should not contain the same amount of detail as required in an ITO. The detail should be sufficient to allow the Director of the Tax Services Office to make an informed decision. The captions that follow are broadly suited to Primary Reports, although the circumstances of a particular case may warrant deletions, additions or further breakdown of text under sub-headings.

(A) Case Identification Case

Name:

Case Number: Complexity

Rating: Investigator's Name:

Investigator's Telephone No.:

Names and addresses of the people and/or corporations suspected of being involved in the alleged offences:

One name will be selected as the Case Name and all reports and correspondence relating to the case will bear that name, even though secondary files may be involved.

(B) The Source of the Case

List the source of the case, i.e., referral from another division, self-generated, etc..

(C) Business History

Where the subject is a commercial firm, indicate whether it is a proprietorship, partnership or corporation. Where applicable, include details of incorporation or of the original partnership, changes in major shareholdings or in partnership interest since that date. State the kind of business, relative standing in its field, associated businesses or individuals and the nature of that association.

Where the subject is a professional outline the nature of their professional activities. If there are any associates or partners, explain the nature of the association and the relationship with the subject.

For subjects in other categories, state source of primary income and outline any sideline businesses.

(D) Personal History

Give a brief description of each subject's age and health, background, marital status and scale of living.

(E) Filing History

State the type of returns or reports on hand including years or periods for corporations and/or individuals, setting out:

- the net income/taxable supplies reported or assessed;
- taxes involved in each year/period under review;
- who prepared the returns or reports;
- how the returns or reports were signed;
- any other relevant factors, such as fiscal period, cash or accrual method, filing and payment record, may be noted.

(F) Case Development

Briefly state what revenue act(s) was violated, how the fraud was identified and the case developed (i.e., internal or external leads). Provide details concerning the actions of the CRA referring officer, if applicable:

- Why were they at the premises or location?
- What were their findings?
- When was it found?
- Where was it found?
- Why did it attract their attention?
- What was done with the findings?
- Any other information considered of potential value for lead development in other offices.
- Outline the steps taken to date by the investigator, the results achieved and any apparent pattern of fraud.

The quantum of the fraud should be set out and summarized by revenue act and year or period to provide the reader with an overview of the case. The supporting narrative describing the fraud should be given particular attention with emphasis on evidence of wilful intent. If photocopies of documents relating to the fraud are available to help clarify the transactions involved, they should be included with the report.

(G) Subject's Records

Specify the type of records available, the extent of computerization, how they have been maintained and the years/periods for which they are available. If no seizure of records is anticipated, indicate this decision and state the reasons why a search is not necessary.

(H) Potential

Specify the prosecution potential by revenue act and the basis for this determination. An estimate of the undeclared tax, false funds or false rebates should be included to indicate the scope of the case. If there are adjustments which are anticipated to be only civil in nature then include these in a separate table.

(I) Proposed Actions

Outline briefly the proposed plan of investigation.

(J) Requests

The Director of the Tax Services Office is requested to authorize the planned actions. Where search warrants are required, the following information should be provided:

- The places to be searched;
- The expected time frame for the search.

When there is a material change in the direction and/or quantum in the file, (i.e. significant decrease/increase in quantum or an increase/decrease in the number of search locations), before the execution of the search warrants, the changes must be brought to the attention of the Director of the Tax Services Offices for approval via a memo or an amended Primary Report.

(L) Signatures on Report

The Primary Report must bear the signatures of the Assistant Director, Criminal Investigations and the Director of the Tax Services Office, indicating their concurrence with the proposed actions.

14.1.5 Search Reports (to headquarters) Purpose

- To inform the Criminal Investigations Directorate of the results of the search so that the Minister, the Commissioner and others can be kept informed.
- Update the Primary Report on any material information that was not known at the date of the Primary Report, or any material development in the case subsequent to the Primary Report that was not otherwise reported to the Criminal Investigations Directorate.
- The investigator in charge of the case completes this search report to headquarters. This is not the report that each searcher is encouraged to make after the search.

Content and Format

A report should be submitted to the Director, Criminal Investigations Division, Criminal Investigations Directorate within two weeks following the search action and should provide the reader with the following information:

- Case name and number;
- Search date;
- Search locations and the number of cartons seized from each location;
- Details of electronic data seized at each location;
- Was the anticipated evidence located?
- Was any additional or new evidence located?
- Were there any major incidents? This can include problems encountered entering a premise, conflict with someone at a location or the need for police intervention etc.
- Were additional warrants required?
- Were there any solicitor client privilege claims?
- Was a locksmith or other third party used in the search? (Not named in the warrant)
- Were there any seizures under Section 489 of the Criminal Code?
- Were there any media inquiries concerning the search or presence at a search location?

Copies of Signed Warrants and Sworn Informations

- (1) The Tax Services Office shall forward electronic or hard copies of the signed warrant for each search location to the Criminal Investigations Directorate with the search report. In addition, all offices will forward electronic or hard copies of the sworn Information(s).
- (2) Criminal Investigations Directorate should be informed as soon as practicable by telephone and follow-up email of any significant incidents that occur during a search action.

14.1.6 Investigation Abort Report (investigation or court stage)

The Investigation Abort Report is to be completed when the prosecution of a full-scale investigation is abandoned by either the CRA or the PPSC.

Purpose

- To request the approval or to inform the Tax Services Office Director of the decision to abort an investigation in the Investigation or Court stage when it becomes apparent that the case will not result in a conviction as a result of charges not being laid or charges are withdrawn or stayed.
- To advise Criminal Investigations Directorate of the decision to abort the case in the Investigation or Court stage and to complete the Criminal Investigations Directorate case files.
- To provide a historical record in the Tax Services Office Investigation's case file of the decision to abort, the underlying reasons for this decision and management's concurrence.

Content and Format

- (1) The report will contain the following information:
 - Record the criteria that was present at the time the decision was made to move the case into the Investigation stage as outlined in the Primary Report;
 - If the case has been referred to PPSC briefly describe the evidence available at the time of the referral;
 - Identify any evidentiary deficiencies that have been uncovered during the Investigation or Court stage that make the case unsuitable for prosecution;
 - Briefly summarize the estimated quantum of the civil assessment by taxpayer uncovered to date;

- A recommendation to abort the investigation and seek the Tax Services Office Director's approval for the decision if prior to a referral to PPSC;
 - Outline the reasons provided by PPSC in their decision not to pursue the prosecution; and
 - Attach a letter, memo or report from the PPSC if the case is aborted in the Court stage.
- (2) The Director of the Tax Services Office is responsible for approving the Investigation Abort Report if the case is aborted in the Investigation Stage. The Director's concurrence will be indicated over their signature on this report. In instances where the case will not be pursued as a result of a PPSC decision the Director must also acknowledge that by way of signing the report.
- (3) A copy of the report will be forwarded to the Director, Criminal Investigations Division, Criminal Investigations Directorate within 30 days of the decision to abort the case.

14.1.7 Prosecution Report Purpose

- To provide the Tax Services Office Director with a summary of the evidence accumulated during the investigation to enable then to determine whether there is sufficient evidence to recommend prosecution action to the PPSC for any offence(s) under the Revenue Acts administered by the CRA.
- To furnish the PPSC and its agents with details of the case, to enable them to perform their functions in handling the prosecution.
- To serve as a historical record of CRA's findings.
- The report also serves to advise the Criminal Investigations Directorate of the details of the case to date and permits officials of the Criminal Investigations Directorate and the Tax Services Office to perform quality and uniformity control functions.
- To assist Criminal Investigations Directorate staff in responding to queries from the Minister, the Commissioner or others.

General

- (1) A Prosecution Report should reflect the results of an investigation by including the findings that are pertinent to the trial of the case. It will normally be unnecessary to refer to the reason for investigation and the source of the lead where such information is not relevant to the trial of the case.
- (2) Although the focal point of the Prosecution Report will be the Witness Reports that were prepared as the case proceeded, and the documentary evidence that was accumulated as the case proceeded, the main body of the report should clearly outline the case and tie it all together.
- (3) Prior to writing the Prosecution Report, Investigators should review the Witness Reports and the documentary (or real) evidence to be tendered at trial and determine the simplest manner in which these facts could be presented in Court. The Witness Reports should be sorted in accordance with a presentation plan with a schedule of the quantum prepared and cross referenced. Finally, a Witness Report, setting out the Investigator's evidence will be prepared.
- (4) When preparing to write the Prosecution Report, the Investigator should bear several points in mind:
- Assume all charges will be tried concurrently and that there will be a joint trial where there are several accused. In most cases, this assumption will permit the most concise presentation. It is, however, recognized that the assumption is made strictly for report writing purposes and that re-sequencing of the data may have to be done at the direction of Counsel, if circumstances at actual trial are otherwise.
 - Strive to present the "best case"; this does not imply that the case cannot be expanded for trial on the advice of Counsel. On the other hand, the Investigator should recognize that the merits of a prosecution recommendation will be judged solely on the "best case" which is presented in the report.
 - Readers of the report will not require copies of routine documentation, such as cancelled cheques, deposit slips, invoices or revenue vouchers. However, statements obtained from witnesses or the subject should be provided. Copies of other exhibits to accompany the report should be restricted to those items where it is simpler to include a document, rather than make a narrative description; items

where there is something significant about the appearance of a document; or documents such as agreements which might require legal interpretation.

- Since evidence of mens rea is an essential ingredient of an offence, the Investigator should be cognizant of the evidentiary items and situations, which identify these facts and be prepared to include the relevant documentary and oral evidence in the report and Witness Reports.
- (5) Once the Investigator has arranged the Witness Reports into logical sequence, as dictated by the presentation plan, and prepared the supporting schedule, the main body of the report can be written.
- (6) The contents of the Prosecution Report should be restricted to factual data and information required to prove the alleged offences. Personal opinions should not be expressed, as the report will be released to the subject or his representatives as part of the disclosure requirements.
- (7) The Prosecution Report must contain the captions described below. It is a minimum required by the Criminal Investigations Directorate. However, the Prosecution Report may include other information that is required by the Regional Office of the PPSC.

Format and Content Part I

Identification (as applicable)

Tax Services Office

Case Name Case Number

Investigator's Name and phone number

Team Leader's Name and phone number

Parties to be charged, including:

Legal name

Address

Business Number

Date of birth

Social Insurance Number

Taxpayer's official language

Representatives

Accounting:

Name Firm

Address

Phone Number

Authorization received: {yes/no}

Legal:

Name Firm Address

Phone Number

Authorization received: {yes/no}

Part II

Date(s) of Importance

Include the date the Detention Order(s) expire

Include the date the statutory limitation period expires, if applicable Part III

Case Overview

This area should be a concise and precise summary of the facts of the case outlining the scheme(s), the business activities, the taxpayers, the years under investigation and the quantum involved. It must include evidence available to prove actus rea and mens rea.

Part IV

Alleged Offences

Provide a table of the alleged offences per entity and per period. PPSC will provide the correct wording prior to the information being sworn. The table should include the taxpayer/registrant's name, years/periods involved ITA/ ETA/ CC charges and the quantum.

Part V

Theory of Case

For each scheme the facts to prove the case should be listed with references to the evidence. The types of evidence could include:

- Witness statements
- Seized records
- Borrowed records from third parties
- Public records
- Tax records
- Investigator's working papers

Transmittal of Reports and Recommendations to PPSC and Criminal Investigations

Directorate

- (1) The original Prosecution Report, including schedules, appendices, exhibits and Witness Reports, with a letter of referral signed by the Tax Services Office Director, will be submitted to the applicable Regional Office of the PPSC.
- (2) A copy of the Prosecution Report and the referral letter will be forwarded to the Director, Criminal Investigations Division, Criminal Investigations Directorate.
- (3) Letters of referral should be signed by the Tax Services Office Director and contain the following information:
 - The subject(s) investigated, the years involved and the business(es) fully identified;
 - A summary of what the subject has done (methods, amounts, years, revenue statutes);
 - The amount of the taxes evaded;
 - Significant facts that might have an impact on the prosecution, particularly the line of defence or facts recently communicated by the party and any rebuttals;
 - State that documents are available for disclosure;
 - Any remarks and recommendations that the Tax Services Office believes are important to emphasize. If it is of the opinion that the prosecution should proceed by way of indictment or summary conviction with a jail term recommendation, the procedures set out in chapter 12.5 Considerations for Indictment or Jail Sentence should be followed.
 - State that if in the opinion of the PPSC there is sufficient evidence to warrant prosecution, they should proceed and advise accordingly;
 - The name and telephone number of the investigator and/or the Team Leader should be mentioned towards the end of the referral letter as the contact for the lawyer assigned to the case.

14.1.8 Communicate Referral to PPSC with the Audit Division or Referring Section

After the referral to the PPSC has been made, the Assistant Director, Criminal Investigations or designate will update the ADA or Assistant Director of the referring section that a referral has been made.

14.1.9 Report on Completed Prosecutions Purpose

- To keep the Minister, the Commissioner and senior officials at Criminal Investigations Directorate advised of the results of prosecution action.
- To hasten the consideration of action to be taken with regard to possible appeals.
- To provide a historical record in the Tax Services Office and Criminal Investigations Directorate case files of the results of the prosecution.

Content and Format

- (1) The report must be submitted within 15 days of the verdict to the Director, Criminal Investigations Division, Criminal Investigations Directorate. If the case is appealed (by Crown or the taxpayer) investigators must still submit the Report on Completed Prosecutions. When the appeal is decided, investigators must submit a Results of Criminal Appeal (see Appendix 14.A).
- (2) The following information should be included:
 - Case name, number and Tax Services Office;
 - Names of subjects charged, DOB, address;
 - Guilty plea – yes or no;

- Trial dates;
 - Date verdict rendered;
 - Date of sentencing;
 - Level of court and its location;
 - Judge's name and length of trial;
 - For each count include the subject, taxation years/periods, Act, section of Act, conviction or acquittal, tax on which convicted, fine levied, percent of fine to tax, date payment of fine due, jail in default, mandatory jail, concurrent or consecutive jail sentence, community service;
 - Total income/taxable supplies unreported;
 - Type of business or occupation of the subject;
 - Explanation of fraud and reasons why file was selected for investigation;
 - Pre-trial litigation, if any, e.g. Charter of Rights challenges;
 - Special circumstances concerning determination of sentence (e.g. subject's health, etc.);
 - Reasons for acquittal - consideration for appeal from acquittal or sentence (e.g. low fine); • Noteworthy points made by Judge (e.g. Charter of Rights, jail, seriousness);
 - Investigator's name and telephone number;
 - Name of crown counsel and telephone number and indicate name of law firm if an agent; • Other: Criminal appeal by Crown or taxpayer, collection status of account, publicity received to date, notation that case is not completed if awaiting other charges against persons involved in the case;
 - Signatures of Investigator, Team Leader and Assistant Director, Criminal Investigations;
- (3) If it is believed the decision will be of value as case jurisprudence, obtain and forward a copy of the judgment to Criminal Investigations Directorate.
 - (4) In the case of an acquittal, a copy of a transcript of the reasons for judgment should be ordered from the court, and provided to Criminal Investigations Directorate as soon as possible, so that appeal proceedings can be initiated, if warranted.
 - (5) Immediately after the conclusion of the proceedings, using the appropriate press fact sheet, the responsible Communications Coordinator should be supplied with all relevant parts of the above information, which became public during the course of the trial. Some details such as civil assessments, for example, may not become public at trial, in which case the investigator must exercise great care to ensure that such information is not disclosed to the media in contravention of the confidentiality provisions of the revenue statutes being administered.
 - (6) Any other relevant information, such as comments on the performance of Crown Counsel or comments on trial in general, can be communicated directly to the Director, Criminal Investigations Division, Criminal Investigations Directorate.

14.1.10 Report on Publicity Purpose

- To keep the Minister, the Commissioner and senior officials at Criminal Investigations Directorate advised of publicity results on Enforcement cases and other discussions with the media.
- To provide a historical record in the Tax Services Office and Criminal Investigations Directorate case files of the results of publicity. – Refer to chapter 1.7 Public Awareness.

Content and Format

The information required to be included is:

- Details of all publicity obtained on prosecutions, including copies of newspaper coverage, listings of TV and radio coverage and any other media coverage.
- Details of all publicity obtained on interviews etc., relating to other than specific cases.
- Details of all publicity noted in your local news media resulting from cases or interviews of other Tax Services Offices.

14.1.11 Report on Cases Transferred to Inactive Court Stage Purpose

- To identify and isolate cases in the court stage that have become inactive;

- To provide background information on the circumstances that lead to the case becoming inactive and to provide a current or ongoing status of the case;
- To provide a historical record in the Criminal Investigations Directorate and the Tax Services Office case files of the circumstances referred to above and to provide periodic updates on developments in the case.

Criteria

The criteria to determine when a case should be transferred to the Inactive Court Stage are:

- Charges are laid, a summons has not been served, the accused is out of Canadian jurisdiction or cannot be located and is not expected to return or to be found in the foreseeable future;
- Charges are laid, a summons has been served, the accused is out of Canadian jurisdiction, or cannot be located and a decision is made not to proceed with the charges in absentia;
- In the event that one or more accused have left Canadian jurisdiction, but other accused remain in Canada, the case should not be moved to the Inactive Court Stage until those accused who remained in Canada are prosecuted and their trials completed;
- Once segregated, these cases will remain in Inactive Court Inventory until either the case is closed in the Inactive Court Stage or the case is returned to active status for prosecution completion.
- For additional particulars relating to policy issues, refer to chapter 5.7 Taxpayer under investigation leaves or is about to leave Canadian Jurisdiction.

Content and Format

- (1) When a Tax Services Office has determined that a case in the Court Stage has become inactive, a memorandum to Criminal Investigations Directorate will be prepared providing the following information:
 - Case name and number;
 - Name and SIN of the subject(s);
 - The subject's new country of residence and mailing address, if known;
 - Steps taken to locate the individual in Canada;
 - Steps taken to determine that the subject has permanently left Canada, e.g. house and/or business sold, bank accounts closed, family moved;
 - Details of any discussions with the subject, family, lawyer, accountant or business associates as to the subject's intentions, vis-à-vis a return to Canada;
 - The amount of tax, interest and penalty involved in the civil assessment and the status of the account.
- (2) The case should be reviewed and evaluated at least yearly and the Criminal Investigations Directorate should be advised by memorandum whenever significant new developments occur which would support actions to either reactivate or close out the case.

14.1.12 Other Reports Purpose and Content

- (1) There may be cases that will necessitate interim or special reports such as reports on Evidence on Commission under the Criminal Code, or Inquiries held under the *Income Tax Act* or the *Excise Tax Act*. The form and content of interim reports will be governed by the circumstances giving rise to them. Unusual circumstances such as bribe attempts should be brought to the immediate attention of the Director, Criminal Investigations Division, Criminal Investigations Directorate by phone, followed by a report providing full details.
- (2) Copies of correspondence with the PPSC concerning acceptance, rejection or analysis of the case should be forwarded to the Criminal Investigations Directorate. The Criminal Investigations Directorate should also be advised by memorandum of any decisions taken with respect to referred cases, such as changes in the type of charges or the amount of taxed alleged in the charges.
- (3) Copies of recommendations by Tax Services Offices for criminal appeals will be forwarded to the Criminal Investigations Directorate.

- (4) When a criminal appeal is resolved, a report should be prepared containing the information as required in Exhibit 14.A – Results of Criminal Appeals. If it is believed it will be of value as case jurisprudence, obtain and forward a copy of the judgment. In the case of an acquittal, a copy of a transcript of the reasons for judgment should be ordered from the court. In the interim, the reasons for judgment and noteworthy comments by the judge should be noted in the report.
- (5) In order that Criminal Investigations Directorate will be aware of all Court actions as they arise, which could affect our national prosecution program, the Director, Criminal Investigations Division, Criminal Investigations Directorate is to be advised of all Court proceedings, which involve the CRA. Such proceedings would include solicitor-client privilege claims, lawsuits against employees, together with any action in which the Charter of Rights is raised as an issue. Notification shall be by telephone or FAX immediately upon the action arising, with a follow-up memorandum, including details and copies of appropriate material, such as notices of motion and affidavits. Reports shall be sent as further events occur.

14.1.13 Case Transferred to another Tax Services Office

- (1) When a case is transferred from one Tax Services Office to another, a memorandum or report providing, as a minimum, the under-noted information will be prepared by the originating office for the receiving office and a copy of that document should be provided to Criminal Investigations Directorate to update case files:
 - Case Name, Number, Complexity Rating Code and Investigator;
 - Date of transfer;
 - Investigation Stage at time of transfer;
 - Investigative steps taken to time of transfer;
 - Amount of income or tax adjustments determined to time of transfer;
 - Reasons for transferring the case;
 - Total hours charged to the case to the time of transfer;
 - Disposition of any borrowed or seized records relating to the case.
- (2) It will be the responsibility of the transferring Tax Services Office to ensure that:
 - The appropriate entries are made to the TSO fields in AIMS to transfer responsibility for the file to another Tax Services Office;
 - The receiving Tax Services Office is formally advised of the transfer in writing and that appropriate arrangements are made for the transfer of relevant information and records to the receiving office.

14.1.14 Reporting on Revenue Losses Due to Fraud

- (1) CRA is required to report on losses of public money and property and related recoveries in the Public Accounts. CRA must report on losses determined to be fraudulent. In this regard, Criminal Investigations Directorate is required to report the following:
 - Losses of revenue due to fraud
 - Recoveries against those losses
 - Amounts expected to be recovered
 - Amounts not expected to be recovered and
 - Potential losses (inventory of cases currently before the courts)
- (2) Revenue loss due to fraud is defined as tax on which convicted in successful prosecutions. In reporting revenue losses, we are working with Collections to report the amounts of those losses recovered and those not expected to be recovered.
- (3) In order to assist Collections in completing their task, it is important that we report the details of the taxpayer(s) whose taxes were evaded and (re)assessed even though this may not be the one accused and/or convicted of evading the taxes.

14.2 Maintenance, Retention and Destruction of Files (under review)

Investigation Case Files Purpose

- (1) The investigation case file (or master file) serves as a central depository for all key documents associated with the investigation.

- (2) By having all key information related to the investigation in one central file, it enables the investigator, TSO staff and management to quickly access and locate any information that may be required during or after the investigation.
- (3) It provides an historical record of the investigation and its results.

Timing

An investigation case file will be opened and maintained for each case where a preliminary investigation has been initiated on AIMS.

Format and Content

- (1) The investigation case file is best maintained in a multi-partitioned pressboard file folder with fasteners attached to each partition. These file folders can be purchased at most office specialty stores.
- (2) The Tax Services Office should adopt a standard filing format for all its investigation case files to maintain consistency of application within the office. The following information should be available in the investigation case file:
 - Case origin and tracking
 - T-134 referral
 - Copy of AIMS – Investigations Supp Edit printout
 - TSO case control sheets
 - Letters, E-Mails, Faxes and Memoranda
 - To or from the subject and his representatives;
 - To or from the PPSC;
 - To or from other Agencies;
 - Memos of Interview with the subject and his representatives.
 - Search documents and related documents
 - Copies of the sworn Information to Obtain search warrants, Production Orders and/or general warrants;
 - Copies of search warrants, Production Orders and/or general warrants;
 - Copies of detention orders and related documents;
 - Copies of inventory of seized documents.
 - Reports and Criminal Investigations Directorate correspondence
 - Preliminary Abort Report;
 - Primary Report;
 - Search Reports;
 - Investigation Abort Report;
 - Prosecution Report;
 - Report on Completed Prosecution;
 - Report on Publicity;
 - Other case related reports.

Additional Supporting Files

The investigator should set up additional supporting files to manage the investigation as dictated by the size and scope of the case. Additional files to cover the following investigation material should be available in support of the investigation case file:

- Search file (planning, search memos, and record of documents seized);
- Inventory control file;
- Case planning sheets;
- Investigation working papers;
- Witness files.

14.2.2 Retention and Destruction of closed Investigation Files

- (1) The Tax Services Office should establish an annual review and progressive destruction of closed investigation case, working papers and certain correspondence.
- (2) Tax Services Offices should conform to the following procedure related to retention and destruction of closed investigation files:
 - Case files and related documents are to be retained for five (5) calendar years, after the date the case is closed (i.e. after all criminal or civil appeals have been finalized).
 - Correspondence and other documentation related to inter-office requests for information are to be retained by the Tax Services Office requesting the information for a period of three (3) years after the case is closed. The Tax Services Office providing the information shall retain the information for three (3) calendar years from the date the information was provided. This requirement applies only on information related to an investigation case file, i.e. Preliminary or subsequent Stage.
 - Document retention limitation for electronic records (imaging or scanning) is governed in the same manner as paper documentation.
- (3) Working papers should be reviewed by the Investigator after a case is finalized, and important documents should be placed in the investigation case file. Duplicate copies of all working papers, including schedules, banking records, etc. are to be destroyed, in order that working papers files are reduced to a minimum.
- (4) In Criminal Investigations Directorate, the following retention periods will apply:
 - Canadian Cases – 5 calendar years after date of last action.
 - U.S. Files on cases – 3 calendar years after date of last correspondence.

14.2.3 Retention and Destruction of Exchanges of Information

- (1) Liaison officers in the Criminal Investigations Division receive leads and respond to requests for CRA information from law enforcement agencies.
- (2) All requests for information from law enforcement agencies that result in the disclosure of CRA information and all related information must be kept for 5 years after the date the information was provided to the other agency. If the CRA does not provide information in response to the request, this retention period does not apply.
- (3) All leads coming from law enforcement agencies are to be retained and stored in a secure manner for 2 years from the last administrative action.

14.3 Controls on Requests to Other Tax Services Offices

14.3.1 Bring Forward (B.F.) Copy

Whenever requests are sent to other Tax Services Offices, Criminal Investigations Directorate or others, by the Criminal Investigations Division, a copy of the memorandum should be used for "B.F." purposes.

14.3.2 Detail in Request

When making a request for assistance from another Tax Services Office, the originating Tax Services Office should set out clearly

- The name of the case, if applicable,
- The case number, if applicable,
- The Activity Reporting code to which the service time should be charged on the Investigator's Activity Report, and

- The Tax Services Office number, Section number and the group number to which the service time should be charged.

The particulars of the request for assistance should be entered into a control register which should include the information referred to above, the date of completion and a memo record of the hours charged by the servicing Tax Services Office.

14.3.3 Processing Reply

When the reply to a request is received by the originating Tax Services Office, it should:

- Remove the B.F. copy of the requesting memo from the B.F. file
- Record the date of receipt and Tax Services Office time charged in the control register.

14.4 Controls on Requests from Other Tax Services Offices

14.4.1 Register of Requests Received

Whenever requests requiring reply are received by the Criminal Investigations Division from other Tax Services Offices or the Criminal Investigations Directorate, the following details will be recorded in a register or card system to ensure prompt compliance:

- Date of request
- Office from which request initiated
- Case number, if applicable
- Time spent in servicing the request
- Activity Reporting code to which the time has been charged
- Name and address of the taxpayer/registrant/importer concerned and/or name and address of any third party for which the request is being made
- Name of Investigator given the assignment
- Date of completion, and
 - The time column in the register may be totalled at the end of each program year, so that the servicing office can identify the time spent servicing other Tax Services Offices requests. This information may be of assistance when preparing budget projections.

14.5 Copies of Correspondence to Criminal Investigations Directorate 14.5.1

Matters of Importance Only

Copies of correspondence and memoranda will be prepared and forwarded to the attention of the Director, Criminal Investigations Division, Criminal Investigations Directorate, in all matters of importance.

Exhibit 14.A – Results of Criminal Appeals A)

Case Identification

Tax Services Office:

Case Name:

Case Number:

Name of each subject involved (in Appeal), decision rendered, original sentence and Appeal results:

Names of Subjects	Year	Act & Section	Original Sentence			Revi	
			Tax	Fine	Jail	Tax	Fi
1.							
2.							
3.							
4.							
5.							

B) Description Of Type Of Business Or Occupation Of The Subject

C) Brief Description of the Type of Offence or Fraud on Which Originally Charged

- D) Originator of the Appeal (CRA, Taxpayer)**
 - E) Original Charges Being Appealed**
 - F) Nature of the Appeal**
 - G) Date of Settlement**
 - H) Level of Court Hearing the Case**
 - I) Reasons for Judgment (Including Noteworthy Comments by Judge)**
 - J) Transcript Ordered - Jurisprudence Issues - Acquittal Registered**
 - K) Signatures**
- Investigator and Assistant Director, Criminal Investigations

August 2013

Chapter 15 – Fraudulent Income Tax Returns, Credits and Refunds

15.1	General Remarks
15.2	Source of Workload
15.3	Determination of Offences Alleged
15.4	Types of Fraudulent Schemes
15.5	National Criminal Investigations Directorate Projects
15.6	Refund Examination Liaison
15.7	Referrals to the Criminal Investigations Program Types of Cases That Will Not Normally Be Referred to the Criminal Investigations Division Referral Procedures
15.8	Recording Results of Fraudulent Refund Cases Fraudulent Refund Referral Form AIMS
15.9	Exhibit A – Fraudulent Refund Referral Form
15.10	Exhibit B – File Selection Reason Codes

15.1 General Remarks

- (1) This chapter deals with cases involving the illegal diversion of public funds through abuses of the Income Tax system.
- (2) Subsection 239(1.1) of the Income Tax Act (ITA) creates an offence for making false statements, altering documents, etc. for the purpose of obtaining or increasing a refund or credit. The fines are from 50% to 200% of the fraudulent refund or credit and up to 2 years imprisonment. Subsection 239(2) enables prosecution by way of indictment and fines from 100% to 200% of the fraudulent refund or credit and up to 5 years imprisonment. The sections are similar to subsections 327(1)(d) and (2) of the Excise Tax Act (ETA).
- (3) Fraudulent refund and credit cases are part of the Criminal Investigation Program (CIP) and are to be recorded in AIMS as Investigation Type 3 (Program Type 63). If the primary focus of the investigation will be to allege offences (see **15.3 Determination of Offences Alleged** below) under 239(1.1) then the case falls within the Fraudulent Refund Program.
- (4) To protect evidence and to preserve fingerprints on original documents used by suspected fraudulent filers, e.g., tax returns, refund cheques etc., they should be immediately placed in plastic envelopes, as soon as it is suspected the returns are fraudulent. This is crucial, as fingerprints and handwriting analysis are sometimes the only evidence available to identify the perpetrators in fraudulent refunds cases.

- (5) Goods and Services Tax (GST) fraudulent rebates or refunds are prosecutable under the Excise Tax Act. However, they do not form part of the Fraudulent Refund initiative (Investigation Type 3). Such cases will be investigated by the Criminal Investigations Program team within the Criminal Investigations Division and recorded in AIMS under Investigation Type 4 (Program Type 64 if self-generated by CIP).

15.2 Source of Workload

- (1) Cases will be identified in or referred from various areas of CRA including the Criminal Investigations Division, Audit and Refund Examination;
- (2) Refund Examination has been established in the Tax Centres to:
 - (A) review returns where unusual taxpayer behaviours may lead to unwarranted refunds, lost revenues, and/or embarrassment to the Agency;
 - (B) identify system weaknesses where compliance is or may be a problem;
 - (C) provide a deterrent against non-compliance through education and visibility;
- (3) After preliminary examination of a T1 Return(s), Refund Examination will determine whether to:
 - (A) Cancel an unassessed return, as a suspicious filing; (B) Process a return, as filed;
 - (C) Process a return with modifications, including a possible penalty; (D) Monitor an account for future suspicious activity;
 - (E) Refer a case to another CRA area (Audit, Aggressive Tax Planning);
 - (F) Refer a case to the CIP in an Criminal Investigations Division on a T134.

15.3 Determination of Offences Alleged

- (1) Section 239(1.1) deals with fraudulently obtaining or claiming refunds or credits. A determination will have to be made whether to allege offences under section 239(1) or section 239(1.1) or both. In addition, section 380 Criminal Code charges may be laid in some cases of large scale frauds.
- (2) The word refund is not defined in the ITA and in general terms includes an individual being reimbursed source deductions that were in excess of tax owing. However these types of refunds will not be considered offences under 239(1.1) for purposes of this policy.
- (3) In general, if the fraudulent refund is a return to the taxpayer of source deductions or instalments that were previously and properly deducted or submitted then section 239(1) offences should be alleged. Examples of offences under 239(1) include tax paid/withheld from source during the year and then a refund is requested on filing when a false business loss/deduction/non-refundable tax credit is claimed on the tax return or a false non-capital loss is applied to other years to claim back what was previously paid to the Agency. In these cases the person has evaded the payment of taxes by submitting a false return.
- (4) In instances where a taxpayer has fraudulently obtained or attempted to obtain refundable credits, such as the Goods and Services Tax Credit or the Canada Child Tax Benefit, 239(1.1) should be alleged.
- (5) In instances where a person has received or attempted to obtain a refund or credit that is the result of fraudulently filing a return on behalf of another taxpayer then 239(1.1) offences should be alleged.
- (6) There will be instances where both section 239(1) and section 239(1.1) offences can be alleged.

15.4 Types of Fraudulent Schemes

- (1) Fraudulent refund or credit schemes include the following:
 - (A) Fraudulent claims of false losses to reduce taxable income and increase credits. These may include the issuance of false T4As, T5008s and T5s to generate false losses;
 - (B) Multiple filing of returns by one individual through various discounters to obtain more than one discounted refund;
 - (C) Fraudulent use of stolen, lost, purchased or unused SINs; (D) Returns filed using information from stolen identities;
 - (E) Fraudulent cashing of a refund cheque or direct deposit by a third party known or unknown to the taxpayer;

(F) Fraudulent requests for a second refund cheque or direct deposit;

(G) Fraudulent T4 or other information slips, showing high tax deductions at source; (H)

Fraudulent charitable donation receipts(will generally result in charges laid under ITA 239(1) unless combined with other schemes);

(I) Organized schemes by particular segments of the population and usually involving a conspiracy i.e. prisoners;

Note: some of the above noted schemes may also result in offences under 239(1)

- (2) The list of types of fraudulent refund schemes is not all inclusive; in fact, they occur in many different combinations.
- (3) The Criminal Investigations Program's workload will consist of the more significant and complex cases from the types listed above.
- (4) Schemes of a lesser complexity and value will be handled by Refund Examination, unless combined with aggravating factors outlined below in paragraph 15.7(3).
- (5) For all referrals from Refund Examination, the known identifying details of each case will be captured in the Refund Examination diary system as a reference for future suspicious activity. These details include such information as suspicious names, addresses, and SINs, as well as the nature of the suspected scheme. Generally, all known suspicious accounts will be monitored for at least one year, for repeated non-compliant activity
- (6) For schemes identified by Refund Examination that involve T1 individual returns and unauthorized use of a taxpayer's identity Refund Examination will advise the true taxpayer of the suspicious activity and refer them to the CRA website that provides information on protecting themselves (<http://www.cra-arc.gc.ca/ntcs/scrty-eng.html>) Please refer to Criminal Investigations Directorate 09-03 Release of taxpayer information to police in situations involving unauthorized use of taxpayer information by third parties for further information.

15.5 National Criminal Investigations Directorate Projects

- (1) The goal of national projects related to fraudulent refunds is to coordinate the Agency's response to a scheme, and reduce the overall risk to the Agency;
- (2) National projects are coordinated by the Criminal Investigations Directorate, Compliance Programs Branch;
- (3) Many schemes have an Agency wide impact affecting Taxpayer Services Debt Management Branch, the Appeals Branch, Tax Centres and various Compliance Programs Branch Directorates. The schemes will also have an impact on external stakeholders such as the Public Prosecution Services of Canada and Department of Justice (civil aspects);
- (4) Cooperation and communication among all affected areas are the keys to the success of all fraudulent refund projects;
- (5) The objectives of fraudulent refund projects are to:
 - determine the financial risk associated with a scheme, and work quickly to reduce that risk;
 - identify the individuals promoting the scheme;
 - identify links between individual tax returns, and promoters across the country, this information must be shared with investigators working other cases across the country;
 - provide a unified agency-wide approach to address the problem;
 - notify the public of the schemes and the consequences of participating in them;
 - identify changes made to the schemes in order to avoid detection; and
 - provide senior management with recommendations to address the issues.
- (6) In national projects in which there are numerous taxpayers perpetrating the same scheme(s) Criminal Investigations Directorate will give guidance on which promoters or advisors should be pursued. Criminal Investigations Directorate may also limit the number of participants that are pursued criminally.

15.6 Refund Examination Liaison

- (1) To ensure refund losses are kept to a minimum, close liaison between the Criminal Investigations Directorate liaison officer and Refund Examination Headquarters is required with respect to all schemes uncovered by the Criminal Investigations Directorate. This is particularly important so that immediate and appropriate measures can be developed and enacted to:
 - Prevent or control, as the case may be, the issuance of any subsequent refunds;
 - Record data related to the suspicious accounts, so that other related files can be identified and referred for investigation;

15.7 Referrals to the Criminal Investigations Program

- (1) Suspicious refund cases will be evaluated in the same manner as all other referrals as outlined in Chapter 3 – Workload Sources, T134 Referrals and Leads.
- (2) Cases will be accepted for investigation on the basis of the potential for:
 - (A) Prosecution under the ITA

As with investigations of other cases, a preliminary investigation will be required by the Criminal Investigation Program to gather additional facts to confirm or negate the initial suspicions about a file before moving it into a full-scale investigation.
 - (B) Identification of Perpetrators

As demonstrated from previous experience with suspicious refund cases, it is often very difficult to locate and identify the perpetrators in such schemes, unless action is taken before refund cheques are issued. Referrals falling into this category would normally require intensive co-ordination and immediate action from all parties involved including the possible involvement of a police agency.
- (3) Each case must be decided on its own merits; however the following are some of the factors which, if present, may warrant a preliminary investigation:
 - The person is a second time offender claiming or attempting to claim a suspicious refund;
 - The person is promoting or selling the use of the schemes to other taxpayers;
 - The amount of the refund or related refunds is substantial;
 - There are indications of a conspiracy;
 - It is suspected that taxpayers identity's are compromised;
 - The suspect is a member of a target group identified through a project;
 - The case involves suspicious T4s, or other information slips.
- (4) Types of Cases That Will Not Normally Be Referred to the Criminal Investigations Division

Cases involving only provincial tax credits will be referred to provincial authorities where applicable.
- (5) Referral Procedures
 - (A) Refund Examination will prepare a T134 Referral to CIP in an Criminal Investigations Division and a Fraudulent Refund Referral Form (**Exhibit 15.A**) for all suspicious refund cases.
 - (B) If additional related returns are identified after the original referral is made, a copy of the original T134 Referral form will be forwarded to the Criminal Investigations Division along with an updated version of the Fraudulent Refund Referral form. The T134 will be marked as a 'copy of the original' and the Fraudulent Refund Referral form, which will include the additional returns, will be marked as an 'amended copy'.
 - (C) When the T134 is received by the Criminal Investigations Division, it must be recorded in AIMS immediately as Program Type 63. Whether referrals are rejected or accepted for preliminary investigation, Refund Examination will be informed of this decision within a period of 60 days from the date of the referral, through completion of the T134 form.
 - (D) Where referrals are rejected, a copy of the T134 will be completed and returned to Refund Examination to inform them of the decision, the reason for rejection, details of the work completed and recommendations for corrective action, together with the Fraudulent Refund Referral Form and all tax returns listed on that form.

(E) Where the referral is accepted for investigation, the completed T134 and completed Fraudulent Refund Referral Form will be returned to Refund Examination.

15.8 Recording Results of Fraudulent Refund Cases (1)

Fraudulent Refund Referral Form

(A) This form, **Exhibit 15.A Fraudulent Refund Referral Form** is used to capture, for Refund Examination monitoring and reporting purposes, the civil results of all fraudulent refund cases processed by the Criminal Investigations Division.

(B) The investigator will complete the Fraudulent Refund Referral Form as soon as the case is moved into the Investigation stage.

(C) The completed Fraudulent Refund Referral form will detail the civil (re)assessment arising from the referral.

(D) The completed T134 will detail the results of the preliminary investigation and recommendations for corrective actions, if any.

(E) If additional tax returns are received from Refund Examination after the Fraudulent Refund Referral Form has been completed and returned, another form is to be completed for the additional tax returns.

- (2) All T134 referral from Refund Examination will be entered in the AIMS system as soon as they are received.
- (3) Although Refund Examination uses AIMS, their cases are set up with multiple files representing different taxpayers. The Criminal Investigations Division should not attach their supp to the original Refund Examination case because they 'bulk batch' their cases (include up to 99 unrelated taxpayers in the same case).

If the Criminal Investigations Division was to accept the Refund Examination case, they would have to accept responsibility for every file in the case (even if only one of those files was being referred to the Criminal Investigations Division). To avoid this the Criminal Investigations Division self-generates their own case number and attaches the Criminal Investigations Division supps to the self-generated case.

- (4) Although Refund Examination uses AIMS (Program Type 48) to control their inventory, they are considered to be a Non-AIMS Area for Criminal Investigations Division purposes. The Non-AIMS Area code for Refund Examination is 375 (048 is no longer to be used).
- (5) All Refund Examination referral cases will be recorded as Program type 63 regardless whether the offences to be investigated will be 239(1.1) or 239(1). The purpose of the code is to capture all cases generated by Refund Examination and any self generated Criminal Investigations Division cases in which the primary focus is offences under 239(1.1).
- (6) The Criminal Investigations Division will create a self-generated case number. On screen 1 enter the Program Type as 63, use a Selection Reason appropriate to Program Type 63, and enter the WORK SOURCE as the TSO or TC code from where the referral originated (first part of the WORK SOURCE filed) followed by code 213 (second part of the WORK SOURCE field). On screen 4 comments enter the original Refund Examination case number. On screen G in the first part of the Non-AIMS Area field (two characters), enter the TSO or TC code for where the referral originated from. In the second part of the Non-AIMS Area (three characters), enter 213 to indicate that this was a referral from Refund Examination, rather than a case initiated by the Criminal Investigations Division. When the CIP case is completed, the Criminal Investigations Division must advise Refund Examination so that they can finalize their original case number. The Criminal Investigations Division will add secondary files (for any files that CIP will be criminally prosecuting or civilly assessing) to the self-generated number. **Exhibit 15.B File Selection Reason Code.**
- (7) All files related to a particular referral will be treated as one case.
- (8) Results of investigations, whether finalized in the preliminary, investigation or court stage, are to be entered into AIMS on a timely basis. This data is required to provide feedback to Refund Examination each quarter, as well as to prepare accurate quarterly program results.

- (9) If returns are being sent to another section under AIMS control for audit and/or processing, selection reason 2900 or 2950 must be used by the receiving section when they process the (re)assessment through AIMS. Please advise the section(s) involved of the selection reason to be used. The principal file of the Criminal Investigations Division case determines which of the two codes should be used. Selection reason 2900 should be used for unassessed returns and 2950 should be used for previously assessed returns. This is important for the tracking of results.

15.9 Exhibit 15.A – Fraudulent Refund Referral Form

Case Name: _____ RE

AIMS Case # _____ File #: _____

Date referred to the Criminal Investigations Division: _____ Criminal

Investigations Division AIMS Case #: _____ File #: _____ Table: _____

Fraudulent Refund Referral Form

[illegible]

Unassessed FR Amount Enter the tax refund amount that was not processed because of false/fraudulent refund claims that will not require any subsequent assessing action.

Tax Centre Adjustments Enter the tax savings (false/fraudulent refund amount) here for assessed returns, which are sent to the Tax Centre for cancellation.

Civil Adj by Other Enter the estimated net income adjustment amount here for returns being sent to another section under AIMS control.

Instructions to Criminal Investigations Division

- (1) Record in AIMS as a self-generated referral under Program Type 63 from Work Source 213 using the appropriate selection reason code for Program Type 63. It is imperative that all fraudulent refund cases referred by Refund Examination (RE) are entered in AIMS under Program Type 63 using the proper Selection Reason code, Work Source code (screen 1) and proper Non-AIMS Area code (screen G).
- (2) All accounts related to a particular referral should be treated as one case. Additional returns identified by RE after the initial referral will be forwarded to the Criminal Investigations Division as they are identified and be accompanied by a Fraudulent Refund Referral Form.

- (3) When referrals are declined (in workload development or preliminary stages) or accepted for full-scale investigation, Refund Examination will be informed of this decision by the completion of the T134 form. Where the case is being rejected, the reason will be provided on the T134 form and all tax returns returned to RE.
- (4) Where the referral is accepted for investigation the T134 and this completed form must be returned to RE to inform them of the results of the preliminary investigation and the civil (re)assessments arising from the referral. This form is necessary to ensure that production from the referral is recorded properly by RE. If additional tax returns are received from RE after the Fraudulent Refund Referral Form has been completed and returned, another form should be completed for the additional tax returns.
- (5) If returns are being sent to another section under AIMS control for audit and/or processing, selection reason code 2900 or 2950 must be used by the receiving section when they process the (re)assessment through AIMS. Please advise the section(s) involved of the selection reason code to be used. The principal file of the Investigation case determines which of the two codes should be used. Selection reason code 2900 should be used for unassessed returns and 2950 should be used for previously assessed returns. This is important for tracking of results. Remember to include the civil adjustments from these returns on the completed form.

15.10 Exhibit 15.B – File Selection Reason Codes Fraudulent

Refunds Cases - Program 63

File Selection Codes:

7300	Fraudulent provincial tax credit program 7301
	Multiple discounting
7302	Fraudulent use of S.I.N.
7303	Fraudulent cashing of a refund cheque
7304	Fraudulent request for a second refund cheque 7305
	Fraudulent income splitting
7306	Fraudulent information slip(s) 7307
	Organized scheme of conspiracy 7308
	Counterfeit refund cheque
7309	Any combination of schemes "7300" through "7308" 7320
	Bankruptcies
7325	Other fraudulent scheme

June 2014

Chapter 16 – Exchange of Information

16.1	Application
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16.15	Specific Requests for Information from Countries with Tax Treaties or Tax Information Exchange Agreements
16.16	Requests for Information through a Mutual Legal Assistance Treaty
16.17	Travel to the United States and Other Countries
16.18	Provision of Evidence from the United States in Canadian Courts
16.19	Time Reporting on Foreign Information Request for Assistance
16.20	Retention and disposal of records and information stemming from exchanges of information (under review)

16.1 Application

- (1) This policy applies to the Criminal Investigations Program (CIP) only. This policy is intended to compliment (not replace) the CRA Guidelines on the Use and Disclosure of Client Information (for exchange of information within Canada) or the CRA Exchange of Information Reference Guide (for foreign exchange of information)
- (2) This policy must be used in conjunction with written collaborative arrangements, tax treaties, tax information exchange agreements (TIEA) and the sections of the *Income Tax Act*, *Excise Tax Act* and the *Privacy Act* that concern the disclosure of taxpayer/confidential/personal information. Where an inconsistency exists between this policy and these laws, the law takes precedence over this policy.

16.2 Overview

- (1) This document contains the Criminal Investigations Directorate's overall policy on the sharing of information with and obtaining information from other government organizations as it pertains to CRA criminal investigations.
- (2) Section 241 of the *Income Tax Act* (ITA) and Section 295 of the *Excise Tax Act* (ETA) protect the confidentiality of information obtained under these Acts. Subsection 241(1) of the ITA and 295(2) of the ETA prohibit an official (as defined in subsection 241(10) of the ITA and 295(1) of the ETA), which includes officers of the CRA, from communicating any information to or allowing access to any information obtained under these Acts, to any person. There are however limited disclosure provisions which allow information to be shared. It is imperative that CIP staff do not share information unless expressly allowed to do so under the Act they are administering.
- (3) A record must be maintained of all information that is released to an organization outside CRA including a copy of the request in writing, the name of the person requesting the information, a detailed list of the information requested, the purpose for its release and any items released. CIP staff should send a written reply to the requestor outline any restrictions on the use of the information.

16.3 Exchange of Information within the Federal Government

- (1) Whenever CIP employees have a work-related need to obtain or exchange non-public information with departments, agencies, branches, bureaus, commissions, boards and services of the federal

government, crown corporations, federal government-controlled companies and the Bank of Canada, they must do so through the Criminal Investigations Directorate. There are exceptions to involving the Criminal Investigations Directorate for exchanges with the Royal Canadian Mounted Police (RCMP) and the Canada Border Services Agency (CBSA). See section 16.7 for guidelines on requests involving the RCMP and 16.8 for CBSA.

- (2) One of the roles of the Criminal Investigations Directorate is to determine if there are any relevant written collaborative arrangements (WCA) in place such as a memorandum of understanding that contain procedures on how to exchange information with the other agency.
- (3) There is a searchable inventory of WCAs on InfoZone :
<http://infozone/english/r9999999/apps/apps03/index-eng.asp>

16.4 Information sharing within the Canada Revenue Agency

- (1) Most information or documents that investigators obtain during the course of an investigation may be shared with other program areas within CRA for the purposes of administering and enforcing the Acts for which the Agency has responsibility.
- (2) Auditors, Collections Officers, Appeals Officers and other CRA employees who are performing the civil aspects related to a criminal investigation may have access to documents and other information that CRA investigators obtained by search warrant or production order. There is no need to obtain prior judicial authorization.
- (3) This approach to sharing seized items with other CRA program areas does not apply to things seized outside the scope of the warrant. For example, electronic information outside the warrant that is on a seized computer should not be shared with other CRA program areas. There may also be restrictions on CIP investigators sharing information they obtained from Canadian and foreign law enforcement agencies and foreign tax authorities.

16.5 Requests made to a Federal Government organization for CRA criminal cases (other than to the RCMP and CBSA)

- (1) All requests for information from a federal government organization (other than CBSA and RCMP) that will be used to further a CRA criminal investigation must be channeled through the Criminal Investigations Directorate. The Assistant Director, Criminal Investigations must provide the Criminal Investigations Directorate with a memo (in electronic format) outlining the information that they wish to obtain from the other federal government organization. The Criminal Investigations Directorate will review the request, prepare the required documents and in accordance with any relevant written collaborative arrangement send the request to the other organization. All responses will be forwarded to the requesting office upon receipt.
- (2) Most federal government departments and agencies have a section that coordinates the exchanges of information.
- (3) Schedule II of the Privacy Act - Privacy Regulations identifies investigative bodies for the purposes of paragraph 8(2)(e) of the *Privacy Act*. The Criminal Investigations Directorate falls under the listing of "Audit Directorate, Department of National Revenue (Taxation)". The Criminal Investigations Directorate was formerly part of the Audit Directorate and the designation as an investigative body continues to be in force. As a result the Criminal Investigations Directorate may obtain personal information under the control of a government institution, subject to any other Act of Parliament and the operational policies of the other department.

16.6 CRA Disclosing and Obtaining Information for the Purpose of Administering Revenue Acts

- (1) Most information gathered for the purposes of the ITA and Part IX (GST) of the ETA may be shared and used for the purposes of administering or enforcing any other federal or provincial act that provides for the imposition or collection of a tax or duty. This includes both civil actions and criminal investigations.
- (2) Section 241(4)(d)(ii) of the ITA and 295(5)(d)(ii) of the ETA are the respective provisions that allow the CRA to exchange taxpayer/confidential information with agencies that administer or enforce other

federal or provincial revenue acts. The CRA has written collaborative arrangements with most of these federal and provincial agencies establishing procedures on the exchange of information.

- (3) CRA administers the Excise Act and parts I to VIII (non-GST portions) of the Excise Tax Act. However, there are no provisions in these Acts that allows for the exchange of information with other CRA officials, such as investigators or auditors, who administer or enforce the ITA and the GST portions of the ETA.
- (4) Any information concerning an identifiable individual that the CRA gathers for the purposes of the Excise Act and the non-GST portions of the ETA is subject to the *Privacy Act*. To access such information, the Criminal Investigations Directorate can make a request under paragraph 8(2)(e) of the *Privacy Act* to the appropriate sections of the CRA.
- (5) Information that CRA officials obtained from a third party under the provisions of a treaty, tax information exchange agreement, MOU or other agreement may only be used for the purposes specified in the particular agreement.

16.7 Exchange of Information with the RCMP

- (1) The Royal Canadian Mounted Police is the Canadian national police service and an agency of the Ministry of Public Safety Canada. The RCMP is unique since it is a national, federal, provincial and municipal policing body.
- (2) The CRA Criminal Investigations Directorate and the RCMP have MOUs with the RCMP concerning access to the Canadian Police Information Centre (CPIC) and RCMP assistance on CRA searches. These MOUs do not cover all potential exchanges of information between CRA and RCMP investigators.
- (3) Whenever CRA investigators wish to obtain information from a local RCMP office, they may request it without involving the Criminal Investigations Directorate. Investigators should make each request in writing and include their legal authority for requesting the information.
 - CRA investigators are authorized to administer and enforce the Income Tax Act under subsection 220(2) and correspondingly subsection 275(2) of the *Excise Tax Act*, by virtue of being appointed or employed as investigators by the Canada Revenue Agency.
 - CRA investigators have statutory authority to administer and enforce the CRA's mandate as described in section 5 of the Canada Revenue Agency Act. Access to RCMP information falls within this mandate.
- (4) In some cases, the RCMP may refuse to provide information that they seized from the target of their investigation unless CRA investigators obtain a court order pursuant to section 490(15) of the *Criminal Code*. Further guidelines on 490(15) orders are in **section 6.2.8 of the Criminal Investigations Manual**.
- (5) If the local RCMP office insists that CRA make a formal request under section 8(2)(e) of the *Privacy Act*, then investigators must follow the procedures in section 16.5 above and ask the Criminal Investigations Directorate to submit the request on their behalf.
- (6) When a local RCMP office contacts a CRA Criminal Investigations Division and requests taxpayer information for use in an RCMP investigation, investigators must follow the procedures in **16.10 Requests from police agencies to CRA investigators for taxpayer information for use in their investigations**.

16.8 Exchange of Information with the Canada Border Services Agency (CBSA)

- (1) The CRA and the CBSA have two MOUs concerning the exchange of protected information. One overarching information sharing agreement and one specific to taxpayer information from the RAPID system.

Overarching agreement

http://infozone/english/r9999999/sa/sa01/tlr/tlr02/fed/C/CBSA_A2-0-eng.html RAPID

Information http://infozone/english/r9999999/sa/sa01/tlr/tlr02/fed/C/CBSA_A3-0-eng.html

The following paragraphs contain a summary of these two MOUs for CRA investigators. If there is an inconsistency between this summary and these MOUs, the MOU takes precedence over this summary.

- (2) The CRA may provide taxpayer information to the CBSA solely for the purposes of the administration of federal laws that provide for the imposition of a tax or a duty. This includes the Customs Act, the Customs Tariff and the Special Import Measures Act.
- (3) It does not include other legislation that the CBSA administers relating to such programs as immigration, food inspection and the protection of endangered species unless criminal proceedings have been commenced.
- (4) Before disclosing any information, CIP staff must ensure that the request meets the provisions of section 241 of the *Income Tax Act* and/or 295 of the *Excise Tax Act* and that the CBSA official requesting the information has a work-related need to know.

16.8.1 Procedures for Releasing Taxpayer Information to the CBSA

- (1) There are two separate processes that can be undertaken to provide information to CBSA depending on what is requested and the role of the requestor. The two processes are:
 - (A) information provided directly by a CIP office;
 - (B) Refer the CBSA official to the CBSA's National Risk Assessment Centre (NRAC);
- (2) For the purposes of a CBSA investigation, the disclosure of information is governed by the overarching MOU between CRA and CBSA which, among other issues, permits CBSA investigators to contact local CRA offices (including CIP) directly for the purposes of obtaining information. Annex C-28 of the MOU details the provision of CRA information to Customs investigations.
- (3) The MOU says that the authorized CRA official to release information is the Assistant Director, Tax Operations, Investigation Directorate, Compliance Program. This position does not currently exist. As long as the release of information is done in accordance with the relevant Act it may be authorized by the Assistant Director, Criminal Investigations, in the TSO.
- (4) CIP staff must consider whether releasing the information (including simply acknowledging that there is an open Investigations file on the taxpayer) may jeopardize a CRA case.
- (5) CIP staff must send a written reply to the CBSA official and state that the purpose of the disclosure is for the enforcement of one of the revenue acts.
- (6) The CBSA cannot share the information with a third party without the written consent of the CRA.
- (7) CIP offices should not process requests from the CBSA for RAPID information unless the request is from the Customs Investigations Division. The provision of information from RAPID is governed by the RAPID information MOU. This MOU stipulates that CBSA requests for RAPID information (excluding investigations) must be routed through the National Risk Assessment Centre (NRAC) of the Canada Border Services Agency in Ottawa.
- (8) Intelligence officers, targeting officers and other CBSA staff will be supplied RAPID information solely from NRAC and not by contacting CIP offices. CBSA officers (excluding investigators) who contact CIP seeking RAPID information should be told to contact the NRAC.

16.8.2 Procedures for Obtaining Information from the CBSA

- (1) CIP staff may request specific information from the CBSA for a specific use. The request should state the years involved and the specific sections of the ITA and ETA to be applied. The request must be in writing and sent to the CBSA official (stipulated in the MOU) who has the authority to approve the release of the information.
- (2) The MOU between CRA and CBSA does not provide the specific types of information that CBSA may provide to the CRA for use in a criminal investigation. This does not mean that specific information will not be provided. Examples of information that CBSA may have that could be relevant to a CRA investigation includes the travel history of the person under investigation and the value and description of imported goods. CBSA may provide the information if they are legally entitled to do so.

(3) As per paragraph 14 of the MOU:

Each written request for information made for information not specifically listed in the MOU must include answers to the following questions, and related information:

- What is the legal authority to collect/use the information requested;
CRA investigators are authorized to administer and enforce the *Income Tax Act* under subsection 220(2) and correspondingly subsection 275(2) of the *Excise Tax Act*, by virtue of being appointed or employed as investigators by the Canada Revenue Agency.
CRA investigators have statutory authority to administer and enforce the CRA's mandate as described in section 5 of the *Canada Revenue Agency Act*. Access to CBSA information falls within this mandate.
The CRA has authority to collect personal information under the *Privacy Act* and its status as an investigative body under section 8(2)(e) of the *Privacy Act* provides further legal justification for investigators to collect and use information from the CBSA to effectively administer and enforce its program legislation.
- What is the intended use of the information? Describe the program, activity or initiative for which the information is requested;
- Have alternate, non-CBSA sources of data been considered? Explain why the CBSA source is preferred;
- What are the details about the information requested? Answer the following questions:
 - What are the particular data elements requested? Specify the relevant data years. Is it the minimum amount of information needed for the intended use?
 - What is the frequency of data release (i.e. one time only or recurring; if recurring, at what frequency)?;
 - What is the type of medium to be used for the release of information (paper, tape, Electronic Data Interchange, etc.)?
 - How long will the requesting organization retain the information?
 - How will the CRA dispose of the information at the end of the retention period (destruction or return to provider)?
 - Is there a possibility of a third party disclosure or subsequent release of the information by the requesting organization? and
 - Is there any additional information that may help to assist in the evaluation of the request? (e.g. is the request subject to a deadline?)

16.9 Provincial and Municipal Liaison

In general, where non-public information is required by CRA investigators and is available from a provincial government agency, municipality, town, or city agency, the request for information should be made in a letter from the Assistant Director, Criminal Investigations to the appropriate provincial or municipal agency. A copy of the request should be forwarded to the Director, Criminal Investigations Division at HQ.

16.9.1 Information Sharing With Provinces

- (1) The CRA (or its predecessors) and each of the provincial Revenue and/or Finance departments have entered into agreements to exchange information and enhance co-operation as they relate to tax matters.
- (2) The agreements may be found at:
<http://infozone/english/r9999999/CSBDB/Organization/IIAD/MOU/search.asp>
- (3) The federal acts to which the agreements pertain include the *Income Tax Act*, *Excise Tax Act*, *Excise Act*, and depending on the province other relevant Acts. The provincial acts will vary but will generally include acts that relate to health tax, fuel tax, income tax, land tax, mining tax, retail sales tax and tobacco tax.
- (4) The designated CRA official who may release information varies in the agreements, but generally is delegated to an Assistant Director in a Tax Services Office.

- (5) The MOU with the Province of British Columbia includes a provision concerning the provision of information related to a criminal investigation. This provision requires that a search warrant or production order be obtained in order for the information to be provided. Given the existence of the clause it is recommended that if BC Finance has information that is required for a criminal investigation that the investigator seek a Production Order to obtain it. The requirement is not present in any of the exchange of information MOUs signed with the other provinces.

16.9.2 Information Sharing with Municipal Government Agencies

- (1) If CRA investigators wish to obtain non-public information from a municipal government agency, they should send a written request to the appropriate municipal agency and forward a copy of the letter to the Director, Criminal Investigations at HQ.
- (2) If officials from municipal government agencies (other than police or law enforcement agencies) ask CRA investigators for taxpayer information, the request should be forwarded to the Criminal Investigations Directorate who will consult with the Strategy and Integration Branch of the CRA. Even if the disclosure meets the requirements of the ITA or ETA, in keeping with the CRA's Guidelines on the Use and Disclosure of Client Information, a written collaborative agreement may be required before CRA can disclose information.

16.10 Requests from Police Agencies to CRA investigators for taxpayer information for use in their investigations

- (1) If federal, provincial or municipal police agencies contact CRA investigators and request taxpayer information for use in a police investigation, investigators should tell their team leader and/or Assistant Director, Criminal Investigations.
- (2) In every request before CRA discloses information to the police, the Assistant Director, Criminal Investigations or team leader must be satisfied that the disclosure is authorized by section 241 of the ITA or 295 of the ETA.
- (3) Section 241 of the ITA and Section 295 of the ETA protect the confidentiality of information obtained under these Acts. Subsection 241(1) of the ITA and 295(2) of the ETA prohibit an official (as defined in subsection 241(10) of the ITA and 295(1) of the ETA), which includes CRA investigators, from communicating any information to or allowing access to any information obtained under these Acts, to any person (including a police officer).
- (4) Subsection 241(2) of the ITA and 295(3) of the ETA prohibit an official from giving evidence or producing information obtained under these Acts in any legal proceedings. There are numerous exceptions to the confidentiality provisions.
- (5) Paragraph 241(3)(a) of the ITA and paragraph 295(4)(a) of the ETA provide an exception to subsections 241(1) and (2) of the ITA/subsections 295(2) and (3) of the ETA, with respect to the provision of information in the possession of the CRA. When criminal proceedings have been commenced by the laying of an Information under an Act of Parliament the CRA may release information.
- (6) When a police agency wishes to obtain information from the CRA under the provisions of 241(3)(a) of the ITA or 295(4)(a) of the ETA, the police or Crown counsel must provide a letter to the appropriate Assistant Director, Criminal Investigations stating that charges have been laid under an Act of Parliament setting out the information requested and reasons why the information requested is relevant to the charges laid. A copy of the information to lay charges must also be provided.
- (7) The Assistant Director, Criminal Investigations or a designated team leader, must satisfy themselves that charges have been laid and that the information requested is relevant to the charges. If they cannot satisfy themselves that these two criteria have been met then the request should be denied and the requesting officer or Crown counsel should be informed of the reason.
- (8) If there is a spouse, associate or corporate entity whose tax information is also being sought, there must be a relevancy established, in writing, relating specifically to the charges laid in order for the information to be released. If only a portion of the information requested is determined to be relevant to the charges laid then only that information should be released.

- (9) When the Assistant Director, Criminal Investigations is satisfied that the criteria have been met then CRA may co-operate with the Crown counsel or the police officer by showing them what CRA feels are relevant documents to their case and providing photocopies as requested. A covering letter, signed by the Assistant Director, Criminal Investigations or a designated team leader, should accompany the disclosure advising the police or Crown counsel that the information can only be used for the purpose for which it was requested and that it cannot be used for any other purpose.
- (10) The police request may request that the information provided be accompanied by an affidavit. For further information on affidavits see **CIM Chapter 23 – Affidavits**.
- (11) All information to be released should be reviewed by the Assistant Director, Criminal Investigations or a designated team leader to ensure that only exempted information is released. It is very important that the documents that are to be released be vetted to ensure that items such as documents covered by solicitor client privilege and those obtained via a tax treaty are not released. A subpoena should be received prior to producing the information at trial.
- (12) Releasing taxpayer information is at the discretion of the CRA. If the Assistant Director, Criminal Investigations is of the opinion that releasing information may not be in the best interest of the Agency then they may deny the request. In the event of any disagreement as to the relevancy or where the Assistant Director, Criminal Investigations is not prepared to disclose the information that Crown counsel or the police officer feels is relevant, the Director General, Criminal Investigations Directorate will be notified to rule on the matter.
- (13) CRA employees must also be aware that the confidentiality provisions can be breached not only by providing documents but also by verbally communicating information to police officers and other individuals. Police officers usually make extensive notes of discussions that they have with potential witnesses during the course of their investigations. Any information provided to a police officer, inadvertently or otherwise, may be entered in a court proceeding at a future date.
- (14) Information may also be shared under paragraph 241(3)(b) of the ITA and paragraph 295(4)(b) of the ETA for purposes of any legal proceedings relating to the administration or enforcement of the ITA, ETA, the Canada Pension Plan, the Unemployment Insurance Act or the Employment Insurance Act or any other Act of Parliament or a law of a province that provides for the imposition or collection of a tax or duty. The same procedures described in paragraphs 2 to 13 apply to exchanges under 241(3)(b) of the ITA and 295(4)(b) of the ETA.

16.11 Requests from Police Agencies to CRA investigators for taxpayer information in situations involving Imminent Danger

- (1) Sections 241(3.1) of the ITA and 295(4.1) of the ETA provide that the Minister of National Revenue (as opposed to "a CRA official") may provide information to appropriate persons if it relates to imminent danger of death or physical injury to any individual.
- (2) In most instances this will be as a result of the police seeking information from CRA on specific individuals. The sensitivity related to the use of these sections dictates the need for a more centralized authorization process. CRA investigators must seek approval from a director at the Criminal Investigations Directorate for release of information if time permits.
- (3) If extraordinary circumstances should arise that warrant the immediate release of information, the Assistant Director, Criminal Investigations or a team leader in the Criminal Investigations Program (delegated authorities) should release the information, with the subsequent notification to the Criminal Investigations Directorate as soon as possible. In those instances the Assistant Director, Criminal Investigations or a team leader in the Criminal Investigations Program must satisfy themselves that the imminent danger exists prior to releasing the information to the police. They should maintain adequate documentation to justify the release of the information if challenged.
- (4) If investigators find information that may indicate that there is an imminent danger of death or physical injury to any individual the situation should be reported to the Criminal Investigations Directorate immediately. The Criminal Investigations Directorate will review the information and

determine whether information should be released under the above noted provisions. The information may be disclosed to the police to the extent necessary to apprise them of the danger.

- (5) For guidance on how to deal with illegal items found during a search, please refer to Chapter 6 Obtaining and Securing Evidence – section 6.3.4 RCMP or Police Force Assistance and section 6.3.8.2 What Can Be Seized? For guidance on how to handle suicide calls please refer to the Suicide Call guidelines in the Finance and Administration Manual at:
<http://infozone/english/r2822200/FAM/security/suicideCall-e.asp>

16.12 Requests from Police Agencies to CRA investigators for taxpayer information pursuant to a court order under section 462.48 of the Criminal Code

- (1) Section 462.48 of the *Criminal Code* enables police forces to apply to a court to obtain an order to have access to taxpayer information collected under the ITA that would aid an investigation in relation to certain named offences. Accordingly, under subparagraph 241(4)(e)(v) of the ITA, taxpayer information may be given to the police when they obtain such a court order. The Minister may object to disclosure of taxpayer information on the following grounds:
- (a) the Minister of National Revenue is prohibited from disclosing the information or document by any bilateral or international treaty, convention or other agreement respecting taxation to which the Government of Canada is a signatory;
 - (b) a privilege is attached by law to the information or document;
 - (c) the information or document has been placed in a sealed package pursuant to law or an order of a court of competent jurisdiction; or
 - (d) disclosure of the information or document would not, for any other reason, be in the public interest.
- (2) The order should be served on the Director of the TSO who is a person specially designated in writing by the Commissioner of Revenue for the purposes of 462.48.
- (3) The Assistant Director, Criminal Investigations (or delegate) must contact the Criminal Investigations Directorate when a 462.48 order is received. The Criminal Investigations Directorate will review the order and provide guidance on how to proceed.
- (4) There is no provision in the ETA similar to subparagraph 241(4)(e)(v) of the ITA. Information related to the ETA cannot be provided to the police during the course of an investigation. If an order under section 462.48 of the *Criminal Code* includes information collected under the ETA, the information will not be provided.

16.13 CRA Investigators Receiving Subpoenas to testify in civil proceedings

If a CRA investigator is served with a subpoena for proceedings which do not qualify for disclosure of information under subsection 241(3) of the ITA or subsection 295(4) of the ETA, the procedures to follow are outlined by the Legal Services Branch at the following link:

http://infozone/english/r2200000/receipt_of_legal_documents_guidelines-e.asp

16.14 Exchange of Information with Other Countries

The Exchange of Information Services Section (EOI Section), Competent Authority Services Division (CASD), International and Large Business Directorate (ILBD) is responsible for overseeing all incoming and outgoing international exchanges of information. To help CRA employees understand the law and procedures concerning foreign exchange of information, EOI Section publishes the Exchange of Information Programs Reference Guide. It is important that employees review the most current version of the Guide as it is subject to revisions at the discretion of ILBD. The guide may be found on Infozone at:

<http://infozone/english/r6001000/manuals/international/exchinfoguide/exchinfoguidetoc-e.html>

16.15 Specific Requests for Information from Countries with Tax Treaties or Tax Information Exchange Agreements

- (1) A number of treaties and Tax Information Exchange Agreements (TIEA) are in force between Canada and other countries, which provide for the exchange of information to prevent tax evasion and avoid double taxation. The treaties and tax information exchange agreements can be found at:

Tax Information Exchange Agreements -<http://www.fin.gc.ca/treaties-conventions/tieaaerf-eng.asp>

Notices of Tax Treaty Developments -http://www.fin.gc.ca/treaties-conventions/treatystatus_-eng.asp

- (2) The authority to exchange information with tax administrations of other countries is found in Canada's tax treaties under the Exchange of Information Article or in a TIEA. The authority for exchanging information is vested with the Competent Authorities of the Contracting States.
- (3) Competent Authority is a delegated position. The Director, CASD, ILBD serves as the Canadian Competent Authority for exchanges of information involving foreign countries.
- (4) All exchanges of information with tax treaty and TIEA partners are controlled and administered by the EOI Section.
- (5) Regardless of the laws or powers of the other jurisdiction, information may not be requested from a treaty or TIEA partner if the information cannot be obtained under similar circumstances in Canada. Canada and its international partners are not obligated to exceed the bounds of their own domestic laws and administrative practices, nor supply information that is not obtainable in the normal course of its own administration.
- (6) Information received from a treaty partner, in most cases, may be disclosed in court in criminal proceedings however Competent Authority must be advised of these cases as Canada has a practice to advise our treaty partners. The Lead Investigator must advise the Criminal Investigations Division, Advisory Services Section that information acquired via a treaty request will be provided to the accused during the disclosure process. The Criminal Investigations Directorate will advise EOI that criminal charges have been laid and that the information will be offered as evidence if the case proceeds to a trial.
- (7) When requesting information from a foreign country relating to an individual or a corporation, it is extremely important to be careful with the choice of words used in any reports or memoranda. As a person is presumed innocent until the case has been heard in court and there has been a finding of guilt, expressions such as "Mr. X has committed fraud" or "Mr. X has failed to report income" must not be used. More appropriate phrases would be "There is a possibility that Mr. X has committed fraud" or "We are attempting to establish if Mr. X has reported his full income". The use of such words as "alleged" or "possible" are considered acceptable and encouraged. It is important to relate the message to the reader of any reports or memoranda that the accused is the subject of an investigation so as to determine if he has committed an offence and not that they have committed an offence.
- (8) The Process to Make a Tax Treaty or Tax Information Exchange Agreement Request is: (a) Before making any request for foreign-based information, the Lead Investigator must consult the Criminal Investigations Division, Advisory Services Section to ensure that the most appropriate tool to gather the information is being utilized (Tax Treaty, TIEA, MLAT, domestic source).
- (b) The following issues will be considered:
 - Is the tax evaded or amount of income/expense involved significant?
 - Is the information requested relevant and genuinely necessary in determining a taxpayer's tax evaded and/or criminal intent?
 - Has sufficient investigative work been done and have all reasonable efforts been made to obtain the information from Canadian sources?
- (c) If it is determined that a Treaty or TIEA request is required the Assistant Director, Criminal Investigations (ADCI) (or their delegate) will electronically send a written request to the Director, Criminal Investigations Division which will include the following:
 - A memo outlining the investigative steps taken to obtain the information in Canada and the significance of the information to the criminal investigation;

- Supporting information or documents such as transcripts of accounts or statements, which would assist the foreign agent in reducing investigation time and appraising any possible foreign tax liability;
 - A completed Specific Request for Information form included in the Exchange of Information Services – Reference Guide
 - A draft affidavit template for the provider of the information in the foreign country to complete.
- (d) The request will be reviewed by a Senior Investigator in the Investigations Advisory Services Section who may request further details, revisions or clarification from the Lead Investigator.
 - (e) The Director, Criminal Investigations Division will electronically send the approved request to the EOI Section. The ADCI, Manager, Team Leader and Lead Investigator will be sent a copy of the approved request.
 - (f) The EOI Section will review the request. If they require further details or clarification the EOI officer may contact the Investigations Advisory Services Section or the Lead Investigator directly. Prior to sending the request to the other country EOI will contact the Investigations Advisory Services Section to ensure they are in agreement with its contents.
 - (g) When the EOI is satisfied with the request they will send a Competent Authority letter to the other country which serves as a request to the foreign tax administration for assistance in securing information concerning a particular individual or corporation. A copy of the Specific Request for Information and any supporting documentation will accompany the letter.
 - (h) The EOI Section will forward all correspondence and information received from the other country to the Director, Criminal Investigations Division. The correspondence and information will be forwarded to the ADCI by the Criminal Investigations Division.
 - (i) Any follow-up action required as a result of correspondence and information received from the other country must be initiated through the Director, Criminal Investigations Division. In consultation with the EOI Section and the Lead Investigator a determination will be made as to the level of involvement of the Criminal Investigations Division in the pursuit of further information from the other country.

16.16 Requests for Information through a Mutual Legal Assistance Treaty

Another method of obtaining information from foreign officials is through the Mutual Legal Assistance in Criminal Matters Act (MLACMA). The Department of Justice is the competent authority in Canada for mutual legal assistance matters. Please see **CIM Chapter 11.3** for guidelines and policy concerning Mutual Legal Assistance Treaty requests.

16.17 Travel to the United States and Other Countries

- (1) Canada has negotiated a formal travel agreement with the U.S. The Memorandum of Understanding allows the tax authorities to conduct official tax administration duties in the other country.
- (2) Refer to: **Memorandum of Understanding Between the Competent Authorities of the United States and Canada with respect to Travel in the Territory of the Other Country (MOU)**.
<http://infozone/english/r6001000/manuals/International/Memo/MOU.pdf>
- (3) All travel to the U.S. to meet with taxpayers, authorized representatives or third parties must be approved by the U.S. Competent Authority prior to departure. The Competent Authority Services Division is the area in the CRA solely responsible for obtaining approval from foreign jurisdictions when CRA employees wish to travel outside Canada on official business. The Competent Authority Services Division also grants or refuses permission to tax administration officials of the U.S. as well as to other foreign jurisdictions who want to travel to Canada on official business.
- (4) The authority to travel to the U.S. and other countries for the purposes of verifying and gathering information is found in a tax treaty's **Exchange of Information** Article. The authority to travel to the U.S. is formalized in the MOU. Strict procedures must be followed to ensure that the activities undertaken do not go beyond those permitted by a tax convention and do not offend a nation's sovereignty.

- (5) In order to request travel to any country with whom Canada has negotiated a treaty, a "**Request for Approval to Travel Outside of Canada**" form must be completed and forwarded to the Director, Competent Authority Services Division in ILDB. The Competent Authority Services Division will forward the request to the treaty partner.
The "**Request for Approval to Travel Outside of Canada**" should be submitted as early as possible.
<http://s155zzdb0001/atl/ratoc/jsp/index.jsp>
- (6) Although the Competent Authority Services Division can usually obtain permission within 15 working days, securing approval from some jurisdictions can take longer. If approved, the Competent Authority Services Division will arrange with the U.S. Competent Authority for the personal visit and will tell the initiating TSO which IRS office or offices the Canadian officer should report to and who to contact.
- (7) Travel to non-treaty countries requires the assistance of the Agency Secretariat and International Relations Directorate - International Relations Office Division. The Competent Authority Services Division should be consulted for further assistance in this regard.
- (8) The following are examples of situations where the CRA may request permission to travel to another country to further an investigation:
 - Cases in which there are indications of cross-border irregularities or fraud on a significant scale in one or both countries;
 - Complex cases where the help of foreign tax officials is required;
 - Cases where there are time constraints and a risk of a time limit expiring, and the help of foreign tax officials can speed up the investigation; and
 - Cases where the records of a taxpayer are in the other jurisdiction and the taxpayer requests the presence of the tax officials.
- (9) The permission granted by the U.S. or another treaty country is specific to the request. The investigation must at all times be restricted to the taxpayer's activities and/or issues specified in the request approved by the foreign government. The investigator may not expand the scope of the official visit to other sites or persons without further Competent Authority approval.
- (10) All information, including original documents or copies required by a Canadian investigator and obtained in a foreign country must be transferred through the Competent Authorities of the two countries. Under no circumstances should any foreign documents be transported back to Canada by an investigator.

16.18 Provision of Evidence from the United States in Canadian Courts

- (1) The terms of the Convention do not provide for U.S. witnesses to appear in court in Canada or for U.S. sources to produce evidence in Canadian courts.
- (2) In tax evasion cases, where such evidence is considered essential, efforts will be made by the Director, Competent Authority Services Division in ILDB to arrange directly with the U.S. witness for their attendance in court. Alternatively, their evidence may be taken by Commission in the U.S. Refer to **Chapter 11 – Commission Evidence, Mutual Legal Assistance Treaties (MLAT)** and Extradition Proceedings in the Criminal Investigations Manual.
- (3) Documents obtained in a foreign country may be entered via an affidavit under section 30 of the *Canada Evidence Act*. Refer to **Chapter 23 – Affidavits** in the Criminal Investigations Manual for further guidance on affidavits.

16.19 Time Reporting on Foreign Information Request for Assistance

All time used in providing information or assistance to other countries is to be recorded as assistance to other programs (Activity Code AT 822).

16.20 Retention and disposal of records and information stemming from exchanges of information (under review)

- (1) All requests for information from other government departments and agencies (including foreign governments) that result in the disclosure of CRA information and all related information must be

kept for 5 years after the date the information was provided to the other government department or agency.

- (2) If the CRA does not provide information in response to the request, this retention period does not apply.
- (3) All leads coming from other law enforcement agencies are retained and stored in a secure manner for 2 years from the last administrative action.

Chapter 17 – United States/Canada Simultaneous Criminal Investigation (SCIP)

Overview

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OVERVIEW

The Simultaneous Criminal Investigations Program (SCIP) was established in 1981 and the first agreement was signed in 1983. In November 2004 the Simultaneous Criminal Tax Investigation Working Arrangement between the Competent Authorities of Canada and the United States (US) was signed. The SCIP is a specific joint arrangement between Canada and the United States wherein a Canada Revenue Agency (CRA) Criminal Investigations Division, together with a US, Internal Revenue Service (IRS), Criminal Investigations Division, undertake to:

- Simultaneously investigate taxpayers resident in either country who are believed to be involved in committing tax evasion in both countries;
 - Prosecute cases where the evidence accumulated indicates guilt beyond a reasonable doubt.
- NOTE: Although SCIPs have primarily been undertaken with the US, it is important to note that other foreign countries may be willing to participate in a SCIP. To further explore and discuss this possibility, contact should be made with Criminal Investigations Division, Criminal Investigations Directorate, who will initiate contact with the Exchange of Information Services Section, Competent Authority Services Division, International and Large Business Directorate, Headquarters.

17.1 Guidelines and Responsibilities

The guidelines presented below provide criteria for the selection of cases and the procedures for implementing and engaging in SCIP. Also refer to chapter 7 of the Exchange of Information Services Reference Guide at the following address:

<http://infozone/english/r6001000/manuals/international/exchinfoguide/exchinfoguidetoc-e.html> **17.1.1**

Legal Basis

- (1) Authorization for the exchange of information in this program can be found in Article XXVII of the Canada – United States Tax Convention (1980) (Tax Treaty).
- (2) All requests to secure the participation of the US in a case contemplated under SCIP must be done in writing. All such cases must be channeled through the respective Competent Authorities prior to any contact or exchange of information. The Director, Competent Authority Services Division (CASD), International and Large Business Directorate (ILBD), serves as the Competent Authority for this program. The Director, International, IRS, in Washington is the US Competent Authority.
- (3) Once the Competent Authorities have approved a SCIP request, the criminal investigation units of the respective countries will perform all the necessary coordination duties applicable to this program. As this program will inevitably involve the exchange of information, Competent Authority letters must be exchanged in all cases.

17.1.2 Responsibility

- (1) The Criminal Investigations Directorate will retain overall responsibility for the SCIP within CRA. This responsibility includes:
 - Considering requests from Tax Services Offices (TSO) to establish a SCIP;
 - Liaising with Exchange of Information Services Section, CASD, ILBD, with respect to securing Competent Authority approvals;
 - Providing opinion on SCIP requests from the IRS which have been forwarded first to Exchange of Information Services Section, CASD and then to the TSOs;
 - Monitoring and evaluating the overall effectiveness of the Program; and
 - Resolving any contentious issues that may arise regarding any aspect of the program. The Criminal Investigations Directorate will have the final decision on whether a case is included in the SCIP.
- (2) The Criminal Investigations Division in each TSO is responsible for:
 - Recommending to the Director, Criminal Investigations Division, Criminal Investigations Directorate any case it feels warrants inclusion under SCIP (If acceptable, a SCIP request in the form of a detailed memorandum or report must be forwarded to Exchange of Information Services Section, CASD, who will undertake the administrative procedures of forwarding the proposal to the IRS and securing Competent Authority approval);
 - Evaluating the Canadian side of a case which the IRS has requested a SCIP, and providing its opinion to Criminal Investigations Division at HQ as to whether the case warrants inclusion as a SCIP (The TSO will advise, in a detailed memo or report, the Exchange of Information Services Section, CASD through the Director, Criminal Investigations Division, Criminal Investigations Directorate as to whether a SCIP is recommended. The Exchange of Information Services Section will inform the IRS accordingly).
 - Liaising with the Exchange of Information Services Section, CASD as necessary regarding Competent Authority matters, exchanges of information, etc.; and
 - Contacting the IRS investigator to discuss SCIP cases after securing Competent Authority approval.

17.1.3 Competent Authority/Exchange of Information

- (1) The Competent Authority in Canada for this program has been delegated to the Director, CASD, ILBD. The Competent Authority in the US is the Director, International, IRS.
- (2) The exchanges of information that are made in the course of a SCIP investigation and any disclosures thereof, shall be governed by the terms of the Tax Treaty between Canada and the US.
- (3) The Director General, Criminal Investigations Directorate or their designate will act as the liaison for coordination purposes of all SCIP cases.
- (4) Once the Competent Authority letters have been signed and exchanged, case coordinators and investigators may discuss and review information and documents deemed necessary or appropriate to carry out an investigation under the program. All documents or other evidence must be exchanged

under the signature of the Competent Authority of the Contracting State supplying such documents or evidence.

17.2 Objectives

- (1) Under the SCIP, each country will select mutually acceptable cases for investigation. Simultaneous criminal tax investigations will be conducted separately and independently in each country within the framework of national laws and practices.
- (2) The SCIP program is designed to:
 - Allow for the efficient exchange of information between the countries involved in the criminal investigation;
 - Increase the effectiveness of the tax authorities in dealing with cases involving criminal tax offences taking place in both countries;
 - Facilitate communications between investigators involved in a case; – Expedite travel activities to the other country; and
 - Eliminate many of the problems encountered when taxpayers use the border to provide a degree of immunity from the production of records and the proper reporting Case Selection and Investigation Procedures.

17.3 Procedures and Case Selection 17.3.1

General

- (1) The Criminal Investigations Division in the TSO will recommend to the Director, Criminal Investigations Division, HQ, cases that it feels meet the criteria for a simultaneous investigation. A detailed report, with all the relevant documentation, must be sent explaining why a simultaneous investigation is being recommended on a particular case. A case can be recommended for simultaneous investigation at any stage of an active investigation.
- (2) In order to discuss any SCIP cases or engage in any information sharing with the IRS, Competent Authority letters must be exchanged. The formulation and transmittal of such letters is undertaken by and is the responsibility of the Exchange of Information Services Section, CASD. As a result, it is imperative that as much information and supporting documentation be provided to assist the Exchange of Information Services Section in preparing the Competent Authority letter to the US and to aid the IRS in evaluating the proposal. The reports or memos should be broad enough to permit the exchange of information relating to prior and/or subsequent years that impact on the years under investigation. A copy of the Competent Authority letters will be provided to the Criminal Investigations Division.
- (3) Additionally, the requested country may solicit further information through Competent Authority in order to assist in making its determination. Once secured, the Competent Authority will notify the Competent Authority of the requesting State in writing, stating whether or not it accepts a proposed case as a SCIP.
- (4) There is no obligation on the part of either country to investigate all potential cases recommended by the other country. Each can participate in whichever investigations it chooses. However, cooperation and communication between both agencies is strongly encouraged to maximize the efficiency of both investigations.
- (5) When the Director, Criminal Investigations Division at HQ has approved a case for SCIP, Investigations Advisory Services will notify the Assistant Director, Criminal Investigations (in the TSO and authorize him/her to proceed and undertake the necessary procedures.

17.3.2 Criteria for Selecting Cases

- (1) All cases selected for simultaneous criminal investigation must involve a taxpayer or taxpayers operating in both countries.
- (2) Consideration must be given to the tax years under investigation and the statute of limitations.
- (3) The types of cases selected for SCIP will contain some of the following elements: (A) There are grounds for believing, based on available evidence, that the subject is

committing tax evasion in both countries. These grounds could be actual documentation or evidence that the subject is committing evasion in one country and has similar businesses in the other country;

(B) The tax liability in the originating country (or the non-compliance) is substantial; (C) The case involves numerous persons in each country (possibly including organized crime figures or related individuals), who have conspired together to commit tax evasion; (D) The case may involve transactions generally referred to as "under-the-table" or "underground" payments between individuals and/or corporations in the two countries (e.g. kickbacks, bribes and illegal payments); and/or

(E) It appears that the taxpayers in both countries may have used tax haven countries as a means to aid them in committing the tax evasion.

17.3.3 Selecting Team Members

- (1) In most cases the Criminal Investigations Division in the TSO in which the taxpayer is located will conduct the investigation. There will be no exchange of personnel between the two countries.

17.3.4 Planning the Investigation

- (1) After a case has been authorized by the Director, Criminal Investigations Division, as a SCIP case, and has secured Competent Authority approval, the investigator will be able to meet with his/her American counterpart. The purpose of this meeting is to discuss, within the framework of the Tax Treaty, the investigation plans of both countries.

17.3.5 Investigative Meetings with the IRS

- (1) In a SCIP environment, officials may meet at regular intervals to discuss their findings, decide on appropriate courses of action and exchange information but only after securing Competent Authority approval. These meetings are not to be considered a platform for the formal exchange of documents or information under the Tax Treaty without Competent Authority approval.

17.3.6 Conducting the Investigation

- (1) In most cases the TSO is best equipped to independently research and obtain the documents and information requested by the IRS. Once the documents and information are secured, the TSO must forward it to the Exchange of Information Services Section, CASD who will then forward it to the US Competent Authority for dissemination to the IRS Agents involved.
- (2) Successful SCIP cases require the co-operation of the two investigative teams, each located in its respective country. Each country will conduct its investigation separately but will meet at regular intervals, or whenever necessary, to discuss findings and progress so they can decide on appropriate courses of action. Competent Authority are to be contacted prior to each meeting to see whether they would like to or need to attend that particular meeting. Although these meetings and discussions are permitted, no exchange of documents can take place without the approval and involvement of the Competent Authorities.

17.3.7 Resolving Contentious Issues

- (1) If during the course of a simultaneous criminal investigation, any contentious issues arise, they should be referred to Director, Criminal Investigations Division, HQ for their assistance and resolution.

17.3.8 Discontinuing Simultaneous Investigation

- (1) At any time, either of the countries may withdraw or terminate the simultaneous investigation by advising the other country. The TSO must submit a written request to the Director, Criminal Investigations Division, HQ whose approval must be obtained prior to the discontinuation of a SCIP. If a SCIP is to be discontinued, the other country should be advised in writing as to why the investigation is being discontinued.
- (2) If after discontinuing a SCIP, further information is to be requested on the case, the request will be made through the Exchange of Information Services Section, CASD, ILBD. The fact that the case was once part of a SCIP will be brought to the attention of the Competent Authority when requesting the additional information.

17.3.9 Concluding the Investigation

- (1) Because of the different laws, procedures and types of investigation required in each country, most investigations will not be completed at the same time. Each country should proceed, at their option, with the laying of charges and the actual court cases, provided they have supplied all necessary information to the other. Before closing a SCIP case, the TSO Criminal Investigations Division should contact their IRS counterpart to ensure that no further information is required in the matter.

17.4 Exchange of Information

- (1) In the furtherance of a simultaneous criminal investigation, the investigators in each country will be able to communicate with each other as required following Competent Authority approval. Communication can be undertaken by telephone or otherwise, as the case dictates. It is envisioned that, in the normal course of a SCIP case, documents from one country may be examined by the investigator in the other country. However, if copies of those documents are to be exchanged, this process must be formalized by sending the copies through the respective Competent Authorities.

- (2) It must be kept in mind that although informal and formal communications are necessary in a SCIP, all exchanges of information must be approved by and must flow through the Competent Authority of each country, pursuant to the terms of the Tax Treaty.
For further guidance concerning exchange of information procedures refer to IM 26 Exchange of Information.

October 2014

Chapter 18 – Joint Forces Operations with Law Enforcement Agencies

- 18.1 Overview of Joint Forces Operations**
- 18.2 Defining the JFO**
- 18.3 Exchanging of taxpayer/confidential information**
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 - Purpose
 - Objective Scope
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 - Assistant Director, Criminal Investigations Liaison officer,
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 - Criminal Investigations Division Management-Level Representative
 - CRA Personnel Participating in the JFO Criminal Investigations Division, Criminal Investigations Directorate

Acknowledgment of Confidentiality of Taxpayer Information

18.1 Overview of Joint Forces Operations

- (1) A joint forces operation is a special project with the police with a specified duration, identified targets and anticipated criminal charges including Income Tax Act /Excise Tax Act offences.
- (2) For the purposes of this policy, the term "police" includes federal and provincial government organizations whose mandates include investigating criminal offences.
- (3) Responding to requests for taxpayer information from the police for use in their criminal investigations does not fall under the definition of a joint forces operation and does not require headquarters pre-approval. However, offices should continue to keep the Partnerships and Workload Development Section at the Criminal Investigations Directorate informed of such requests as per existing procedures.

18.2 Defining the JFO

- (1) In a Joint Forces Operation (JFO) the CRA will investigate Income Tax Act (ITA) and/or Excise Tax Act (ETA) offences while the police investigate offences under another Act of Parliament.
- (2) All JFOs require a written agreement between the CRA and the police agency outlining the roles and responsibilities of each participant. The agreement will specify the scope of the project and whether the CRA will exchange taxpayer information with the police. JFOs will have a specified duration, identified targets and an anticipated outcome.
- (3) The nature of the CRA's participation in the JFO will be agreed upon by the Criminal Investigations Directorate, the Assistant Director, Criminal Investigations and the officer in charge of the police

agency or their designate(s). No JFO can proceed without approval by the Director, Criminal Investigations Division, Criminal Investigations Directorate.

- (4) The Criminal Investigations Directorate will determine whether to consult with the Public Prosecution Service of Canada on the JFO.
- (5) If more than one TSO is involved, the Criminal Investigations Directorate and the respective Assistant Directors, Criminal Investigations must determine which CRA office will take the lead role prior to signing an agreement.
- (6) The agreement should identify the lead agency for the purposes of the JFO and the lead agency coordinator responsible for its direct operation. While official reporting relationships will not change for personnel participating in the JFO, participants will take their day-to-day direction from the lead agency coordinator.
- (7) One CRA participant in the JFO should be identified as the investigator in charge of the CRA case who will be responsible for keeping the Assistant Director, Criminal Investigations informed of the progress of the JFO and any issues that arise that relate to the CRA's participation in the arrangement.
- (8) The agreement should provide for managerial review of the JFO such as a management team consisting of representatives of all the participating agencies. The JFO should identify the CRA's representative for this purpose. One or more Assistant Director, Criminal Investigations (or designate) may represent the CRA on this management team if the scope of the operation is large and considerable resources are required from more than one Tax Services Office.
- (9) Continuity of personnel should be maintained for the duration of the operation, and reasonable time frames should be set on the duration of the JFO.
- (10) Media relations and press releases will be handled according to the terms of the JFO and each agency's applicable policies such as the CRA Conviction Communication Guidelines.
- (11) CRA personnel assigned to a JFO will not engage in activities that will endanger their safety, the safety of the general public or that are contrary to the CRA's Code of Conduct, or other applicable CRA policy or legislation.
- (12) The statistical reporting method to be used should be specified within the JFO agreement. The objective is to avoid the potential problem of either party in a JFO arbitrarily claiming the full results of the JFO at its conclusion.

18.3 Exchanging of taxpayer/confidential information

- (1) In most JFOs, CRA employees work alongside the police. A JFO does not supersede or override the confidentiality provisions of the ITA/ETA.
- (2) Section 241(4)(a) of the ITA and 295(5)(a) of the ETA allow the CRA to provide tax information to the police if it is reasonably regarded as necessary for the purposes of the administration and enforcement of the ITA, the Canada Pension Plan, the Unemployment Insurance Act or the Employment Insurance Act and the ETA, respectively.
- (3) In the context of a JFO, the exchange of information would be done for the specific purpose of a criminal investigation into suspected ITA and/or ETA offences.
- (4) The agreement should to the extent possible, provide the names of the officers, or group of officers, who have been authorized to receive the information from the CRA. All non-CRA officials participating in a JFO where taxpayer information is exchanged pursuant to 241(4)(a) of the ITA and/or 295(5)(a) of the ETA must sign a confidentiality agreement.
- (5) In some JFOs, CRA will not exchange taxpayer information with the police during the investigation until police have laid criminal charges or obtain a court order.
- (6) Subsections 241(3) of the ITA and subsection 295(4) of the ETA permit disclosure of confidential tax information to other agencies after the other agency has laid criminal charges under an Act of Parliament. All disclosures under 241(3) of the ITA and 295(4) of the ETA must be in line with the guidelines in 16.10 and approved by the Assistant Director, Criminal Investigations.

- (7) Section 462.48 of the Criminal Code enables police forces to apply to a court to obtain an order to have access to taxpayer information collected under the ITA that would aid an investigation in relation to certain named offences. Accordingly, under subparagraph 241(4)(e)(v) of the ITA, taxpayer information may be given to the police when they obtain such a court order.
- (8) There is no provision in the ETA similar to subparagraph 241(4)(e)(v) of the ITA. If an order under section 462.48 of the Criminal Code includes information collected under the ETA, the information must not be provided.

18.4 JFO Procedures

- (1) Requests from the police or other law enforcement agencies to enter into a JFO will usually come to the liaison officer within the Criminal Investigations Division. Requests may also come directly to an investigator, team leader, manager or the Assistant Director, Criminal Investigations. All requests to enter into a JFO must be approved by the Assistant Director, Criminal Investigations before CRA investigators begin to work on them.
- (2) When a TSO intends to participate in a JFO, the Assistant Director, Criminal Investigations will seek the approval of the Criminal Investigations Directorate. To obtain this approval, an investigator will prepare a Case Development Proposal for their team leader or manager's review and then submit it to the Partnerships and Workload Development Section. Investigators must not do any more work on the case (including writing a primary report, Information to Obtain or drafting a JFO agreement) until the Partnerships and Workload Development Section reviews the proposal and determines that it should be accepted for preliminary investigation.
- (3) If the PWDS accepts the case development proposal, the investigator assigned the case will prepare a JFO. The JFO must be reviewed by the Assistant Director, Criminal Investigations before it is submitted to the Investigations Advisory Services Section at the Criminal Investigations Directorate for approval. The Criminal Investigations Directorate will determine if and when to consult CRA Legal Services and/or Public Prosecution Service of Canada on the JFO.
- (4) The JFO agreement should include:

Purpose

- The rationale for the JFO.

Objective

- The background of the case, a description of the targets and the expected results.

Scope

- The identification of the lead agency and the lead agency coordinator responsible for the day-to-day operation of the JFO;
- A list of participating agencies and their representatives including their role and responsibilities;
- The expertise required from each participating agency (analysts, clerical support, forensics, communications, photographic, etc.) and its origin;
- Anticipated costs to all agencies (For example, equipment rental, accommodations, living and travel expenses, informant fees, etc.);
- A statement concerning the exchange of taxpayer information with the other agencies in the JFO.

Term

- The date of initiation and anticipated completion date.

Project Supervisors / Officers

- Provision for an interagency managerial-level overview function and identification of appropriate representatives from all participating agencies;
- The identification of the investigator in charge of the CRA case;
- An outline of the interagency arrangement regarding seizures, the laying of charges and the prosecution, and the handling of evidence and suspects;
- An outline of the interagency arrangement regarding media and press releases.

Approvals

- A signature block for the Assistant Director(s), Criminal Investigations and the senior official of the participating law enforcement agency(ies).
- (5) The Director, Criminal Investigations Division, Criminal Investigations Directorate will determine whether to seek input from CRA Legal Services and/or the Public Prosecution Service of Canada (PPSC) regarding the JFO.
- (6) The Assistant Director, Criminal Investigations (or designate) will provide quarterly reports to the Investigations Advisory Services Section within the Criminal Investigations Directorate on the status of the JFO.
- (7) Upon completion of the JFO, the Assistant Director, Criminal Investigations, will provide the Director, Criminal Investigations Division, Criminal Investigations Directorate, with a final report which will include:
 - An overview of the CRA's participation in the JFO;
 - A summary of the tangible results (investigative actions taken, charges laid, revenue collected and goods seized, etc.);
 - A summary of intelligence gathered;
 - An analysis of the operation including recommendations for future JFOs;
 - A summary of the taxpayer information exchanged; and
 - An accounting of all expenses incurred by the CRA.
- (8) All documentation relating to JFO agreements and final reports must bear the appropriate security classification at all times.

18.5 Roles and Responsibilities

Assistant Director, Criminal Investigations

The Assistant Director Criminal Investigations is responsible for:

- Assigning potential JFO cases to a CRA investigator;
- Ensuring the investigator submitted a case development proposal that was approved by the Partnership and workload development section before they begin drafting a JFO agreement;
- Submitting a JFO to the Director, Criminal Investigations Division, Criminal Investigations Directorate for approval as outlined in 18.4(2) JFO Procedures;
- Ensuring that the role of the Criminal Investigations Division personnel falls within the legislated mandate of the CRA;
- Ensuring that the Criminal Investigations Division's participation in the JFO will have tangible, quantifiable results for the CRA;
- Ensuring information sharing arrangements adequately protect the CRA's responsibility for confidentiality of information including having signed confidentiality agreements;
- Providing quarterly reports to the Investigations Advisory Services Section within the Criminal Investigations Directorate as outlined in 18.4(4) JFO Procedures;
- Ensuring media coverage and press releases are handled in accordance with the terms of the JFO agreement and with the applicable policies/agreements of the agencies involved; and
- Submitting a final report to the Director, Criminal Investigations Division, Criminal Investigations Directorate upon conclusion of the JFO with the information as outlined in 18.4(5) JFO Procedures.

Liaison officer, Criminal Investigations Division

- Being the CRA's representative with local law enforcement agencies including:
- Promoting CRA and the Criminal Investigations Program (CIP).
 - Receiving requests from law enforcement agencies to enter into JFOs and bringing those requests to the attention of the Assistant Director, Criminal Investigations.

Investigator in charge of the CRA case

- Prepare a case development proposal to be reviewed by the CIP team leader, manager and Assistant Director, Criminal Investigations before it is submitted to the Partnerships and Workload Development Section. The proposal should include all the required information as outlined in section 14.1.1 and a recommendation to enter into a JFO with the other agency(ies).

- If PWDS approves the case development proposal, prepare a JFO containing the information as outlined in 18.4(2) Procedures.
- Seeking the signature of the Assistant Director, Criminal Investigations on the JFO before submitting it to the Investigations Advisory Services Section at headquarters for approval;
- Liaising with the lead agency coordinator and other agency representatives as required;
- Coordinating operational information exchange with other participating agencies;
- Periodically reporting to local management the general progress of the JFO as well as any significant issues, which might arise relating to the CRA's participation.

Criminal Investigations Division Management-Level Representative

This role may be assumed by the Assistant Director, Criminal Investigations (or designate). The Criminal Investigations Division Management-Level Representative is responsible for:

- Representing the CRA in the ongoing (or periodic) review by management-level representatives of all participating agencies of the progress of the JFO and of the scope and nature of the CRA's role within the JFO;
- Making recommendations to senior management (where applicable) on the scope and nature of the CRA's role within the JFO including, if necessary, the recommendation to terminate the CRA's participation.

CRA Personnel Participating in the JFO

CRA personnel participating in the JFO are responsible for the execution of all of the CRA's responsibilities as stated in the JFO agreement.

Criminal Investigations Division, Criminal Investigations Directorate

The Criminal Investigations Division, Criminal Investigations Directorate is responsible for:

- Providing advice and guidance to Criminal Investigations Program personnel on JFOs
- Determining whether to seek CRA Legal Services and/or PPSC input on the JFO
 - Approving all CRA JFOs;
 - Maintaining a copy of all JFOs;
 - Notifying senior management (if necessary); and •
- Monitoring the progress of all JFOs.

Acknowledgment of Confidentiality of Taxpayer Information

Designation under Section 241 of the Income Tax Act AND Section 295 of the Excise Tax Act

(Name of Police Officer) (Name of
Police Force)

THIS IS TO CERTIFY that I have read subsections 239(2.2) 239(2.21), 241(1), 241(3), 241(4) and 241(10) of the *Income Tax Act* and subsections 295(1), 295(2), 295(4), 295(4.1) and 295(5)(l) of the *Excise Tax Act*.

I understand the law with regards to the communication, disclosure and protection of taxpayer information under the *Income Tax Act* and confidential information under the *Excise Tax Act*. **I FURTHER STATE** that I will not knowingly use taxpayer/confidential information for any purpose, other than the purpose it was intended under these Acts. Further, I will not provide any person, allow the provision to another person, or allow any person to access information obtained from the Canada Revenue Agency other than the purpose for which it was provided.

Signed at (City), (Province), this day of , 20xx.

of (Name of Police Officer) Signature

December 2010

Chapter 19 – Forensic Informatics Services

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Computer Search and Evidence Recovery Program

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Appendix 19.C – Description of Electronic Evidence for Seizure and Detention

Appendix 19.D – Notice to Regional Processing Centre - Case Is Terminated

19.1 Overview 19.1.1

Introduction

- (1) Forensic Informatics Services is responsible for all electronically stored or scientifically analyzed evidence relating to Canada Revenue Agency (CRA) criminal investigations. This section provides scientific and informatics services for the CRA's Criminal Investigations Divisions.
- (2) Forensic Informatics Services has the following program areas: –
 - Computer Search and Evidence Recovery;
 - Document Imaging Technology; and
 - Electronic Courtroom and Electronic Assisted Presentation.

19.1.2 Structure

Forensic Informatics Services is part of the Criminal Investigations Directorate's Policy and Planning and Informatics Division. The section consists of a manager, project leaders, program coordinators and other technical and administrative staff. The manager is also responsible for regional informatics investigators located in various Tax Services Offices (TSO's).

19.2 Computer Search and Evidence Recovery Program

19.2.1 Introduction

- (1) The advent of the electronic age has allowed organizations and individuals to easily create and efficiently store, use and exchange data in electronic form. Data is found not only in computers but also in other electronic equipment and media. Such electronic data may be used as evidence during an investigation or at trial. Special techniques and procedures are required to retrieve and preserve the integrity of the evidence to ensure its admissibility in court. The Computer Search and Evidence Recovery Program uses techniques and procedures to ensure the preservation and integrity of electronic data.
- (2) Informatics investigators who have received the necessary training and expertise from Forensic Informatics Services are the only persons who should examine computers and computer related items. Informatics investigators are able to properly prepare computers for search, to conduct computer and media searches and to retrieve data from seized media and to review the results. Informatics investigators are the link between the investigator in charge of the case and the electronic evidence.

19.2.2 Structure

The Computer Search and Evidence Recovery Program comprises a functional and an operational role. Forensic Informatics Services is the functional role and the Regional Processing Centre in the Criminal Investigations Divisions of the TSO provides the operational role.

19.2.3 Roles and Responsibilities 19.2.3.1

Forensic Informatics Services

Forensic Informatics Services performs the functional role of the Computer Search and Evidence Recovery Program. Its responsibilities include the following:

- a) Train informatics investigators via formal classroom sessions and on-the-job training;
- b) Research, test, acquire, implement, maintain and control software and equipment for the program and related the needs of the Criminal Investigations Program;
- c) Provide technical assistance to informatics investigators as required and participate in operational activities related to complex cases or particular issues;
- d) Develop policies and procedures;
- e) Provide advice and recommendations on operational issues;
- f) Conduct tests and independent audits on various issues related to computer Forensic;
- g) Establish and maintain contact with other national and international informatics investigative bodies;
- h) Determine and obtain funding to achieve the program's roles and responsibilities; i) Conduct quality assurance audit of operations related to the program.

19.2.3.2 *Criminal Investigations Divisions*

- (1) The Criminal Investigations Division in the TSO performs the operational role of the Computer Search and Evidence Recovery Program through their Regional Processing Centre. Their responsibilities include the following:
 - a) Contact the regional informatics investigator early in the process of planning searches that may involve electronic evidence;
 - b) Assign a partner to the informatics investigator during searches and for the return of seized electronic items;
 - c) Contact the Regional Processing Centre upon closing a case where electronic evidence was seized in order to facilitate the correct treatment of electronic evidence.
- (2) The investigator in charge of the case must notify the regional informatics investigator and Regional Processing Centre team leader when the case is completed and confirm that the court has ordered the return or destruction of the electronic evidence and that all other detention or destruction restrictions have been met. See **Appendix 19.D – Notice To Regional Processing Centre Leader And Regional Informatics Investigator That A Case Is Terminated.**

19.2.3.3 *Designated Criminal Investigations Divisions*

- (1) A Designated Criminal Investigations Division is one where a Regional Processing Centre is located. The Designated Criminal Investigations Divisions constitute the working forces of the Computer Search and Evidence Recovery Program. Their responsibilities include the following:
 - a) Administer the Regional Processing Centre's personnel;
 - b) Plan and provide an appropriate number of properly trained informatics investigators to the Criminal Investigations Divisions for search actions and processing in their respective regions;
 - c) Provide timely service to the Criminal Investigations Divisions within the respective regions;
 - d) Assist other Regional Processing Centres when required;
 - e) Budget the necessary funds to achieve its role and responsibilities;
 - f) Complete standards of service with the appropriate clients-divisions;
 - g) Create, secure, manage and review the informatics Forensic file;
 - h) Keep their informatics investigator trained and up to date through Forensic Informatics Services.
- (2) Regional Processing Centres are located in the following TSO's:

• Halifax	• Calgary
• Winnipeg	• Hamilton
• Montreal	• Vancouver

Noticeable benefits have been realized through the creation of Regional Processing Centres. The informatics investigators report to one team leader and are expanding their knowledge level through

teamwork and cooperation. The Regional Processing Centres also provide the team with a knowledgeable team leader who can coordinate their deployment and assist them in performing the duties of the program.

19.2.3.4 Regional Informatics Investigators

- (1) The role of the regional informatics investigators is of strategic importance as they are the interface between Forensic Informatics Services and the Regional Processing Centres. Their roles and responsibilities include:
 - a) Liaison between the operational and functional aspects of the program;
 - b) Understand the "Things to be searched for" and "Information to obtain" regarding issues about electronic evidence and "computer paragraphs";
 - c) Identify possible technical issues in the planned searches and recommend appropriate measures;
 - d) Provide assistance and advice on informatics related items to Regional Processing Centres;
 - e) Provide assistance to the Public Prosecution Service of Canada (PPSC) on issues related to Computer Search and Evidence Recovery issues;
 - f) Conduct internal audits of Regional Processing Centres as they relate to Computer Search and Evidence Recovery related issues.
- (2) It is the regional informatics investigator's responsibility to advise the informant swearing the Information to Obtain with the relevant grounds to include related to the seizure of computer related items. See **Appendix 19.A – Regular Paragraphs and Appendix 19.B – Third Party Search.**

19.2.3.5 Informatics Investigators

Informatics investigators are investigators specially trained in Computer Search and Evidence Recovery. They work in a Regional Processing Centre and provide search, seizure and processing functions for the CRA. Their responsibilities include:

- a) Ensuring that a safety net is in place for all their work activities;
- b) Only using software that is provided by Forensic Informatics Services;
- c) Ensuring that all electronic items seized are safely and securely transported;
- d) Ensuring the safe and secure use of all equipment;
- e) Attending all training as required by Forensic Informatics Services.

19.2.4 Computers, Equipment, Software and Supplies 19.2.4.1

Responsibilities

- (1) Due diligence and care must be exercised at all times to ensure that equipment, computers and software are operational.
- (2) Regional Processing Centres are equipped with the necessary computers, equipment and software to allow the informatics investigators to efficiently process most Computer Search and Evidence Recovery workload. If the Regional Processing Centre requires additional computers, equipment or software, it is provided by Forensic Informatics Services on a loan basis. All computers, equipment and software loaned to the Regional Processing Centres remain the property of Forensic Informatics Services.

19.2.4.2 Testing, Acquisition and Maintenance of Computers, Equipment, Software and Electronic Supply

- (1) Persons involved in Computer Search and Evidence Recovery Program activity will only use suitable computers, equipment, software and electronic supplies. To be considered suitable for use in the Computer Search and Evidence Recovery Program, the National Lab must approve all equipment, computer, software and electronic supplies.
- (2) Regional informatics investigators are responsible for ensuring that the appropriate action is taken to fix, repair or replace any defective hardware within a reasonable timeframe.

19.2.4.3 Use of Computer Search and Evidence Recovery Equipment

- (1) The configuration of Computer Search and Evidence Recovery Program computers is different from standard CRA computers.

- (2) Due to the particular needs that informatics investigators have at search locations, special authorization is provided for them to carry media and laptops that are not encrypted.
- (3) The CRA security software is not installed on these computers. This is to facilitate work related to search and seizures. When a Computer Search and Evidence Recovery Program computer is used to examine taxpayer information, it should be secured. Following searches, CRA computers must be wiped clean and the basic software reinstalled by the informatics investigator.

19.2.4.4 Use of Canada Revenue Agency "RC Net" Equipment

Informatics investigators are required to adhere to the same rules as all other CRA employees with regards to the use of "RC Net" equipment.

19.2.5 Search

19.2.5.1 Prior to Search

- (1) As soon as possible during the search planning stage, an informatics investigators should be designated for each location where required.
- (2) The informatics investigator(s) assigned to a search should attend the search briefing with all other search team members. Should an informatics investigator not be able to attend the briefing, it is the informatics investigator's responsibility to arrange a separate briefing.
- (3) Following the search briefing, the informatics investigator should meet with the search team leader to coordinate the search details and with his/her search partner to brief him/her on his/her tasks.
- (4) When multiple informatics investigators are required for a search, one informatics investigator may be asked to coordinate all the other informatics investigators. This informatics investigator will act as the liaison.
- (5) When neither computer nor electronic evidence is expected during a search, an informatics investigator should be assigned to "stand-by" in order to provide a timely response, should one be required.

19.2.5.2 Entering Premises

It is recommended that an informatics investigator be part of the initial entry team in order to secure the electronic evidence. However, there may be situations where this may not be necessary. The circumstances of each case will dictate the need to have the informatics investigator on the initial entry. Refer to Chapter 6 Obtaining and Securing Evidence for more information related to entering the premises.

19.2.5.3 Seizing Original Media vs. Copying Media Content

- (1) When deciding whether to seize or copy the original media, informatics investigators base their judgement on general principles, such as, minimal intrusion and the best evidence rule.
- (2) The informatics investigator must consider all relevant facts and circumstances including issues related to media, data and technical limitations.

19.2.5.4 Hard Disk Copying

- (1) Hard disk copying should be done at the Regional Processing Centre and not on-site. Some of the reasons why the copying should not be done on-site are technical and reasonable time limitations, intrusiveness due to excessive time on-site, volume of evidence, complexity of the computer system and controlled environment.
- (2) However, there will be situations where copying is done on-site such as when the location is at a great distance from the regional processing centre or where the removal is impractical. A regional informatics investigator should be consulted in such situations.

19.2.5.5 Third Parties

- (1) During the course of a search of third party premises, circumstances may develop that will dictate whether the original hardware should be seized. This may include the following:
 - A threat to the integrity of the evidence (whether or not the person is a suspected accomplice)
 - The discovery of evidence that links the third party to the fraud beyond acceptable levels; and/or

- That hardware belonging to the third party is required to review data related to the subject of the investigation.

All facts relevant to this decision should be properly documented.

- (2) When evaluating the evidence to be extracted from the computer system, informatics investigators should consult the third party to determine the best method to use.

19.2.5.6 *Seizing Recommendations*

- (1) Before concluding the examination of the media, the informatics investigator should analyze the relevant files to determine the steps required to process and recover the data. This may entail the additional searching for software or hardware required to obtain access to the data.
- (2) In order to facilitate the inventory process, a description as indicated in **Appendix 19.C – Description of Electronic Evidence for Seizure and Detention** should be considered when seizing a media at the search location.
- (3) When a major piece of equipment or media is seized, the informatics investigator and the search team leader for that location should notify the owner/occupant in a timely manner to determine the impact of the seizure and the appropriate measures to be taken.
- (4) When media is examined and seized, the informatics investigator should document the grounds for the decision to seize the media.

19.2.5.7 *Solicitor Client Privilege*

- (1) Solicitor client privilege is inherent in all cases involving the examination of media at a law practitioner's office. The seized media must be put in a custodian's trust as agreed with the lawyer. In these situations, informatics investigators should inform the custodian that access to this media must be controlled to preserve its value as evidence. Due to the volatile nature of media, the informatics investigator should attempt to negotiate creation of copies of all media subject to custodial care.
- (2) Informatics investigators may discover media subject to solicitor-client privilege when executing searches outside a lawyer's office. When a potential privileged document is identified, informatics investigators should not examine it, unless there is informed consent. Informatics investigators may, nevertheless, complete the examination of the media.

19.2.6 **Privacy Issues**

In the course of their examinations, informatics investigators may come across information that is not relevant to the CRA case that should be kept confidential. Where feasible, informatics investigators will only provide the investigator in charge of the case with the data that relates to the case.

19.2.7 **Return in operation**

- (1) CRA is committed to causing minimal disruption to the person or business from whom the items were seized. The Return in Operation phase takes place as soon as media, equipment or a computer is seized. During this phase, where possible, all operational media will be copied to replacement media and returned to the person legally entitled to possess them.
- (2) An image of the seized media is made and tested in a CRA computer. If the data is found to be fully accessible then consideration will be given to returning the original equipment with a copy of the seized media. If the data on the seized media is not fully accessible then consideration must be given to retaining the original equipment and only returning a copy of the seized media.
- (3) The decision on whether to keep seized equipment should be made within 48 hours from the moment the seized media left the premises. After the 48-hour delay, the regional informatics investigator should be contacted for an evaluation of the situation.
- (4) When media and/or equipment are returned, the informatics investigator will prepare an agreement or a receipt describing the returned items.
- (5) If it is found that more than one copy of the same material exists, then a decision may be made to return the extra media and equipment. A determination of its evidentiary value should be made at an early stage to establish if any seized media and /or equipment should be returned.
- (6) When searching in a remote location, the informatics investigator should make reasonable efforts to complete the return in operation before returning to the Regional Processing Centre.

19.2.8 Inventory of Seized Things

- (1) The informatics investigator should make an inventory of all electronic items seized. The expected turnaround time is ten-business days. Reasons for any further delay should be documented.
- (2) A description of the items should be accurate enough to properly identify the items so that the investigator in charge of the case and a judge or justice can decide on its detention. A description of the seized things should include its physical aspects and its content. Examples of such descriptions can be found in **Appendix 19.C – Description of Electronic Evidence For Seizure And Detention**.
- (3) Caution should be taken to ensure that all media is properly inventoried. **19.2.9**

Evidence Processing and Recovery

- (1) The processing or recovery of evidence is the phase where electronic evidence is extracted from a media and made available to the investigator in charge of the case.
- (2) All seized media should be imaged as soon as possible. This will allow the informatics investigator to use an image of the media to do the processing.
- (3) Anti-static bags should be used if available for the storage of media. Procedures should be in place to ensure the custody and control of the evidence is maintained in an appropriate manner. The Criminal Investigations Division bond room should be used for the storage of original media.
- (4) When transportation of media and equipment is required, it should be done in a manner that is appropriate with its security classification level. The Regional Processing Centres have security briefcases available that can be used for the transportation of media.
- (5) It is the responsibility of the informatics investigator to make available all data pertaining to the warrant contained in media to the investigator in charge of the case in a timely manner.

19.2.10 Disclosing Electronic Evidence

The obligation of full disclosure extends to seized electronic evidence. An informatics investigator will provide the investigator in charge with a copy of the seized data. Disclosure can be undertaken at different stages of the case using various media. Consultation with the PPSC regarding the amount of disclosure should be undertaken as early as possible. Care should be taken to ensure that all requested media be provided in a timely manner.

19.2.11 Recovering Loaned Hard Drives

- (1) CRA will loan hard drives in situations where the subject of the search is not providing a replacement hard drive. This is not a blanket authorization for providing replacements and each situation will be evaluated on a case-by-case basis.
- (2) When a loaned hard drive is provided to the subject of a search, the informatics investigator should prepare a receipt for the returned items indicating that CRA has lent the person a copied hard drive and retain the original. When the loaned hard drives is unusually expensive, the regional Informatics Investigator should determine whether a loan agreement is necessary.
- (3) When a loaned hard drive is to be returned to CRA, it is acceptable for the person to whom the hard drive was provided to substitute another new hard drive as a replacement. In all cases, the cost of pursuing the return of the loaned hard drives must be taken into consideration.

19.3 Document Imaging Technology

- (1) Imaging Technology can be used in many ways to benefit the investigative process. It can increase efficiency by eliminating manual research with an automated image library research program.
- (2) The sophisticated Imaging Technology software enhances the physical documents so they are clear digital images. This technology can also be used with the latest electronic courtroom presentation system, which eliminates all paper evidence in the courtroom and displays it digitally to all courtroom participants. <http://infozone/english/r6001000/ed/informatics/imagetechnology/imagetechnology-e.html>

19.4 Electronic Courtroom and Electronic Assisted Presentation

- (1) The Electronic Courtroom Program eliminates or reduces the need for paper document binders and helps to present evidence through the use of litigation presentation tools and software by facilitating communication and improving the understanding of complex facts. This program provides

investigators with the necessary hardware and software required to electronically prepare and present their case in court.

- (2) These tools have extensive capabilities such as zooming features to focus in on specific text, timeline projection or transaction graphs, map creation, document image displays and audio / video presentation features to enhance the presentation. The use of electronic courtroom technology can cut trial time in half by allowing the court to see the evidence in an organized and timely fashion.

<http://infozone/english/r6001000/ed/informatics/ec/ec-e.html>

Appendix 19.A – Standard Computer Paragraphs

The following wording is provided as an example for the Information to Obtain and the corresponding warrant(s) for search locations involving the subject(s) of the investigation. Where indicated wording should be modified to suit the case.

Things to be searched for:

1. Data storage media, including disks, tapes, chips or other devices capable of storing data, whether internal, external, attached or not attached to a computer system, containing any data pertaining to the items described in paragraphs **[insert paragraph reference(s)]** above;
2. Items required to access, make intelligible, reproduce, transfer, communicate or receive data contained in the data storage media described in paragraph **1 [adjust accordingly to reference appropriate paragraph(s)]** above, including:
 - a) Computer systems and computer components including hardware, equipment, peripheral components and devices;
 - b) Computer programs including operating systems, software and drivers;
 - c) Documentation and data, including manuals, operating instructions, licensing and operating data, whether preserved, stored or retained on any type of support, intelligible or not, inscribed by a person or a computer system;
3. Data or other recorded information that may provide an indication of use, maintenance, ownership and possession of the items described in paragraphs **1 and 2 [adjust accordingly to reference appropriate paragraph(s)]** above;

Information to obtain:

On **[insert date] (or between [insert date] and [insert date])**, I received information from **[insert name]**, Regional Informatics Investigator, an officer of the CRA attached to the Criminal Investigations Directorate, that:

- a) He has experience with computer systems, including data storage and retrieval, and has been involved in numerous searches conducted by Criminal Investigations Divisions, involving computerized records and documents;
- b) He is involved in computer search and seizure and also provides technical advice, guidance and training to investigators specialized in computer search and evidence recovery;
- c) The items as described in paragraph **2 [adjust accordingly to reference appropriate paragraph(s)]** of Things To Be Searched For are required to access, make intelligible, reproduce, transfer, communicate or receive data contained in data storage media described in paragraph **1 [adjust accordingly to reference appropriate paragraph(s)]** of Things To Be Searched For;
- d) The data storage media will be examined by or under the supervision of an Informatics Investigator of the CRA, an investigator who has been trained in the forensic analysis of computer systems and electronic data retrieval;
- e) At the search location, an Informatics Investigator will take appropriate measures to verify the content of items as described under paragraph **1 [adjust accordingly to reference appropriate paragraph(s)]** of Things To Be Searched For, unless it is impractical or impossible to do so. The Informatics Investigator examining items described under paragraphs **1 to 3 [adjust accordingly to reference appropriate paragraph(s)]** of Things To Be Searched For will, before seizing any specific item, consider all the facts and circumstances, including the properties relating to the data and media, technical and accessing

limitations, and whether that item is required to conduct a forensic recovery, examination and disclosure of data;

f) Dependant on the facts and circumstances, the computer system and computer components may be seized because of technological constraints and barriers. For example, data storage media may contain extraordinary amounts of data, which includes data that may be mislabelled, encrypted, stored in hidden directories, deleted or embedded in unused space. This data may require a specific environment, in order to be accessed or made intelligible, including the use or the presence of a specific computer system, computer component or computer program. From a technical perspective, it may not be feasible to search and process all this information at a search location. Therefore, the recovery of data described in paragraph 1 **[adjust accordingly to reference appropriate paragraph(s)]** of Things To Be Searched For requires a meticulous analysis by an Informatics Investigator in a controlled environment;

g) If a computer system is seized as described in paragraph 2a) **[adjust accordingly to reference appropriate paragraph(s)]** of Things To Be Searched For, the CRA will conduct the following procedures unless technical constraints exist:

- i) The computer system will be removed from the premises, secured and transported to a CRA Regional Processing Center or other secure location;
- ii) The original data storage media will be copied, removed from the seized computer system and placed in a CRA evidence room;
- iii) The data storage media copy will be tested in a CRA computer system to ensure that the data can be properly accessed and processed using compatible equipment; and
- iv) When compatible equipment is available at the CRA, the computer system will be returned to the person from whom it was seized together with a copy of the data storage media originally contained in the system, subject to other agreements with the person;

h) In the course of his/her examination, either during or after the search, the Informatics Investigator may encounter data that are not related to the case. Where feasible, the Informatics Investigator will only provide me with the data that relates to the case.

Appendix 19.B – Modified Computer Paragraphs

The following wording is provided as an example for the Information to Obtain and the corresponding warrant(s) for search locations involving a third party. The parts in red may be modified to suit the case.

Things to be searched for:

1. Data storage media, including disks, tapes, chips or other devices capable of storing data, whether internal, external, attached or not attached to a computer system, either taken by themselves or in relation to other data or information, containing any data pertaining to the items described in paragraphs **[insert paragraph reference(s)]** above;
2. Items required to access, make intelligible, reproduce, transfer, communicate or receive data contained in the data storage media described in paragraph 1 **[adjust accordingly to reference appropriate paragraph(s)]** above, including:
 - a) Computer programs including operating systems, software and drivers;
 - b) Documentation and data, including manuals, operating instructions, licensing and operating data, whether preserved, stored or retained on any type of support, intelligible or not, inscribed by a person or a computer system;
3. Data or other recorded information that may provide an indication of use, maintenance, ownership and possession of the items described in paragraphs 1 and 2 **[adjust accordingly to reference appropriate paragraph(s)]** above;

Grounds for belief:

On **[insert date] (or between [insert date] and [insert date])**, I received information from **[insert name]**, Regional Informatics Investigator, an officer of the CRA attached to the Criminal Investigations Directorate, that:

- a) He has experience with computer systems, including data storage and retrieval, and has been involved in numerous searches conducted by Criminal Investigations Divisions, involving computerized records and documents;
- b) He is involved in computer search and seizure and also provides technical advice, guidance and training to investigators specialized in computer search and evidence recovery;
- c) The items as described in paragraph 2 **[adjust accordingly to reference appropriate paragraph(s)]** of Things To Be Searched For are required to access, make intelligible, reproduce, transfer, communicate or receive data contained in data storage media described in paragraph 1 **[adjust accordingly to reference appropriate paragraph(s)]** of Things To Be Searched For;
- d) The data storage media will be examined by or under the supervision of an Informatics Investigator of the CRA, an investigator who has been trained in the forensic analysis of computer systems and electronic data retrieval;
- e) At the search location, an Informatics Investigator will take appropriate measures to verify the content of items as described under paragraph 1 **[adjust accordingly to reference appropriate paragraph(s)]** of Things To Be Searched For, unless it is impractical or impossible to do so. The Informatics Investigator examining items described under paragraphs 1 to 3 **[adjust accordingly to reference appropriate paragraph(s)]** of Things To Be Searched For will, before seizing any specific item, consider all the facts and circumstances, including the properties relating to the data and media, technical and accessing limitations, and whether that item is required to conduct a forensic recovery, examination and disclosure of data;
- f) Dependant on the facts and circumstances, the computer system and computer components may be seized because of technological constraints and barriers. For example, data storage media may contain extraordinary amounts of data, which includes data that may be mislabelled, encrypted, stored in hidden directories, deleted or embedded in unused space. This data may require a specific environment, in order to be accessed or made intelligible, including the use or the presence of a specific computer system, computer component or computer program. From a technical perspective, it may not be feasible to search and process all this information at a search location. Therefore, the recovery of data described in paragraph 1 **[adjust accordingly to reference appropriate paragraph(s)]** of Things To Be Searched For requires a meticulous analysis by an Informatics Investigator in a controlled environment;
- g) In the course of his/her examination, either during or after the search, the Informatics Investigator may encounter data that are not related to the case. Where feasible, the Informatics Investigator will only provide me with the data that relates to the case.

Appendix 19.C – Description of Electronic Evidence for Seizure and Detention

The description of files contained in the media is not all-inclusive (i.e. not every file covered by Warrant is listed), but the description provides the justice with "a reason to believe that the media was seized in accordance with the terms of the warrant" or legitimately seized according to section 489 of the Criminal Code.

Examples of descriptions:

One 3.5-inch HD orange floppy disk labelled "ABC Data" containing, among other files, correspondence for ABC Ltd. for the period January 1, 2XXX to December 31, 2XXX. Or
 One Western Digital WD1200 Hard disk, model WD1200LB-00EDA0, Serial number WMAES1748695 containing, among other files, books of original entry, including, General Ledger for ABC Ltd. for the periods January 1, 2XXX to December 31, 2XXX and January 1, 2XXY to December 31, 2XXY.
 Or

One USB dongle, Iomega 512 Mb containing worksheets listing unreported overtime hours made for ABC Ltd by employees and related payments from January 1, 2XXX to December 31, 2XXY.

Note:

The envelope should bear the following information: Case number and name, address of location, date, person who found it and who seized it, global description of seized thing, grounds to seize it (as much as possible these grounds should be "inventory-wise") and all other relevant information.

Appendix 19.D – Notice to Regional Processing Centre - Case Is Terminated [*Team Leader*], Regional Processing Centre

[*Regional informatics investigator*] [TSO] Criminal Investigations Division [City]

We are in the process of closing case [Case #] [Case Name], carried out by the Criminal Investigations Division in the [TSO] Tax Services Office. This case was initiated by [*investigator*] and the search was conducted on [date]. The informatics investigator assigned to the case was [*informatics investigator's Name*].

We plan to return things seized on [Date].

Since all prerequisites related to the return and/or destruction of evidence have been met, we hereby authorize [*Team Leader*] and/or [*Regional informatics investigator*] to destroy any media images generated by this case and transfer the Case's Electronic folder to a removable media that will be provided to us.

[Name of Author]

[TSO] Criminal Investigations Division [Address]

August 2014

Chapter 20 – Activity (Time) Reporting and Case Stages

20.1 20.1.1 20.1.2

20.1.3 20.1.4
20.1.5

20.1.6

20.2 20.2.1 20.2.2

20.2.3 20.2.4
20.2.5

20.3

20.4 20.4.1 20.4.2

20.4.2.1 20.4.2.2

Activity Types

Operational Direction – Assistant Director – Criminal I
Technical Advisor – Criminal Investigations Division –
AT 267

Workload Development – AT 694

... Investigation Time – AT 680 (used with AIMS case
CSER Time – AT 348 (used with AIMS case
number)

Other Related Functions – AT 642

Case Stages and Activities

Stage 0 – Workload Development (AT 694)

Stage 1 – Preliminary (AT 680)

Stage 2 – Investigation (AT 680)

Stage 3 – Court (AT 660 and 680)

Criminal Appeal, Civil Appeals and Court Fines (AT 68)

Statistics and Printouts

Flow of Work

Tax Referrals from Audit – Flow Chart (Criminal)

Major Decision Points

Tax referral from Audit

Self Generated Leads/Referral

(1) For a full description of time and activity types refer to **CAS RM Activity Type Dictionary**

http://infozone/english/r2822200/fab/fam/rmd/rmd_rmf_psaa-e.asp

(2) These direct activity types are open to all TSOs with an Investigations presence. They can only be opened to TSO work sections 641–645.

20.1 Activity Types

20.1.1 Operational Direction – Assistant Director – Criminal Investigations Division – AT 611

This activity type is to be used to record the time spent by Assistant Directors, Criminal Investigations to direct operations designed to carry out Agency plans, programs and policies. Include the time spent planning, organizing, coordinating, directing and controlling subordinate supervisors and staff.

20.1.2 Technical Advisor – Criminal Investigations Division – AT 267

This activity type should be used to record the time spent by the technical advisor on providing technical advice and audit assistance on complex tax, legal, industry and commercial issues related to audits or investigations by Investigations officers to ensure compliance with the provisions of the Acts administered.

This will also include but is not limited to the following activities:

- Assisting the investigations officer in the explanation of the Agency's interpretation of the law and the Agency's policies at meetings with taxpayers and their representatives;
- Assisting and advising investigations officers regarding the legal and procedural requirements relating to search warrants and the conduct of criminal investigations;
- Assisting and advising investigations officers in negotiating proposed reassessments, penalty recommendations, complex technical and contentious issues with taxpayers and/or their representatives;
- Assisting investigations officers in the identification of referrals to specialized areas; – Reviewing completed investigations cases when requested, to assist in ensuring the correct application of the relevant acts and Agency policies.

NOTE: This activity type will not be used by supervisors in their regular functions. **20.1.3**

Workload Development – AT 694

This activity type should be used to record time spent on:

- The initial review of the case to decide if a preliminary investigation should be undertaken (file selection);
- Generating, gathering and screening of leads derived from cases under investigation;
- Participating in projects that identify non-compliance gaps and developing measures that counteract tax evasion or other fraudulent activities; and
- Communicating with other sections and offices within the CCRA with respect to developing TSO staff and workload.

20.1.4 Investigation Time – AT 680 (used with AIMS case number)

This activity type covers all time charged on a case under investigation from the time it is accepted for preliminary investigation through to the finalization of the case in the Audit Information Management System (AIMS). This includes time spent on the criminal appeal (if applicable). The related AIMS case number must be entered in the order field on the RC509 to allow the hours to be transferred from CAS to AIMS. Hours from CAS are transferred to AIMS electronically on a weekly basis and are posted to the current stage of the case. Management information on cases under investigation is collected on the Investigations SUPP (INV SUPP) on AIMS.

20.1.5 CSER Time – AT 348 (used with AIMS case number)

This activity type is only to be used by investigators trained in computer search and evidence recovery (I/CSER). All computer search and evidence recovery time spent on a case is to be recorded under this activity type with the related AIMS case number entered in the order field of the RC509. The hours charged to this activity are passed from CAS to AIMS electronically each week and are posted to the current stage of the case.

20.1.6 Other Related Functions – AT 642

The time spent on the following activities should be included under this activity code:

- Packaging and returning documents and records on **cases** that have been **finalized** previously;
- General housekeeping of the record storage area that cannot be related to a specific case. **20.2 Case**

Stages and Activities

(1) Investigations of suspected fraud are reported by case stages completed within a given period (e.g. a preliminary investigation is completed when a case is closed in the Preliminary stage or when it is moved to Investigations stage). Therefore, the cases must be moved through the stages at the appropriate times to ensure that the program results are properly recorded. These numbers are reported to Parliament annually, therefore the cases must be properly recorded in AIMS. Closing cases in the appropriate stages allows for accurate reporting on performance.

(2) The following is a description of the activities that will be included under each stage of an investigation:

20.2.1 Stage 0 – Workload Development (AT 694)

The Workload Development stage starts when the subject is identified or a T134 referral is received, including the initial assessment of the file. This stage ends when it is decided that further action by the Criminal Investigations Division is not warranted or the case is accepted for a preliminary investigation.

20.2.2 Stage 1 – Preliminary (AT 680)

(1) The preliminary stage commences when a file is accepted for a preliminary investigation. The activities within this stage include the assessment and evaluation of the file and the investigative activities necessary to determine the overall quantum and the presence or absence of reasonable grounds to believe that an offence has been committed.

(2) **The preliminary stage ends when:**

- The decision is made to conduct a full-scale investigation, or
- The referral is rejected and returned to the originating section for completion.

20.2.3 Stage 2 – Investigation (AT 680)

(1) The investigation stage commences when the decision is made to proceed to a full-scale investigation. The activities within this stage include the drafting of the Information to Obtain a search warrant, the planning and execution of the search and the investigation activities necessary to support the decision to refer the case to the PPSC for criminal prosecution or to abort the case.

(2) **The investigation stage ends when:**

- The prosecution report is completed and the referral is made to PPSC recommending criminal prosecution, or
- The criminal investigation is aborted within the stage.

20.2.4 Stage 3 – Court (AT 660 and 680)

(1) The court stage commences when the referral letter has been submitted to PPSC with the prosecution report.

(2) **The court stage ends when:**

- PPSC renders a decision not to pursue criminal prosecution; or
- A decision of guilt or innocence has been rendered by the court and the 30-day criminal appeal period has expired.

(3) Once the file is referred to PPSC, time spent preparing and appearing in court is to be charged to Activity Type 660.

(4) In some cases, PPSC may ask investigators to interview witnesses, obtain production orders or collect foreign evidence. Use Activity Type 680 for time spent on further investigation during the Court stage.

20.2.5 Criminal Appeal, Civil Appeals and Court Fines (AT 680/642 if case finalized)

The criminal appeal is tracked through AIMS. It commences when the criminal appeal is filed and it ends when the criminal appeal period of the latest court decision has expired or when the appeal is withdrawn. AIMS tracks the collection of the court fines levied. Cases are not finalized until the court fine has been collected or written off. Entering a date in the Finalized field on screens J or K closes an AIMS INV SUPP for a subject that is convicted.

20.3 Statistics and Printouts

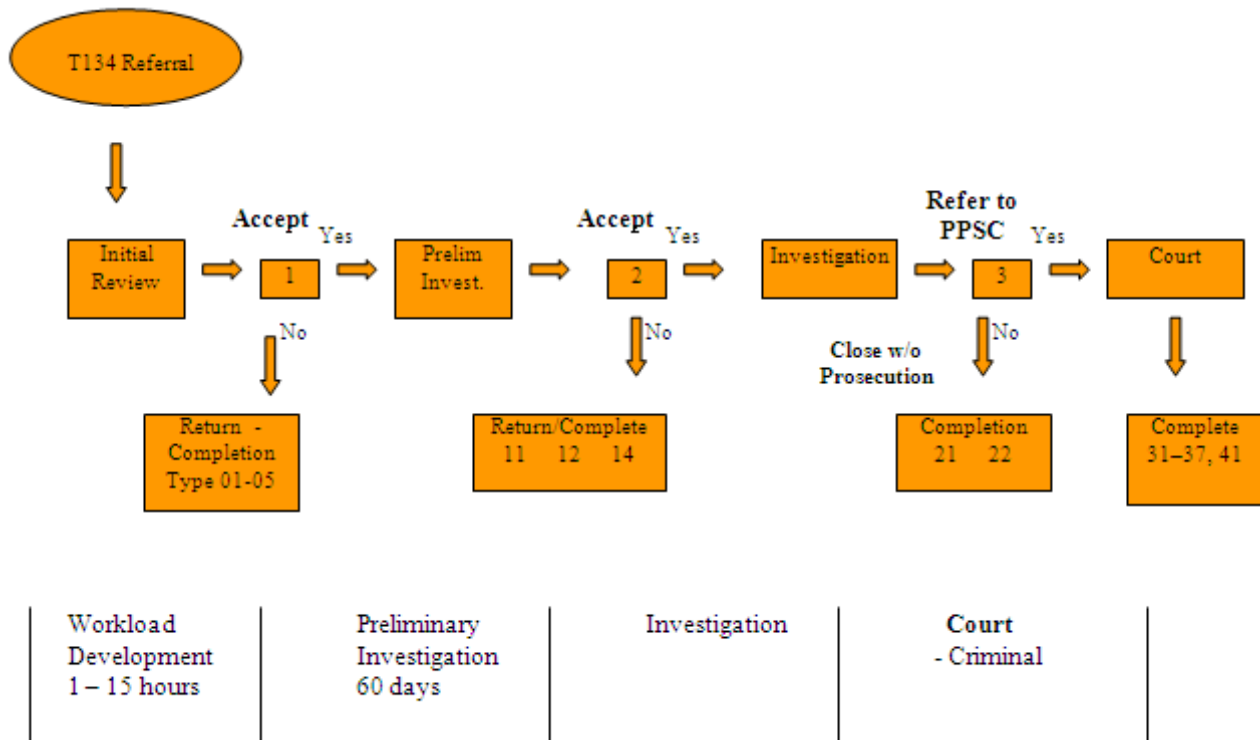
(1) Accurate statistics are a vital tool for management to manage and evaluate the national Investigation programs. Statistics gathered from CAS, AIMS are used for future planning, reporting on program results and identification of significant issues for the programs. Since Investigations handle a relatively small number of cases each year, accurate reporting is essential to our programs. Instructions for completing RC509s time and activity records and AIMS screens should be followed strictly.

(2) AIMS is accessible in the TSOs for data input and Platinum Reporting Facility (PRF) is used for producing customized statistical reports that will accommodate individual manager's needs. If required, assistance in producing Investigation reports can be obtained from the Strategic Planning and Program Coordination Section, Policy, Programs and Disclosures Division at Headquarters.

20.4 Flow of Work

20.4.1 Tax Referrals from Audit – Flow Chart (Criminal) Tax

Referrals from Audit – Flow Chart (Criminal)



20.4.2 Major Decision Points *20.4.2.1 Tax referral from Audit*

(1) There are three basic decision points when handling a referral received from Audit. As you proceed through the various stages, you must decide whether or not to:

- Accept for Preliminary investigation;
- Accept for Investigation;
- Refer to PPSC.

(2) All referrals from Audit are documented in AIMS. This ensures that the workload is controlled and can be reported consistently.

20.4.2.2 Self Generated Leads/Referral

(1) Self-generated workload usually comes from cases under Investigation or external leads. These cases are set up on AIMS once we have decided to conduct the preliminary investigation. Do not set up a case unless a preliminary investigation is conducted (exceed 15 hours).

(2) You must decide whether or not to:

- Conduct a preliminary investigation;
- Accept for full-scale investigation; and
- Refer to PPSC

Chapter 21 – Canadian Police Information Centre

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21.1 CANADIAN POLICE INFORMATION CENTRE (CPIC)

(1) The Canada Revenue Agency (CRA) has access to the Canadian Police Information Centre (CPIC) database to assist in carrying out its law enforcement responsibilities. The CRA is committed to using this access in accordance with the Memorandum of Understanding (MOU) signed with CPIC.

(2) The CRA's CPIC access is a privilege and a very substantial investment. This investment greatly improves the CRA's enforcement efficiency and enhances Investigator safety. Access to the CPIC system is granted by the CPIC Advisory Committee and can be revoked. Criminal Investigations Division employees with access to CPIC are expected to abide by this policy to ensure that CPIC access is not put at risk. Criminal Investigations Division employees should also refer to the *CPIC Reference Manual* when using the system.

(3) The Assistant Director, Criminal Investigations in the Tax Services Offices (TSO) with CPIC access are responsible for ensuring that CPIC users comply with the guidelines.

21.2 PURPOSE AND SCOPE

(1) The purpose of this policy is to provide the requirements to obtain access to CPIC through the Web (Internet), and the guidelines for the use of the system.

(2) This policy applies to all CRA Criminal Investigations Division employees whose position requires them to use the CPIC system and the information it contains to perform work-related duties.

(3) This policy does not supersede or replace any segment of the policy contained in the *CPIC Reference Manual*, Chapter 1.2.7.1 and Appendix IV.1.A.

21.3 AUTHORITIES

(1) Information contained in the CPIC system is collected and retained by CPIC and is used for authorized purposes only. The CRA is not the originator of this information and has access to it on a query basis only.

(2) Disclosure of CPIC information is strictly controlled pursuant to sections 241 of the *Income Tax Act* and 295 of the *Excise Tax Act*, as well as the *Privacy Act*, the *Access to Information Act*, and related policy.

(3) The Criminal Investigations Directorate, Compliance Programs Branch is responsible for providing CPIC access to authorized employees of the Criminal Investigations Division under this policy.

21.4 BACKGROUND

(1) The CPIC system is a Canada-wide law enforcement network linked to a central computer located in Ottawa. The CPIC system is a national police service of the RCMP and is managed by them on behalf of all members of the law enforcement community. The CRA has been granted standard query access to CPIC data files (persons, vehicles, marine, property, and criminal records), narrative traffic, and ancillary data files (vehicle registered owner and driver's licence information) under the MOU between CRA and the CPIC.

(2) CRA, as defined by the *CPIC Reference Manual*, is an agency with limited law enforcement responsibilities and its authority is provided under specific federal and/or provincial legislation. Under this definition, CRA is granted Category II(B) access to the CPIC system.

(3) The definition of a Category II(B) agency in the *CPIC Reference Manual*, Chapter I.2, section 2.2 is an agency which has investigative responsibilities within the scope of the statutes that it enforces. The investigative powers of the agency go beyond simple monitoring, routine inspection, or enforcement of administrative penalties and must include a range of responsibilities, such as investigating presumed offences likely to be subject to prosecution under the *Criminal Code of Canada* or other federal/provincial statutes.

(4) CRA employees, as specified under the existing MOU, can only be granted access to the CPIC system for performing work-related activities as part of their duties as investigators.

21.5 POLICY GUIDELINES

21.5.1 User Access

(1) Access to the CPIC function is controlled by user profile. User profiles are based on the user's work position and the "need-to-know" principle.

21.5.2 System Security

(1) The CPIC system and the data contained therein are classified as PROTECTED B.

(2) Users may access data only in the manner authorized for the performance of their duties. Any use of the system or system data for unethical, illegal, or inappropriate purposes is strictly prohibited and may be cause for disciplinary action, in accordance with the CRA Code of Ethics.

(3) Examples of inappropriate use include, but are not limited to:

- (a) Unauthorized use of a user ID and password;
- (b) Accessing the system data for the benefit of the user or another person;
- (c) Disclosing information contained on the system to unauthorized persons;
- (d) Intentionally interfering with the normal operation of the system.

(4) A controlled environment protects the CPIC system from accidental or deliberate compromise of confidentiality, protects data integrity, and is governed by the CRA's security policy. The interface connectivity is also subject to the security, confidentiality, privacy, and audit requirements in effect for the CPIC system.

21.5.3 Monitoring

(1) CPIC Services must complete one operational review per year to ensure compliance with the CPIC policy and procedures. Upon completion of the report, a copy is to be provided to the Director General, Criminal Investigations Directorate.

(2) Any findings of improper use or abuse of the system by a CRA employee will be dealt with in accordance with the CRA Code of Ethics. For this reason, strict internal controls on the usage of the system will be maintained and reviewed periodically.

21.5.4 Confidentiality

(1) The CPIC system is to be used for legitimate law enforcement purposes only. Personal or private use of the query system and information stored in the CPIC system is strictly forbidden.

(2) Information obtained from the system is to be used only for performing the assigned duties of the person requesting the information.

(3) The CRA cannot query CPIC to verify whether the subject of a CRA audit poses a threat to CRA auditors. If CRA investigators receive such requests, they should advise the auditors to speak to their team leader and request police assistance. Refer to section 4.6 of the Audit Manual Conducting Enforcement Actions Under Unusual Circumstances.

21.5.5 Release of Information

(1) Authorized employees who have been granted access to the CPIC system are responsible for the confidentiality and use of information stored on the system.

(2) All information obtained from CPIC is the property of the originating agency and may not be disclosed to a third party without prior approval of the originator.

(3) Under no circumstances are CPIC system information or printouts to be released, unless specifically authorized in the CPIC Reference Guide.

(4) All printouts are to be stamped "Protected B" and with the CPIC Caution Stamp, that states: "The accuracy of this record can only be confirmed with fingerprints."

21.6 PROCEDURAL GUIDELINES 21.6.1

Functional CPIC Access Approval

(1) All CRA employees including maintenance and/or support staff who are to be granted CPIC access must:

(a) Undergo an enhanced reliability security check including a fingerprint check through CRA Security HQ;

(b) Successfully complete Canadian Police Knowledge Network (CPKN) accredited on-line training in the operation of the CPIC system prior to obtaining access to the system;

(c) Comply with rules and regulations associated with the use of their user identification access code (UserID) and password as per the *Finance and Administration Manual*, Policy, Security Volume, Chapter 17, Access Accountability and Authentication to Agency Information Technology Systems; and

(d) Complete the CPIC ACCESS AUTHORIZATION FORM (see Appendix 21.A) Each user will maintain a specialised CPIC profile to comply with the CPIC requirement that each authorized CRA employee be uniquely identified to activate each CPIC session for logon and queries.

(2) The completed form, signed by the employee requesting access, is submitted to the Assistant Director, Criminal Investigations of the TSO for verification and authorization. The form will be sent to the Director, Criminal Investigations Division at HQ for approval. (see attached Appendix A).

(3) Upon authorization of CPIC access by the Director, Criminal Investigations Division, HQ, the Assistant Director, Criminal Investigations will email the local Information Technology section for modification of the user's profile to allow access to the CPIC system and installation of hardware and software.

(4) When an employee changes to a position that does not require access to the CPIC system or terminates employment, the Request for Termination of CPIC Access form (see Appendix 21.B) must be signed and forwarded with the CPIC Access card to the Director, Criminal Investigation Division, at HQ.

- (5) For CPIC audit purposes, Criminal Investigations Division, HQ will maintain and provide, upon request, a copy of the signed and authorized forms
- (6) CRA employees responsible for support and maintenance of the computer systems providing access to, or containing CPIC information, are to be supervised by an authorized CRA employee capable of providing assurance that no unauthorized access to data has taken place.
- (7) To ensure that the Random Access Memory (RAM) cache is cleared of CPIC data, all CRA employees with a CPIC user profile must shut down (not just log off) their computers at the end of the day.
- (8) It is the responsibility of the Assistant Director, Criminal Investigations to ensure that security measures are in accordance with the CPIC security standards in the CPIC Reference Guide.
- (9) It is up to the user whether or not to keep CPIC printouts. Any references to subjects other than the person under investigation should be removed from the printout. All printouts are to be stamped "Protected B" and with the CPIC Caution Stamp, that states: "The accuracy of this record can only be confirmed with fingerprints." At the end of the investigation, all CPIC printouts must be shredded to prevent disclosure of information to unauthorized persons.
- (10) Information copied from CPIC material and records must not be removed from an office without the approval of the Assistant Director, Criminal Investigations. When such material is to be removed, a log must be kept detailing what is being removed, where it is being taken, and the final disposition of the material. It is the responsibility of the Assistant Director, Criminal Investigations to ensure that any CPIC material or records in the possession of an employee are returned.
- (11) All CPIC records (i.e., manuals, bulletins) must be properly secured in accordance with CRA security standards.

21.6.2 CPIC Audits

- (1) A physical audit may be performed by the Criminal Investigations Division, HQ at each CPIC site periodically and on HQ visits, in order to verify records, review CPIC file control, examine site security, and to verify compliance with CPIC policy and procedures.
- (2) CPIC Services will monitor all CRA CPIC users' access by using the narrative traffic log tapes and will notify the CPIC Coordinator of any problems in the use of the system. These problems can include inappropriate use, failure to follow proper procedures, or instances of unauthorized access to or use of the information.
- (3) The Assistant Director, Criminal Investigations must ensure that only those persons who have completed a CPIC ACCESS AUTHORIZATION FORM and have been authorized to have access to CPIC are involved in the access and handling of the information.
- (4) The CPIC query results may be provided over the telephone, only to persons authorized to obtain and use the results. CPIC information may be requested by CRA investigators or by other law enforcement agencies. Before any information is given, the identity of the requester must be verified. The verification may include asking for information such as badge number, work location, name of supervisor, or any other information that will confirm the requester is authorized to have access to the information.
- (5) General Remarks field must be completed with reference to the AIMS case #, your name and the name of the investigator requesting the information, as per the CPKN on-line course.

21.7 ROLES AND RESPONSIBILITIES

21.7.1 The Assistant Director, Criminal Investigations Division

- (1) Maintain security and integrity of the CPIC system by establishing monitoring procedures and ensuring that the policies and procedures relative to operation and use of CPIC in their office are followed.
- (2) Maintain confidentiality of information contained within or extracted from CPIC.
- (3) Authorize the requests for employees to have CPIC access and the termination of CPIC service by forwarding the requests to the CPIC Administrative Assistant, Criminal Investigation Division, Criminal Investigations Directorate.
- (4) Ensure that CPIC access applicants have the appropriate security clearance, fingerprint verification and training prior to authorizing access to the CPIC system. Ensure that the applicants have read and understand the most recent CRA Code of Ethics and the CRA – CPIC MOU.

(5) Investigate and report all instances of CPIC policy and security breaches to the Director, Criminal Investigations Division, Criminal Investigations Directorate.

21.7.2 Criminal Investigations Division, Criminal Investigations Directorate

(1) Approve requests from Criminal Investigations Division employees for CPIC access and termination of CPIC access.

(2) Maintain security and integrity of the CPIC system by establishing monitoring procedures and ensuring that the policies and procedures relative to the operation and use of CPIC by Criminal Investigations Division employees are adhered to.

(3) Register authorized employee with CPIC to obtain USER ID and Password to obtain access to CPIC services.

(4) Provide registration for CPKN course.

(5) Provide technical and support services to CPIC users.

21.7.3 The Information Technology (IT) Section

(1) Establish connectivity to the CPIC system for each user's desktop/laptop.

(2) Provide assistance to local CRA CPIC users through the National Help desk at 1-800-461-7797.

21.7.4 CPIC Users

(1) The information obtained from CPIC may only be used for criminal investigations purposes.

(2) All authorized users of the CPIC system are responsible for:

(a) Maintaining security and integrity of the CPIC system;

(b) Ensuring that CPIC use is restricted to workrelated purposes;

(c) Completion of CPIC ACCESS AUTHORIZATION FORM to obtain access to the CPIC system;

(d) Providing immediate notification through their supervisor of change in work circumstances requiring termination of access to CPIC (change of job, termination, etc.) and returning the smart card to the CPIC Administrative Assistant;

(e) Maintaining confidentiality of information contained within or extracted from the CPIC system;

(f) Filling in the general remarks field on the CPIC system;

(g) Ensuring that the "Alternate routing" notification is "OFF" when logging off;

(h) Reporting any security issues to the Assistant Director, Criminal Investigations, (e.g. questionable request for info);

(i) Maintaining an access request Log Book. The CPIC user must complete a "Request for CPIC Query" (see attached Appendix 21.C), form for each request, each form must be maintained in a binder.

(j) Shutting down their computer at the end of the day.

Appendix 21.A

CPIC Access Authorization Form

Surname	Given Name(s)/	User ID
Region	TSO	DOB
Telephone		F
ax		

The applicant hereby requests access to the CPIC online system and confirms that:

1. the applicant has submitted their fingerprints to the CRA Security Screening Section and has been advised by Security that the prints did not disclose any adverse information.
2. the applicant agrees to successfully complete the Canadian Police Knowledge Network CPIC training course prior to accessing the CPIC on line system;
3. the applicant has read and understands the most recent CRA Code of Ethics and the CRA/CPIC Memorandum of Understanding (MOU) dated November 5, 2007
4. The applicant agrees to use the CPIC system in accordance with the CRA Code of Ethics and only for the specific purposes stated in the MOU.

Applicant

Date

I recommend the above named person for CPIC access.

Assistant Director, Criminal Investigations

____ Date

To be completed by HQ

Access Card Number: _____ Date of
Approval: _____ Approved by: _____

Director, Criminal Investigations Division, Criminal Investigations Directorate **Appendix**

21.B

Request for Termination of CPIC Access

TERMINATION OF SERVICES/RESILIATION DES SERVICES

I declare that I have not in any way retained CPIC material or records, and that I will continue to protect the confidentiality of all CPIC information.

Employee Name (Printed)

Signature

Date

Returned Access Card #

Assistant Director, Enforcement

Date

Appendix 21.C

REQUEST FOR CPIC QUERY

Section A – To be completed by person making this request

Purpose of Query

☐ Criminal Records Check
 ☐ Motor Vehicle / DL Information
 ☐ Skip Trace
 ☐ Gun Registrat

Subject Information

Surname Given Name 1 Given Name 2

Corp / Bus Name

Street Address City Prov

DOB (YYYYMMDD) Sex (M / F)

Motor Vehicle / Drivers Licence Information

DL RIN

Tag1 Tag2 Tag3 Tag4 Tag5

VIN1 VIN2

Person Requesting Query Date

Reference

Instructions

Section B – To be completed by person performing query

Queried by Date

Comments

August 2013

Chapter 22 – Non-Filer Prosecutions

22.1 GENERAL REMARKS

22.2 SOURCE OF WORKLOAD

22.3 EVIDENCE REQUIRED FOR PROSECUTION

22.4 CASE DEVELOPMENT AND CONTROL

This chapter will assist investigators in carrying out investigations on persons who have evaded income tax or GST/HST by not filing their returns as required by the Income Tax Act (ITA) or the Excise Tax Act (ETA). Various items need to be addressed for a successful prosecution of non-filers pursuant to section 239 of the ITA and section 327 of the ETA for those cases where the persons have deliberately failed to file returns for the purpose of evading taxes.

22.1 GENERAL REMARKS

- (1) Persons who fail to file returns on time, as required by the ITA or the ETA, can be separated into two general categories for purposes of this policy:
 - (A) **Repeat Late-Filer.** This is the person who files their returns late and the returns are filed only as a result of compliance action taken by the Canada Revenue Agency (CRA). Compliance actions could be in the form of TX11, TX14, requirements to file returns under subsection 231.2(1) of the ITA and under subsection 289(1) of the ETA and demands to file returns under section 282 of the ETA. Prosecution action under section 238 of the ITA and section 326 of the ETA could also result.
 - (B) **Non-Filer.** This is the person who has never filed returns or has ceased to file them for a minimum of three years. It could also include a person who was not registered, but was required to be for GST/HST purposes.
- (2) Persons described as Repeat Late-Filers are normally dealt with by the Non-Filer/Non-Registrant Sections within Tax Centres and appropriate Taxpayer Services and Debt Management section within a Tax Services Offices (TSO). In most cases, these persons are not attempting to evade tax, but are simply delaying the filing of the necessary returns until requested to do so. The Non-Filer/Non-Registrant section will normally deal with these cases by levying the applicable civil penalties.
- (3) The penalty provisions set out in section 162 of the ITA provide for a two-tier penalty system, whereby repeat offenders will be automatically penalized (subsection 162(2)) by the CRA. The application of this penalty should result in a reduction in the number of Repeat Late-Filers. The penalty provisions for failure to file GST/HST returns are set out under section 283 of the ETA.
- (4) Persons described as non-filers will be the focus of any contemplated criminal investigations. Non-filers may be prosecuted by the Taxpayer Services and Debt Management Division under section 238 of the ITA or section 326 of the ETA for failure to file or register. Non-filers may also be

prosecuted by the Criminal Investigations Division under section 239 of the ITA, and section 327 of the ETA, where the evidence gathered will demonstrate wilful evasion of income tax and/or GST/HST through the deliberate failure to file returns. The act of not filing is therefore one of the schemes used by the person to evade tax or GST/HST.

- (5) Refer to the NF/NR TSO Operations Manual:
http://infozone/english/r5044502/0000/mg/5043mg/43_07/01_43_07-e.asp

22.2 SOURCE OF WORKLOAD

- (1) The detection and prosecution of non-filers is dependent on leads from sources both internal and external to the CRA. Once the person is identified as being a non-filer, the normal procedure is to refer the matter to the appropriate Taxpayer Services and Debt Management section for the initiation of delinquent action. They will attempt to locate the person and obtain the required outstanding returns.
- (2) The Taxpayer Services and Debt Management section also initiates and carries out projects designed to identify non-filers and to obtain outstanding returns. In the course of performing their duties, they may refer files to the Audit Division for further action or to the Criminal Investigations Division if the files have prosecution potential under section 239 of the ITA or 327 of the ETA.
- (3) As a result of the actions of the Taxpayer Services and Debt Management Division and the Audit Division, cases may be referred to the Criminal Investigations Division for possible prosecution under the ITA and/or the ETA.

22.3 EVIDENCE REQUIRED FOR PROSECUTION

- (1) Prosecution of non-filer cases is mainly for offences under paragraph 239(1)(d) of the ITA, and/or paragraph 327(1)(c) of the ETA. Because the person has not filed returns, the offences described in the other paragraphs of section 239 of the ITA and section 327 of the ETA have not occurred. However, where additional evidence uncovered during the investigation proves that the person made false statements in other returns that they have filed, then charges for the offences set out under section 239(1)(a) of the ITA and/or section 327(1)(a) of the ETA could result.
- (2) Non-filer cases are different from tax evasion cases where the persons have taken steps to reduce their tax liability by understating their income, claiming false expenses or credits. The non-filers have been inactive. The method of evasion has simply been not to file returns, thereby, evading the taxes due.
- (3) Prosecution of non-filers for tax evasion requires that the Crown prove beyond a reasonable doubt that the act of not filing returns was done with the intent to evade the payment of taxes due. Evidence, which proves the failure to file (*actus reus*) returns, will not in itself be sufficient to satisfy the court that there exists the intention (*mens rea*) to evade the payment of tax. The courts have to be satisfied that there existed the intention (*mens rea*) to evade the payment of tax.
- (4) The *actus reus* evidence in these types of cases is usually easily gathered. The non-filing of returns can be shown to the courts by the use of the actual returns filed subsequent to our request, RAPID printouts, historical CINDAC printouts, delinquent action records, etc.
- (5) The greatest emphasis in non-filer cases is the gathering of evidence necessary to prove the *mens rea*. Evidence should be gathered to show:
 - (A) The person received income from a taxable source for several years/periods resulting in a substantial tax liability.
 - (B) The person had knowledge of the tax liability and the obligation to file returns.
 - (C) The act of not filing was deliberate and intentional.
- (6) The following are some of the important questions that will help in gathering the necessary evidence for a successful prosecution of a non-filer/non-registrant case:
 - Were they aware that they had to file returns every year/period, and the date such returns were required to be filed?
 - Were they aware that they had taxable income or taxable supplies during the relevant years/periods?
 - Were they aware that they had taxes owing for the relevant years/periods?

- What are their reasons for not filing returns?
- What was the intent at the time? We must show that the act of not filing returns was done with the intent of not paying taxes.
- Were they in financial or emotional difficulty during the relevant time periods, which may provide them with a defence as to the intent?
- If they state that they never intended to evade taxes, when and how did they intend to file their returns and pay the outstanding taxes? What steps had they taken to this end?
- During the period of non-filing, did they have any contact with accountants or lawyers or other advisors concerning their tax affairs? Obtain details of such contacts and any advice given.
- What steps did they take after receiving any advice?
- Did they have any contact with the Agency during the period of non-filing regarding those years/periods?
- What was their past filing history with the Agency? If returns were filed in prior years/periods, was the type of income /taxable supplies reported similar in nature to the income/taxable supplies not reported in the non-filing period?
- Were requirements or demands ever issued to them by the Agency?
- Were they ever prosecuted for failure to comply with demands and requirements to file returns or documents?
- Does the Agency have a collection history on them?
- Were they aware of the quarterly instalment requirements, if applicable?
- Did they have any employees during the non-filing period?
- In the affirmative, were source deductions taken off the employees' pay and properly remitted to the Agency during the non-filing period?
- Did they collect provincial sales tax? Were these properly remitted?
- Did they maintain any books and records?
- If books and records exist, who prepared them? In what condition are the books and records? What was the purpose of maintaining these books and records?
- Are there any reasons why they would be required to maintain a proper set of accounting records for purposes other than the Income Tax Act or the Excise Tax Act (i.e. franchise requirement, audit by professional organisations, collection of accounts receivable, for bank loan purposes, etc.)? This type of evidence could be useful in rebutting a defence that they were planning on filing returns and paying taxes as evidenced by them having maintained a good set of records.
- Did they have any financial statements prepared? If so, for what purpose? When and how were such statements prepared?
- Did they have income tax/GST returns prepared during the non-filing period? If so, why were they not filed?
- Did the person's spouse file returns during the relevant period? If so, was the person claimed as a dependant? Were there any claims for child tax benefits etc., where they had to report what the person's income was for the year? What did they report as the person's income?
- Did they have any loans or mortgages loans from financial institutions? Did they supply them with any financial statements? Did they reflect the tax liability for the non filed years/periods on these statements? What income did they report to the financial institution?
- What did they spend their money on during the relevant years/periods? (purchase of assets, high living standard etc.) Can it be shown that when the person had money available for payment of taxes, they made a deliberate choice to spend the money for some other purpose?
- Is there any evidence of concealment of income, taxable supplies, falsification of records or any other schemes or subterfuge in the records?
- What was their attitude when they were finally caught? Did they co-operate with the investigation?

The above list is by no means exhaustive, as the type of information or evidence available will vary from case to case.

- (7) Some areas of importance to cover during a non-filer investigation with respect to the person are:
- Did he/she receive income from a taxable source for the several years/periods that he/she did not file?
 - Was there a substantial tax liability as a result of not filing those returns?
 - Was he/she aware that returns had to be filed each year/period that he/she was taxable?
 - Was he/she aware that he/she had tax owing to the CRA for each year/period that he/she did not file?
 - Why were the required returns not filed?
 - Has there been an increase in net worth in the period of non-filing?
 - If the net worth has not increased substantially, what was the money spent on?

22.4 CASE DEVELOPMENT AND CONTROL

- (1) Cases accepted for preliminary investigation will be entered into the AIMS system. The selection reason code and the source of referral will be entered in accordance with the instructions set out in the AIMS On-line. All non-filer criminal investigation cases will be coded as Criminal Investigations Program (CIP) cases.
- (2) Non-filer cases will be developed through the different investigation stages as outlined in **chapter 20**
- **Activity Reporting.** Cases which are aborted at the conclusion of the preliminary investigation will be returned to the originator for finalization (provided that the case is returned within the time limit of 60 days or as negotiated with the originating section) or finalized by CIP.

August 2014

Chapter 23 – Affidavits

23.1	Application
23.2	Background
23.3	Elements of an Affidavit
23.4	The Statutes
23.4.1	<i>Income Tax Act</i> – Subsection 244(9)
23.4.2	<i>Excise Tax Act</i> – Subsection 335(5)
23.4.3	Canada Evidence Act
23.4.3.1	Section 29
23.4.3.2	Section 30
23.4.3.3	Section 31
23.5	
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23.5.2	
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23.6	Affidavits from CRA Personnel (T1, T2 and GST) T1
	Returns and other Documents
	T2 Returns and Other Documents GST
	Returns and Other Documents
23.7	
23.8	Refund and Rebate Cheques – Government of Canada
23.9	Financial Institutions
23.10	Other Third Parties
	Foreign Evidence and Affidavits
	Timing

23.1 Application

This policy applies to the Criminal Investigations Program only. The purpose of this chapter is to clarify the roles, responsibilities and procedures of the various stakeholders involved in the preparation of affidavits to be tendered in criminal proceedings. In addition, information concerning the various statutes under which documents may be entered via an affidavit is provided.

23.2 Background

Much of the evidence used in tax cases is in documentary form. Although any document may be entered as a court exhibit without a witness or affidavit if defence agrees to its production, in most instances, in order to be entered in court as evidence, a document must be spoken to by a witness or attached to a valid affidavit. Affidavits may be used to enter originals or copies of documents.

23.3 Elements of an Affidavit

There are some basic elements that must be present in all affidavits that will be used to enter documents into evidence as follows:

- The heading which, if charges have been laid, gives the court name and the parties to the matter which in CRA investigations are Her Majesty the Queen (or Regina) and the accused. If charges have not been laid the header should refer to the matter under investigation and the relevant statute under which the evidence will be entered.
- An introductory paragraph identifying the affiant.
- A paragraph(s) which outlines the position and responsibilities of the affiant. These paragraphs must reflect how the affiant meets the specific requirements of the statute under which the evidence will be entered. For example if documents are to be entered under subsection 29(2) of the Canada Evidence Act (CEA) then the affiant must indicate that they are a person employed by the financial institution who has knowledge of the book or record or the manager or accountant of the financial institution.
- A paragraph(s) that outlines the person's knowledge related to the particular document to be introduced as evidence.
- An area for the affiant to swear^{iv} the affidavit.
- An area for a commissioner of oaths, or other person authorized to take oaths, to sign that the affidavit was sworn before them and place their stamp.

In reviewing and preparing affidavits investigators must be cognizant of the following potential problem areas that have been identified in affidavits:

- Exhibits to the affidavits must be sworn.
- Exhibits must be prepared prior to the swearing of the supporting affidavit. For example the date that appears on computer printouts must be prior to the date the affidavit was sworn.
- Affidavits must not be changed after they are sworn – a new affidavit must be sworn. For example, if the exhibit says: "This is Exhibit "A" to the Affidavit of John Smith, comprising 40 pages", the affidavit cannot be changed from 40 to 39 after discovering that there are only 39 pages.
- The pages in the affidavit and exhibits must be numbered in order to provide easy reference.
- Affidavits must be obtained in a timely manner.
- Affidavits must contain the correct headings.

Any reference in an affidavit to a Statute must be accurate and refer to the proper section in an Act.

23.4 The Statutes

There are various sections in the *Income Tax Act* (ITA), *Excise Tax Act* (ETA) and the *Canada Evidence Act* (CEA) that allow for the introduction of documents via an affidavit. In order for a document to be used as evidence, via an affidavit, the document and the affidavit must meet the requirements of the statute under which it is being entered. If affidavits contain errors the evidence is inadmissible, which may cause substantial delays in cases.

The sections within the ITA and ETA that allow for the entering of evidence via an affidavit are as follows:

<i>Income Tax Act</i>	Details	<i>Excise Tax Act</i>
244(5) 244(6)	Proof of service by mail	335(1)
244(7) 244(8)	Proof of personal service	335(2)
244(9) 244(10)	Proof of failure to comply	335(3)
	Proof of time of compliance	335(4)
	Proof of documents (photocopies)	335(5)
	Proof of no appeal	335(6)

There is one significant limitation to the use of subsection 244(9) ITA and subsection 335(5) ETA affidavits. Unlike Section 30 CEA affidavits, these sections do not allow for an explanation of the documents exhibited to the affidavit. They allow only a description of the nature of the records. If the meaning of the document is not plain on its face and requires an explanation in order to be useful as evidence, subsection 244(9) ITA and subsection 335(5) ETA affidavits should not be used. Instead, a Section 30 CEA affidavit should be used.

Affidavits sworn by CRA personnel should normally quote a section of an Act under which it is expected that the document will be introduced into evidence. The investigator must include this information in any affidavits that they prepare on behalf of a Tax Centre employee. There are however PPSC counsel who prefer to make the determination under which statute to enter the evidence. It is our recommendation that you follow local PPSC guidance as to whether or not you include the particular statute reference.

23.4.1 Income Tax Act – Subsection 244(9) Subsection

244(9) of the ITA reads as follows:

An affidavit of an officer of the Canada Revenue Agency, sworn before a commissioner or other person authorized to take affidavits, setting out that the officer has charge of the appropriate records and that a document annexed to the affidavit is a document or true copy of a document, or a print-out of an electronic document, made by or on behalf of the Minister or a person exercising a power of the Minister or by or on behalf of a taxpayer, is evidence of the nature and contents of the document.

This provision is very useful for putting into evidence documents and correspondence from an accused that is in the possession of CRA. The exhibits are admissible in all prosecutions, regardless of the charging statute.

Subsection 244(9) ITA affidavits may be used to introduce the following types of records (among others) into evidence:

- Income Tax Returns
- ACSES or SUDS Diary Notes
- Correspondence with a taxpayer
- Contents of a Permanent Document Envelope **23.4.2**

Excise Tax Act – Subsection 335(5) Subsection 335(5) of the

ETA reads as follows:

An affidavit of an officer of the Agency, sworn before a commissioner or other person authorized to take affidavits, setting out that the officer has charge of the appropriate records and that a document annexed to the affidavit is a document or true copy of a document, or a print-out of an electronic document, made by or on behalf of the Minister or a person exercising the powers of the Minister or by or on behalf of a person, is evidence of the nature and contents of the document.

As with subsection 244(9) of the ITA this provision is very useful for putting into evidence documents and correspondence from an accused that is in the possession of CRA. The exhibits are admissible in all prosecutions, regardless of the charging statute.

Subsection 335(5) ETA affidavits may be used to introduce the following types of records (among others) into evidence:

- GST Returns
- GST Mainframe Printouts
- GST Audit Downloads
- Correspondence with a taxpayer
- GST files

23.4.3 Canada Evidence Act

The main sections of the Canada Evidence Act that deal with affidavits are sections 29, 30 and 31. Section 29 of the CEA is a means by which copies of banking records may be admitted to prove the entries and transactions recorded by a financial institution. Section 30 allows for the introduction of business records that are made in the usual and ordinary course of business. Section 31 is a statutory means whereby prints

of cheques or bank statements made from microfiche may be admitted in evidence for all purposes for which the original cheques may have been admitted.

23.4.3.1 Section 29

Subsection 29(1) of the CEA reads as follows:

Subject to this section, a copy of any entry in any book or record kept in any financial institution shall in all legal proceedings be admitted in evidence as proof, in the absence of evidence to the contrary, of the entry and of the matters, transactions and accounts therein recorded.

Subsection 29(2) of the CEA reads as follows:

A copy of an entry in the book or record described in subsection (1) shall not be admitted in evidence under this section unless it is first proved that the book or record was, at the time of the making of the entry, one of the ordinary books or records of the financial institution, that the entry was made in the usual and ordinary course of business, that the book or record is in the custody or control of the financial institution and that the copy is a true copy of it, and such proof may be given by any person employed by the financial institution who has knowledge of the book or record or the manager or accountant of the financial institution, and may be given orally or by affidavit sworn before any commissioner or other person authorized to take affidavits.

The definition of "financial institution" in for purposes of section 29 is found in subsection 29(9) of the CEA:

"financial institution" means the Bank of Canada, the Business Development Bank of Canada and any institution that accepts in Canada deposits of money from its members or the public, and includes a branch, agency or office of any of those Banks or institutions;

A section 29 affidavit may be sworn by:

- a bank manager;
- an accountant of the financial institution; or
- any person employed by the financial institution who has knowledge of the book or record.

Section 29 allows original or copies of cheques and other bank records to be admissible as prima facie proof of the entries and of the transactions recorded. Copies of the records may be entered if:

- the entries shown on the cheques (or other records) in the prints were true copies of entries;
- the entries were made in the usual and ordinary course of the financial institution's business;
- that at the time the entry was made the records were one of the financial institution's ordinary records; and
- the records are in the financial institution's custody or control.

The types of records that may be introduced via a section 29 affidavit include:

- bank statements
- cheques
- deposit slips
- money orders
- signature cards
- account opening document 23.4.3.2

Section 30

Section 30 of the CEA includes (inter alia) the following:

- (1) Where oral evidence in respect of a matter would be admissible in a legal proceeding, a record made in the usual and ordinary course of business that contains information in respect of that matter is admissible in evidence under this section in the legal proceeding on production of the record.
- (2) Where a record made in the usual and ordinary course of business does not contain information in respect of a matter the occurrence or existence of which might reasonably be expected to be recorded in that record, the court may on production of the record admit the record for the purpose of establishing that fact and may draw the inference that the matter did not occur or exist.
- (3) Where it is not possible or reasonably practicable to produce any record described in subsection (1) or (2), a copy of the record accompanied by two documents, one that is made by a person who states

why it is not possible or reasonably practicable to produce the record and one that sets out the source from which the copy was made, that attests to the copy's authenticity and that is made by the person who made the copy, is admissible in evidence under this section in the same manner as if it were the original of the record if each document is

- (a) an affidavit of each of those persons sworn before a commissioner or other person authorized to take affidavits; or
 - (b) a certificate or other statement pertaining to the record in which the person attests that the certificate or statement is made in conformity with the laws of a foreign state, whether or not the certificate or statement is in the form of an affidavit attested to before an official of the foreign state.
- (4) Where production of any record or of a copy of any record described in subsection (1) or (2) would not convey to the court the information contained in the record by reason of its having been kept in a form that requires explanation, a transcript of the explanation of the record or copy prepared by a person qualified to make the explanation is admissible in evidence under this section in the same manner as if it were the original of the record if it is accompanied by a document that sets out the person's qualifications to make the explanation, attests to the accuracy of the explanation, and is
- (a) an affidavit of that person sworn before a commissioner or other person authorized to take affidavits; or
 - (b) a certificate or other statement pertaining to the record in which the person attests that the certificate or statement is made in conformity with the laws of a foreign state, whether or not the certificate or statement is in the form of an affidavit attested to before an official of the foreign state.
- (12) In this section, "business" means any business, profession, trade, calling, manufacture or undertaking of any kind carried on in Canada or elsewhere whether for profit or otherwise, including any activity or operation carried on or performed in Canada or elsewhere by any government, by any department, branch, board, commission or agency of any government, by any court or other tribunal or by any other body or authority performing a function of government;

Subsection 30(1) is used to enter the originals of normal business records into evidence. Subsection 30(3) of the CEA allows copies of business records to be introduced as evidence, via affidavit(s), in those situations where it is not possible or reasonably practicable to produce the original. The documents must be accompanied by two affidavits (or if the same person one affidavit), one that is made by a person who states why it is not possible or reasonably practicable to produce the record and one that sets out the source from which the copy was made, that attests to the copy's authenticity and that is made by the person who made the copy.

The types of records that may be introduced via a section 30 affidavit include:

- Government of Canada cheques
- printouts from CRA systems such as RAPID, TAPMA
- documents in the possession of CRA
- Foreign banking information
- business records such as
 - cheque register, ledgers and journals
 - invoices, work orders and receipts
 - accountant working papers
 - employee related records
 - cell phone records

23.4.3.3 Section 31

Section 31 of the CEA includes (inter alia) the following:

- (2) A print, whether enlarged or not, from any photographic film of
 - (a) an entry in any book or record kept by any government or corporation and destroyed, lost or delivered to a customer after the film was taken,

- (b) any bill of exchange, promissory note, cheque, receipt, instrument or document held by any government or corporation and destroyed, lost or delivered to a customer after the film was taken, or
 - (c) any record, document, plan, book or paper belonging to or deposited with any government or corporation, is admissible in evidence in all cases in which and for all purposes for which the object photographed would have been admitted on proof that
 - (d) while the book, record, bill of exchange, promissory note, cheque, receipt, instrument or document, plan, book or paper was in the custody or control of the government or corporation, the photographic film was taken thereof in order to keep a permanent record thereof, and
 - (e) the object photographed was subsequently destroyed by or in the presence of one or more of the employees of the government or corporation, or was lost or was delivered to a customer.
- (3) Evidence of compliance with the conditions prescribed by this section may be given by any one or more of the employees of the government or corporation, having knowledge of the taking of the photographic film, of the destruction, loss or delivery to a customer, or of the making of the print, as the case may be, either orally or by affidavit sworn in any part of Canada before any notary public or commissioner for oaths.

(12) In this section,

"corporation" means any bank, including the Bank of Canada and the Business Development Bank of Canada, any authorized foreign bank within the meaning of section 2 of the Bank Act and each of the following carrying on business in Canada, namely, every railway, express, telegraph and telephone company (except a street railway and tramway company), insurance company or society, trust company and loan company;

"government" means the government of Canada or of any province and includes any department, commission, board or branch of any such government;

Section 31 is generally used to introduce copies (whether made from microfiche or electronic versions) of cheques and deposits that were made at a bank but are no longer available in their original format. The affidavit must be sworn by an employee(s) of the bank who has knowledge of:

- (i) the documents being photographed,
- (ii) the documents being destroyed, lost, or delivered to the customer, or
- (iii) the making of the prints.

In Lemay the Judge described one of the differences between section 29 and 31 as:

[27] It is significant that, unlike s. 31, this section (referring to Section 29) of the Act is not confined to proving authenticity. Section 31 only provides for the admissibility or prints of documents that would themselves be admissible. Section 29 is broader. It provides for the admission of copies of documents to prove the entries on them and the transactions disclosed. The section (referring to Section 29) provides a legislated exception to the rule against hearsay as well as a means of proving the authenticity of copies of documents.

23.5 Affidavits from CRA Personnel (T1, T2 and GST)

Generally an officer of the CRA who has charge of the appropriate records should be the affiant but any CRA officer can prepare the affidavit. For T1, T2 and GST returns, the officer who has charge of the appropriate records is usually a Tax Centre employee – not an investigator. However, the officer who has charge of the records does not have to be the person who prepares the affidavit. Instead, investigators can prepare an affidavit and send it to the appropriate Tax Centre. The role of the Tax Centre employee includes assembling the client information as noted on the affidavit, sign and swears the affidavit before a commissioner of oaths or someone with Ministerial designation to take oaths (usually a team leader in the Tax Centre).

There may be instances when an Investigator or Auditor may be the person best suited to be the affiant because of their knowledge of CRA systems and processes. This is most likely to occur when explanations of the documents are required to make them useful to the courts. In these instances a section 30 CEA affidavit would be required.

23.5.1 T1 Returns and other Documents

T1 returns, printouts of electronic documents (including efiled returns) and other documents supported with an affidavit can be obtained from the appropriate Tax Centre. Requests for T1 affidavits are to be sent to T1 Specialty Services of the Tax Centre as identified on option E in RAPID. Specialty Services will not draft the affidavit – this must be done by the investigator requesting the affidavit.

The investigator must contact Specialty Services to determine the name and position of the affiant from Specialty Services. If the investigator is in possession of the original T1 Returns of Income they must be sent to Specialty Services along with a covering memo and the affidavit(s) to be sworn. The documents and affidavit sent to Specialty Services must allow them to make true copies and swear the affidavit. Specialty Services will exam and search their filed records (including electronic) to determine if there are any other returns to be copied or printed.

The affiant will review the affidavit and if satisfied with its contents swear it in front of a commissioner of oaths or someone with Ministerial designation to take oaths. If the affiant disagrees with the contents the investigator and the affiant should discuss any discrepancies and agree on a revised version of the affidavit. The officer from Specialty Services should send the sworn affidavit, true copies and any original documents to the requesting investigator.

TOM 26 – Specialty Service concerning T1 affidavits can be found at:

http://infozone/english/r5065100/himsd/divisions/cshi/tom_online/manual/26/2650/tom2655-e.as p

In order to introduce as evidence information from a person's returns which have been destroyed, a RAPID option C for the particular year or a TAPMA Historic Master File printout and a supporting affidavit may be used.

23.5.2 T2 Returns and Other Documents

T2 returns, printouts of electronic documents (including efiled returns) and other documents supported with an affidavit can be obtained from the appropriate Tax Centre. Requests for T2 affidavits are to be sent to T2 Specialty Services of the appropriate Tax Centre which can be determined by reviewing the T2 charge out screen in CORTAX.

The investigator must contact Specialty Services to determine the name and position of the affiant from Specialty Services. If the investigator is in possession of the original T2 Returns of Income they must be sent to Specialty Services along with a covering memo and the affidavit(s) to be sworn. The documents and affidavit sent to Specialty Services must allow them to make true copies and swear the affidavit. Specialty Services will exam and search their filed records (including electronic) to determine if there are any other returns to be copied or printed.

The affiant will review the affidavit and if satisfied with its contents swear it in front of a commissioner of oaths or someone with Ministerial designation to take oaths. If the affiant disagrees with the contents the investigator and the affiant should discuss any discrepancies and agree on a revised version of the affidavit. The officer from Specialty Services should send the sworn affidavit, true copies and any original documents to the requesting investigator.

T2 Specialty Services has instructions on how to complete affidavits in cases where there have been no returns filed for the period under investigation. The instructions can be found at:

http://infozone/english/r5033402/online_mans/corp_assessing_online/manual/csm/05/corp_05_0 11-e.asp

23.5.3 GST Returns and Other Documents

GST returns and computer printouts supported with an affidavit can be obtained from the appropriate Tax Centre. GST affidavits may be requested via the GST/HST File Retrieval System or alternatively by faxing the GST Records section in the appropriate Tax Centre. The GST/HST File Retrieval System is a web based tool located at:

<http://apps.ec.rc.gc.ca/ebci/fzfr/pages/logon.jsp;jsessionid=QZ2QTQYQ7x1wpczBwwTSChp1nLJghzZ4khXQGj2cJK8MGgvqhphS!361948910>

GST Records in the Tax Centre will prepare and swear the affidavits. The returns attached to GST affidavits may be the original GST returns or copies. GST Records will also prepare affidavits for returns that were filed electronically.

The instructions given to GST Tax Centre staff to prepare affidavits can be found in the GST/HST Adjustment and Processing Procedures (GAPP) Manual 10.3.3. - Process an Affidavit Request: http://infozone/english/r5033402/online_mans/gapp2_online/manual/sect2/ch10/gapp_02_10_00_3-e.asp?#10.3.3.

and at http://infozone/english/r5033402/online_mans/gapp2_online/directives/PROC_07_01.doc There are various other areas in CRA, such as Charities Directorate and the International Tax Services Office, which may be required to provide affidavits. The processes followed for the other areas of will be similar to those outlined above for T1 and T2's.

23.6 Refund and Rebate Cheques – Government of Canada

The most common example of this is cheques issued by CRA to a taxpayer or GST registrant. Once negotiated, the cheques are kept by the Cheque Redemption Control Directorate of the Department of Public Works and Government Services Canada, not the CRA. The original negotiated cheques will be provided to the CRA on request. As the cheques are not in the control of CRA, a subsection 244 (9) ITA or a subsection 335(5) ETA affidavit may not be used. A section 30 CEA affidavit must be obtained. When requested the Cheque Redemption Control Directorate will provide an affidavit along copies of the cheques to investigators.

In order to obtain cheques and an affidavit a request must be sent to: Public Works and Government Services Canada
Cheque Redemption Control Directorate Matane,
Quebec

As with any affidavit, the investigator must review the affidavit and documents to ensure that they are accurate and may be used in court proceedings.

23.7 Financial Institutions

Information and documents are obtained from financial institutions by way of Production Orders under section 487.012 of the Criminal Code. The financial institutions are ordered to provide true copies of the documents and also to provide an affidavit to certify them. The affidavit is to accompany the documents that the financial institution provides in response to the Production Order.

The financial institution must prepare an affidavit(s) which conforms to the requirements of either section 29 or 30 of the CEA. The investigator must review the documents and affidavit to ensure that they are accurate and meet the requirements of the CEA. If there is an issue with the affidavit the investigator should contact the financial institution to discuss the problem area and obtain a revised affidavit. Financial institution affidavits should be obtained as soon as the documents are produced in response to the production order.

23.8 Other Third Parties

Information and documents are obtained from other third parties by way of Production Orders under section 487.012 of the Criminal Code or by informed consent. Depending on the size and nature of the business that the third party is involved in the affidavit may be prepared by CRA or by the third party. In the case of smaller businesses the investigator will prepare the affidavit and someone from the third party will be the affiant and swear the affidavit.

In certain instances the third party may be ordered to provide true copies of the documents and an affidavit to certify them in a Production Order. The affidavit is to accompany the documents that the third party provides in response to the Production Order. The third party must prepare an affidavit(s) which conforms to the requirements of section 30 of the CEA. The investigator must review the documents and affidavit to ensure that they are accurate and meet the requirements of the CEA. If there is an issue with the affidavit the investigator should contact the third party to discuss the problem area and obtain a revised affidavit.

23.9 Foreign Evidence and Affidavits

Documents obtained in a foreign country may be entered via an affidavit under section 30 of the CEA. Refer to the paragraph above for further guidance on the criteria that must be met in the affidavit for the evidence to be admissible under section 30. Section 29 of the CEA may not be used to introduce documents from a foreign bank as they are not included in the definition of a financial institution under section 29. In addition,

the affidavit must be sworn before an official identified in section 52 of the CEA. Section 52 enumerates the persons (or their positions) that may administer take or receive affidavits in foreign countries. The person swearing the affidavit must do it in the presence of the person authorized to administer, take or receive the oath and that person must confirm that it was sworn in front of them by signing the document. Section 53 allows that an affidavit taken outside of Canada has the same force and effect as it had been sworn in Canada. Foreign affidavits may be obtained via a Tax Treaty request or a Mutual Legal Assistance Treaty (MLAT) request depending on the circumstances.

For further information on Tax Treaty requests refer to Exchange of Information Services – Reference Guide 2012 at: <http://infozone/english/r6001000/manuals/international/exchinfoguide/exchinfoguidetoc-e.html> For further information on MLAT requests please refer to the policy on that topic **11.3 Mutual Legal Assistance Treaties – Obtaining Evidence in Criminal Matters.**

23.10 Timing

Affidavits should be prepared and obtained in a timely fashion and not after the fact.

All affidavits from government employees should be obtained shortly after a determination has been made that the case will be referred to the PPSC and it believed that the document will be entered as evidence. The investigator should endeavour to have the affidavits available for disclosure along with the related documents. Completion of this task early in the referral process will allow the investigator to focus on other important tasks as a trial date approaches.

Should investigators or PPSC lawyers identify problems with affidavits that cannot be resolved locally they should contact the Advisory Services Section in the Criminal Investigation Directorate.

June 2014

Chapter 24 – Revenue Statutes, Money Laundering and Proceeds Of Crime

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24.1 PURPOSE

This chapter contains information, policy and procedures related to the use of the Proceeds of Crime legislation contained in Part XII.2 of the Criminal Code as it relates to criminal investigations carried out by the CRA.

During the process to have the legislation amended CRA committed to ensuring that there would be administrative oversights put in place to ensure the proper use of the powers. These commitments included: strict criteria (size of evasion/fraud, funds moved offshore, organized criminal activity etc.) on when the Proceeds of Crime regime could be considered for purposes of a tax and/or refund/rebate investigation institute a process requiring approval by senior HQ management

Public Prosecution Services of Canada (PPSC) would always be consulted and would remain the final decision-maker with respect to prosecuting charges in such cases the Proceeds of Crime provisions would only be considered for the most egregious and sophisticated cases of tax evasion

24.2 BACKGROUND Legislative

History

The Criminal Code (CC) was amended in 2002 to enact a number of measures to combat organized crime and enhance law enforcement generally. One of the amendments that came into force expanded the application of the Proceeds of Crime provisions in Part XII.2 of the CC to all federal indictable offences except for certain offences prescribed in the Regulations Excluding Certain Indictable Offences from the Definition of "Designated Offences". The regulations excluded the indictable offences in the Income Tax Act (ITA) and the Excise Tax Act (ETA) from being considered as designated offences.

Part XII.2 of the CC sets out what is referred to as the "Proceeds of Crime regime" in Canada. It establishes the laundering of the Proceeds of Crime as a criminal offence and establishes search, seizure, detention and forfeiture mechanisms for those proceeds. These provisions were introduced in Canada to more effectively prevent criminals from profiting from their crimes by targeting their "proceeds" no matter how difficult they make it for authorities to find. The regime allows for the forfeiture of property, for a fine to be issued by the court in lieu of forfeiture and imprisonment in default of payment of the fine. The provisions provide for consecutive jail sentences (up to 10 years) to perpetrators who fail to pay a court ordered fine, in lieu of forfeiture of the proceeds, whether the money was hidden in Canada or outside Canada's borders.

On July 12, 2010 the regulations were amended to remove the ITA and ETA offences from the excluded offences list. The result is that indictable offences under the ITA and ETA are now designated offences and the CRA may use the powers available under the Proceeds of Crime regime for offences that took place after July 12, 2010.

24.3 LEGISLATION

The money laundering / Proceeds of Crime regime consists of three inter-connected but distinct elements:

1. Laundering Proceeds of Crime – offence sub-section 462.31(1)¹
2. Seizure, restraining and forfeiting assets obtained by crime
3. Possession of property obtained by crime - offence Section 354

24.3.1 MONEY LAUNDERING - LAUNDERING PROCEEDS OF CRIME Sub-section

462.31 (1) states that:

Every one commits an offence who uses, transfers the possession of, sends or delivers to any person or place, transports, transmits, alters, disposes of or otherwise deals with, in any manner and by any means, any property or any proceeds of any property with intent to conceal or convert that property or those proceeds, knowing or believing that all or a part of that property or of those proceeds was obtained or derived directly or indirectly as a result of:

- (a) the commission in Canada of a designated offence; or
- (b) an act or omission anywhere that, if it had occurred in Canada, would have constituted a designated offence.

In the CC, a "designated offence" means:

- (a) any offence that may be prosecuted as an indictable offence under this or any other Act of Parliament, other than an indictable offence prescribed by regulation, or
- (b) a conspiracy or an attempt to commit, being an accessory after the fact in relation to, or any counselling in relation to, an offence referred to in paragraph (a).

This sub-section provides for the offence for laundering the Proceeds of Crime. Laundering consists of converting or concealing property or its proceeds derived or obtained through the commission of designated offences (including ITA and ETA offences).

In order for charges to be laid under this sub-section there have to be two elements present:

- The offender deals with any property, or proceeds of property, in any manner and by any means with intent to conceal or convert it
- The person knows or believes that the property or its proceeds were, in whole or in part, obtained or derived directly or indirectly as a result of the commission of a designated offence

The offence does not require that an amount be specified for the Proceeds of Crime. The offence reads "knowing or believing that all or a part of that property or those proceeds" was obtained from the commission of the crime. In the context of ITA and ETA offences the taxes evaded or false rebates or refunds may be the part of the proceeds obtained by the commission of the offence.

24.3.2 SEIZURE, RESTRAINT AND FORFEITURE OF PROPERTY 24.3.2.1

SPECIAL SEARCH WARRANTS

Section 462.32 refers to special search warrants. A special search warrant is used to search for and seize any property which is in any building, receptacle or place, in respect of which an order may be made for forfeiture under subsection 462.37(1) or 462.37(2.01) or 462.38(2). The peace or public officer must have reasonable grounds to believe that the property was obtained through the commission of a designated offence. Special warrants are employed to seize property which is tangible and movable in nature such as furniture, cash, vehicles etc.

Special warrants must be issued by a Judge as defined in S. 462.3. The special warrants can be executed anywhere in Canada, but must be obtained from a judge who has jurisdiction in the province in which the designated offence took place.

An application will be made by the Attorney General or their delegate and be supported by an Information To Obtain (ITO). The ITO will be prepared and sworn by the lead investigator. Form 1 must be used for the ITO.

Concerning the application and the related ITO:

- may be made ex-parte
- must be in writing
- must reveal if any previous applications have been made in respect of the same property • must give a full and frank disclosure of the facts

The ITO must contain reasonable grounds to believe that:

- a designated offence was committed (includes indictable ITA and ETA offences)
- property exists that was derived from a designated offence
- the property is in the building, receptacle or place
- that an order of forfeiture may be made under subsections 462.37(1) or 462.37(2.01) or 462.38(2) for the property

The following three requirements must be fulfilled, by the lead investigator, after a special warrant is executed (462.32(4)):

- detain the things seized with reasonable care (note: property seized is detained by the Seized Property Management Directorate of Public Works and Government Services Canada - not CRA - through a management order pursuant to section 462.331 of the CC)
- prepare a report to the judge within seven days of the execution of the warrant in form 5.3 outlining items seized and the location where these are being detained
- provide a copy of the report, on request, to the person whom the property was seized from or another person who convinces the judge that they have a valid interest in the property

As public officers, CRA investigators cannot return items seized pursuant to a special warrant prior to reporting back to the judge outlining items seized and the location where these are being detained. Prior to granting a special warrant the judge will require the Attorney General to give such undertaking as the judge considers appropriate to cover the cost or damages, or both, in relation to the issuance or execution of the warrant. The undertaking provides financial coverage to persons who were aggrieved by the issuance of the special warrant (462.32(6)).

The issuing judge may require that notice be given to anyone who appears to have an interest in the property in question; unless the possibility exists that doing so would result in the disappearance, dissipation or reduction in the value of the property (462.32(5)).

24.3.2.2 *RESTRAINT ORDERS (Freeze Assets)*

Section 462.33 deals with applications for restraint orders. In contrast to special warrants which are used to seize tangible and movable property, restraint orders are used by investigators to seize intangibles and immovable items such as residences and bank accounts. Restraint orders are employed to restrain any property, which on reasonable grounds is believed to have been obtained through the commission of a designated offence and which an order may be made for forfeiture under subsection 462.37(1) or 462.37(2.01) or 462.38(2).

An application will be made by the Attorney-General or their delegate and be supported by an affidavit. The affidavit will be prepared and sworn by the lead investigator.

The affidavit must set out:

- offence or matter under investigation
- the person who is believed to be in possession of the property
- the grounds for belief that an order of forfeiture may be made under subsections 462.37(1), 462.37(2.01) or 462.38(2) for the property
- a description of the property
- whether any previous application have been made under the section with respect to the property

If the judge is satisfied that there are reasonable grounds to believe the property has been obtained through the commission of a designated offence and which an order may be made for forfeiture under subsection 462.37(1) or 462.37(2.01) or 462.38(2) they may issue an order prohibiting any person from disposing of the property specified in the order except in a manner that may be specified in the order.

Section 462.33(3.1) allows a judge to grant a restraint order in respect of property situated outside of Canada.

Prior to granting a restraint order the judge will require the Attorney General to give such undertaking as the judge considers appropriate to cover the cost or damages, or both, in relation to the issuance or execution of the order. The undertaking provides financial coverage to persons who were aggrieved by the issuance of the restraint order (462.33(7)).

The issuing judge may require that notice be given to anyone who appears to have an interest in the property in question; unless the possibility exists that doing so would result in the disappearance, dissipation or reduction in the value of the property (462.33(5)).

24.3.2.3 *SPECIAL WARRANTS AND RESTRAINT ORDERS*

Section 462.35 sets the amount of time that property restrained or seized may be detained. The property may be detained for a period not exceeding six months from the day of the seizure or the day the restraining order was signed. The following two exceptions will extend the time frame:

- proceedings are instituted in respect of which the thing detained may be forfeited
- if, on application, by the Attorney General the judge is satisfied that the property is required for investigational or evidentiary purposes related to a forfeiture or any other provision of the Criminal Code or any other Act of Parliament

Section 462.37 deals with the forfeiture of proceeds of crime. In order for property to be forfeited there are a number of elements that must be present:

- the offender is convicted (or given a discharge under section 730) of a designated offence • during sentencing an application is made by the Attorney General

- the court is satisfied, on the balance of probabilities, that the property is the proceeds of crime
- the designated offence that was the subject of the trial was committed in relation to the property (proceeds of the crime)
- the judge is satisfied beyond a reasonable doubt that the property is proceeds of crime the judge may order forfeiture. This allows the Crown to seize assets from an accused where it is not possible to link assets to a specific criminal act, but where it can be inferred that they were nonetheless obtained through the commission of one or more designated offences

Subsection 462.37(2.1) allows for an order of forfeiture to be made concerning property situated outside Canada.

The property that is to be forfeited does not have to have been previously seized by a special warrant or restrained by order. If assets identified during the course of an investigation are Proceeds of Crime then an application may be made to have the property forfeited. This could include such items as a residence, cottage, vehicle or offshore bank accounts.

Sections 462.33 to 462.47 also deal with the following topics:

- management of the things seized or restrained
- rights of the person from whom the item was seized or restrained
- notice provisions
- where the accused has absconded
- imposing a fine in lieu of a forfeiture order and imprisonment for non-payment of the fine
- return of property
- appeals process

The sub-sections of the CC dealing with the seizure, restraint and forfeiture of proceeds of crime do not require that any money laundering type of activity has to have taken place. In addition, they do not require that any charges under Section 354 for the possession of property obtained by crime be alleged or laid. If seized or restrained assets are ordered to be returned to the accused the CRA may interject prior to the return of the assets and attempt to collect monies it is due for outstanding civil debts. The CRA Collections Enforcement Liaison Officer must be involved in any attempt to collect the assets.

24.3.3 POSSESSION OF PROPERTY OBTAINED BY CRIME

Section 354 describes the offence of possession of property obtained by crime. It makes it an offence if a person has in their possession any property or proceeds of any property, knowing that such property or proceeds were obtained or derived directly or indirectly from the commission of an indictable offence. The indictable offences under the ITA and ETA are included in this definition.

This offence was not affected by the changes made to the Regulations Excluding Certain Indictable Offences from the Definition of "Designated Offences" on July 12, 2010. It is an offence that has been used very infrequently in relation to tax evasion cases.

PART XII.2 Criminal Code 24.4

Procedures

Due to the sensitive nature of the Proceeds of Crime regime it is imperative that an oversight mechanism is put in place in order to ensure proper use of the powers.

24.4.1 Seizure or Restraint of Assets

The seizure or restraint of assets can take place at any time during the course of a CRA criminal investigation case. However, it will be used primarily during the investigation stage. Investigators must be kept in mind that the items seized or restrained will have to be returned within six months of the action unless one of the exceptions outlined in 462.35, as discussed above, are met. In all cases where the Proceeds of Crime regime is being considered during the investigation stage the Investigations Advisory Services Section and PPSC must be consulted at the earliest possible instance.

The Director, Criminal Investigations Division at HQ must approve of the use of the Proceeds of Crime regime. When a Tax Services Office wants to use the Proceeds of Crime regime the Assistant Director, Criminal Investigations is required to forward a memorandum to the Director, Criminal Investigations Division at HQ outlining the reasons and requesting approval. The ITO or affidavit will be reviewed by the

assigned Investigations Advisory Services officer in the same manner as an ITO for a search warrant or production order.

The application for a special search warrant or a restraint order must be made by the Attorney General or their designate which would generally be PPSC counsel. The application for a special search warrant must be accompanied by a sworn information to obtain and a restraint order must be accompanied by a sworn affidavit. The sworn ITO or affidavit will be prepared by the investigator.

NOTE: Sub-section 462.33(2) refers to an "affidavit sworn on information or belief". The affidavit must contain the investigator's reasonable grounds to believe in the same fashion that any ITO contains reasonable grounds to believe.

The following criteria should be present in order for seizure or restraint of proceeds of crime actions to be taken in a case:

1. there is known property which is the proceeds of crime for which an order of forfeiture may be made; and
2. the accused has committed an offence (after July 12, 2010) under section 239(1) or 239(1.1) of the ITA or 327 of the ETA or a tax related offence to which section 380 of the Criminal Code applies; and
3. the amount of tax evaded/false refund is significant; and 4. at least one of the following is present:
 - the accused is engaged in real-time frauds;
 - the evasion scheme(s) was highly sophisticated and demonstrated considerable planning;
 - the accused counselled others to evade taxes/GST/HST or obtain false rebates or refunds;
 - an innocent third party suffered significant losses because of the actions of the accused;
 - the accused sold, transferred or placed assets beyond the reach of CRA to prevent collection of taxes payable;
 - funds or other property obtained from the commission of the offence were placed outside of Canada;
 - the accused has been previously convicted of tax evasion or conspiracy to evade taxes under section 239 of the ITA or 327 of the ETA or a tax related offence under Section 380 of the Criminal Code;
 - the accused is the target of a Joint Forces Operation in which CRA is a participant. While the

above criteria should be present in order to seize or restrain assets each case will be evaluated on its own merits based on the significance of the case.

24.4.2 Money Laundering Offences

In addition to charges under the ITA, ETA or section 380 of the Criminal Code an offender may be charged with offences under section 462.31 for laundering the Proceeds of Crime if the elements discussed above are present.

The CRA has committed to alleging these offences in only the most egregious and sophisticated cases of tax evasion. The following criteria should be present in order to lay money laundering charges:

1. the accused has committed an offence (after July 12, 2010) under section 239(1) or 239(1.1) of the ITA or 327 of the ETA or a tax related offence to which section 380 of the Criminal Code applies; and
2. the offender dealt with any property, or proceeds of property, in any manner and by any means with intent to conceal or covert including if the accused sold, transferred or placed assets beyond the reach of CRA or transferred funds or other property outside of Canada; and
3. the amount of tax evaded/false refund is significant; and 4. at least one of the following is present:
 - the accused is engaged in real-time frauds;
 - the evasion scheme(s) was highly sophisticated and demonstrated considerable planning;
 or

- the accused has been previously convicted of tax evasion or conspiracy to evade taxes under section 239 of the ITA or 327 of the ETA or a tax related offence under section 380 of the Criminal Code;
- the accused is the target of a Joint Forces Operation in which CRA is a participant. While the

above criteria should be present in order to lay money laundering charges, each case will be evaluated on its own merits based on the significance of the case. As in all cases the determination of what offences will be alleged is determined by PPSC in consultation with the Criminal Investigations Division of the TSO. If the Criminal Investigations Division is considering recommending that money laundering charges be laid they must have the approval of the Director, Criminal Investigations Division at HQ prior to including the allegations in the Prosecution Report. The approval may be sought via memo or email outlining the reasons and how the criteria outlined above are met.

24.4.3 Sentencing

If an accused is convicted of a designated offence the court shall (462.37(1)) or may (462.37(2)), depending on the circumstances, order that property deemed proceeds of crime be forfeited. The elements necessary are discussed above in relation to section 462.37.

Sentencing submissions will be made by PPSC in consultation with the Assistant Director, Criminal Investigations, team leader or investigator. If the Crown counsel is of the opinion that forfeiture of assets should be sought then there is no need for the Assistant Director, Criminal Investigations to consult with HQ. However, the Criminal Investigations Directorate must be informed if the forfeiture of assets will be pursued.

24.4.4 Joint Forces Operation(s) (JFOs)

JFOs with a law enforcement agency(ies) will be part of many of the cases in which the Proceeds of Crime regime will be employed. These cases generally involve an investigation into individuals who have allegedly committed serious CC offences or a tax related offence which will result in a charge under section 380 of the CC.

ADEs should contact their Investigations Advisory Services officer at HQ prior to entering a JFO.

24.4.5 Public Works and Government Services Canada - Seized Property Management Directorate

The Seized Property Management Directorate (SPMD) of Public Works and Government Services Canada (PWGSC) manages assets seized or restrained under specific sections of the Criminal Code, the Controlled Drugs and Substances Act and the Proceeds of Crime (Money-Laundering) and Terrorist Financing Act.

In all instances where a seizure or restraint of assets is being considered, SPMD must be consulted at the earliest possible juncture. SPMD must be involved in the planning of seizing or restraining assets. Since PWGSC is responsible for payment of damages arising from all undertakings given by the Attorney General of Canada, SPMD personnel should be consulted prior to any seizure, restraint or forfeiture of property. Such consultation serves to notify the SPMD that a particular property will be put under its management and allows SPMD personnel to have input regarding the feasibility or advisability of the seizure, restraint or forfeiture. There may be instances where time is of the essence in ensuring identified assets are not disposed of by the perpetrator.

The initial contact with SPMD on CRA cases will be made by the Criminal Investigations Directorate after the actions are approved by the Director, Criminal Investigations Division, at HQ. In some instances PPSC counsel may initiate discussions with SPMD but this should only occur after the approval from the Director, Criminal Investigations Division. Subsequent to the initial contact the local Criminal Investigations Division will be advised of the details of whom to contact at SPMD to coordinate the specific details related to the case.

The Seized Property Management Act came into effect on September 1, 1993. It authorizes the Minister of PWGSC to:

- provide consultative and managerial services to law enforcement agencies in relation to property seized or restrained in connection with designated criminal offences;

- dispose of this property when the Courts declare forfeiture;
- and share the proceeds of the disposition.

SPMD performs a variety of functions related to the management of seized property. SPMD provides advice to law enforcement agencies and Crown prosecutors on the value of target assets and the estimated costs of management prior to seizure. Once an asset is seized and an order of management or restraint has been issued by the appropriate judicial authority, SPMD takes possession and control of the reported seized assets or manages the restrained property in accordance with that order.

Services provided by SPMD include:

- Pre-seizure or Restraint
Financial analysis of property before a seizure and recommendations to law enforcement on the financial viability of proceeding with the seizure;
Analysis and evaluation of the best method to protect and maintain the value of the assets, and evaluation of the costs associated with asset management; and Coordinating services such as towing, storing and inspection, as needed.
- Post Seizure (for assets seized or under restraint)
Inspection, appraisal, administration, storage, protection and maintenance of seized or restrained property;
Settlement of third-party claims (i.e. from tenants and/or financial institutions) on seized property; and
Advances of funds to preserve property.
- Post Forfeiture Order
SPMD begins the asset disposal process;
Coordinates the sharing of proceeds with provincial and foreign governments in accordance with the Forfeited Property Sharing Regulations of the Seized Property Management Act; and
Returns non-forfeited assets pursuant to a court order. Seized or

restrained property may include:

- Cash, equities, loans, RRSP, bank accounts, lottery tickets, life insurance policies, personal loans and mortgages;
- Vehicles, motorcycles, boats and aircraft;
- Real property;
- Businesses;
- Personal property such as jewellery;
- Livestock
- Hydroponic equipment

Note: while these are the types of property that may be seized or restrained the cost to maintain the items must be considered prior to seizure

24.4.6 Disposal of Assets

After a 30-day appeal period, SPMD disposes of forfeited assets. Moveable assets are normally sold through public sales. Cash is shared according to the Forfeited Property Sharing Regulations. Real property is disposed of using PWGSC Realty Services or private sector realty brokerages.

Links:

Seized Property Management Directorate

<http://www.tpsgc-pwgsc.gc.ca/app-acq/gbs-spm/index-eng.html> **24.4.7**

FINTRAC – Voluntary Information Record (VIR)

The CRA provides information to FINTRAC in the form of a Voluntary Information Record relating to persons whom it believes may have used money-laundering techniques during the course of committing the alleged offence(s) being investigated by the CRA. With the assistance of specialized automated tools, FINTRAC will analyze the reported transactions, as well as information from other sources, to extract financial intelligence that would be relevant to the investigation or prosecution of money laundering

offences, terrorist activity financing offences or threats to the security of Canada. The CRA receives disclosures from FINTRAC where there is also a suspicion of evasion of taxes or duties.

The policy concerning making VIR's to FINTRAC is in **chapter 26** of the Criminal Investigations Manual.

Other Links:

The Federal Prosecution Service DESKBOOK – Proceeds of Crime

November 2012

Chapter 25 – Covert Operations**POLICY GOALS****25.1 OVERVIEW COVERT OPERATIONS****25.2****SURVEILLANCE**

- 25.2.1 Categories of Surveillance
- 25.2.2 Static Surveillance
- 25.2.3 Driving by the Places to be Searched in a Vehicle
- 25.2.4 Foot Surveillance
- 25.2.5 Mobile Surveillance

25.3**UNDERCOVER OPERATIONS**

- 25.3.1 RCMP Involvement

25.4**ELECTRONIC MONITORING OF TARGETS**

- 25.4.1 Audio Interceptions
- 25.4.2 Video Interceptions

POLICY GOALS

his policy provides CRA investigators, Team Leaders and Assistant Directors, Criminal Investigations with guidelines for the initiation and conduct of covert operations.

25.1 OVERVIEW COVERT OPERATIONS

There are three types of covert operations that investigators may employ during the course of their investigations:

1. Surveillance
2. Undercover operations
3. Electronic monitoring of targets

25.2 SURVEILLANCE

Surveillance is an investigative technique involving the deployment of various types of resources to observe the activities of one or more individuals for the purposes of gathering evidence or information. The primary concern when conducting surveillance is safety; both of the employee and of the public. The CRA does not expect employees engaged in any operational (surveillance) activity to knowingly place themselves in a position where their safety or that of the public is at risk.

Other concerns when conducting surveillance include preserving Agency, public and private property, media exposure and tipping off the target.

Surveillance is an investigative technique used to:

- Obtain detailed information about a premises to carry out a lawful search
- Obtain reasonable grounds to swear an Information to Obtain
- Test the reliability of informants and/or information
- Identify targets and their assets
- Obtain evidence of illicit activities, and
- Obtain detailed information on suspects and their activities (patterns of movement)

All instances of surveillance must be supported by notes of actions taken and observations made. These notes will support any information that may be used in an Information to Obtain (ITO) either a Search Warrant or Production Order or in any court proceedings.

25.2.1 Categories of Surveillance

For the purpose of this policy there are four categories of surveillance:

- a) Static Surveillance - surveillance carried out from a fixed observation point (including a vehicle);
- b) Driving by the places to be searched in a vehicle;
- c) Foot surveillance - moving surveillance carried out on foot; and
- d) Mobile surveillance - moving surveillance of an individual carried out with the use of motor vehicles.

25.2.2 Static Surveillance

Static Surveillance will be the primary surveillance tactic employed by CRA investigators. Examples of static surveillance are:

- The observation of a location in order to confirm a target's residence or business address.
- When an additional search location is identified during the course of a search action and it would be prudent to post investigators at or near the location until such time as the additional warrant is obtained and executed.

Static surveillance can take place from an observation post such as a park bench, bus stop, restaurant or stationary vehicle.

25.2.3 Driving by the Places to be Searched in a Vehicle

Investigators are encouraged to drive by all search locations thirty days prior to and as close to the search date as possible to confirm that they have the most current information about a place to be searched. There will be instances where driving by the place to search is not practical for logistical or financial reasons. Two investigators should drive by in an unmarked CRA vehicle. If a CRA vehicle is not available the Assistant Director, Criminal Investigations may authorize the use of a rental vehicle. Investigators should avoid using their personal vehicles. **25.2.4 Foot Surveillance**

Foot surveillance is similar to static or drive-by surveillance in that it should be done to gather evidence or information about possible search locations.

Investigators must not put themselves in situations which may result in a target becoming aware that they are being watched.

Foot surveillance for CRA purposes will not involve following individuals. **25.2.5**

Mobile Surveillance

CRA investigators are not trained in mobile surveillance and are prohibited from undertaking any form of moving surveillance involving a motor vehicle. Mobile surveillance may be contracted out to the Canada Border Services Agency, Royal Canadian Mounted Police (RCMP) or some other trained law enforcement agency. The Assistant Director, Criminal Investigations or investigator may contact their Investigations Advisory Service Officer at HQ for further guidance.

25.3 UNDERCOVER OPERATIONS

Undercover operations are undertaken to obtain information or evidence directly from the target of the investigation or someone associated to them.

CRA investigators may undertake only the least sophisticated and non-obtrusive types of undercover operations such as attending a restaurant, bar or office to obtain information or documents that are readily available to all clients such as bills, invoices or pamphlets.

There are cases in which an investigator may wish to attend seminars or presentations in order to gather information. These seminars or presentations may provide good information or evidence in cases where individuals are counseling others on how to evade taxes. However, there is an element of danger in attending these events. Prior to an investigator attending any such events the Assistant Director, Criminal Investigations must seek approval of the operation from the Director, Criminal Investigations Division at HQ. These types of operations will only be approved in situations where the evidence is not available from other sources and is a key element in proceeding with the case.

25.3.1 RCMP Involvement

The Assistant Director, Criminal Investigations may approach the local RCMP detachment to undertake an undercover operation on behalf of CRA. Many of the urban RCMP detachments have a unit that conducts undercover operations. Prior to approaching the RCMP, approval must be received from the Director, Criminal Investigations Division at HQ to proceed with the operation. It should also be noted that the undercover operation will have costs associated with it that the RCMP will need to be reimbursed for. The RCMP will require detailed information from CRA on the alleged tax evasion and the perpetrators. The CRA and RCMP will prepare an operational plan which will outline how the operation will take place, estimated cost and contacts. Copies of all operational plans and other reports related to the undercover operation must be forwarded to the Director, Criminal Investigations Division at HQ.

25.4 ELECTRONIC MONITORING OF TARGETS

Electronic monitoring will only be undertaken in cases in which the RCMP conducts an undercover operation on behalf of CRA. The use of electronic monitoring must be approved by the Director, Criminal Investigations Division at HQ and Public Prosecution Service of Canada (PPSC) counsel.

Electronic monitoring falls into two categories. Consent and non-consent intercepts. Consent intercepts include an individual wearing a recording device and knowingly recording themselves and whomever they are meeting or conversing with.

Non-consent intercepts happen when a monitoring device (i.e. wiretap or video recorder) is covertly installed and records individuals, all of whom are unaware that they are being recorded. Non-consent intercepts require that all other investigative procedures have been tried and failed or that they are unlikely to succeed. Given the restrictions, costs and logistics involved in obtaining non-consent intercepts CRA investigators will not pursue them.

25.4.1 Audio Interceptions

Electronic interception (recording) of conversations may form part of an undercover operation that the RCMP performs on behalf of the CRA. In these instances an undercover RCMP officer will wear a recording device.

These recordings are referred to as consent audio intercepts and may be authorized by a judge pursuant to Section 184.2 of the Criminal Code (CC). The RCMP officer will consent to wearing the recording device. The CRA investigator would make an ex-parte application to the courts which must contain the following:

- a) Reasonable grounds to believe that an offence against the CC or any other Act of Parliament has been or will be committed;
- b) The particulars of the offence(s);
- c) The name of the person (RCMP member) who has consented to the interception; and
- d) The period for which the authorization is requested.

In order to sign the authorization the judge must be satisfied that:

- a) There are reasonable grounds to believe that an offence against the CC or any other Act of Parliament has been or will be committed;
- b) Either the originator of the private communication or the person intended by the originator to receive it has consented to the interception; and
- c) There are reasonable grounds to believe that information concerning the offence referred to in paragraph (a) will be obtained through the interception sought.

The authorization to intercept the communications will include:

- a) The offence in respect of which private communications may be intercepted;
- b) The type of private communication that may be intercepted;
- c) The identity of the persons, if known, whose private communications are to be intercepted, generally describe the place at which private communications may be intercepted, if a general description of that place can be given, and generally describe the manner of interception that may be used;
- d) The terms and conditions that the judge considers advisable in the public interest; and
- e) The period, not exceeding sixty days, that it is valid.

25.4.2 Video Interceptions

A video surveillance warrant is a type of "general warrant" (CC section 487.01 see **chapter 6.2.6 General Warrants**) and is required where the activity being recorded can be said to be protected by a reasonable expectation of privacy. Video surveillance is considered by the courts to be more intrusive than audio surveillance. In addition to the requirements of S.487.01 an investigator will also have to meet the additional requirements contained in S. 184.2 of the Criminal Code (see above) to obtain a video surveillance authorization.

Consensual video interceptions will be governed, like consensual audio interceptions, by the requirements of CC S.184.2(1) modified as necessary by the circumstances. In other words, there will have to be the consent of one of the persons who is to be observed (CC S.184.2 (1)), a written application by a peace officer or public officer with an affidavit setting out the required particulars (CC S.184.2 (2)), the judge will have to be satisfied the grounds have been met (CC S.184.2(3)) and the video authorization will have to contain the specified requirements including a specified time period that cannot exceed 60 days. (CC S.184.2(4)) .

All general warrants must contain terms and conditions to minimize the invasion of privacy such as live monitoring, restricted duration, restricted locations (e.g. no washrooms, bedrooms etc. unless they can be justified).

Given the invasive nature of these audio and video recordings it is imperative that both PPSC and the Director, Criminal Investigations Division at HQ be consulted prior to applying to the courts. The Criminal Investigations Directorate will review the ex-parte application prior to it being submitted to the judge in accordance with the normal ITO review process.

June 2014

Chapter 26 – Voluntary Information Record (VIR) to the Financial Transactions and Reports Analysis Centre of Canada (FINTRAC)

26.1	Policy Statement
26.2	Policy Objectives
26.3	Authorities
26.4	Background
26.5	Policy Guidelines
26.5.1	Preparation and Submission of a VIR
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26.5.3	Timing
26.5.4	Disclosure by FINTRAC
26.5.5	Designated Information Included in a disclosure from FINTRAC to CRA
26.5.6	Disclosure Feedback

APPENDIX A Voluntary Information Record

APPENDIX B Best Practices

26.1 Policy Statement

It is the policy of the Criminal Investigations Program to consider using a Voluntary Information Record (VIR) at the early stages of all CRA criminal investigation cases.

A VIR should be prepared in all cases where an investigator identifies transactions that a reporting entity would be required to report to FINTRAC. The existence of such a transaction would be an indication that FINTRAC would be in possession of information concerning the target of the investigation.

In addition, an investigator may make a VIR if there are indications that a reporting entity has reported a suspicious transaction(s). Indicators of suspicious transactions identified by FINTRAC can be found in Guideline 2: Suspicious Transactions:

<http://www.fintrac-canafe.gc.ca/publications/guide/guide-eng.asp>

26.2 Policy Objectives

The purpose of the policy is to ensure national awareness, direction and consistency in the provision of voluntary information to FINTRAC by the CRA in the course of criminal investigations.

The intent of the VIR is to further a criminal investigation into tax evasion and fraud by providing information to FINTRAC that may lead FINTRAC to make a disclosure of designated information to the CRA.

26.3 Authorities

The CRA is guided by its own legislation and policies regarding the disclosure of information to FINTRAC. Authority to provide taxpayer information to any person, is provided under paragraph 241(4)(a) of the

Income Tax Act. Similarly, authority to provide confidential information is provided under paragraph 295(5)(a) of the *Excise Tax Act* and paragraph 211(6)(a) of the *Excise Act, 2001*. Sharing such information is permitted if it is reasonably regarded as necessary for the administration or enforcement of the applicable Act. A VIR is considered to be an investigative technique that is undertaken for the administration or enforcement of applicable CRA legislation.

FINTRAC is guided by the Proceeds of Crime (Money Laundering) and Terrorist Financing Act (PCMLTFA).

26.4 Background

The Proceeds of Crime (Money Laundering) and Terrorist Financing Act (*PCMLTFA*) requires reporting entities to report to FINTRAC suspicious and other transactions including the following :

- Suspicious transactions (including attempted transactions) related to money laundering or terrorist activity financing;
- Possession or control of terrorist property;
- International electronic funds transfers of \$10,000 or more;
- Large cash transactions of \$10,000 or more;
- Casino disbursements of \$10,000 or more;
- Cross-border seizures of \$10,000 or more in currency or monetary instruments; and
- Cross-border movements of \$10,000 or more in currency or monetary instruments

Persons or entities involved in the following businesses are required to report:

- financial entities such as banks or authorized foreign banks with respect to their operations in Canada
- credit unions, caisses populaires, financial services cooperatives, credit union centrals, trust companies, loan companies and agents of the Crown that accept deposit liabilities;
- life insurance companies, brokers and agents;
- securities dealers;
- money services businesses;
- agents of the Crown that sell money orders;
- accountants and accounting firms when carrying out certain activities on behalf of their clients;
- real estate brokers, sales representatives and developers when carrying out certain activities;
- casinos;
- dealers in precious metals and stones;
- public notaries and notary corporations of British Columbia when carrying out certain activities on behalf of their clients.

The PCMLTFA defines "money laundering offence" as an offence under 462.31(1) of the Criminal Code. In order to be an offence under this section, money laundering actions must be associated with the commission in Canada of a designated offence. On July 12, 2010 amendments to federal legislation were made which resulted in offences under the ITA and ETA becoming designated offences. As a result tax evasion, when associated with money laundering actions, fits the criteria set out in subsection 55(3)(a) of the *PCMLTFA*. Money laundering actions in 462.31(1) are when someone:

"...uses, transfers the possession of, sends or delivers to any person or place, transports, transmits, alters, disposes of or otherwise deals with, in any manner and by any means, any property or any proceeds of any property with intent to conceal or convert that property or those proceeds..."

VIR's from CRA are intended to assist FINTRAC in analyzing and assessing its database to determine whether the thresholds in subsection 55(3) of the *PCMLTFA* have been met; namely, whether there are reasonable grounds to suspect that the designated information is:

- (a) relevant to investigating or prosecuting a money laundering offence or a terrorist activity financing offence; and
- (b) relevant to an offence of obtaining or attempting to obtain a rebate, refund or credit to which a person or entity is not entitled, or of evading or attempting to evade paying taxes or duties imposed under an Act of Parliament administered by the Minister of National Revenue.

26.5 Policy Guidelines

26.5.1 Preparation and Submission of a VIR

No information should be sent directly to FINTRAC as the Criminal Investigations Directorate will be responsible for forwarding all VIR information to FINTRAC and will deal with FINTRAC on all VIR matters.

When investigators (in consultation with their team leaders) wish to submit a VIR to FINTRAC they will send an electronic memorandum to their Investigations Advisory Services Section representative at HQ containing the following information:

- Case Name
- Case number
- Investigator in charge of the case
- A brief summary of the case including:
 - The names of the parties under investigation
 - The years being investigated
 - The type of scheme(s) detected
 - The charges contemplated.
- Whether CRA has previously received a FINTRAC disclosure on the case either directly from FINTRAC or indirectly from law enforcement. If so, also provide the FINTRAC disclosure control number (DC0000XXX).
- Outline any time constraints the investigator may be working under.

Accompanying the memorandum should be completed electronic copies of the FINTRAC VIR form(s) along with supporting schedules and working papers that would assist FINTRAC in its analysis. A copy of the VIR form is attached as *Appendix "A"*.

The memo, VIR form and supporting schedules and working papers must be in electronic form and placed on the Criminal Investigations Directorate common drive

26.5.2 Completion of a VIR

The VIR form provides guidance on the information that would be most useful to FINTRAC's analysis in support of a CRA investigation. CRA may provide as much information as is deemed necessary for FINTRAC to undertake their analysis. The provision of the information to FINTRAC is entirely voluntary. FINTRAC ensures that information received from CRA is protected from unauthorized disclosure.

The information that CRA could provide to FINTRAC in a VIR includes:

- The name, address and phone number of the CRA investigator preparing the VIR;
- Identifying information on the subjects of the VIR such as name, DOB, alias, gender, addresses (both current and previous), marital status, employment details, etc.;
- If the subject is a corporation, provide the listing of shareholders
- An explanation of suspected criminal activity, including geographic area of activity;
- Any known financial information;
- Known associates;
- Any other relevant information that would assist FINTRAC in its analysis and the identification of the subject.

Similar to any situation where a CRA investigator is releasing information to a third party in the course of an investigation great care must be exercised to ensure that only necessary and relevant information is provided. In order to assist you in preparing the VIR, you will find attached as *Appendix "B"* a list of best practices the FINTRAC analytical team identified as being most useful when processing voluntary information from law enforcement.

26.5.3 Timing

In any case where it is determined that a VIR should be prepared it must be submitted as *early* in the investigation as possible. This will allow FINTRAC to perform their analysis and prepare a report to CRA in a timely fashion.

26.5.4 Disclosure by FINTRAC

FINTRAC will review all VIRs and will examine their database to determine if a disclosure is warranted under the provisions of subsection 55(3) of the PCMLTFA.

It is important to note that FINTRAC will only release information back to the CRA when they have met the thresholds included in subsection 55(3) of the PCMLTFA. They may conduct an analysis of their records based on the CRA VIR; however, there is no guarantee that CRA will receive a disclosure in return. If FINTRAC makes a disclosure to the CRA as a result of a VIR, it will be delivered to the attention of the Director, Criminal Investigations Division at HQ. Upon receipt of a disclosure, the investigator in charge of the case will be contacted and the disclosure will be put electronically in the investigator's folder on the shared drive.

Subsection 55(3) of the PCMLTFA obliges FINTRAC to disclose designated information to the "appropriate police force" when certain conditions set out in the Act are met. Therefore, at the time of the disclosure, FINTRAC will identify other possible recipients of the disclosure, such as the Royal Canadian Mounted Police (RCMP), Proceeds of Crime Branch and will request the CRA's written consent to provide the disclosure to the other appropriate police force(s). Consequently, it is important that the investigator provide Investigations Advisory Services at HQ with the response because they will liaise with FINTRAC on the release of the disclosure.

26.5.5 Designated Information Included in a disclosure from FINTRAC to CRA

The information that may appear in a Disclosure of Designated Information is set out in the *PCMLTFA* at subsection 55(7) and in the regulations, and includes the following:

- Case Overview;
- Fact Sheet;
- Transaction Spreadsheets;
- I2 Chart;
- Publically Available Information.

26.5.6 Disclosure Feedback

FINTRAC uses a feedback form to follow up on the value of any disclosure made to law enforcement. This form is part of the disclosure package. Due to the CRA confidentiality provisions, the CRA is unable to provide this form to FINTRAC on a case by case basis. However, Criminal Investigations Directorate does a summary report to FINTRAC which removes any taxpayer data. Therefore, please complete the form and forward it to the Investigations Advisory Services Section at HQ. **Do not under any circumstance** forward this information directly to FINTRAC.

APPENDIX A Voluntary Information [Click here](#)

to view in Word format. **APPENDIX B Best**

Practices

FINTRAC analytical teams identified a number of factors as being most useful when processing voluntary information from law enforcement. The following information may assist CRA staff in preparing a VIR:

Priority: Provide information in the VIR with respect to how important the investigation is from an operational perspective, possibly reflecting resources invested. Make reference to the status or stage of the investigation to assist the Centre in case assignment.

Timeline: It is useful for FINTRAC analytical case assignment to know the timelines for an ongoing investigation (e.g., when it was initiated).

Electronic Reporting: Provide voluntary information to FINTRAC electronically. This will enhance the ease with which information may be added to and subsequently examined within the context of the Centre's database.

Type of investigation: Information indicating the nature or focus of the investigation being conducted (e.g., money laundering / tax evasion, GST refund fraud) sets the context for assessing the other information provided in the VIR.

Type of criminal activity and criminal methodology: This information helps to establish the relationship between the subject(s) financial operations and the type of criminal enterprise or activity they are engaged in.

Type of money laundering methodology: This information, if available, enables the analyst to link the financial transactions reported and the expected financial activity associated with the crime.

Information pertaining to individuals' names, dates of birth, addresses, phone numbers, and banking information: This information enables the analyst to match the subject(s) identified through searches done in both FINTRAC's database and other open source databases. It is also useful in helping to identify and establish links among multiple subjects.

Information pertaining to location of activity: This information allows the analyst to apply knowledge of particular locations of concern (e.g., tax havens known to be used by money launderers/ tax evaders) in looking for indications of suspicious transaction activity, as well as to track and assess the flow of funds in and out of Canada.

Information pertaining to the names, addresses, and banking information of businesses or organizations: This information is similarly important in confirming the identities of subjects. **Information pertaining to the involvement of criminal organizations:** This information makes it possible to draw upon known methodologies used by criminal groups and then apply this knowledge to the financial activity being observed.

Type of criminal: This information would provide the analyst with additional context for identifying possible relationships, and assists in understanding general trends in the behaviour of criminal groups.

The link between individuals in a VIR: This link provides a context with respect to the links between individuals and may assist the analyst in determining whether the threshold for disclosure has been met. This would include situations where an individual or business goes by a variety of names or aliases. We not only want to catch links between different individuals/businesses but match up different reports containing similar names which may relate to the same individual/business.

The link between individuals and businesses in a VIR: The addition of this information in a VIR provides the analyst with some context with respect to how an individual might be related to a business involved in the report including the role the business plays in the facilitation of money laundering or tax evasion activity. (I.e., is the business used to launder proceeds of crime, suppress income or convey benefits to the owner.)? If a business indicated in the report is actively being used to launder money or commit tax evasion, it is helpful for the analyst to learn as much as possible about the way in which the business is being used.

ⁱ 1 If PWDS initially recommended rejecting the referral, the TSO does not have to complete all of these steps. The PWDS will do this.

ⁱⁱ 1 "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" Supreme Court of Canada R. v. Plant, [1993] 3 SCR 281,

ⁱⁱⁱ 2 The CRA investigator's lawful authority is that he/she is an investigator authorized by the Minister of National Revenue to enforce the Income Tax Act [ITA 220(2)] and the Excise Tax Act.[ETA 275(2)].

^{iv} 1. As per section 15 of the CEA a person may also solemnly affirm an affidavit. For purposes of this document any reference to an affidavit being sworn may also be read as solemnly affirm. ^v 1. All references to sections and subsections in this document refer to the Criminal Code unless otherwise noted