PROFESSIONAL ETHICS IN A TAX WORLD – SELF-ASSESSMENT, SELF-INCRIMINATION, THE *CHARTER*, CROWN FAIRNESS AND OTHER MATTERS (A PANEL DISCUSSION)[(a)]

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PROFESSIONAL ETHICS IN A TAX WORLD – SELF-ASSESSMENT, SELF-INCRIMINATION, THE *CHARTER*, CROWN FAIRNESS AND OTHER MATTERS (A Panel Discussion)[1]

1.0 INTRODUCTION

1.1 If you were to rob a bank, you would have the right to remain silent, one aspect of the right against self-incrimination.[2] The Crown would have to prove beyond a reasonable doubt that you were guilty of the offence of robbery under our *Criminal Code*.[3]

1.2 As we know, the *Income Tax Act*[4] contains offences for tax evasion[5] and the like[6] that may also attract imprisonment where the Crown proves beyond a reasonable doubt that the accused committed the offence.

1.3 Unlike the *Criminal Code*, the ITA has many administrative and regulatory provisions. Indeed, the ITA is principally an administrative statute with some penal offences inserted to deter and punish non-compliance. The administrative and regulatory provisions are based on taxpayers self-assessing their financial affairs and some personal matters (e.g., age, number of children) in order to determine annual income tax liability.

1.4 As tax advisors, we are often faced with ethical issues. Of particular note, the annual reporting of the information to determine tax liability creates the potential of self-incrimination for the client. The advice is never as simple as telling a client not to rob another bank and that he or she has a right to remain silent. This is because the information provided in the current year may lead to questions about prior years (e.g., income from a previously undisclosed offshore bank account). In many situations, the advisor must try to ensure that the right against self-incrimination is available or that the client does not self-incriminate without disobeying the law. The advisor must counsel that the law be obeyed, however incriminating properly required or requested information may be.

1.5 Other ethical issues may arise where the tax advisor knows that the Canada Revenue Agency (the "**CRA**") has made a mistake or where the advisor learns that previously submitted tax returns contain wrong information. How do these issues relate to our system of "voluntary" self-assessment under the ITA?

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2 Alan W Bryant, Sidney N Lederman, Michelle K Fuerst, *Sopinka, Lederman & Bryant*: *The Law of Evidence in Canada*, 3d ed (Markham: LexisNexis Canada Inc, 2009) at para 8.189 [*Sopinka*, *Evidence*].

3 RSC 1985, c C-46.

4 RSC 1985, c 1 (5th Supp) [ITA].

5 ITA, *ibid*, s 239(1)(b).

6 ITA, *ibid*, ss 238(1), 239(1)(a)-(e).

1.6 Finally, in addition to their ethical obligations as lawyers, Crown counsel, civil or criminal, face particular considerations in connection with tax matters. Civil tax matters are handled by Crown counsel under the *Department of Justice Act*[7] and criminal prosecutions by Crown counsel under the *Director of Public Prosecutions Act*.[8] In either case, Crown counsel has an overriding duty to be "fair".

1.7 What does fairness entail? Does a Crown counsel owe ethical duties to the taxpayer to ensure the taxpayer may exercise his or her right against self-incrimination? For example, is Crown counsel looking at a requirement letter issued under section 231.2 of the ITA obliged to help identify whether the matter has changed from a regular audit to a criminal investigation? Must Crown counsel insist that the responsible CRA agents give the taxpayer a proper and timely warning so that the taxpayer may avail himself or herself of protections under the *Canadian Charter of Rights and Freedoms*[9] (the "***Charter***")?

1.8 The panel has developed six hypothetical situations to illustrate the workings of some of the key principles and the ethical issues that arise. Many other ethical situations may arise especially in connection with tax opinions. The topic of professional ethics in a tax world is large and simply cannot be addressed by one panel or one article. Helpful literature exists.[10]

1.9 Through the six situations, we hope to show how fundamental principles in the context of tax may give rise to ethical problems for lawyers and accountants not faced in other areas of practice. Before addressing the six situations, we will first summarize the key legal principles and state the relevant professional ethics rules.

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7 RSC 1985, c J-2.

8 SC 2006, c 9, s 121.

9 Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Constitution Act 1982* (UK), 1982, c 11 [*Charter*] .

10 See e.g. American Institute of Certified Public Accountants, Statements on Standards for Tax Services, online: American Institute of Certified Public Accountants <http://www.aicpa.org/Research/Standards/Tax/Pages/default.aspx>; Gregory TW Bowden, Morley P Hirsch, Barry Lacombe, Robin J MacKnight & Deen C Olsen, "Standards and Ethics in Tax Practice" (Paper presented at the 1996 Conference of the Canadian Tax Foundation, Montreal, 25-27 November, 1996); WF Bowker, "Legal Ethics" (1955-61) 1:2 Alta L Rev 71; John D Brooks, "Ethical Obligations of the Crown Attorney- Some Guiding Principles and Thoughts" (2001) 50 UNBLJ 229; Allan C Hutchinson, *Legal Ethics and Professional Responsibility*, 2d ed (Toronto: Irwin Law, 2006); Gavin MacKenzie, *Lawyers and Ethics: Professional Responsibility and Discipline*, loose-leaf (consulted on September 12, 2011), (Toronto: Carswell, 1993); Robin J MacKnight, "Ethics, Standards, and Mural Dyslexia: Who's Writing on the Wall?" (Paper presented at the 1996 Conference of the Canadian Tax Foundation, Montreal, 25-27 November, 1996); TE McDonnell, Glen E Cronkwright, PN Thorsteinsson & Harold Park, "Professional Responsibility and Tax Practice" (Paper presented at the 1976 Conference of the Canadian Tax Foundation, Vancouver, 22-24 November, 1976); Sheldon Silver, "Ethical Considerations in Giving Tax Opinions" (Paper presented at the 1994 Conference of the Canadian Tax Foundation, Vancouver, 21-23 November, 1994); US, Internal Revenue Service, "Regulations Governing Practice before the Internal Revenue Service" (Treasury Department Circular No 230 (Rev 8 2011)) (Washington, DC: US Government Printing Office, 2011); Phillip F Vineberg, "The Ethics of Tax Planning" (1970) 9 West Ont L Rev 119; Bernard Wolfman, James P Holden & Kenneth L Harris, *Standards of Tax Practice*, 6th ed (Arlington: Tax Analysts, 2004) (with 2006 Supplement, "Circular 230 and Shelter-Related Developments").

2.0 KEY PRINCIPLES

2.1 "Voluntary" Self-Assessment

2.1.1 In the leading tax case of *R. v. Jarvis*,[11] the Supreme Court of Canada described our "voluntary" self-assessing system:

> 50 While voluntary compliance and self-assessment comprise the essence of the ITA's regulatory structure, the tax system is equipped with "persuasive inducements to encourage taxpayers to disclose their income": Krishna, *supra*, at p. 767. In this connection, Krishna writes at p. 772, the "system is 'voluntary' only in the sense that a taxpayer must file income tax returns without being called upon to do so by the Minister". For example, in promotion of the scheme's self-reporting aspect, s. 162 of the ITA creates monetary penalties for persons who fail to file their income returns. Likewise, to encourage care and accuracy in the self-assessment task, s. 163 of the Act sets up penalties of the same sort for persons who repeatedly fail to report required amounts, or who are complicit or grossly negligent in the making of false statements or omissions.[12] (our emphasis)

2.1.2 The obverse of self-assessment are the broad powers given to the Minister of National Revenue (the "Minister") to supervise and inspect a taxpayer's returns and related information. As the Supreme Court in *Jarvis* stated:

> 51 It follows from the tax scheme's basic self-assessment and self-reporting characteristics that the success of its administration depends primarily upon taxpayer forthrightness. As Cory J. stated in *Knox Contracting*, *supra*, at p. 350: "The entire system of levying and collecting income tax is dependent upon the integrity of the taxpayer in reporting and assessing income. If the system is to work, the returns must be honestly completed." It is therefore not surprising that the Act exhibits a concern to limit the possibility that a taxpayer may attempt "to take advantage of the self-reporting system in order to avoid paying his or her full share of the tax burden by violating the rules set forth in the Act" (*McKinlay Transport*, *supra*, at p. 637). The nature of the tax collection scheme, however, creates an obstacle in this regard:
>
> > Often it will be impossible to determine from the face of the return whether any impropriety has occurred in its preparation. A spot check or a system of random monitoring may be the only way in which the integrity of the tax system may be maintained.
> >
> > (*McKinlay Transport*, *supra*, at p. 648)
>
> Accordingly, "the Minister of National Revenue must be given broad powers in supervising this regulatory scheme to audit taxpayers' returns and inspect all records which may be relevant to the preparation of these returns" (*ibid*).[13]

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[11] 2002 SCC 73 at paras 50-51, [2002] 3 SCR 757 [*Jarvis* cited to SCC].

[12] *Ibid* at para 50, quoting Vern Krishna, *The Fundamentals of Canadian Income Tax*, 6th ed (Scarborough, Ont: Carswell, 2000).

[13] *Ibid* at para 51, quoting *Knox Contracting Ltd v Canada*, [1990] 2 SCR 338 at 350, *R v McKinlay Transport Ltd*, [1990] 1 SCR 627 at 637, 648.

2.1.3 Under the ITA's system of self-assessment and ministerial supervision, taxpayers have a low expectation of privacy *vis-à-vis* the Minister regarding tax related matters.[14]

2.2 The Nature of Tax Penalties

2.2.1 The ITA's penal provisions are designed to ensure compliance by punishing non-compliance with the ITA's self-assessing provisions. The Supreme Court in *Jarvis* described the nature of the ITA's penal provisions as follows:

> 55 To be effective, self-enforcing regulatory schemes require not only resort to adequate investigation, but also the existence of effective penalties: *Thomson Newspapers*, *supra*, at p. 528; *R. v. Wholesale Travel Group Inc.*, [1991] 3 S.C.R. 154 (S.C.C.), at p. 250, *per* Cory J.; *Comité paritaire de l'industrie de la chemise c. Sélection Milton*, [1994] 2 S.C.R. 406 (S.C.C.), at p. 421, *per* La Forest J. In the ITA context, see *Hydro-Québec*, *supra*, at para. 46, and *Knox Contracting*, *supra*, at p. 355. To this end, s. 238(1) sets out a summary conviction offence that is triggered by non-compliance with the filing requirements or with other of the Act's provisions -- including ss. 231.1(1) and 231.2(1), and the documentary retention rules imposed by s. 230(1). Section 238's purpose is inherently pragmatic or instrumental: the offence exists "not to penalize criminal conduct but to enforce compliance with the Act" (*R. v. Grimwood*, [1987] 2 S.C.R. 755 (S.C.C.), at p. 756; *McKinlay Transport*, *supra*, at p. 641; *143471 Canada*, *supra*, at p. 378).
>
> 56 Section 239(1) creates a number of additional offences. It speaks of false or deceptive statements, destruction or alteration of documents, false or deceptive documents, wilful evasion of income tax, and conspiracy to engage in prohibited activities. In Cory J.'s words from *Knox Contracting*, *supra*, at pp. 349-50: "Those who do evade the payment of income tax not only cheat the State of what is owing to it, but inevitably increase the burden placed upon the honest taxpayers." As a consequence, the s. 239(1) offences carry rather significant penalties. They may be proceeded on by way of summary conviction or by way of indictment at the election of the Attorney General (s. 239(2)).
>
> 57 As with the s. 238 offence, this Court has recognized the centrality of s. 239 to the income tax *régime*: see Strayer J.A.'s reasons, endorsed on appeal to this Court, in *Del Zotto*, *supra*, at para. 23, where he described s. 239 as being "designed to ensure compliance with the self-reporting requirements of the *Income Tax Act*". Moreover, the presence in the ITA of s. 239 does nothing to alter the regulatory or administrative nature of the inspection and requirement powers, even though s. 239 "relate[s] to conduct that might well be discovered by the[ir] exercise" (*Thomson Newspapers*, *supra*, at p. 516, *per* La Forest J. See also *Comité paritaire*, *supra*, at p. 421). As already mentioned, it is under ss. 239(1)(*a*) and (*d*) that the appellant in the present case was ultimately charged.[15]

2.2.2 In short, the ITA is primarily a regulatory scheme based on self-assessment. Broad supervising powers are given to the Minister to confirm and help ensure compliance. Penalties are provided as further measures to ensure compliance.

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[14] *Ibid* at para 72.

[15] *Ibid* at paras 55-57.

2.3 Right Against Self-Incrimination

2.3.1 The general theory underlying the principle against self-incrimination is that an individual is sovereign[16] and that the individual need not be bothered unless the Crown has established a "case to meet".[17] The individual must not be conscripted in helping the Crown establish the "case to meet".[18]

2.3.2 The right against self-incrimination is reflected in sections 7, 8, 11(c), 13 and 24 of the *Charter*:

> 7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.
>
> 8. Everyone has the right to be secure against unreasonable search or seizure.
>
> …
>
> 11. Any person charged with an offence has the right
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> …
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> (c) not to be compelled to be a witness in proceedings against that person in respect of the offence;
>
> …
>
> 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.
>
> …
>
> 24. (1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.
>
> (2) Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.[19]

2.3.3 The principle against self-incrimination is part of "fundamental justice" as expressed in section 7. Sections 11(c) and 13 are particular aspects of the principle.[20] Sections 7 and 8 interplay where there is compelled document production. Section 24 is designed to ensure that a court may fashion the appropriate remedy.

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16 *R v S (RJ)*, [1995] 1 SCR 451 at paras 80, 81, 83 [*R v S (RJ)*].

17 *Ibid* at paras 83, 89.

18 *Ibid* at paras 89, 90.

19 *Charter*, *supra* note 9 at ss 7, 8, 11(c), 13, 24.

20 *R v S (RJ), supra* note 16 at para 91.

2.3.4 Documentary compulsion may also engage the right against self-incrimination. The protection is much more restrictive than for oral testimony.[21]

2.3.5 The principle against self-incrimination as reflected in the *Charter* generally accords with the common law prior to the *Charter*.[22]

2.3.6 With the foregoing said, the individual[23] may still be required to testify in proceedings other than those in which he or she is or may be charged. An example is found in the Supreme Court of Canada's decision in *British Columbia Securities Commission v. Branch*.[24] In *Branch*, the B.C. Securities Commission was investigating a public company as a result of an auditor's report showing potential financial irregularities. Mr. Branch, an officer of the public company, was subpoenaed to testify and produce documents. The purpose of the investigation was part of regulating the securities industry to "protect the public from unscrupulous trading practices".[25] The purpose of the investigation was not "to obtain incriminating evidence" against Mr. Branch.[26]

2.3.7 Mr. Branch objected on the basis that compelled testimony would violate his section 7 *Charter* rights, in particular, the right against self-incrimination, Mr. Branch also argued that the production of documents would be an "unreasonable" seizure and accordingly would violate his section 8 *Charter* rights.

2.3.8 In the end, Mr. Branch's case was heard by the Supreme Court of Canada. He lost. The Court reasoned that the individual's testimony would be protected under section 13 of the *Charter* from the testimony being used in subsequent criminal proceedings if such were to be brought. This is known as "use immunity". Similarly, information or other evidence obtained as a result of an individual's testimony cannot be used in subsequent criminal proceedings where the individual can show a "plausible connection between the compelled testimony and the evidence sought to be adduced"[27] and the Crown cannot "satisfy the court on a balance of probabilities that the authorities would have discovered"[28] the evidence. In other words, "but for" the compelled testimony or information would the Crown have discovered the evidence?[29] This is known as "derivative use immunity".

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21 *See e.g. British Columbia Securities Commission v Branch*, [1995] 2 SCR 3 at paras 40-48 [*Branch*]; *R v Fitzpatrick*, [1995] 4 SCR 154 at paras 24, 49-53 [*Fitzpatrick*].

22 *Sopinka*, *Evidence, supra* note 2 at para 8.191.

23 Corporations do not enjoy a right against self-incrimination. Corporations are legal creations that do not enjoy liberty. *Branch*, *supra* note 21 at paras 39, 40.

24 *Ibid.*

25 *Ibid* at para 35.

26 *Ibid*.

27 *Ibid* at para 5.

28 *Ibid*.

29 *R v S(R J)*, *supra* note 16 at 562; *Branch*, *supra* note 21 at para 5.

2.3.9 If the predominant purpose of the investigation had been to obtain incriminating evidence against Mr. Branch then Mr. Branch would not have been compelled to testify. Any documents would only have been available by way of a search warrant. The protections are similar to where the predominant purpose of a CRA investigation is for penal liability, such as tax evasion.[30]

2.3.10 Unfortunately for the taxpayer the "use immunity" and "derivative use immunity" protections are not available where statements or documents are obtained as part of a regular audit. For practical purposes, this means that the right against self-incrimination will usually only be available where the predominant purpose of a CRA investigation is for penal liability (or the taxpayer's liberty interest is otherwise at stake).

2.3.11 With respect to information obtained in the context of an audit, the Supreme Court in *Jarvis* in denying possible "use immunity" or "derivative use immunity" stated:

> …It is well known, as Laskin C.J. stated in *Smerchanski, supra*, at p. 32, that "[t]he threat of prosecution underlies every tax return if a false statement is knowingly made in it". It follows that there is nothing preventing auditors from passing to investigators their files containing validly obtained audit materials. That is, there is no principle of use immunity that prevents the investigators, in the exercise of their investigative function, from making use of evidence obtained through the proper exercise of the CCRA's audit function. Nor, in respect of validly obtained audit information, is there any principle of derivative use immunity that would require the trial judge to apply the "but for" test from *S. (R.J.)*, *supra*. If a particular piece of evidence comes to light as a result of the information validly contained in the auditor's file, then investigators may make use of it.[31]

2.3.12 The foregoing passage was in connection with section 8 of the *Charter* and whether the *Charter* protections afforded where there is an unreasonable search or seizure apply to a tax audit undertaken by the CRA. In short, the Court is saying that the exercise of audit powers as part of an audit does not constitute an unreasonable search or seizure. The regulatory nature of the ITA and a taxpayer's low expectation of privacy in connection with relevant tax information underlies the Court's reasoning that the exercise of audit powers as part of a regular audit does not give rise to section 8 protection against an "unreasonable" search or seizure.

2.3.13 Similarly, the Court in denying section 7 *Charter* protections where information is obtained as part of an audit relied to a significant extent on its earlier decision in *R v Fitzpatrick*.[32]

2.3.14 In *Fitzpatrick*, the accused, a fisherman, was charged with overfishing (catching and keeping fish in excess of the accused's assigned quota). The relevant regulations required the accused to keep

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30 *Del Zotto v Canada*, [1997] 3 FC 40, 147 DLR (4th) 457 (FCA) at para 75, Strayer JA, dissenting, rev'd [1999] 1 SCR 3 (adopting reasoning of Strayer JA).

31 *Jarvis*, *supra* note 11 at para 96.

32 *Ibid* at paras 68, 69, citing *Fitzpatrick*, *supra* note 21.

fishing logs. The accused sought to have the fishing logs excluded on the basis that their admission into evidence would violate the accused's right against self-incrimination.

2.3.15 The Court held that a contextual approach must be taken. The Court noted that participation in the fishery was not compelled. Having made the conscious decision to participate in a regulated fishery the accused had to accept the regulations.[33] Moreover, the Court held that there was not an "adversarial relationship" between the accused and the Department of Fisheries. The regulatory scheme was designed to ensure "the continual survival of the fishery and the fair distribution of its profits".[34] Finally, the Court noted that similar to business records, the accused had a "decreased expectation of privacy" with respect to the fishing logs.[35]

2.3.16 To state matters another way, in *Fitzpatrick* and in a regular tax audit, the right against self-incrimination is not violated because the information is regularly or readily available as part of the administrative and regulatory self-reporting scheme of the *Fisheries Act* or the ITA, as the case may be. In this sense, the individual is not conscripted in helping the Crown establish the "case to meet". In *Branch*, "use immunity" and "derivative use immunity" protection would be afforded because the testimony involved state coercion not associated with a self-reporting system.

2.3.17 What constitutes an "adversarial relationship"? In *Jarvis*, the Court observed that during an audit the CRA and the taxpayer are in "opposing positions" but such does not make for an adversarial relationship.[36] Where the CRA is exercising "its investigative function", the Court stated that the CRA and the taxpayer "are in a more traditional adversarial relationship because of the liberty interest that is at stake".[37]

2.3.18 With respect to information obtained in the context of an investigation for penal liability the Court in *Jarvis* stated:

> 96 On the other hand, with respect to s. 7 of the *Charter*, when the predominant purpose of a question or inquiry is the determination of penal liability, the "full panoply" of *Charter* rights are engaged for the taxpayer's protection. There are a number of consequences that flow from this. First, no further statements may be compelled from the taxpayer by way of s. 231.1(1)(*d*) for the purpose of advancing the criminal investigation. Likewise, no written documents may be inspected or examined, except by way of judicial warrant under s. 231.3 of the ITA or s. 487 of the *Criminal Code*, and no documents may be required, from the taxpayer or any third party for the purpose of advancing the criminal investigation. CCRA officials conducting inquiries, the predominant purpose of which is the determination of

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33 *Fitzpatrick, supra* note 21 at para 29.

34 *Ibid* at para 23.

35 *Ibid* at para 49.

36 *Jarvis*, *supra* note 11 at para 84.

37 *Ibid* at para 84.

> penal liability, do not have the benefit of the ss. 231.1(1) and 231.2(1) requirement powers.[38]

2.3.19 How far do *Jarvis* and *Fitzpatrick* go? If an audit is underway and the client is accordingly not eligible to make a voluntary disclosure, does an adversarial relationship exist? The first situation below will tackle these questions?

2.3.20 In *R. v. Jarvis*, the Supreme Court summarized the case's key points regarding the line between a regular audit and a penal investigation:

> 99 By way of summary, the following points emerge:
>
> 1. Although the ITA is a regulatory statute, a distinction can be drawn between the audit and investigative powers that it grants to the Minister.
>
> 2. When, in light of all relevant circumstances, it is apparent that CCRA officials are not engaged in the verification of tax liability, <u>but are engaged in the determination of penal liability under s. 239, the adversarial relationship between the state and the individual exists. As a result, Charter protections are engaged.</u>
>
> 3. When this is the case, investigators must provide the taxpayer with a proper warning. The powers of compulsion in ss. 231.1(1) and 231.2(1) are not available, and search warrants are required in order to further the investigation.[39,40] (Our emphasis)

2.3.21 One of the *Charter* protections is the right against self-incrimination. However, as noted, *Charter* protection usually only exists where there is an adversarial relationship, particularly where an investigation of penal liability is underway.

2.3.22 One of the difficulties tax advisors face is where the advisor suspects an investigation into penal liability is underway. The CRA may be tempted to not warn the taxpayer that an investigation into penal liability is underway as long as possible in the hope of obtaining further incriminating information to cinch the case. Of course, one may not always wish to just phone the CRA and ask: "Are you investigating my client for tax evasion?" If one were to do so: "No, why do you ask?", might be the answer.

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38 *Ibid* at para 96.

39 *Ibid at* para 99.

40 For articles regarding the issue see S Cook and C Sturrock, "When an Audit Becomes a Criminal Investigation" (Paper presented at the 1998 BC Tax Conference of the Canadian Tax Foundation, Vancouver, 23-24 November, 1998); David Stratas, "Crossing the Rubicon: The Supreme Court and Regulatory Investigations"(2002) 6 CR (6th) 74.

2.4 Unjust Enrichment

2.4.1 The legal principles surrounding the doctrine of unjustment enrichment are much more straightforward than those involving the *Charter*. The test in Canada for unjust enrichment was confirmed by the Supreme Court of Canada in *Garland v. Consumers' Gas Co*[41]:

> 30 As a general matter, the test for unjust enrichment is well established in Canada. The cause of action has three elements: (1) an enrichment of the defendant; (2) a corresponding deprivation of the plaintiff; and (3) an absence of juristic reason for the enrichment.[42]

2.4.2 The foregoing is not as straightforward as it may seem. For example, considerable litigation has arisen in connection with the meaning of "juristic reason".[43] That said, it is safe to say that you cannot take advantage of what you know is clearly wrong.

2.4.3 The fifth situation below deals specifically with unjust enrichment.

3.0 PROFESSIONAL ETHICS

3.1 Lawyers

Generally

3.1.1 A lawyer's conduct is governed by both the lawyer's regulating law society and the courts. As the Supreme Court of Canada recently described in *The Queen v. Cunningham*[44]:

> [18] Superior courts possess inherent jurisdiction to ensure they can function as courts of law and fulfil their mandate to administer justice (see I. H. Jacob, "The Inherent Jurisdiction of the Court" (1970), 23 *Curr. Legal Probs*. 23, at pp. 27-28). Inherent jurisdiction includes the authority to control the process of the court, prevent abuses of process, and ensure the machinery of the court functions in an orderly and effective manner. As counsel are key actors in the administration of justice, the court has authority to exercise some control over counsel when necessary to protect its process. In *MacDonald Estate v. Martin*, [1990] 3 S.C.R. 1235, this Court confirmed that inherent jurisdiction includes the authority to remove counsel from a case when required to ensure a fair trial:
>
> > The courts, which have inherent jurisdiction to remove from the record solicitors who have a conflict of interest, are not bound to apply a code of ethics. Their jurisdiction stems from the fact that lawyers are officers of the court and their conduct in legal proceedings which may affect the administration of justice is subject to this supervisory jurisdiction. [p. 1245]
>
> It would seem to follow that just as the court, in the exercise of its inherent jurisdiction, may remove counsel from the record, it also may refuse to grant counsel's application for withdrawal.

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41 2004 SCC 25, [2004] 1 SCR 629 [*Garland* cited to SCC].

42 *Ibid* at para 30.

43 *Kerr v Baranow*, 2011 SCC 10 at paras 40-45, [2011] 1 SCR 269.

44 2010 SCC 10, [2010] 1 SCR 331.

> [19] Likewise in the case of statutory courts, the authority to control the court's process and oversee the conduct of counsel is necessarily implied in the grant of power to function as a court of law. This Court has affirmed that courts can apply a "doctrine of jurisdiction by necessary implication" when determining the powers of a statutory tribunal:
>
> > . . . the powers conferred by an enabling statute are construed to include not only those expressly granted but also, by implication, all powers which are practically necessary for the accomplishment of the object intended to be secured by the statutory regime . . . .
> >
> > (*ATCO Gas and Pipelines Ltd. v. Alberta (Energy and Utilities Board)*, 2006 SCC 4, [2006] 1 S.C.R. 140, at para. 51)
>
> Although Bastarache J. was referring to an administrative tribunal, the same rule of jurisdiction, by necessary implication, would apply to statutory courts.
>
> …
>
> [35] I am also unable to accept the argument of Ms. Cunningham and the interveners that oversight of lawyer withdrawal falls exclusively to the law societies. The law societies play an essential role in disciplining lawyers for unprofessional conduct; however, the purpose of the court overseeing withdrawal is not disciplinary. The court's authority is *preventative* — to protect the administration of justice and ensure trial fairness. The disciplinary role of the law society is *reactive*. Both roles are necessary to ensure effective regulation of the profession and protect the process of the court.[45]

3.1.2 Under the *Legal Profession Act*[46] the Law Society of British Columbia is responsible for regulating the practice of law in British Columbia including the conduct and discipline of lawyers. The legal profession in British Columbia is a self-regulating profession.

3.1.3 The Law Society publishes the *Professional Conduct Handbook*[47] (the "Handbook"), which sets forth a variety of ethical and professional duties. The Handbook is "effectively binding on lawyers in British Columbia"[48] because the Handbook has been adopted by the Law Society and is used by the Law Society in disciplinary matters.

3.1.4 Some of the key ethical duties set forth in the Handbook and reflected in the jurisprudence are described below.

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45 *Ibid* at paras 18-19, 35.

46 *Legal Profession Act*, SBC 1998, c 9.

47 The Law Society of British Columbia, *Professional Conduct Handbook*, Vancouver: Law Society of British Columbia, June 2011, ch 1, 5, 6, online: Law Society of B.C., <http://www.lawsociety.bc.ca/page.cfm?cid=383&t=Professional-Conduct-Manual> [Law Society of British Columbia*, Handbook*].

48 Jeffrey G. Hoskins, "Professional Responsibility" in Morag MacLean, Margrett George & Gurprit Gill, eds, *Professional Legal Training Course 2011 - Practice Material* (Vancouver: The Law Society of British Columbia, 2011) at s 1.01(1), online: Law Society of B.C., <http://www.lawsociety.bc.ca/docs/becoming/material/ProfessionalResponsibility.pdf>.

To the Client

3.1.5 Chapter 1 Rule 3(5), Chapter 5 Rule 1, and Chapter 6 Rule 1 of Handbook provide:

Chapter 1

3(5) A lawyer should endeavour by all fair and honourable means to obtain for a client the benefit of any and every remedy and defence which is authorized by law. The lawyer must, however, steadfastly bear in mind that this great trust is to be performed within and not without the bounds of the law. The office of the lawyer does not permit, much less demand, for any client, violation of law or any manner of fraud or chicanery. No client has a right to demand that the lawyer be illiberal or do anything repugnant to the lawyer's own sense of honour and propriety.

Chapter 5

A lawyer shall hold in strict confidence all information concerning the business and affairs of the client acquired in the course of the professional relationship, regardless of the nature or source of the information or of the fact that others may share the knowledge, and shall not divulge any such information unless disclosure is expressly or impliedly authorized by the client, or is required by law or by a court.

Chapter 6

As a general principle, a lawyer has a duty to give undivided loyalty to every client.

3.1.6 The Supreme Court of Canada in *Strother v. 3464920 Canada Inc.*[49] described the duty:

A fundamental duty of a lawyer is to act in the best interest of his or her client to the exclusion of all other adverse interests, except those duly disclosed by the lawyer and willingly accepted by the client.[50]

3.1.7 Lord Brougham in the Trial of Queen Caroline famously described the duty:

[A]n advocate, in the discharge of his duty, knows but one person in all the world, and that person is his client. To save that client by all means and expedients, and at all hazards and costs to other persons, and, amongst them, to himself, is his first duty; and in performing this duty he must not regard the alarm, the torments, the destruction which he may bring upon others. Separating the duty of a patriot from that of an advocate, he must go on reckless of the consequences, though it should be his unhappy fate to involve his country in confusion. [51]

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[49] 2007 SCC 24, [2007] 2 SCR 177.

[50] *Ibid* at para 1.

[51] *R. v. Neil*, 2002 SCC 70 at para 12, [2002] 2 SCR 631, quoting from J Nightingale, *Trial of Queen Caroline (1821)*, vol 1 (np: no publisher [nd]) part 1 at 8.

To the State, the Legal Profession, and Oneself

3.1.8 Chapter 1 Rule 1(1), Chapter 1 Rule 4(1), Chapter 1 Rule 5(1), Chapter 4 Rule 6 and Chapter 8 Rule 1(6) of the Handbook provide:

> **Chapter 1**
>
> 1(1) A lawyer owes a duty to the state, to maintain its integrity and its law. A lawyer should not aid, counsel, or assist any person to act in any way contrary to the law.
>
> 4(1) A lawyer's conduct toward other lawyers should be characterized by courtesy and good faith. …
>
> 5(1) A lawyer should assist in maintaining the honour and integrity of the legal profession, …
>
> **Chapter 4**
>
> 6 A lawyer must not engage in any activity that the lawyer knows or ought to know assists in or encourages any dishonesty, crime or fraud.
>
> **Chapter 8**
>
> 1.(b) A lawyer must not:
>
> …
>
> (b) knowingly assist the client to do anything or acquiesce in the client doing anything dishonest or dishonourable,

3.1.9 The Supreme Court of Canada in *Hill v. Church of Scientology of Toronto*[52] stated:

> In the present case, consideration must be given to the particular significance reputation has for a lawyer. The reputation of a lawyer is of paramount importance to clients, to other members of the profession and to the judiciary. A lawyer's practice is founded and maintained upon the basis of a good reputation for professional integrity and trustworthiness. It is the cornerstone of a lawyer's professional life. Even if endowed with outstanding talent and indefatigable diligence, a lawyer cannot survive without a good reputation. In his essay entitled "The Lawyer's Duty to Himself and the Code of Professional Conduct" (1993), 27 *L. Soc. Gaz.* 119, David Hawreluk described the importance of a reputation for integrity. At page 121, he quoted Lord Birkett on the subject:
>
> > The advocate has a duty to his client, a duty to the Court, and a duty to the State; but he has above all a duty to himself and he shall be, as far as lies in his power, a man of integrity. No profession calls for higher standards of honour and uprightness, and no profession, perhaps, offers greater temptations to forsake them; but whatever gifts an advocate may possess, be they never so dazzling, without the supreme qualification of an inner integrity he will fall short of the highest…[53]
>
> (our emphasis)

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52 [1995] 2 SCR 1130.

53 *Ibid* at para 118.

To the Courts and Tribunals

3.1.10 A lawyer must conduct him or herself with candour and not mislead. Chapter 1 Rule 2(1) provides:

> **Chapter 1**
>
> 2(1) A lawyer's conduct should at all times be characterized by candour and fairness. The lawyer should maintain toward a court of tribunal a courteous and respectful attitude and insist on similar conduct on the part of clients, at the same time discharging professional duties to clients resolutely and with self-respecting independence.

3.1.11 G. Mackenzie in *Lawyers and Ethics: Professional Responsibility and Discipline*[54] describes matters as follows:

> In argument, lawyers must not knowingly misstate the contents of documents, the testimony of witnesses, the substance of arguments, or the provisions of legislation. They must not knowingly assert something for which there is no reasonable basis in evidence. Lawyers must inform the court or tribunal of authorities that bear on the issues, whether or not the authorities advance the position for which the lawyer contends.[55]

3.1.12 As W.F. Bowker describes in "Legal Ethics"[56]:

> In litigation generally the canons say that the lawyer's conduct should be characterized by candour and fairness, courtesy and respect to the court and courtesy to the witness. The obligation not to mislead the court was well put by the late Chief Justice Anglin in 1909.
>
> > The court has the right to rely upon him to assist it in ascertaining the truth. He should be most careful to state with strict accuracy the contents of a paper, the evidence of a witness, the admissions or the argument of his opponent. Knowingly to cite an overruled case or to refer to a repealed statute as still in force, would be unpardonable and counsel cannot be too cautious not to make such mistakes unwittingly.[57]

Crown Counsel

3.1.13 Chapter 1 Rule 1(2) of the Handbook provides:

> **Chapter 1**
>
> 1(2) When engaged as a Crown prosecutor, a lawyer's primary duty is not to seek a conviction but to see that justice is done; to that end the lawyer should make timely disclosure to the defence of all facts and known witnesses whether tending to show guilt or innocence, or that would affect the punishment of the accused.

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54 MacKenzie, *supra* note 10.

55 *Ibid* ch 4 at s 4.16.

56 Bowker, *supra* note 10.

57 *Ibid* at 73.

3.1.14 The jurisprudence suggests that Crown tax counsel, like all Crown counsel, has a special duty to be fair. Crown tax counsel's duty is not to win or lose; it is to be just. The duty does not vary simply because Crown counsel may be handling a civil tax assessment as opposed to prosecuting a case of tax evasion.

3.1.15 In *Rainforth v. The Queen*, [58] Justice Woods in commenting on whether the Crown should have had the onus to prove a particular aspect of the case based on the Crown's pleadings stated:

> 57 Finally, I wish to comment that the onus issue in *Anchor Pointe* was not raised by either counsel, but was first mentioned by me after both counsel had delivered opening statements.
>
> 58 Mr. Rainforth's counsel, who is not a tax specialist, was not aware of the *Anchor Pointe* decision and he had assumed that Mr. Rainforth had the burden to establish all relevant facts. Counsel for the Crown were certainly aware of the decision, as they are co-counsel in that case.
>
> 59 I am quite troubled that the Crown did not bring this decision to my attention at the commencement of the hearing. Counsel is presumably aware of the ethical duty prescribed by provincial law societies to advise the Court of adverse judicial decisions. Counsel suggested that this is not applicable in this instance because the onus issue had not been raised by the appellant. I do not agree. This is not the type of issue that engages the Court only if raised by one of the parties.
>
> 60 For the Crown to sweep this issue under the rug and pretend that the onus was entirely on the appellant, contrary to *Anchor Pointe*, was an inappropriate position for the Crown to take, in my view.
>
> 61 I wish to refer to a recent Supreme Court of Canada decision which addressed the issue of standards of conduct by Crown prosecutors. In *R. v. Trochym*, 2007 SCC 6 (S.C.C.), the Court cited the following statement by Rand J. in *R. v. Boucher* (1954), [1955] S.C.R. 16 (S.C.C.), at pp. 23-24:
>
> > It cannot be over-emphasized that the purpose of a criminal prosecution is not to obtain a conviction, it is to lay before a jury what the Crown considers to be credible evidence relevant to what is alleged to be a crime. Counsel have a duty to see that all available legal proof of the facts is presented: it should be done firmly and pressed to its legitimate strength <u>but it must also be done fairly</u>. The role of prosecutor excludes any notion of winning or losing; his function is a matter of public duty than which in civil life there can be none charged with greater personal responsibility. It is to be efficiently performed with an ingrained sense of the dignity, the seriousness and the justness of judicial proceedings.
>
> 62 <u>Although the above comment was made in the context of criminal proceedings, in my view it should also apply to Crown counsel who appear in this Court</u>.[59]
>
> (our emphasis)

[58] 2007 TCC 132, 2007 DTC 523 [*Rainforth* cited to TCC].

[59] *Ibid* at paras 57-62.

3.1.16 This statement was cited with approval in *Faibish v. The Queen*,[60] in which Justice Hershfield emphasized that:

> 31 The role of a Justice lawyer is not to win every appeal. The role of a Justice lawyer is not to prosecute his client's case in a zealous manner. The role of a Justice lawyer, particularly in a self-represented Appellant case and, again, particularly in an Informal Procedure matter, is to assist Judges in determining the correctness of an assessment.[61]

3.2 Accountants

3.2.1 The rules of professional conduct for Chartered Accountants (CAs) and Certified General Accountants (CGAs) focus on serving the public interest. The preamble of the *Rules of Professional Conduct* for CAs (the "**CA Rules**") states:

> **Fundamental principles governing conduct**
>
> The rules of professional conduct, as a whole, flow from the special obligations embraced by the chartered accountant. The reliance of the public, generally, and the business community, in particular, on sound and fair reporting and competent advice on business affairs – and the economic importance of that reporting and advice – impose these special obligations on the profession. They also establish, firmly, the profession's social usefulness.
>
> To protect the public and to maintain the reputation of the profession, the rules apply, as appropriate, to members of the profession, students, and licensed firms of Chartered Accountants.[62]

The preamble to the *Code of Ethical Principles and Rules of Conduct* for CGAs (the "**CGA Rules**") states:

- Certified General Accountants are committed to the public interest. Normally, acting in the public interest is achieved by acting in the interest of one's client or employer. However, whenever there is a conflict between these interests, the professional's first obligation is to the public at large. Acting appropriately in such situations may require the courage of one's convictions. [63]

3.2.2 Both the Institute of Chartered Accountants and the Association of Certified General Accountants insist on straightforwardness and candour. The CA Rules provide:

> ***Integrity and Due Care***
>
> *Members perform professional services with integrity and due care.*

---

60 2008 TCC 241, 2008 DTC 3554 [*Faibish* cited to TCC].

61 *Ibid* at para 31, citing *Rainforth*, *supra* note 59 at paras 61, 62, Woods J.

62 Chartered Accountants of British Columbia*, Rules of Professional Conduct*, Vancouver: CABC, April 2011, online: Chartered Accountants of B.C. <http://www.ica.bc.ca/pdf/mh_rules_apr2011.pdf > [Chartered Accountants of British Columbia, *Rules*].

63 Certified General Accountants Association of British Columbia, *Code of Ethical Principles and Rules of Conduct,* Vancouver: CGABC December 2010, [Certified General Accountants Association of British Columbia, *Ethical Principles*].

> Members are expected to be straightforward, honest and fair dealing in all professional relationships. They are also expected to act diligently and in accordance with applicable technical and professional standards when providing professional services. Diligence includes the responsibility to act, in respect of an engagement, carefully, thoroughly, and on a timely basis. Members are required to ensure that those performing professional services under their authority have adequate training and supervision.

The CGA Rules provide:

> **Ethical Principles**
>
> **1. Responsibilities to Society**
>
> Members have a fundamental responsibility to safeguard and advance the interests of society. This implies acting with trustworthiness, integrity and objectivity. This responsibility extends beyond a member's own behaviour to the behaviour of colleagues and to the standards of the Association and the profession.
>
> **4. Deceptive Information**
>
> Members shall not be associated with information which the member knows, or should know, to be false or misleading, whether by statement or omission.[64]

4.0 SIX ILLUSTRATIVE SITUATIONS

Situation #1

Facts:

(a) Client has underreported income for prior years.

(b) Client is under audit.

(c) Voluntary disclosure conditions cannot be met.

(d) Client has income for the past year from the same source as the underreported income for prior years and a return is due to be filed.

Questions:

(a) Can one advise the client not to file on the basis of self-incrimination?

(b) If the client files, can the CRA use the current filing as evidence of earlier evasion?

(c) Is there a way to make the current filing so that it will not or can not be used as evidence?

---

[64] Certified General Accountants Association of British Columbia, *Ethical Principles*, *supra* note 63 at 8.

(d) If the client is required to file, what are the tax advisor's professional obligations if the client refuses to follow the tax advisor's advice?

Answer

Can one advise the client not to file on the basis of self-incrimination?[65]

Although the right against self-incrimination is an aspect of various sections of the *Charter*, its basic foundation is contained in section 7. That right is a principle of fundamental justice.

> 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.[66]

It should be noted that section 7 describes rights which apply to individuals rather than corporations.

The companion cases of *Jarvis*[67] and *Ling*[68] are authority for the proposition that, in the tax context, there is no principle of use or derivative use immunity that prevents a CRA investigator from using evidence obtained in the course of a valid audit function. However, if the predominant purpose of the inquiry is penal in nature the liberty interest of the taxpayer is at stake and the "full panoply"[69] of *Charter* rights are engaged.

Situation 1 assumes a civil audit as opposed to a criminal tax investigation and consequently the current return would have to disclose income from a source which was not reported in prior years. Based on *Jarvis* and *Ling* there would likely be no use or derivative use immunity although those cases did not consider this issue in the context of the filing of a current return which might provide evidence in relation to a prior year. However, it might be possible to provide information that is both accurate in the sense of reporting the amount of income but with only essential particulars.[70] Of course, the taxpayer would be required to pay the full amount of tax owing.

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65 The type of situation described in Situation 1 has been considered in the U.S., by reference to The Bill of Rights, the Fifth Amendment. See Frederic G Corneel, "Guidelines to Tax Practice Second" (1989-1990) 43:2 Tax Law 297; Scott D Michel*, "*Advising a Client with Secret Offshore Accounts – Current Filing and Reporting Problems", *Journal of Taxation* (September 1999) 158; Thomson West, ed*, "*White Collar Crime*"* (2004) 19:3 Andrews Litigation Reporter; and Kathryn Keneally, "Taking the Fifth on a Tax Return" (2002-2003) 4:1 Tax Prac & Proc 11.

66 *Charter*, *supra* note 9 at s 7.

67 *Jarvis*, *supra* note 11.

68 2002 SCC 74, [2002] 3 SCR 814.

69 *Jarvis*, *supra* note 11 at para 96.

70 Subsection 150(1) requires a return with prescribed information. The definition of "prescribed" in subsection 248(1) means the "information to be given on a form".

Counsel should advise the client as to the law and the consequences of violating the law. Counsel must advise the client that the ITA requires that a tax return be filed on a timely basis. Failure to do so would result in a civil late filing penalty and possibly the laying of a charge for the commission of an offence under subsection 238(1) of the ITA. Counsel may also advise the client that a voluntary disclosure application will not be accepted if there is current "enforcement action". If the audit is concluded with or without the issuance of a notice of reassessment the client may then make a voluntary disclosure application. The lawyer's duty is to advise the client as to the law and the consequences arising from a violation of the law. The decision as to whether to file on a timely basis or to delay filing in the hope and expectation of making a voluntary disclosure application is the client's.

Divergent views exist as to whether counsel may continue to act if the client decides not to file in the hope and expectation that the current audit for an earlier taxation year may come to an end such that he or she will be able to make a voluntary disclosure. Gordon's view is that, in particular, Chapter 8, Rule 1(b) of the Handbook would require tax counsel to resign where tax counsel has been acting in connection with the current audit.

Chapter 8, Rule 1(b) reads:

> A lawyer must not:
>
> (b) knowingly assist the client to do anything or acquiesce in the client doing anything dishonest or dishonourable.

In Gordon's view, if counsel were to continue to act, counsel would be acquiescing in the client doing something dishonourable. The withholding of statutorily compelled information is dishonourable, if not dishonest. By continuing to act for the client counsel would be acquiescing to the withholding of statutorily compelled information (information compelled by the ITA offence of section 238).

Gordon finds further support for his position in the Preamble of the Handbook and Chapter 1, Rule 1(1), Chapter 1, Rule 3(5), and Chapter 4, Rule 6 of the Handbook.

In Gordon's view, tax counsel's more general ongoing representation distinguishes the described tax situation from a typical criminal situation because tax counsel in acting in connection with the current audit is implicitly representing to the CRA that tax counsel is not acquiescing in the client withholding relevant or potentially relevant statutorily compelled information in relation to the current audit.

Craig's view is that tax counsel does not need to resign if the client decides not to file on a timely basis. Craig's view is that the client intends that a tax return be filed, albeit late. Counsel advises the client on the law and the decision is made by the client; see *R. v. Bartle* (S.C.C.).[71] Section 238 is rarely, if ever, used in relation to a simple late filing of a tax return, although there may be a regulatory

[71] [1994] 3 SCR 173.

late filing penalty. The intention of the client is to comply with the law by refiling so as to correct a prior year's return and this is not "dishonest" or "dishonourable" on the part of counsel.

In any event, an obvious problem in these situations involving an ongoing CRA inquiry is that one simply does not know whether the CRA inquiry is a civil audit or predominantly a criminal investigation. The advisor or the client could ask the CRA auditor about the nature of the inquiry. If the advice given is that the inquiry is a civil audit but at a later date it should turn out that that advice was not correct and that, in fact, the inquiry was predominantly penal in nature, any evidence that might ultimately be considered to be illegally obtained may be ruled pursuant to *Charter* subsection 24(2) to be inadmissible in a subsequent criminal prosecution.

Jarvis and *Ling* are, of course, authority for the proposition that civil audit tools such as section 231.1 (inspection and audit powers) and section 231.2 (requirement letters) may not be used in the course of a criminal tax investigation. In *M.N.R. v. Ellingson*[72] the Federal Court of Appeal applied *Jarvis* and allowed the Crown's appeal and, contrary to the Court below,[73] concluded that the dominant purpose for issuing the requirement to file returns and asset and liability statements was to conduct an audit despite the fact that there was significant evidence of criminal involvement. The Court below noted that the Crown agreed with the taxpayer that if a penal liability investigation was underway, based on the authority of *Jarvis*, the auditor had acted beyond his jurisdiction in issuing the requirement.

The statutory obligation to file a tax return is not like a requirement under section 231.2 or other audit or investigative powers. The obligation to file is regulatory in nature. The obligation to file cannot be said to be directed at any particular taxpayer. In other words, assuming the taxpayer is otherwise the subject of a penal investigation, the predominant purpose of the statutory obligation to file a tax return is not to gather evidence as part of the penal investigation (although this may be the result). The jurisprudence in this area has not developed fully but is briefly discussed below.

If the client files, can the CRA use the current filing as evidence of earlier evasion?

Once again, if the inquiry by the CRA is, in fact, a civil audit or inspection of books and records and a current return is filed which shows income from a source that was not reported in prior years that return could likely be used as evidence against the taxpayer in subsequent civil or criminal court proceedings. Even if the CRA is conducting a criminal tax investigation, as noted above, a taxpayer is still obliged to file a return. However, the pre-*Jarvis* decision of the B.C. Court of Appeal in *R. v. Blair*[74] seems to be premised on the assumption that if a criminal investigation was underway that might constitute a

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72 2006 FCA 202, [2006] 4 CTC 103.

73 *Ellingson v MNR*, 2005 FC 1068, [2005] 4 CTC 145.

74 2001 DTC 5587.

defence to a charge under section 238 of the ITA of failing to file. Also in *R. v. Klundert*[75] the 1993 to 1997 taxation years were the subject of a separate prosecution. The taxpayer was later prosecuted with respect to his 2000 to 2005 taxation years. The accused argued that he could not be found guilty of making false or deceptive statements in his 2000 to 2005 returns (he filed incomplete returns) because of his fear of self-incrimination. The Court said:

> … I may have found more merit in it if we were retrying the original prosecution. That is to say, if Dr. Klundert had completed the T1 returns properly with all numeric values for the years 2000 through to 2005 and the Crown moved to rely on those entries during that prosecution for the taxation years 1993 through to 1997, Dr. Klundert would to my mind then be in a better position to argue that the information in those forms ought to be excluded as the completion of the T1 returns were compelled by statute and therefore should not be admissible as evidence in that proceeding.

Is there a way to make the current filing so that it will not or can not be used as evidence?

Again, if the CRA inquiry is of a civil audit nature there is nothing, subject to the comments mentioned above, that can be done such that the current return may not be used by the Crown as evidence (other than possibly in the type of situation described below where CRA has stated it will prosecute). If the CRA inquiry is a criminal investigation, the client could claim *Charter* protection. Depending on the nature of the investigation and the particular information, such a claim may facilitate future *Charter* relief. There is, as mentioned above, little case law specifically dealing with this type of situation.

Another approach would be to make a court application to have the tax return filed but quarantined. That is, the current CRA investigators would not be allowed access to the return. Judicial authority exists for courts to develop approaches and remedies to ensure *Charter* protection.[76]

In describing the U.S. position[77] with respect to invoking the Fifth Amendment[78] in relation to a tax return Keneally observes:

> First, the difficulties that a taxpayer may face in providing some of the information called for by a tax return will not excuse the requirement that a return must be filed. The Fifth Amendment's protection against self-incrimination will not protect a taxpayer from a criminal charge of wilfully failing to file a tax return. Second, if there are errors on prior returns, neither the practitioner nor the taxpayer may wilfully continue those errors on current and future returns. The Internal Revenue Code ("the Code") requires that a return be filed and that it be truthful and accurate. …

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75 2011 ONCJ 45, 92 W.C.B. (2d) 517.

76 *Kourtessis v. M.N.R.* [1993] 2 S.C.R. 53, para 57.

77 Keneally relies in part on the decision of the U.S. Supreme Court in *Gardner v US*, 424 US 648, 96 SCt 1178. Keneally, *supra* note 65.

78 For our purposes, the Fifth Amendment reads "[n]o person… shall be compelled in any criminal case to be a witness against himself."

> Filing a tax return, which is signed under the penalties of perjury, is, the equivalent of giving testimony. …
>
> If a taxpayer wants to invoke the Fifth Amendment privilege instead of providing particular information in a tax return the taxpayer must state on his or her return that the Fifth Amendment is being asserted. …
>
> Additionally, the act of asserting the Fifth Amendment on a tax return risks heightened scrutiny of the return and, thus, should be weighed carefully.[79]

Our *Charter* provisions are different from the U.S. Fifth Amendment. After a thorough analysis and in the appropriate case, the U.S. approach may be viable. For example, if the CRA had publicly announced that it planned to prosecute any taxpayer with unreported income from a particular geographic source, a taxpayer with unreported income from the particular geographic source may, with legal advice, wish to review the U.S. approach.

If the client is required to file, what are the tax advisor's professional obligations if the client refuses to follow the tax advisor's advice?

This question is based on the assumption that the client wishes to file a false current return. The codes of professional conduct governing lawyers, CAs and CGAs would all require that the advisor resign from the engagement. The lawyer or the accountant can advise the client on how he or she should file but how the client ultimately files is his or her own call. All of the codes of professional conduct in Canada governing the conduct of lawyers provide that when advising a client a lawyer must never knowingly assist in or encourage any dishonesty, fraud, crime or illegal conduct or instruct a client on how to violate the law.

<u>Situation #2</u>

Facts:

(a) Client has underreported income.

(b) Client receives a requirement letter under section 231.2 of the ITA requesting information that will show the underreported income.

Questions:

(a) What is the appropriate response?

(b) What are the tax advisor's professional obligations?

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[79] Keneally, *supra* note 65 at 11-12.

Answer

A lawyer has a duty of undivided loyalty to one's client. As noted above, a lawyer also has a duty to the courts, to the State and to himself or herself. An essential element of all of these duties is of course respect for the law and the administration of justice. Accordingly, unless the requirement is quashed on a timely basis, the requested information should be provided. Neither the right against self-incrimination nor any other right (*Charter* or common law) would allow one not to produce the requested information.

The failing to comply with a valid requirement is an offence under section 238 of the ITA punishable by a fine[80] or a fine and imprisonment.[81]

A requirement is not a court order. One must comply with any court order, even if it is subsequently determined that the order should not have been made.[82] Accordingly, if counsel is certain that a purported requirement is not valid, counsel may advise that the requirement may be ignored rather than incurring the time, trouble and expense of a court application.[83]

A less risky approach is to contact Crown counsel and insist that the purported requirement be withdrawn. If Crown counsel refuses, one may write a "with prejudice" letter stating the reason(s) why the purported requirement is invalid and that if the purported requirement is not withdrawn by a specified time, the "with prejudice" letter will be used in future proceedings quashing the requirement (including a submission for costs on the highest basis) and any future claim for damages.[84]

Various grounds may exist by which a requirement may be challenged. For example, one may challenge a requirement on the basis that it is not for the "administration and enforcement" of the ITA. Where the predominant purpose of the investigation underlying the requirement is penal then the requirement may be quashed. In *Jarvis* the Supreme Court of Canada stated specifically that "the words 'administration and enforcement', as they are used in the context of s. 231.2(1), do not extend to the investigation of ITA offences".[85]

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80 Not less than $1,000 and not greater than $25,000.

81 Not more than 12 months imprisonment.

82 See e.g. *Poje v BC(AG)*, [1953] 1 SCR 516 at 517-18 (order of superior court may not be "treated as in any sense a nullity"); Jeffrey Miller, *The Law of Contempt in Canada* (Scarborough, Ont: Carswell, 1997) at 95 ("It is no defence that the Court order is incorrect, null, unconstitutional, or under appeal, and thus 'ineffective.' The order stands and commands respect in all of its aspects . . . .").

83 If a compliance order is subsequently issued under section 231.7 the order must be obeyed unless its execution is suspended by an appellate court under subsection 231.7(5) or is set aside on appeal. See Miller, *supra* note 81.

84 For an excellent review of the law involving suits against the Crown see chapter seven of Karen Horsman & Gareth Morley, *Government Liability: Law and Practice*, loose-leaf (consulted on 12 September 2011), (Aurora, Ont: Canada Law Book, 2007).

85 See *Jarvis*, *supra* note 11 at para 97.

An example of a successful challenge to a requirement on the basis that the predominant purpose was an investigation of an ITA offence is found in *Stanfield v. the Queen.*[86]

A requirement issued to assist a police investigation into criminal activities is not for the administration and enforcement of the ITA.[87]

A requirement issued merely because no tax return had been filed and which is not part of a genuine and serious inquiry into a taxpayer's tax liability is not considered to be for the purposes of the administration and enforcement of the ITA.[88]

The Courts view requirements seriously because failure to comply may engage, in the words of the Court in *Murphy*, "potential criminal liability". This is a reference to section 238 of the ITA. In *Murphy*, the Court after quashing the requirements awarded the Applicants $200,000 in fees plus disbursements.[89]

Typically, a requirement letter perfunctorily states that it is issued "for purposes related to the administration and enforcement" of the ITA. No further details are provided.[90]

As C. Campbell in *Administration of Income Tax*[91] states:

> These provisions [requirements under section 231.2 of the ITA] are frequently resorted to by the CRA when investigating tax evasion or tax avoidance schemes and allows the auditor access to the records of all parties involved in the transactions, including the lawyer (subject to solicitor-client privilege), the auditor, the banker, the tax planner and other third parties.[92]

Within the CRA administrative context Campbell describes, it is usually advisable to confirm the purpose(s) of the requirement. Where the requirement is demanding information with respect to the taxpayer's intent or *mens rea*, counsel should be particularly suspicious.[93]

If the CRA confirms that the requirement is part of a regular audit when in fact it was not this will strengthen a subsequent argument for exclusion under subsection 24(2) of the *Charter*.

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86 2005 FC 1010, [2005] 4 CTC 47.

87 *Murphy v The Queen*, 2009 FC 1226 [*Murphy*].

88 *N M Skalbania Ltd v The Queen* (1989), 89 DTC 5495 (BC CoCt).

89 *Murphy*, *supra* note 86.

90 In June 2010, the CRA released a policy statement, dated May 31, 2010, entitled "Acquiring Information from Taxpayers, Registrants and Third Parties", which is available on the CRA web site (see http://www.cra-arc.gc.ca/tx/tchncl/cqrngnfrmn/menu-eng.html). This publication states that "It should be stated in the requirement whether the information is required for the audit of a taxpayer or for the collection of a debt due by a taxpayer." Our general experience is that such detail is not provided.

91 Colin Campbell, *Administration of Income Tax* (Toronto: Carswell, 2011).

92 *Ibid* at 267.

93 *Jarvis*, *supra* note 11 at para 94 (factor f).

The argument will be strengthened further where Crown counsel is involved. As the Court in *Rainforth* makes clear, Crown counsel has an ethical duty to be fair. For example, if Crown counsel were to see a requirement that he or she believed was issued with the predominant purpose of a penal investigation, Crown counsel should see to its withdrawal. If the predominant purpose underlying the requirement is a penal investigation and the requirement is not withdrawn, the inference might be that the CRA agents also misled Crown counsel as to the true nature of matters.

Situation #3

Facts:

(a) An accountant prepares a client's personal tax return each year.

(b) While preparing the client's return for the current year, the accountant realizes that he/she made a mistake by not including certain income in the previous year's return (e.g. a $30,000 capital gain readily apparent from information the client had given to the accountant by the client the previous year).

(c) The client was not aware of the error.

Questions:

(a) Does the accountant have a professional obligation to tell the client?

(b) Does the accountant have a professional obligation to tell the CRA?

Answer

Does the accountant have a professional obligation to tell the client?

There is no doubt that a either a CA or a CGA practising in British Columbia has a professional obligation to inform the client of the error.

If a CA failed to inform the client, the CA would be in breach of several of the CA Rules namely: Maintenance of Reputation of the Profession (CA Rule 201.1); Integrity and Due Care (CA Rule 202.1); and False or Misleading Documents (CA Rule 205(a)).

If a CGA failed to inform the client, the CGA would be in breach of several of the CGA Rules namely: Deceptive Information – Communication Issued in Connection with Financial Information (CGA Rule 401), Association with Financial and Other Information (CGA Rule 402); Known Omission (CGA Rule 403); and Material Discrepancy (CGA Rule 404).

Does the accountant have a professional obligation to tell CRA?

A CA has a duty not to disclose any confidential information concerning the affairs of any client or former client (CA Rule 208.1). Exceptions to this duty include circumstances where such information is required to be disclosed by order of lawful authority (CA Rule 208.1(c)) or where the client (or former client) has consented to such disclosure (CA Rule 208.1(e)).

Similarly, a CGA has a duty not to disclose any confidential information acquired as a result of professional or business relationships concerning the affairs of any client or former client (CGA Rule 201(a)). Exceptions to this duty include circumstances where disclosure is compelled by a process of law or by a statute (CGA Rule 201.1(a)) or the client consents.

Therefore, unless legally required or the client has consented, the CA or CGA must not disclose the error to the CRA. In short, the CA or CGA has no professional obligation to tell the CRA of the error.

One would expect the CA or CGA to advise the client to correct the error.

An interesting issue arises where a client will not agree to correct the error. In this case, the accountant will need to consider whether he or she can continue to act for the client.

If the CA failed to resign, the CA would be in breach of several CA Rules, namely Maintenance of Reputation of the Profession (CA Rule 201.1); Integrity and Due Care (CA Rule 202.1); and False or Misleading Documents (CA Rule 205(a)).

If a CGA failed to resign, the CGA would be in breach of several CGA Rules, namely: Deceptive Information – Communication Issued in Connection with Financial Information (CGA Rule 401) Association with Financial and Other Information (CGA Rule 402); Known Omission (CGA Rule 403); and Material Discrepancy (CGA Rule 404).

It may be observed that to the extent the client does not correct the error and therefore avoids incurring interest charges or other costs that would otherwise arise from the correction of the error, the accountant will benefit financially to the extent that the client does not make a claim against the accountant for reimbursement of such costs.

In addition to the above noted standards, the CA Rules set out five fundamental principles of ethics. One of these five principles, Objectivity, requires that "Members do not allow their professional or business judgment to be compromised by bias, conflict of interest or the undue influence of others."

The CA Rules provide the following guidance in considering the principle of Objectivity:

> With respect to both independence and conflicts of interest, the profession employs the criterion of whether a reasonable observer would conclude that a specified situation or circumstance posed an unacceptable threat to a member's objectivity and professional judgment.

The CGA Rules similarly defines an Independence Standard that requires that Members be "free of any influence, interest or relationship in respect of a client's affairs that impairs the member's professional judgment or objectivity or that, in the view of a reasonable observer, may have that effect."

In short, the CA or CGA should resign from the engagement where the client refuses to correct the error.

In such circumstances of a client refusing to correct the error, a resignation letter should be sent to the client. The Institute and the Association recommend that a letter should describe the circumstances leading to the resignation.

Assuming the client wishes to hire a new accountant, the "new" accountant has a duty (CA Rule 302.1, CGA Rule 504) to write to the predecessor accountant to enquire if there are any "circumstances that should be taken into account which might influence the decision whether or not to accept the engagement".

Accountants have an obligation (CA Rule 302.2, CGA Rule 505) to respond promptly in writing to another accountant as to circumstances that might influence that accountant's decision to accept an engagement. Under CA Rule 302.2, a CA responding to such a communication must tell the new accountant if suspected fraud or other illegal activity by the client was a factor in the member's or licensed firm's resignation or if, in the member's or licensed firm's view, fraud or other illegal activity by the client may have been a factor in the client's decision to seek the new accountant.

Although fraud or illegal activity is not involved in this situation, the resigning accountant may tell the new accountant that a letter was provided to the client setting out the details and reasons for the resignation.

The new accountant will also wish to consider his or her professional responsibility with respect to the prior erroneous tax return. CRA's Information Circular IC 01-1 'Third-Party Civil Penalties" offers some guidance:

> If an advisor or tax return preparer finds himself or herself in a situation where he or she discovers that another person had made a false statement for tax purposes (e.g., he or she obtains a new client and finds that previous accountant has made a false statement), the new advisor or tax return preparer would be expected to rectify the situation to the extent that the false statement affects the tax return of the current year. If the advisor or preparer advises his or her client to make a voluntary disclosure as described in Information Circular (IC) 00-1, Voluntary Disclosure Program, for the prior years, and the client does not follow this advice, the advisor or preparer is not exposed to the third-party civil penalties in respect of prior years. If the current-year return does not reflect the corrections (for example, an incorrect balance of an undepreciated capital cost schedule) because the taxpayer did not agree to it, and the advisor or preparer prepared the return knowing of the false statement, the advisor or preparer as well as the taxpayer may be subject to penalties. The advisor could be subject to the third-party civil penalties and the person

whom the tax return belongs to could be subject to a gross negligence penalty (subsection 163(2) of the Act and section 285 of the ETA).[94]

In other words, so long as the current return does not have any carry forward balances or other amounts that are false as a result of the unremedied error of a prior year, the new accountant is not exposed to any third party penalties related to the past return filed in error.

Situation #4

Facts:

(a) Your client has acquired, in an arm's length transaction, all of the shares of a corporation that carries on significant business activities.

(b) After the acquisition, your client discovers that one or more of the corporation's prior years returns are fraudulent.

Questions:

(a) What duties or obligations are imposed on a new accountant preparing the tax return (and financial statements) for the current year?

(b) What duties or obligations are imposed on your client with respect to past and future tax returns?

Answer

What duties or obligations are imposed on the new accountant in preparing the tax return (and financial statements) for the current year?

The new accountant must determine whether he or she should accept the engagements to provide assurance services with respect to the financial statements and to prepare the tax return. The new accountant must consider whether the engagement can be performed without violating the applicable professional conduct rules. CA Rule 205(a) states that a CA must not be *associated* with documents they know or should know are false or misleading. CA Rule 206.1 and Rule 206.2 state that a CA shall perform professional services in accordance with generally accepted standards of practice of the profession which include presenting general purpose financial statements in accordance with generally accepted accounting principles. CGA Rule 402 states that a CGA must not be associated with deceptive financial and other information. CGA Rule 303 states that a CGA must adhere to

[94] Canada Revenue Agency, Information Circular IC01-1, "Third-Party Civil Penalties" (18 September 2001) at para 67.

acknowledged principles and standards of professional practice which include Canadian generally accepted accounting principles.

A public accountant associates himself or herself with information when he or she "performs services in respect of that information".[95]

Therefore, the accountant should not accept the assurance engagement unless the client is prepared to disclose within the financial statements the impact of the fraud including the resulting tax expense and liability. The proper accounting treatment is to treat the item as a correction of an error and to make a prior period adjustment to the financial statements. This will also include a note to the financial statements that will include a description of the nature of the prior period error.[96]

For the same reason, the accountant should not accept the engagement to prepare the corporate tax return unless the client is prepared to disclose the impact of the fraud including the resulting tax expense on the information provided to the CRA. Subsection 150(1) of the ITA requires a return with "prescribed" information. The definition of "prescribed" in subsection 248(1) means the "information to be given on a form". On a form such as a T2 return such information would include General Index Financial Information ("**GIFI**"). The failure to report the tax expense and the liability arising from the prior fraudulent returns in those earlier years will mean that the current year's opening retained earnings of the company are misstated. In addition, if the current year's financial statements do not include the continuing accrual of interest, the current year's financial statements will be misstated. These misstatements will preclude the accountant from becoming associated with the current year tax return. Practically speaking, it is difficult to imagine a situation where at least some portion of the current GIFI would not be affected by a prior year fraud that included an underpayment of taxes.

What duties or obligations are imposed on your client with respect to past or future tax filings?

When exercising the powers and performing the functions of a director or officer of a company a person must act honestly and in good faith with a view of the best interests of the company and exercise the care, diligence and skill that a reasonably prudent individual would exercise in comparable circumstances. (See for example section 142 of British Columbia's *Business Corporations Act.*[97])

Moreover, if a director knows of the fraud and acquiesces to the filing of the current year return and GIFI that is incorrect, he or she may be subject to criminal proceedings under the combination of subsection 239(1) and section 242 of the ITA.

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95 Canadian Institute of Chartered Accountants, *Canadian Institute of Chartered Accountants Handbook – Assurance* (Toronto, Ont: Canadian Institute of Chartered Accountants, 2010) at s 5020(4)(a).

96 *Ibid* at Accounting, Part II, Accounting Standards for Private Enterprises, s 1506.27(a).

97 SBC 2002, c 57.

Therefore, the prudent client would take steps to amend the prior returns.

With counsel, a review should be made to determine whether the corporation is able to make a voluntary disclosure as a means to avoid prosecution and penalties. If a voluntary disclosure is not possible, the approach will be similar to the answer to Situation 1.

Situation #5

Facts:

(a) The CRA makes a clear error in assessing your client and sends to your client a cheque for a significant amount.

Questions:

(a) What duties or obligations are imposed on your client?

(b) What are the professional obligations of the client's tax advisor?

Answer

What duties or obligations are imposed on your client?

Where the cheque represents an amount refunded to the client in excess of the amount to which the client was entitled as a refund under the ITA, paragraph 160.1(1)(a) deems the excess to be "an amount that became payable by the taxpayer on the day on which the amount was refunded." Although the ITA does not define the meaning of an amount refunded to a taxpayer, the term is broad enough to contemplate most payments that the CRA might make to a taxpayer, including refunds of tax withheld at source,[98] dividend refunds under section 129,[99] and refundable tax credits.[100] As a result, in addition to any ethical duties that the client may have to return an excess refund, the client is also subject to a legal obligation under paragraph 160.1(1)(a) of the ITA.

Further, where an excess refund is deemed to be payable under paragraph 160.1(1)(a), paragraph 160.1(1)(b) stipulates that the taxpayer must pay interest on this excess computed at the prescribed rate from the day the amount became payable to the date of payment. Under section 4301 of the Regulations,[101] this rate is the average rate of Government of Canada T-bills plus 4%.

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98 See e.g. *Fraser v The Queen*, 2006 TCC 134, 2006 DTC 2709.

99 See e.g. *Mario Côté Inc v The Queen*, 2011 TCC 105.

100 See e.g. *Surikov v The Queen*, 2008 TCC 161, 2008 DTC 3064.

101 *Income Tax Regulations*, CRC, c 945.

In addition, according to subsection 160.1(3), the Minister may assess a taxpayer under subsection 160.1(1) "at any time". As a result, there is no limitation period on an assessment under this provision.

Where the cheque does not constitute an amount refunded under section 160.1 (for example, where the CRA accidentally issues two cheques to the client), the client is almost certainly subject to a legal obligation to return the payment under the common law of restitution, specifically the branch of this area of law dealing with unjust enrichment.

The test in Canada for unjust enrichment was confirmed by the Supreme Court of Canada in *Garland*:

> 30 As a general matter, the test for unjust enrichment is well established in Canada. The cause of action has three elements: (1) an enrichment of the defendant; (2) a corresponding deprivation of the plaintiff; and (3) an absence of juristic reason for the enrichment. [102]

The first element, "enrichment" of a defendant, occurs whenever a "tangible benefit" has been conferred on the defendant.[103] Since the payment of money clearly constitutes a tangible benefit under this test, the cheque represents a qualifying enrichment.

As with the first element of the test, the Supreme Court of Canada has consistently taken a "straightforward economic approach" to the assessment of a "deprivation" to the plaintiff.[104] Since the excess refund deprives the government of money that it would otherwise have had, the second prong of the test is also satisfied.

According to the third element of the test, the restitutionary cause of action exists only where the enrichment and corresponding deprivation are "unjust".[105] According to the Supreme Court, this third test is "flexible, and the factors to be considered may vary with the situation before the court."[106] In *Garland*, the Supreme Court of Canada established a two-part test for this inquiry, asking first whether an established legal category exists to deny recovery, and second whether the defendant can show another good reason to deny recovery, taking into account reasonable expectations and public policy considerations.[107] Established categories to deny recovery include a contract, a disposition of law, a donative intent, and other valid common law, equitable or statutory obligations, none of which are likely to exist in the case of an erroneous tax refund. In contrast, however, courts have suggested that it might be inequitable to require an innocent defendant to return a benefit where the defendant is able

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102 *Garland*, *supra* note 41 at para 30.

103 *Peel (Regional Municipality) v Canada*, [1992] 3 SCR 762.

104 *Peter v Beblow*, [1993] 1 SCR 980.

105 *Ibid*.

106 *Ibid*.

107 *Garland*, *supra* note 41 at paras 44-45.

to demonstrate a material change in position as a result of the unjust enrichment.[108] In this circumstance, therefore, the client may not be required to return the excess refund – though public policy considerations may incline a court to conclude otherwise.

What are the professional obligations of the client's tax advisor?

Lawyers

The professional obligations of the client's tax advisor turn on the client's legal obligations *vis-à-vis* the CRA. Although Chapter 6 Rule 1 of the Handbook expresses the general principle that "a lawyer has a duty to give undivided loyalty to every client", Chapter 1 Rule 1(1) affirms that a lawyer also "owes a duty to the state to maintain its integrity and its law" and "should not aid, counsel, or assist any person to act in any way contrary to the law."[109]

As a result, where the client has received an excess refund that might be subject to subsection 160.1 of the ITA, it is the lawyer's obligation to advise the client about the effect of the rule – specifically that the excess constitutes an amount payable by the client, that interest is payable on this excess, and that the CRA may assess the taxpayer in respect of this excess at any time. It is unlikely that the lawyer's ethical obligation extends beyond this, even if the client decides not to return the excess refund.

Where the payment does not constitute an amount refunded within the meaning of section 160.1, the lawyer's obligation is to advise the client that the payment constitutes a benefit that must be returned to the CRA absent a good reason for not returning this benefit. Where an innocent client has made a material change in circumstances in reliance on the payment, the lawyer may advise the client that the payment need not be returned. Otherwise, the lawyer is obliged to advise the client to return the amount.

Where the client refuses to act on the lawyer's advice, the lawyer may consider withdrawing from the solicitor-client relationship consistent with Chapter 10 Rule 2 of the Handbook on the basis that "there has been a serious loss of confidence between the lawyer and the client".

Accountants

Where the client's tax advisor is an accountant, the accountant would offer the same analysis for lawyers noted above. In addition, the accountant would recommend the client seek legal advice to determine the client's obligations to the CRA.

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108 *Den Haag Capital LLC v Correla*, 2010 ONSC 5339.

109 Law Society of British Columbia*, Handbook*, *supra* note 47 at ch 1 (Rule 1), 5 (Rule 1).

Depending upon the legal advice received and the whether the client is prepared to follow the legal advice, the accountant will need to consider whether he or she can continue to act for the client.

Where the client is advised that the amount must be returned to the CRA and elects not to do so, the CA will likely conclude that continuing the engagement will run afoul of the following rules of professional conduct including: Maintenance of Reputation of the Profession (CA Rule 201.1); Integrity and Due Care (CA Rule 202.1); and False or Misleading Documents (CA Rule 205(a)).

Similarly the CGA will likely conclude that continuing the engagement will run afoul of professional conduct rules including: Deceptive Information -Association with Financial and Other Information (CGA Rule 402); Known Omission (CGA Rule 403); and Material Discrepancy (CGA Rule 404).

Situation #6

Facts:

(a) You are a Crown counsel acting for the CRA in connection with a tax dispute.

(b) You have just received information that you know would help the taxpayer (e.g. a Requirement letter was not properly authorized) but your instructing CRA agent instructs you not to disclose the information to the taxpayer.

Question:

(a) What are your professional obligations?

Answer

To the extent that the CRA constitutes the Justice lawyer's client, the lawyer is subject to professional obligations to "give undivided loyalty" to this client and to hold in confidence information concerning the business and affairs of the client.[110] At the same time, these obligations must be balanced against other obligations to the state, the legal profession, and oneself, and must be carried out "within and not without the bounds of the law".[111]

According to the Handbook, lawyers owe duties to the state and the legal profession to maintain the integrity of the law and to assist in maintaining the honour and integrity of the legal profession.[112]

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110 Law Society of British Columbia*, Handbook*, *supra* note 47.

111 *Ibid* at ch 1 (Rule 3(5)).

112 *Ibid* at ch 1 (Rules 1(1) and (5(1)).

In addition, lawyers owe a special obligation to other lawyers to act with courtesy and good faith, and a duty to courts and tribunals to conduct themselves with candour and fairness.[113]

Crown prosecutors have a further professional obligation "to see that justice is done" rather than to obtain a conviction, and to "make timely disclosure to the defence of all facts and known witnesses whether tending to show guilt of innocence, or that would affect the punishment of the accused".[114] This duty reflects the quasi-judicial role of the Attorney General as a matter of constitutional law,[115] is reflected in federal and provincial legislation setting out the powers, duties and functions of Attorneys General,[116] and underlies the Supreme Court of Canada decision in *R v Stinchcombe*[117] that the Crown has an obligation to disclose all relevant information to the defence.

In addition to their responsibility for criminal prosecutions, Attorneys General and Crown counsel also have the responsibility for regulating and conducting civil litigation for and against the Crown.[118] In this context, Tax Court of Canada decisions have suggested that Crown tax counsel, like all Crown counsel, have a special duty to be fair in legal proceedings, particularly if the taxpayer is unrepresented or represented by a non-tax specialist, by advising the Court of adverse decisions and assisting Judges to determine the correctness of an assessment.[119] These duties have particular relevance in the context of a self-assessing tax system in which taxpayers often require assistance to complete their tax returns accurately.

Although it is unclear whether these special obligations extend to taxpayers directly outside the context of legal proceedings, the general duties of Crown tax counsel to the state and the legal profession, as well as their special obligation to other lawyers to act in good faith could support a duty to the taxpayer's legal representative to disclose the information. As well, a broader ethical duty to the taxpayer might be grounded in Crown tax counsel's special duty to assist the legal system in determining the correctness of an assessment.

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113 *Ibid* at ch 1 (Rule 4(1)),2 (Rule 1).

114 *Ibid* at ch 1 (Rule 2).

115 See e.g. Ian G. Scott, "The Role of the Attorney General and the Charter of Rights"(1986-1987) 29:2 Crim LQ 187.

116 See e.g. *Department of Justice Act*, RSC 1985, c J-2, s 5; *Attorney General Act*, RSBC 1996, c 22, s 2.

117 [1991] SCR 326.

118 See e.g. *Department of Justice Act*, *supra* note 123; *Attorney General Act*, *supra* note 123.

119 *Faibish, supra* note 60 *Rainforth, supra* note 58.