NOVA SCOTIA COURT OF APPEAL
Citation: ***R. v. Taylor***, 2008 NSCA 5

Date: 20080118
Docket: CAC 280365
Registry: Halifax

Between:

Her Majesty the Queen

Appellant

v.

Terry E. Taylor

Respondent

Revised Judgment:	The text of the original judgment has been corrected according to the erratum dated **June 10, 2008**.
Judge(s):	Cromwell, Saunders & Oland, JJ.A.
Appeal Heard:	October 9, 2007, in Halifax, Nova Scotia Post-Hearing Supplemental Factums filed by the Appellant, October 30, 2007; and by the Respondent, December 4, 2007
Held:	Appeal allowed, per reasons for judgment of Saunders, J.A.; Cromwell & Oland, JJ.A. concurring
Counsel:	Mark J. Covan, for the appellant Duncan Beveridge, Q.C., for the respondent

Reasons for judgment

Introduction

[1] The important issue in this case is the extent to which Her Majesty the Queen in Right of Canada will be liable for costs following an ill-conceived and poorly executed search and seizure of a suspected citizen's private documents by regulatory officials investigating suspected violations of the **Income Tax Act**, 1985, c. 1 (5th Supp.).

[2] The respondent, Mr. Terry E. Taylor, commenced an application in the Supreme Court of Nova Scotia for an order in the nature of *certiorari*, and other relief, after thousands of documents along with computer equipment and electronic data were seized from his residence by investigators with the Canada Revenue Agency.

[3] The application was heard by Mr. Justice Arthur J. LeBlanc who in a written decision dated September 25, 2006 granted the application to quash the search warrant on what he found to be fatal defects in the methods and supporting information used to obtain it.

[4] In a subsequent decision dated November 14, 2006, LeBlanc, J. awarded costs of $17,000 to Mr. Taylor for the violation of his **Charter** rights arising from the egregious conduct of officials with the Canada Revenue Agency.

[5] The appellant now appeals Justice LeBlanc's decision and the April 24, 2007 order giving effect to it which directed Her Majesty the Queen to pay costs of $17,000 to Mr. Taylor.

[6] For the reasons that follow I would allow the appeal and set aside the order of costs against the Crown. To better explain the issues that arise on appeal, and my analysis that follows, it will be necessary to set out the circumstances surrounding this case in some detail.

Background

[7] In the course of a tax audit of a corporation named Advanced Metal Technology Limited (AMTL), an auditor for the Canada Customs and Revenue Agency (CCRA, now CRA) was notified in June 2004 that the St. John's Tax Centre had received, pursuant to a CCRA request, a hand written 2003 T-4 employment income slip from the respondent, Terry E. Taylor (Mr. Taylor) reporting income of $108,850.56 as an employee of AMTL.

[8] Inquiries by the auditor ensued. In July 2004 the president of the now bankrupt AMTL (Mr. Perry) denied that such a T-4 slip would have been issued. Further, the Trustee in Bankruptcy had no record of Mr. Taylor ever being an employee of AMTL. Neither had the CCRA for the period 2001 to 2003, inclusive.

[9] The matter was referred to Mr. Paul Patterson, an investigator with the Investigations Division of the CCRA in Halifax. In November 2004 Mr. Patterson began drafting an Information to Obtain a Search Warrant (ITO). He worked on the document intermittently over the next several months. On April 21, 2005 Mr. Patterson swore an ITO as the named informant and on May 3, 2003 he swore a superceding ITO which resulted in the issuance of two search warrants bearing those same respective dates, pursuant to s. 487(1) of the **Criminal Code of Canada**, R.S.C. 1985, c.C-46 as amended.

[10] The record discloses that the first search warrant was not executed because of a perceived over-broad clause. The second ITO was sworn to secure the second search warrant. The factual grounds for believing that an offence had been committed were set out in the first ITO, and were then incorporated into the second ITO. Similarly the second ITO incorporated the previous search documents as exhibits but added nothing to the grounds already stated for believing that offences had been committed.

[11] Both ITO's were sworn before, and both search warrants were issued by, Justice of the Peace Angus A. MacIntyre, Q.C. They each concerned the same alleged offences under s. 239(1.1) of the **Income Tax Act** involving false claims for refunds for 2001, 2002, and 2003. They each involved searching for the same

business records at the same premises, it being the residence of Mr. Taylor and his wife.

[12] On May 5, 2005 eight employees of the CRA, including Mr. Patterson, searched the home of the respondent and his spouse. Thousands of documents were seized along with computer and electronic storage devices and the data inscribed therein. Included in the materials seized were solicitor/client documents.

[13] CRA staff found a letter dated February 13, 2003 signed by Mr. Perry the president of AMTL confirming that the respondent had been employed as its chief financial officer with the company since February 2002.

[14] Mr. Taylor demanded the return of all items seized. He made two principal submissions. First, he said Mr. Patterson misrepresented the facts in disclosures to the Justice of the Peace. Second, he alleged bias on the part of the Justice of the Peace because he had once acted as a lawyer for Mr. Taylor's wife when they were experiencing matrimonial difficulties.

[15] Mr. Patterson, and his superiors at the CRA refused to surrender the items.

[16] On May 30, 2005, some 680 documents were returned to Mr. Taylor as being outside the scope of the warrant. However, the CRA retained copies of those materials. Additional original documents and the copies earlier retained were returned to Mr. Taylor on November 22, 2005.

[17] On October 31, 2005 the respondent applied to the Supreme Court of Nova Scotia for multiple relief: an order in the nature of *certiorari* to quash the May 3, 2005 search warrant; an order returning all items seized; a declaration that his rights under ss. 7 and 8 of the **Canadian Charter of Rights and Freedoms** had been infringed or denied; and such orders under s. 24(1) of the **Charter** as might be considered appropriate and just in the circumstances. The grounds advanced by the respondent in support of his application were, essentially (1) incomplete and misleading information given to the Justice of the Peace, and (2) a reasonable apprehension of bias on the part of the Justice of the Peace through his previous dealings as Mrs. Taylor's lawyer in matters opposed to the respondent's interests.

[18] The application was initially returnable November 24, 2005. On that date Mr. Taylor tried to set the application down for hearing. The Crown, however, insisted that a "preliminary issue" be tried saying the Nova Scotia Supreme Court ought not to allow Mr. Taylor's application to be heard on its merits at that stage because it was premature, or ought to be considered as part of the trial, and not in Chambers. The Crown's motion came before Justice M. Heather Robertson on January 12, 2006. Briefs were filed. At the conclusion of argument the Crown's preliminary motion was dismissed, with costs payable to Mr. Taylor in the amount of $1,200.

[19] The Crown appealed Robertson, J.'s decision to award costs in favour of Mr. Taylor (CA 261833). That appeal was later abandoned.

[20] Dates were then set to proceed with Mr. Taylor's application. A hearing took place before LeBlanc, J. on March 27, 2006. Mr. Taylor was cross-examined on his affidavit, and the Informant, Mr. Patterson, was cross-examined with respect to the Information(s) he swore to obtain the search warrant(s). Written briefs were filed. On April 11, 2006 the parties returned for oral argument. Justice LeBlanc reserved his decision.

[21] In a written decision dated September 25, 2006 Justice LeBlanc excised a number of paragraphs from the Information to Obtain, which he found to be misrepresentations. Once excised, LeBlanc, J. concluded that there was an insufficient basis to establish reasonable and probable grounds to secure a search warrant.

[22] The Crown then took the position that despite the findings of LeBlanc, J., the items seized from Mr. Taylor should not be ordered returned to him. Further, the Crown argued that notwithstanding its attempt to obtain a costs order against Mr. Taylor should it be successful in upholding the search warrant, no costs ought to be awarded in his favour, despite his success in quashing the warrant(s).

[23] Additional written submissions were filed by the parties, buttressed by further oral arguments heard by LeBlanc, J. on November 14, 2006. That morning the Crown advised the respondent, and the court, that they would not be pursuing charges against the respondent under the **Income Tax Act**, nor would the Crown oppose the granting of an order returning all of the items seized to the respondent.

[24] LeBlanc, J. reserved judgment. In a written decision dated March 22, 2007 he concluded that the conduct of the CRA officials was sufficiently serious and egregious to justify an award of costs in favour of Mr. Taylor. He fixed those costs in the amount of $17,000 and ordered the Crown to pay.

[25] The Crown applied to this Court in Chambers for a stay of execution of Justice LeBlanc's cost order pursuant to **Civil Procedure Rule** 62.10. That application was dismissed by Hamilton, J.A. in a written decision dated May 18, 2007, now reported [2007] N.S.J. No. 210.

Issues

[26] In its factum the appellant frames the points in issue as follows:

> (i) Whether the learned Supreme Court Judge erred in law by ordering costs against the Crown, Her Majesty the Queen in Right of Canada, in the circumstances of this case.
>
> (ii) In particular, did the learned Supreme Court Judge err in law by not making a proper inquiry into whether and how the Crown could be considered a party to the acts and omissions of the Canada Revenue Agency that are complained of?
>
> (iii) And further, did the learned Supreme Court Judge err in law by concluding, without any evidence before him, that the Crown had done or omitted to do something that would implicate it in the conduct of the Canada Revenue Agency that was complained of?
>
> (iv) And finally, in defending an impugned search in a *certiorari* application, under what circumstances, if at all, does the Crown make itself complicit in the conduct of investigators that is ultimately deemed "egregious and oppressive"?

[27] These enumerated issues track the grounds listed in the appellant's notice of appeal in all but one important respect. There, the appellant complained:

. . .

> 4. The learned Supreme Court Justice erred in law by misapprehending the evidence in coming to the conclusion that the conduct complained of was sufficiently serious and egregious to be the basis for an award of costs.
>
> (Underlining mine)

[28] Based on this revised position and counsel's oral submissions at the hearing, it is clear that the Crown no longer imputes to the trial judge a misapprehension of the evidence in concluding that the conduct of the CRA investigator, Mr. Patterson, was serious and egregious. Rather, the Crown now says that the judge erred in law:

> . . . by concluding, without any evidence before him, that the Crown had done or omitted to do something that would implicate it in the conduct of the Canada Revenue Agency . . .
>
> (Underlining mine)

[29] From all of this I will recast the essential questions on appeal as being:

(i) Was the application brought by the Respondent, a matter of criminal, or civil, procedure?

(ii) What standard of review ought to be invoked here?

(iii) Under what circumstances will the Crown be liable for costs in a criminal proceeding?

(iv) Based on the evidence presented, did the Chambers judge err by ordering costs against the Crown?

(v) What is the effect, if any, of s. 4(2) of the **Canada Revenue Agency Act** in this case?

Analysis

(i) <u>Was the application brought by the Respondent, a matter of criminal, or civil, procedure</u>?

[30] As a preliminary point it must first be determined whether this is a criminal matter or a civil one. At the hearing before LeBlanc, J. the respondent maintained that his original application was a civil proceeding. The Crown took a contrary position, and claimed that the proceeding constituted a criminal matter, citing **Newfoundland and Labrador v. Canadian Broadcasting Corporation** 2006 NLCA 21. The Chambers judge discussed both sides of the issue but, with respect, never expressly decided the point. He said:

> [12] Mr. Beveridge maintains that this is a civil proceeding. The Crown maintains that it is a criminal proceeding. In *Newfoundland and Labrador v. Canadian Broadcasting Corp.*, [2006] N.J. No. 91 (Nfld. C.A.) an application was made under the rules of court to challenge a warrant issued under the *Criminal Code*. Wells C.J.N.L. held that such a proceeding was criminal in nature and should be processed as if it were (sic) criminal appeal. The court did award costs on the application, however.

[31] The distinction is important. In my respectful view the decision and order under appeal in this case must be characterized as a criminal proceeding. In carrying out his investigation Mr. Patterson was a "public officer" as that term is defined in s. 2 of the **Criminal Code**. The Justice of the Peace who received the ITO's and issued the search warrants was exercising his powers pursuant to the **Criminal Code**. The application in Chambers was brought pursuant to a provision of the **Criminal Code**, and the **Criminal Code** provides an appeal process of that decision and order to this court. If charged and convicted of the offences identified in the warrant(s) the respondent faced penal consequences.

[32] This appeal lies under s. 676.1 of the **Criminal Code**, supra, which states:

> 676.1 **Appeal re costs –** A party who is ordered to pay costs may, with leave of the court of appeal or a judge of a court of appeal, appeal the order or the amount of costs ordered.

[33] In its application for leave to appeal and notice of appeal the Crown has limited its grounds to alleged errors of law.

[34] Recognizing that the grounds of appeal allege error of law in certain particulars I will briefly consider the standard of review on appeal when such errors arise, and go on to assess how those legal principles have significance in the circumstances of this case.

(ii) <u>What standard of review ought to be invoked here</u>?

[35] Appeals restricted to questions of law alone generally engage a standard of correctness. **Housen v. Nikolaisen**, [2002] 2 S.C.R. 235.

[36] The interpretation of a legal standard has always been considered a question of law. The application of a legal standard to the facts, while a question of law for jurisdictional purposes, is treated as a mixed question of law and fact for standard of review purposes. **R. v. Araujo et al** (2000), 149 C.C.C. (3d) 449 (S.C.C.); **R. v. Oickle**, [2000] 2 S.C.R. 3, at ¶ 22; and **R. v. Grouse,** [2004] N.S.J. 346, at ¶ 32-44 (C.A.).

[37] A question of mixed fact and law may, upon further reflection, constitute a pure error of law subject to the correctness standard. **Canada (Director of Investigation and Research) v. Southam Inc.**, [1997] 1 S.C.R. 748, 144 D.L.R. (4th) 1; **Housen**, supra.

[38] Legal conclusions based on factual conjecture, possibility, or speculation on important matters where there is a complete absence of evidence on the record, will constitute a misapplication of the law requiring appellate intervention. See for example **R. v. Torrie,** [1967] 3 C.C.C. 303 (Ont. C.A.); **R. v. Coote**, [1970] 3 C.C.C. 248 (Sask. C.A.); and **R. v. Leblanc**, [1981] 64 C.C.C. (2d) 31 (N.B.C.A.).

[39] As noted by Chipman, J.A. in **R. v. White** (1994), 89 C.C.C. (3d) 336 at 351:

> These cases establish that there is a distinction between conjecture and speculation on the one hand and rational conclusions from the whole of the evidence on the other. The failure to observe the distinction involves an error on a question of law. This court is, therefore, empowered and obliged to intervene when such error has occurred.

[40] In the continuing analysis that follows I will explain how these discrete legal principles apply to the circumstances of this case.

(iii) <u>Under what circumstances will the Crown be liable for costs in a criminal proceeding</u>?

[41] To answer this question we must first address the Crown's role generally in the prosecution of criminal or quasi criminal cases, and then more specifically, the proper characterization of the Crown's involvement in this case.

[42] It is trite to observe that the Crown fulfills its prosecutorial role in the public interest. Unlike the private litigant a Crown Attorney's objective is not to "win" or "lose" cases, but rather to lawfully and fairly present the evidence, leaving decisions of guilt or innocence in the hands of an independent and impartial tribunal.

[43] Accordingly the general rule with respect to costs awards against the Crown is that costs are not awarded in criminal proceedings, whether the Crown wins or loses the case. The public policy rationale for not awarding costs against the Crown other than in exceptional circumstances is based on the recognition that such an award may deter the Crown from exercising its criminal powers to the fullest extent. In prosecuting crime the Crown acts in the public interest. Courts have been hesitant to take punitive measures against the Crown unless the Crown is shown to be responsible for some misconduct, complicit in it, or other unique circumstances exist.

[44] This principle was affirmed by Chief Justice Glube writing for this Court in **R. v. LeBlanc**. [1999] N.S.J. No. 179. That case involved charges under the **Radio Communication Act** and the **Criminal Code**. The accused filed an application pursuant to s. 24 of the **Charter**, and for *certiorari* to quash the search warrants, sought a return of the items seized, and asked for costs. The judge in first instance found it unnecessary to deal with the **Charter** application, but granted *certiorari*, quashed the search warrants, and ordered a return of the seized items. He also ordered costs against the Crown on the grounds that in his view the police conduct was not just inadvertent or careless, but rather set out to destroy the reputation and business of the accused. In addition he held that the searches were not justified in law, were unnecessary, and were carried out in an oppressive manner.

[45] In allowing the appeal and setting aside the order for costs against the Crown, Chief Justice Glube's analysis presents a helpful starting point for my review of the judge's approach in this case. Glube, C.J.N.S. observed:

> [8] Justice Haliburton referred to the following cases cited by the Crown as setting out the requirements for costs to be awarded against the Crown. He stated:
>
> > I am referred to **R. v. Jedynack**, [1994] 16 O.R. (3d) 612 (Ontario C.A.), where the Court expresses the view that costs should be awarded only where the conduct of the authorities amounts to
> >
> > > something well beyond inadvertent or careless failure [to discharge a duty] ... conduct ... within the realm of recklessness, conscious indifference to duty ... a marked and unacceptable departure from the usual and reasonable standards of prosecution ... (resulting in) an undisputed [undisputable] and clearly measurable infringement or denial of a right (and) ... serious prejudice to the accused.

> **Trask v. The Queen** (1987), 37 C.C.C. (3d) 92 [S.C.C.] suggests no costs should be allowed in the absence of "oppressive or improper conduct"; **R. v. Brown Shoe Co. Of Canada Ltd.** (No.2) (1984), 11 C.C.C. (2d) 514 would require "negligence or misconduct"; and **R. v. C.A.M.** (1996), 105 C.C.C. (3d) 327 repeats "oppressive and improper conduct".
>
> . . .

[15] The general rule found in **Berry v. British Transport Commission**, [1961] 3 ALL E.R. 65 (C.A.) and confirmed by the Supreme Court of Canada in **R. v. M (C.A.)** 1996, 105 C.C.C. (3d) 327 (S.C.C.), is that a prosecutor brings proceedings in the public interest and generally costs are not awarded whether or not the Crown wins or loses the case. This is in contrast to the individual who brings an action for his or her own ends and if he or she loses, should pay costs. To award costs there must be exceptional circumstances, something "remarkable about the defendant's case" or "oppressive or improper conduct" proven against the Crown. (See: **M (C.A.)** at p. 377 and **Trask**, supra.) Ordinarily, the costs of a person charged with a criminal offence are borne by that person. (See: **R. v. Curragh Inc.** (1997), 113 C.C.C. (3d) 481 (S.C.C.) and **M (C.A.)**)

[16] What has happened in this case is really an attempt to obtain damages through costs in a criminal matter instead of commencing a civil action against the R.C.M.P. Even if a **Charter** breach had been found against the R.C.M.P., a breach by a law enforcement agency should not be attributed to the Crown unless the Crown was a party to the breach. A criminal case cannot form the basis of an award of damages through costs. There was nothing to indicate oppressive or improper conduct on the part of the Crown. Justice Haliburton placed reliance on allegations which we find were either not proven or ones which would require findings of credibility. In neither case should these provide a foundation for the award of costs.

[17] Section 676.1 of the **Criminal Code** allows a party who is ordered to pay costs, to appeal the order or the amount of costs, with leave of the court.

[18] We find there was no conduct or behaviour on the part of the Crown to warrant an award of costs against the Crown. We would grant

> leave to appeal and allow the appeal, setting aside the order for costs against the Crown, Her Majesty the Queen in Right of Canada.
>
> *Ibid* paras. [8], and [15] to [18] See also *R.v. Pottier*, 1999 CanLII 2551 (N.S.C.A.) At para [7].

[46] In **R. v. 974649 Ontario Inc.**, [2001] 3 S.C.R. 575 the Supreme Court of Canada dealt with a Justice of the Peace's award of costs at trial against the Crown, associated with an adjournment of sentencing. The case involved a prosecutor who had failed to disclose information relevant to motive to the accused. Although the Justice of the Peace had not relied upon motive in convicting the accused and declared that the lack of disclosure did not affect the outcome of the trial, he nonetheless found that this non-disclosure was a marked and unacceptable departure from the conduct expected of the Crown. The case went to the Supreme Court of Canada on the issue of whether a justice of the peace presiding over a provincial offence trial had jurisdiction to award costs under s. 24(1) of the **Charter**, and for a **Charter** breach. In holding that the Justice of the Peace was a court of competent jurisdiction, Chief Justice McLachlin, writing for a unanimous court took the opportunity to comment on awards of costs against the Crown in criminal proceedings, particularly in the context of non-disclosure:

> 80 Costs awards to discipline untimely disclosure are integrally connected to the function of the provincial offences court as a quasi-criminal trial court. Costs awards have a long history as a traditional criminal law remedy. Although sparingly used prior to the advent of the Charter, superior courts have always possessed the inherent jurisdiction to award costs against the Crown: *R. v. Ouellette*, [1980] 1 S.C.R. 568; *R. v. Pawlowski* (1993), 12 O.R. (3d) 709 (C.A.), at p. 712. In recent years, costs awards have attained more prominence as an effective remedy in criminal cases; in particular, they have assumed a vital role in enforcing the standards of disclosure established by this Court in R. v. Stinchcombe, [1991] 3 S.C.R. 326. See, for example: *Pawlowski, supra*; *Pang, supra*; *R. v. Regan* (1999), 137 C.C.C. (3d) 449 (N.S.C.A.).
>
> 81 Such awards, while not without a compensatory element, are integrally connected to the court's control of its trial process, and intended as a means of disciplining and discouraging flagrant and

unjustified incidents of non-disclosure. Deprived of this remedy, a provincial offences court may be confined to two extreme options for relief – a stay of proceedings or a mere adjournment – neither of which may be appropriate and just in the circumstances. Since untimely pre-trial disclosure will rarely merit a stay of proceedings when the court can protect the fairness of the trial with a disclosure order (*O'Connor*, *supra*, at paras. 75-83; *Canada (Minister of Citizenship and Immigration) v. Tobiass*, [1997] 3 S.C.R. 391, at paras. 90-92), denying the provincial offences court the jurisdiction to issue a costs award may deprive it of the only effective remedy to control its process and recognize the harm incurred, even in cases involving unjustified and flagrant disregard for the accused's rights. In these circumstances, the issuance of a costs award is a quintessential example of "the development of imaginative and innovative remedies when just and appropriate" that Lamer J. identified as essential to the meaningful enforcement of *Charter* rights through the s. 24 guarantee (*Mills*, *supra*, at p. 887).

82 Further, fracturing the availability of *Charter* remedies between provincial offences courts and superior courts could, in some circumstances, effectively deny the accused access to a remedy and a court of competent jurisdiction. It may be unrealistic to expect criminal accused, who often rely on legal aid to mount a defence against the state, to bring a separate action in the provincial superior court to recover the costs arising from the breach of their *Charter* rights. This option, while available in theory, may far too often prove illusory in practice. While some delay or inconvenience may be an inevitable result of balancing access to *Charter* relief with the practice and structure of the existing legal system, the Court should not interpret the will of the legislature in such a way that it results in the effective denial of *Charter*-mandated relief, in the absence of an unequivocal indication to this effect.

. . .

85 . . . the Crown concedes that legal costs in criminal and regulatory matters are an exceptional or remarkable event.

. . .

87 . . . the developing jurisprudence uniformly restricts such awards, at a minimum, to circumstances of a marked and unacceptable departure from the reasonable standards expected of the prosecution.

[47] In **R. v. Sweeney** (2003), 179 C.C.C. (3d) 225, Philp, J.A., of the Manitoba Court of Appeal referred to these latter statements by the Chief Justice and observed at 239:

> [48] Those principles, it seems to me, will apply whether costs are awarded against the Crown as a *Charter* remedy or under the court's inherent jurisdiction.

[48] From these and similar authorities we see a clear affirmation of the court's power to award costs against the Crown, whether as a **Charter** remedy, or through the application of the court's own inherent jurisdiction. While the issuance of a costs award may be characterized as a type of "imaginative and innovative" remedy, it is equally apparent that the imposition of a costs award against the Crown will be restricted to "remarkable," " exceptional" events in "circumstances of a marked and unacceptable departure from the reasonable standards expected of the prosecution."

[49] The courts have left open the possibility that costs may be awarded following a breach of a **Charter** right or abuse of process in a criminal case even if the prosecution is not implicated in the breach. The cases indicate, however, that such an award could only be made in a circumstance that was so unusual as to be virtually unique.

[50] This was discussed in **Canada (Attorney General) v. Foster**, [2006] O.J. No. 4608, a case involving an "evidence-gathering" order and a "sending" order under the **Mutual Legal Assistance in Criminal Matters Act**, R.S.C. 1985 c. 30 (4th Supp.). In that case Rosenberg, J.A. writing for the court allowed the appeal of the Attorney General of Canada against a costs order. He undertook an extensive review of the authorities and then offered an instructive analysis of the types of circumstances where costs would be ordered against the Crown. He observed that Canadian courts have not attempted to precisely define the limits to exceptional circumstances that will justify an award of costs in a criminal matter, yet it is clear from the language used in such cases that it is intended to highlight the unique nature of such an award. Citing **R. v. M. (C.A.)** (1996), 105 C.C.C. (3d) 327, (S.C.C.) and **R. v. LeBlanc**, supra, Rosenberg, J.A. opined that absent improper or oppressive conduct on the

part of the Crown, an accused will not generally be entitled to costs unless the circumstances are “remarkable.” Furthermore, Rosenberg, J.A. observed that even where courts have awarded costs against the Crown pursuant to s. 24(1) of the **Charter**, the power to award such a remedy has been interpreted “relatively narrowly,” citing **R. v. 974649 Ontario Inc.**, supra, which:

> . . . restricts such awards, at a minimum, to circumstances of a marked and unacceptable departure from the reasonable standards expected of the prosecution.

[51] Justice Rosenberg went on to describe the general rule and the limited exception to it in these terms:

> [65] The general rule that witnesses and other innocent third parties (like the innocent accused) are not compensated for losses and expenses occasioned by the criminal process exists despite the fact that these costs can be onerous. A witness, for example, may be jailed as a material witness. As it was put in *Blair v. United States*, 250 U.S. 273 (1919) at 281, "The duty, so onerous at times, yet so necessary to the administration of justice according to the forms and modes established in our system of government ... is subject to mitigation in exceptional circumstances".
>
> [66] Courts have not attempted to exhaustively define the scope of exceptional circumstances, outside Crown misconduct, that will justify an award of costs in a criminal matter. The language used in the cases, however, captures the unusual nature of such an order. For example, in *R. v. M.(C.A.)* (1996), 105 C.C.C. (3d) 327 (S.C.C.) at 377, the court referred to the "prevailing convention of criminal practice" that, absent oppressive or improper conduct by the Crown, a criminal defendant is generally not entitled to costs unless the circumstances are "remarkable". To a similar effect is *R. v. Leblanc*, [1999] N.S.J. No. 179 (QL) (C.A.) at para. 15. In *R. v. King* (1986), 26 C.C.C. (3d) 349 (B.C.C.A.) at 351, the court suggested that while the classes of cases for awarding costs beyond improper Crown conduct or a test case were not closed there would have to be "some special category". In *R. v. Curragh Inc.* (1997), 113 C.C.C. (3d) 481, 144 D.L.R. (4th) 614 (S.C.C.) at para. 13 the circumstances were described as "unique" and justified an order for costs against the Crown. In *Curragh Inc.* the Supreme Court did not, however, identify the jurisdictional basis for awarding costs.

[52] Rosenberg, J.A. suggested that a principle which would help to identify the kinds of unique circumstances where costs might be awarded (outside of a s. 24(1) **Charter** remedy) would lie in the court's inherent power to protect against abuse of process. He reiterated his court's earlier approval in **R. v. Chapman** (2006), 204 C.C.C. (3d) 457 at ¶ 16, of the statements by L'Heureux-Dubé, J.A., (as she then was) in **Attorney General of Quebec et al v. Cronier** (1981), 63 C.C.C. (2d) 437 (Que. C.A.) at 449, 451:

> [TRANSLATION]
>
> . . .
>
> In my view, nothing in the present case authorized the Superior Court Judge to order the appellants to pay costs by virtue of his inherent powers of control and supervision.
>
> On the one hand, the Judge cannot authorize himself to do indirectly what the Canadian criminal law does not expressly authorize him to do, in the present case, the ordering to pay costs with respect to extraordinary remedies in criminal matters. In the absence of reprehensible conduct by the appellants, or a serious affront to the authority of the Court or of a serious interference with the administration of justice, which is not the present case, the imposition of costs on appellants in the context of the present debate is in no way justified.

[53] In **R. v. Ciarniello**, [2006] O.J. No. 3444 (C.A.), Sharpe, J.A., for the Court found that costs should be ordered as a **Charter** remedy in favour of a "bystander" – that is, a person who was neither an accused nor the target of a search – where his **Charter** right against unreasonable search and seizure had been breached by the police in a way that was so subversive of the pre-authorization process that the search warrant was quashed and where the Crown had engaged in "hard ball" tactics in the face of that conduct. Sharpe, J. A. went to considerable lengths to distinguish the situation in that case, which he found involved a bystander, from one involving either an accused, or the target of a search. He concluded that the less advantageous position of a bystander with respect to access to effective remedies and other factors justified a less restrictive attitude towards costs as a **Charter** remedy: see ¶ 38-42.

[54] Distilling the relevant legal principles from these several authorities leads me to three general conclusions. First, in criminal proceedings, where exceptional circumstances exist, a costs award may be made against the Crown, whether as a remedy pursuant to s. 24(1) of the **Charter** or pursuant to the court's own inherent jurisdiction. Second, the prosecution's own misconduct may draw a costs sanction in criminal proceedings where, for example, its actions go well beyond inadvertence or carelessness, and amount to oppressive or otherwise improper conduct. Examples would include a Crown Attorney's failure to disclose evidence. Third, whether seen as a remedy under s. 24(1) of the **Charter**, or an exercise of the court's own inherent jurisdiction, the imposition of a costs award against the Crown in criminal proceedings will be an unusual order, reserved to situations which may be seen to involve circumstances of a marked and unacceptable departure from the reasonable standards expected of the prosecution, or if not involving prosecutorial misconduct, conduct by the police or systemic failures so extraordinary as to be virtually unique in character. Given that Mr. Taylor was both a suspect and the target of the search in issue here, I do not need to opine on whether these principles should be relaxed somewhat, as held by Sharpe, J.A. in **Ciarniello**, supra, with respect to infringements of the **Charter** rights of bystanders.

[55] These cases, and others cited in them, demonstrate that the general principles relating to costs in criminal matters apply not only to the trials of accused persons, but also to other types of criminal proceedings, including a *certiorari* application by the target of a search to quash a search warrant: see, for example, **R. v. LeBlanc**, supra; see also in another context **Re Regina and Pawlowski** (1993), 79 C.C.C. (3d) 353 (Ont. C.A.). See as well **R. v. Regan**, [1996] N.S.J. No. 355; **R. v. Nantes**, [1991] N.S.J. No. 72; and **R. v. Morrison**, [1997] N.S.J. No. 290.

[56] The principles to which I have just referred offer a useful reference when the misconduct of the Crown is impugned. However, this case is different on a number of fronts. I will turn to those features now.

[57] As I have just explained, there is no dispute that a superior court may make an award of costs against the Crown in an appropriate case

pursuant to either its inherent jurisdiction, or pursuant to s. 24(1) of the **Charter**.

[58] The Chambers judge acknowledged these two bases of authority, however, at no point did he indicate which of these two (or both) he was relying upon.

[59] It is clear from reading his reasons that the Chambers judge understood costs were being sought "because of the egregious conduct of officials of CRA," a "test" he repeated several times in his decision. For example, in ¶ 17 he observes:

> [17] Costs are not awarded against the Crown unless there has been improper or egregious conduct . . . The agency's conduct amounted to more than error or simple negligence. It was serious negligence bordering on gross negligence; in fact, it was willful blindness on the part of Mr. Patterson in conducting the investigation.

[60] The Chambers judge based his costs award entirely on the conclusion at ¶ 30 of his decision that the "conduct complained of was sufficiently serious and egregious to be the basis for an award of costs." The Crown has not appealed from the judge's findings of fact about the investigator's conduct or his characterization of it as "serious," "bordering on gross negligence" and "egregious."

[61] What is challenged is the "leap" taken by the Chambers judge in linking the conduct of the CRA's investigator and other officials to the conduct of "the Crown" thereby fixing the Crown with liability for a $17,000 cost award. I accept the appellant's submissions and find, respectfully, that in making that connection the Chambers judge erred in law by failing to apply proper legal principles and by failing to carefully assess the evidence in order to decide the extent to which the circumstances would warrant their application.

[62] As noted by Glube, C.J.N.S. in **R. v. LeBlanc**, supra:

> [16] . . . really an attempt to obtain damages through costs in a criminal matter instead of commencing a civil action against the R.C.M.P. Even if a **Charter** breach had been found against the R.C.M.P., a breach by a

> law enforcement agency should not be attributed to the Crown unless the Crown was a party to the breach.
>
> . . .
>
> [18] . . . there was no conduct or behaviour on the part of the Crown to warrant an award of costs against the Crown. . . .

(Underlining mine)

[63] This critical distinction was also considered in the recent decision of Ratushny, J. in **O'Neill v. Canada (Attorney General)**, [2007] O.J. No. 496, which illustrates the point. The case involved a constitutional challenge to the provisions of the **Security of Information Act**, R.S.C. 1985, c. 0-5 as amended, creating offences relating to "leaks" of "secret official" government information. The R.C.M.P. had obtained warrants to search the home and office of a journalist who had published an article concerning Mr. Maher Arar, the Syrian-born Canadian citizen who had been arrested by American authorities and deported to Syria in September, 2002. The searches were conducted and evidence was seized. The journalist and other interested parties challenged the validity of the searches and seizures on the grounds that the offences created by the legislation were unconstitutional. They asked that the warrants be quashed, that the seized items be returned, and that there be an order for costs. In the result the warrants were quashed and the seized items ordered returned. The matter of costs was adjourned for further submissions. In her costs decision dated February 12, 2007, Ratushny, J. reviewed the relevant jurisprudence and stated:

> [6] The general rule is that costs will only be awarded against the Crown if the accused can show "a marked and unacceptable departure from the reasonable standards expected of the prosecution" (*974649 Ontario Inc*. at para. 87; *Ciarniello*, at para. 31) or, if there is "oppressive or improper conduct" by the Crown (Foster, at para. 62) or, where "other exceptional circumstances exist such that fairness requires that the individual litigant not carry the financial burden flowing from his or her involvement in the litigation" (*Foster*, at para. 63 referring to R. *v. Garcia* (2005), 194 C.C.C. (3d) 361 (Ont. C.A.) at para. 11).

> [7] The rationale behind this general rule has been well expressed by a number of courts across Canada. They have emphasized the public interest role of the Crown, that compensation for losses incurred is ordinarily left to civil proceedings and that the conduct of a law enforcement agency is not to be attributed to the Crown unless the Crown was a party to that conduct.

In **O'Neill**, as is the case here, there was no evidence of Crown involvement *until* the filing of an application to challenge the search.

> [20] There is no evidence to support a conclusion of Crown misconduct and the applicants do not allege Crown misconduct. None of the *Charter* breaches committed by the RCMP in their obtaining and executing of the Warrants can be attributed to the Crown. There is no evidence the Crown was a party to the abuse of process committed by the actions of the RCMP.

[64] Before the judge, Mr. Taylor did not rely at all on misconduct of the prosecutor, or involvement by the prosecution in the investigator's misconduct, in his request for costs against the Crown. His position was that if the usual rule concerning costs in criminal cases applied, he could not succeed. His claim for costs was based solely on the conduct of the investigator and the submission that the usual costs rule in criminal cases should not apply because the proceeding was not a prosecution, but rather an application for *certiorari*, and Mr. Taylor had not been charged with any offence.

[65] Unfortunately the Chambers judge here appears to have misconstrued counsels' submissions on the point. He writes:

> [31] It has not been argued that this case is similar to *LeBlanc*, in that a line should be drawn between the investigating authorities and the prosecuting authorities for purpose of awarding costs against the Crown. While I am cognizant of that line of cases, it has not been suggested that Canada Revenue is analogous to the police in *LeBlanc* and similar cases. If that were the case, I would still be satisfied that there is no clear line between the conduct of the Canada Revenue investigators and that of the Crown. While the original obtaining of the warrant would appear to be purely the responsibility of the CRA, the egregious and oppressive conduct continued until well into the course of the first prosecution, in fact, after the decision quashing the warrant, with the refusal to return

> the seized items until the eve of a hearing on the issue. As such, I am satisfied that the Crown is implicated in conduct justifying an award of costs.
>
> (Underlining mine)

[66] With respect, this issue emerged clearly from the cases to which the Chambers judge was referred, and from which he liberally quoted on that very point. It formed part of Crown counsel's submissions attempting to separate the conduct of CRA officials, from the Crown's own limited involvement in this proceeding. Then, in formulating his "alternative" conclusion the Chambers judge opined that even if the "dividing line" argument had been made, he would still have determined that there was no meaningful demarcation between the behaviour of the Crown and the conduct of the CRA. In seeking to justify that conclusion the Chambers judge observed that:

> . . . the egregious and oppressive conduct continued until well into the course of the prosecution . . .
>
> (Underlining mine)

Here the Chambers judges's error is evident. There was never any "prosecution" of the respondent which might have arguably prolonged the Crown's involvement and expanded its role in these proceedings. On the contrary its participation was exceedingly limited. The tight parameters are accurately described in the appellant's factum:

> At the conclusion of the cross-examination, and considering the documentation before the Court, it is a fact that there was no evidence that the Crown, as represented by counsel for the Attorney General of Canada, (hereinafter, the Crown) had played any role in the drafting or execution of either the April or May ITOs and SWs, in maintaining custody or control of the items seized, or in the making of any subsequent decisions by CCRA to retain or dispose of those items. There was no evidence that the Crown was informed about the

> Respondent Taylor's complaints concerning the search, much less took a position on the issue, or had any lawful authority to compel the CCRA to do anything in the latter's dealings with the Respondent Taylor and, in particular, to refuse or consent on behalf of the CCRA to the return of any seized items. There were no charges laid and there was no "prosecution." The Crown's role was in this case limited to responding to the *certiorari* application of the Respondent (then Applicant) Taylor, the costs portion of which is the subject of this appeal.

[67] In my respectful opinion the Chambers judge erred by failing to instruct himself as to whether the impugned conduct of the CRA officials which was found to be egregious, was sufficiently tied to the Crown such as would make the Crown liable for an additional remedy of costs. Had he done so, he would have concluded that there was no evidence to support any conclusion that the Crown was implicated in the investigator's misconduct. The Chambers judge's failure to undertake a proper review of the Crown's own conduct, simply referring instead back to his initial characterization of the actions which led him to quash the search warrants, amounts to an error in law. See, for example, **R. v. Cole**, 2000 N.S.C.A. 42, in particular ¶ 60-62.

[68] I will now consider the basis on which the Chambers judge awarded costs against the Crown.

(iv) <u>Based on the evidence presented, did the Chambers judge err by ordering costs against the Crown</u>?

[69] My review of the Chambers judge's decision points to two reasons for his determination that the Crown's behaviour was sufficiently blameworthy as to render it liable for substantial costs.

[70] The Chambers judge concludes ¶ 29 with these comments:

> . . . It was only after my decision quashing the warrant, and on the eve of a further hearing requesting a direction to return the items seized, that Crown and CRA officials notified Mr. Taylor's counsel that they would not be pressing charges under the *Income Tax Act*.

Here, the judge appears to fault a certain tardiness on the part of the Crown in resiling from its initial position.

[71] The second reason may be gleaned at the end of ¶ 31 of his decision where he states:

> . . . While the original obtaining of the warrant would appear to be purely the responsibility of the CRA, the egregious and oppressive conduct continued until well into the course of the prosecution, in fact, after the decision quashing the warrant, with the refusal to return the seized items until the eve of the hearing on the issue. As such, I am satisfied that the Crown is implicated in conduct justifying an award of costs.

Here, the judge appears to target a delay on the part of the Crown in coming to the decision to return the seized items to the respondent. Mr. Taylor took no such position. On appeal, he submitted that we should simply "ignore" the judge's findings in ¶ 31 of his reasons.

[72] With respect, these two features are hardly evidence of some type of *animus* or "hard ball" attitude on the part of the Crown suggestive of the kind of oppressive or otherwise improper conduct as to justify a costs award in a criminal case. It is important to keep in mind that the respondent's original request of the court for relief included return of the items seized. These items would still have been under a Provincial Court detention order pursuant to s. 490 of the **Criminal Code** which would have required a contrary court order in order to be returned. The Chambers judge's September 25, 2006 decision granted *certiorari* but was silent on the request for return. The next hearing date (November 14, 2006) was set to determine the matter of costs, not to speak to the issue of returning items.

[73] Further, there was no evidence before the court as to who made the decision about not charging Mr. Taylor, much less when that decision was made, or why. It is unfortunate that the Chambers judge sought to link the quashing of the warrant and the timing of what he considered to be an "order of return" hearing, with the decision to prosecute or not.

[74] Finally, notwithstanding the quashing of the warrant, the fact that the Chambers judge did not deal with Mr. Taylor's request for an order returning the items seized on September 25, 2006, left that request an open issue. The Crown had taken a position opposing the granting of such an order while the issue remained unresolved and there was still a possibility that Mr. Taylor might be charged. This it had a right to do. The subject, however, became moot when the decision not to lay charges was made and communicated to the Court by counsel. By the hearing of November 14, 2006 it would seem to me that consenting to the order became a simple house-keeping matter.

[75] In my respectful view there was a complete lack of evidence of the Crown ever having been implicated in the "egregious and oppressive" conduct of CRA officials. Absent such evidence, the Chambers judge speculated as to the Crown's motives or attitudes based on the timing of events and his characterization of the purpose of the November 14, 2006 hearing. This amounted to an error of law. **R. v. White**, supra.

[76] There is no reason to conclude that in defending a challenged search warrant and seizure, the Crown acted in any manner other than what might reasonably be expected of Crown counsel in similar circumstances.

[77] I would hold that there was no evidence presented in this case upon which the Chambers judge could conclude that the Crown ought to be liable for the exceptional remedy of costs in a criminal case.

(v) <u>What is the effect, if any, of s. 4(2) of the Canada Revenue Agency Act in this case</u>?

[78] Prior to the hearing, through the Registrar, we asked counsel to address the following issue in their oral arguments:

> *"Is s. 4(2) of the Canada Revenue Agency Act, 1999 c. 17, which makes the agency for all purposes an agent of Her Majesty in Right of Canada, relevant to the issues raised by the Appellant?"*

[79] Both counsel addressed this issue at the hearing on October 9, 2007. At the conclusion of the hearing we reserved judgment and gave counsel a

further opportunity to add to their submissions in writing. I have considered those submissions, the appellant's filed October 30 and the respondent's filed December 4.

[80] Having done so it is my opinion that the answer to the question we posed is "no." In my respectful view ss. 4(2) of the CRAA is not relevant to the determination of the issues on appeal, for the reasons that follow.

[81] Subsection 4(2) of the **Canada Revenue Agency Act**, S.C. 1999, c. 17 (the CRAA) provides that the Canada Revenue Agency is:

> . . . for all purposes an agent of Her Majesty in Right of Canada

[82] In my opinion subsection 4(2) does not displace the requirement at common law that in order to award costs against the Crown in a criminal matter it generally – as discussed earlier in my reasons – must be demonstrated that the Crown was either complicit in, or engaged in, egregious or outrageous conduct towards an accused person, a person under investigation, or a third party.

[83] The basis of this general rule is not that the prosecutor might be an agent of the Crown and that an investigator might not be. The general rule is not based on the law of agency, but on strong reasons of public policy which I have already described, and which have been set out in the cases on many occasions: see, for example, **Foster**, supra at ¶ 62-65; and **Ciarniello**, supra, at ¶ 31-36. Whether by virtue of ss. 4(2) of the CRAA, the investigator here was or was not an agent of the Crown (a point I need not decide) does not change the general legal principle applicable to costs against the Crown in criminal matters.

[84] Nor, in my opinion, does it make a difference that the impugned conduct in this case involved a CRA investigator, as compared to the "independent" "status of an R.C.M.P. officer in the course of a criminal investigation." See **R. v. Campbell**, [1999] 1 S.C.R. 565 at ¶ 27-29. The investigative function common to the police and regulatory investigators is illustrated by their shared privileges and protections, their responsibilities, and their access to enforcement tools under the **Criminal Code**. See, for example, the provisions dealing with the authorized use of reasonable

force, s. 25; immunity, s. 25.1; use of firearms, s. 117.07; obstruction, s. 129; assault, s. 270; interception of private communications, s. 184.2; search warrants, s. 487.11; and production orders, s. 487.012. In the context of investigations under the **Income Tax Act**, s. 244 provides that an Information may be laid by an officer of the CRA, or by a member of the R.C.M.P.

[85] To conclude on this point, I see no useful distinction between these "types" of investigators as it relates to an award of costs against the Crown. A prosecution under the **Income Tax Act** for tax evasion carries with it significant penalties, including imprisonment. In **R. v. Wholesale Travel Group Inc.** (1991), 67 C.C.C. (3d) 193 (S.C.C.), a case involving a comparable economic regulatory act, the **Competition Act**, Chief Justice Lamer remarked at pages 215-16:

> . . . Much has been made in this case of the fact that the *Competition Act* is aimed at economic regulation. In my view, whether this offence (or the Act generally) is better characterized as "criminal" or "regulatory" is not the issue. The focus of the analysis in *Reference re: s. 94(2) of Motor Vehicle Act* and *R. v. Vaillancourt* was on *the use of imprisonment* to enforce the prohibition of certain behaviour or activity. A person whose liberty has been restricted by way of imprisonment has lost no *less* liberty because he or she is being punished for the commission of a regulatory offence as opposed to a criminal offence. Jail is jail, whatever the reason for it. In my view, it is the fact that the state has resorted to the restriction of liberty through imprisonment for enforcement purposes which is determinative of the principles of fundamental justice. I cannot agree that these principles take on a different meaning simply because the offence can be labelled as "regulatory". Indeed, while I agree that this offence can be characterized as "regulatory", the label loses much of its relevance when one considers that an accused faces up to five years' imprisonment upon conviction.

[86] In resisting the present appeal the respondent has also referred to the **Crown Liability and Proceedings Act**, R.S., 1985, c. C-50, as amended, the **Criminal Code**, as well as certain related statutory provisions in the **Judicature Act** and the **Civil Procedure Rules,** as providing sufficient legislative authority to bind the Crown as "principal" for the acts of the CRA investigator as its "agent" in this case. As appears in the respondent's supplemental factum:

> . . . prosecutors . . . are agents of the Crown and where their conduct is found wanting, cost consequences can follow. In the same vein where the conduct of the Canada Revenue Agency is found wanting, cost consequences can and should follow.

Further, the respondent says:

> . . . costs can be awarded against the Crown for misconduct by a police agency. Failure to disclose is an obvious example.

[87] For the reasons already expressed in rejecting concepts from the law of agency as being applicable here, I do not consider the provisions of the **Crown Liability and Proceedings Act** to be relevant in disposing of the issues in this case, which involve a criminal investigation and an inquiry as to whether the Crown itself is complicit in the investigating officer's conduct. Neither do I regard the respondent's reference to failure to disclose cases as persuasive in the circumstances here.

[88] In matters of disclosure the Crown invariably manages the disclosure of evidence through its office, whether to the accused directly or to defence counsel. While obviously the Crown is not involved in gathering evidence – clearly the responsibility of the peace or public officer involved in the investigation – it is the Crown Attorney who discloses the evidence gathered by the investigators, and who responds to any further requests for disclosure. In that way the Crown is very much engaged, and will be assumed to have taken on the responsibility for any lapses or misconduct on the part of the police or regulatory agency in disclosing evidence. Such missteps may visit costs upon the Crown. But those examples are not this case, which has nothing to do with disclosure, and where the Crown's only and very limited role was to respond to an application for *certiorari*.

[89] In conclusion I would find that ss. 4(2) of the CRAA is not relevant to the determination of the issues on appeal.

Conclusion

[90] I recognize the considerable deference that is owed to a judge's findings of fact and to inferences that may be reasonably drawn from the evidence. However, I respectfully conclude that in this case the failings I have noted constitute an error in law which require our intervention. The Chambers judge erred in holding that the impugned conduct of the CRA officials which he found to be egregious (and which is not contested) was sufficiently tied to the Crown as to make it liable for an additional remedy of costs. There was no evidence upon which the Chambers judge could conclude that the exceptional remedy of costs against the Crown in a criminal proceeding was warranted, whether on the basis of a **Charter** violation, or applying the court's own inherent jurisdiction at common law. The statutory provisions of the **Canada Revenue Agency Act**, and the **Crown Liability and Proceedings Act**, are of no assistance to the respondent in the circumstances of this case.

[91] In this appeal the Crown was not involved in prosecuting the case. The respondent had not been charged. There was no trial. The Crown did not participate in supervising the disclosure of evidence or in responding to requests for further disclosure. Its role was limited to responding to a *certiorari* application brought by Mr. Taylor. To impose a costs award against the Crown in this case would in my view deter the Crown from defending such applications, undermine criminal prosecutorial processes generally, and be contrary to the public interest.

[92] Whatever remedies the respondent may have against the Canada Revenue Agency or its investigator Mr. Patterson, they do not include a costs order against the Crown in the circumstances of this case.

[93] I would grant leave to appeal, allow the appeal and set aside the Chambers judge's order dated April 24, 2007. Of course there will be no order as to costs on this appeal.

Saunders, J.A.

Concurred in:

Cromwell, J.A.

Oland, J.A.