NOVA SCOTIA COURT OF APPEAL
Citation: *R. v. Martin*, 2017 NSCA 39

Date: 20170516
Docket: CAC 437121
Registry: Halifax

Between:

Darren Martin

Appellant

v.

Her Majesty the Queen

Respondent

Judges:	Beveridge, Oland and Scanlan, JJ.A.
Appeal Heard:	January 30, 2017, in Halifax, Nova Scotia
Held:	Leave to Appeal Denied, per reasons for judgment of Oland, J.A.; Beveridge and Scanlan, JJ.A. concurring
Counsel:	Darren Martin, appellant on his own Shaun O'Leary, for the respondent

Reasons for judgment:

[1] Canadian income tax and excise tax legislation authorizes the Canada Revenue Agency ("CRA") to exercise both audit and investigative functions. The matter which now comes before this Court concerns the distinction between the two functions and, more particularly, when the predominant purpose of the CRA's inquiries shifts from a compliance audit to a criminal investigation. Once it does, the Minister can no longer compel a taxpayer to disclose information in order to further its investigation. The CRA must then obtain a search warrant.

[2] In this case, a taxpayer charged with making false or deceptive statements under the *Income Tax Act* and the *Excise Tax Act* applied for the exclusion of certain evidence on the grounds that it had been collected in violation of his rights under ss. 7 and 8 of the *Charter*. The courts below have considered this matter twice, with different results.

[3] A judge of the Nova Scotia Provincial Court determined that the audit had evolved into a criminal investigation when the taxpayer made certain statements to the auditor. He found that ss. 7 and 8 of the *Charter* had been violated, and ordered evidence collected pursuant to a search warrant excluded. Without that evidence, the charges could not be pursued and they were dismissed. The Crown appealed to the Summary Conviction Appeal Court ("SCAC").

[4] That Court found no *Charter* violations, allowed the appeal and ordered a new trial. The taxpayer now comes before this Court pursuant to s. 839(1) of the *Criminal Code*, which only permits an appeal from a SCAC decision with leave of the Court on a question of law.

[5] For the reasons which follow, I would deny leave to appeal.

Background

[6] In *R. v. Jarvis*, 2002 SCC 73, the Supreme Court of Canada adopted the "predominant purpose" test to determine when a CRA investigation into a taxpayer changes from an audit to a determination of penal liability. If there was no clear decision to pursue a criminal investigation, the trial judge must determine the predominant purpose of the inquiry in light of the factual circumstances. The *Jarvis* decision provided a non-exhaustive list of factors to be considered. Both judges below correctly accepted *Jarvis* as the governing authority.

[7] The appellant, Darren Martin, has an ornamental ironworks business. In the fall of 2007, the CRA randomly selected him as a small business taxpayer for a field audit. The auditor, Ms. Higgins, met with Mr. Martin and obtained various financial records and authorization forms. She had reviewed bank deposit records against invoices and found a sizable discrepancy before she, her team leader and Mr. Martin met on November 7, 2007. Judge Del W. Atwood of the Nova Scotia Provincial Court determined that what the taxpayer admitted during this meeting transformed the audit into an investigation.

[8] The trial judge wrote two decisions: 2013 NSPC 49 ("Audit Decision") and 2013 NSPC 50 ("Warrant Decision"). His reasoning on when the audit became an investigation is found in the former.

[9] In his Audit Decision, Judge Atwood referred frequently to the *Jarvis* decision, including its passages on ss. 7 and 8 of the *Charter*. He quoted *Jarvis* on how to distinguish a compliance audit from an investigation and the factors to be considered in making that determination. His Audit Decision explained how the application of those criteria to the evidence before him led to his conclusion that the audit inquiry became a criminal investigation on November 7, 2007:

> [29] … Significantly, the interview conducted between Ms. Higgins, her team leader and Mr. Martin, held at Mr. Martin's shop on November 7th … During that meeting, Mr. Martin disclosed to Ms. Higgins and her team leader that he had a practice of deferring invoices: "Darren said that if he can't afford to pay the HST in a quarter, he will take out the invoice which he can't afford to pay and pay it later". That is the entry in Ms. Higgins' diary at page 166 of *voir dire* Exhibit #3, and Ms. Higgins adopted the accuracy of that record.
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> …
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> [31] What I can say is that it is clear that at that particular point in time, Mr. Martin had essentially admitted to the Canada Revenue Agency auditors the broad outline that he had failed, on at least one if not more than one occasion, to make the proper quarterly remittences of collected HST required of him under the terms of the *Excise Tax Act*; flowing inevitably from that, he had admitted submitting intentionally an inaccurate return under that legislation. That, essentially, could well have been taken as an admission of the commission of an offence, an admission of, essentially, all of the essential elements of an offence because Mr. Martin did not claim to have acted with inadvertence. Mr. Martin said that he did what he did on purpose.
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> [32] And so, in relation to criterion "A" of *Jarvis*, based on Mr. Martin's admission and based on the information that they had collected from Mr. Martin at that point in time, the CRA authorities certainly had in their hands evidence

> that would have supported a decision to proceed with a criminal investigation because of the very complete nature of Mr. Martin's admission of improper conduct. Yet the audit continued, including the compelled production of business records.
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> [33] In considering criterion "B" in *Jarvis*, I inquire into the result of Mr. Martin's disclosure to Ms. Higgins. Ms. Higgins described her audit function in great detail. She stated that it was often the case that if a taxpayer were to reveal to her that the taxpayer had been carrying out business practices that involved violations of the *Income Tax Act*, she would engage that taxpayer in an educational function to set the taxpayer straight. There was no evidence that, during the meeting on November 7th, 2007, Ms. Higgins engaged in that function. …

[10] After the meeting, Ms. Higgins' team leader told her to track the invoices to determine if they were claimed later. The Audit Decision continued:

> [36] … It is clear to the court that the inquiry that Ms. Higgins had been instructed to undertake by her supervisor was not an inquiry to determine overall taxpayer financial liability over the years that were the subject of the audit, but to determine whether Mr. Martin had told the truth about properly reporting and properly remitting collected HST in the following quarter. Ms. Higgins continued to gather up records based on the legislative authority compelling production for audit purposes.
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> [37] A taxpayer's truthfulness, in the court's view, goes to the issue of *mens rea*, and I observe the significance of that because of the fact that the gist of the offences before the court is the making of false or deceptive statements. … Honesty is a clear component of *mens rea* in a Section 239 *Income Tax Act* offence and in conducting the inquiry as instructed by her supervisor, Ms. Higgins' focus was clearly, in my view–and I find this as a fact–to verify whether Mr. Martin was telling the truth.
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> [38] In my view, the conduct of the authorities was such that it was consistent with the pursuit of a criminal investigation. …

[11] The trial judge accepted Ms. Higgins' "complete honesty that she believed she was acting in her capacity as an auditor." However, in his view, the investigation was into Mr. Martin's *mens rea* so, regardless of her subjective belief, she was then collecting evidence pursuant to a criminal investigation. He determined that the compliance audit had become a criminal investigation on November 7, 2007, months before the file was transferred to CRA investigators, and stated:

> [43] Having made that finding, I do find that there has been a Section 7 violation of Mr. Martin's *Charter* rights. That flows essentially into a finding of a Section 8 violation, given that the Section 7 violation afforded the evidence upon which the information to obtain was largely drafted; this, in turn, resulted in the issuance of the search warrant, and it was this search that resulted in the seizure of essentially the entirety of the Crown's criminal case against Mr. Martin.

The trial judge ordered the exclusion of evidence collected as a result of the search warrant against Mr. Martin.

[12] As mentioned earlier, Judge Atwood wrote two decisions. The second, his Warrant Decision, considered Mr. Martin's application to determine the constitutionality of a s. 487 warrant to search issued on the strength of an information to obtain (ITO) sworn on September 22, 2008. ITO paragraph 8(m) referred to the auditor's notes about the November 7, 2007 meeting, which recounted the taxpayer's statements about his practice of deferring HST he could not afford to remit to subsequent quarters. The trial judge wrote:

> [7] … the Court is concerned particularly with the judicial use of that admission, given the fact that the Court is being called upon to adjudicate upon the constitutionality of a warrant; conscious of what was stated by the Supreme Court of Canada in *R. v. White*, [1999] 2 S.C.R. 417 at paragraph 62 regarding the reliability or lack of reliability of utterances made under statutory compulsion, absent use immunity, I find that there remains on the record insufficient evidence for the Court to conclude that the authorizing justice would have had before him on 22 September 2008, sufficient evidence to authorize the issuance of the search warrant… .

He ordered that all evidence gathered pursuant to the search warrant be excluded.

[13] The Crown appealed the decisions of the trial judge to the SCAC. It presented two issues for determination:

> 1. The trial judge erred concluding that the predominant purpose of the inquiry shifted after November 7, 2007. Specifically, he:
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> (a) Failed to apply the subjective component of the "predominant purpose" test; and
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> (b) Overemphasized the possible relevance of the inquiry to a criminal investigation rather than focussing on the purpose of the inquiry.
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> 2. The trial judge erred excluding the evidence obtained by search warrant, specifically; he erred in excising from the Information to Obtain a Search Warrant

> the statement of Mr. Martin as unreliable and the information obtained by the auditor after November 7, 2007 as obtained contrary to section 7 of the *Charter*.

[14] The appeal to the SCAC was heard by Justice Elizabeth Van den Eynden, then of the Nova Scotia Supreme Court. She determined that the trial judge's conclusions as to when the compliance audit had evolved into a criminal investigation were unreasonable and could not be supported by the evidence. In her view, there had been no breach of the *Charter*, and no basis upon which to exclude material in the ITO. The SCAC judge allowed the appeal and ordered a new trial (2015 NSSC 8). Later in my decision, I will examine her reasons in greater detail.

Standards of Review

[15] Two standards of review are applicable for this appeal pursuant to s. 839(1) of the *Code*. *R. v. Pottie*, 2013 NSCA 68 explained:

> [15] … there are two standards of review at play in summary conviction matters; the first is the standard of review to be applied by the SCAC judge when reviewing the trial decision; and the second being the standard we apply to the decision of the SCAC judge.
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> [16] The standard of review for the SCAC judge when reviewing the trial judge's decision, absent an error of law or miscarriage of justice, is whether the trial judge's findings are reasonable or cannot be supported by the evidence. In undertaking this analysis the SCAC court is entitled to review the evidence at trial, re-examine it and re-weigh it, but only for the purposes of determining whether it is reasonably capable of supporting the trial judge's conclusions. The SCAC is not entitled to substitute its view of the evidence for that of the trial judge.
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> [17] Our jurisdiction is grounded in the error alleged to have been committed by the SCAC judge. It is not a *de novo* appeal from the trial judge. This Court must determine whether the SCAC judge erred in law in the statement or application of the principles governing its review (see *Francis*, ¶7; see also *R. v. R.H.L.*, 2008 NSCA 100; *R. v. Travers*, 2001 NSCA 71; *R. v. Nickerson*, 1999 NSCA 168, ¶6). This distinction is important when considering whether to grant leave; the error we must identify is in the SCAC judge's decision.

Issues

[16] Mr. Martin represented himself in Provincial Court, the SCAC and before this Court. I reformulate his grounds of appeal as follows:

(a) Should leave be granted in the matter?

(b) Did the SCAC judge commit an error of law when she concluded the trial judge's conclusions were unreasonable and could not be supported by the evidence?

(c) Did the SCAC judge commit an error of law when she concluded that the search warrant should be upheld?

Leave to Appeal

[17] An appeal from a decision of the SCAC requires leave of the Court, and can only be heard on a question of law: s. 839(1) of the *Code*

[18] In *Pottie*, this Court reiterated its endorsement of the test for granting leave set out in *R. v. R. R.*, 2008 ONCA 497 and summarized the applicable principles:

> [21] The Crown, in its factum, has accurately summarized the principles that have emerged from the case law to guide provincial appellate courts when deciding whether to grant leave to appeal from a SCAC decision. They are:
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> 1. Leave to appeal should be granted sparingly. A second appeal in summary conviction cases should be the exception and not the rule. [see *R. R.* at ¶25 and ¶37; *R. v. Chatur*, 2012 BCCA 163 at ¶18; *R. v. Paterson*, 2009 ONCA 331 at ¶1]
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> 2. Leave to appeal should be limited to those cases in which the appellant can demonstrate exceptional circumstances that justify a further appeal. [see *R.R.*, ¶27; *R. v. Dickson*, 2012 MBCA 2, ¶14; *R. v. M. (R.W.)*, 2011 MBCA 74, ¶32]
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> 3. Appeals involving well-settled areas of law will not raise issues that have significance to the administration of justice beyond a particular case. [see *R. v. Zaky*, 2010 ABCA 95 at ¶10; *R. v. Im*, 2009 ONCA 101 at ¶17; *R. v. Hengeveld*, 2010 ONCA 60 at ¶5; *R.R.*) at ¶31]
>
> 4. If the appeal does not raise an issue significant to the administration of justice, an appeal that is merely "arguable" on its merits should not be granted leave to appeal. Leave to appeal

> should only be granted where there appears to be a clear error by the SCAC. [see *M. (R.W.)* at ¶37; *R.R.* at ¶32]
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> 5. A second level of appeal is an appeal of the SCAC justice. It is to see if he or she made an error of law. The second level of appeal is not meant to be a second appeal of the provincial court decision. [see *R.R.* at ¶24; *Chatur* at ¶17]
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> 6. The fitness or leniency of a sentence is a factor a provincial appellate court can consider when deciding whether to grant leave. [see *Chatur* at ¶19; *Im* at ¶22]
>
> [22] To decide whether the appellant should be granted leave to appeal, I agree with the Crown's submission that the following questions must be answered:
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> a. Does this case raise an issue that is significant to the administration of justice?
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> b. Are the merits of the appellant's case strong; is there a "clear" error of law?
>
> c. Does the appellant face a significant deprivation of his liberty if he is not granted leave to appeal?

Pottie was cited as the correct test for leave to appeal a decision of the SCAC in *R. v. Boliver*, 2014 NSCA 99 at ¶6; *R. v. Alkhatib*, 2013 NSCA 91 at ¶14; *R. v. Roshanimeydan*, 2014 NSCA 65 at ¶3; and *Doncaster v. Canada (Attorney General)*, 2013 NSCA 150 at ¶9.

[19] *Jarvis* is well-established law and this case does not raise issues of significance to the administration of justice. The central question on the application for leave to appeal is whether there appears to be a clear error by the SCAC.

The Audit Decision

[20] The SCAC judge reminded herself that the trial judge had made factual determinations, and that she was not to substitute her view for his. Rather, while she must review the evidence at trial, re-examine and weigh it, she was to do so **only** for the purpose of determining whether his findings were unreasonable and cannot be supported by the evidence.

[21] If a SCAC judge substitutes her view of the evidence based on her review of the transcript for that of the trial judge, instead of asking herself whether the trial judge's finding was unreasonable or unsupported by the evidence, then she has

applied the wrong test in conducting her appellate review and, in doing so, erred in law. See *R. v. Nickerson*, 1999 NSCA 168 at ¶6 and ¶7, and *R. v. Farrell*, 2009 NSCA 3 at ¶18.

[22] Despite the SCAC judge setting out the correct test for appellate review, Mr. Martin argues that her reasons show that she erred by substituting her view of the evidence for that of the trial judge. He points to what the SCAC judge wrote after referring to the trial judge's factual determinations after his application of the *Jarvis* factors:

> [30] The determination as to whether the predominant purpose of the inquiry shifted is very much a fact driven exercise. As noted by the Supreme Court of Canada in *Jarvis* it involves subjecting the facts to a multi-factual legal standard. I have reviewed and reweighed all the evidence to determine if it is capable of supporting the trial judge's conclusions. I have determined it is not. With respect, I have determined that the trial judge's conclusions are unreasonable and cannot be supported by the evidence. The evidence does not support the trial judge's conclusion the Rubicon was crossed.
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> [31] **In my view the evidence is clearly most consistent with and strongly supports a determination that the auditor was solely performing a legitimate audit function prior to February 20, 2008 when the decision was made to transfer to investigation**. Prior to that time the auditor was asking for information in the normal course of an audit. The auditor's inquiry goes more to the determination of tax liability - a civil matter. To conclude otherwise stretches the evidence beyond its reasonable application.
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> [32] In my view, the trial judge incorrectly overemphasized the relevancy of the auditor's inquiry to a criminal investigation, ignored or failed to recognize the importance of the intended purpose of the auditor's inquiries, and overemphasized any criminal evidence or inculpatory statements of the accused as being tantamount to a full admission of all the elements of the offense.
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> [Emphasis added]

[23] In her decision, the SCAC judge quoted Mr. Martin's confirmation that the auditor's notes were accurate where he had said that if he could not afford to pay the HST in a quarter, he would omit that invoice and pay it later. She reasoned:

> [34] This seems to fall short of an admission of willful evasion; in other words, the Respondent knowing that his actions were clearly contrary to his reporting requirements. Furthermore, I find the evidence cannot reasonably support a finding or inference the auditor's pursuit of information was aimed at determining intent behind the tax payers [*sic*] conduct.

She also wrote:

> [41] **From a review of the transcripts, I restate my conclusion that I find the evidence is clearly consistent with and strongly supports a finding the auditor was engaged in a legitimate audit function to determine tax payer liability more generally**. In other words, a civil matter and not crossing into the territory of penal or criminal investigations which would trigger *Charter* protections for the Respondent. There is insufficient evidence to conclude that an investigation was underway *de fac*to or otherwise prior to the crystallization of the investigative decision in February 2008.
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> [42] The decision of the trial judge created procedural shackles on CRA regulatory officers; something to be guarded against, assuming the regulatory officers are acting appropriately and within the scope of their authority. **In my view, the evidence consistently and strongly supports the auditor was acting appropriately, lawfully and within the scope of her authority and the trial judge erred in his application of the *Jarvis* factors to the evidence.**
>
> [43] Having reached this conclusion, regarding the legitimate audit function there are no *Charter* breaches; therefore no basis upon which to excise information from the Information to Obtain. …
>
> [Emphasis added]

[24] Mr. Martin points to the SCAC judge's repeated statements that, in her view, the evidence was "clearly more consistent with and strongly supports" determinations contrary to those made by the trial judge. According to the taxpayer, these show that she weighed the evidence herself, and substituted her assessment of the evidence for his and so erred in conducting her appellate review. The SCAC judge's wording was unclear. However, my review of her reasons satisfies me that she applied the correct test, and properly asked herself whether the trial judge's findings were unreasonable or unsupported by the evidence.

[25] As stated in *Nickerson* at ¶6, a summary conviction appeal on the record is an appeal: it is neither a simple review to determine whether there was **some** evidence to support the trial judge's conclusion, nor a new trial on the transcript. Here, the SCAC judge did not retry the case on the transcript. Rather, she explained why the trial judge's conclusions were unreasonable or unsupported by the evidence.

[26] For example, the SCAC judge quoted excerpts from the transcript of Mr. Martin's evidence showing that, when the auditor raised the discrepancy between invoices and remittances during the November 7, 2007 meeting, Mr. Martin called his bookkeeper. It was the bookkeeper, not the taxpayer, who first indicated that

the deferred invoices might explain the discrepancy. Mr. Martin relayed that telephone communication to the auditor. That evidence was not considered by the trial judge when he characterized the taxpayer's words to the auditor as an admission of tax evasion triggering a criminal investigation to determine if the taxpayer had the requisite *mens rea*.

[27] The SCAC judge also explained that in the audit phrase, it was logical for the auditor to inquire whether the deferred income was in fact later recorded, which would confirm compliance. Ms. Higgins testified that it was only after she was unable to reconcile the financial documents "year after year" that the decision was made to refer the matter to investigators.

[28] The SCAC judge pointed out the auditor's "uncontested and unequivocal evidence" that, had compliance been confirmed, she would have advised the taxpayer how to proceed properly in the future, with no other consequences. There was a valid audit purpose to continue to make inquiries of the taxpayer. This evidence was contrary to any inference, such as that drawn by the trial judge, that the auditor was "effectively" acting as an agent for investigative purposes.

[29] The SCAC judge also set out how the evidence did not support the negative inferences the trial judge drew from the auditor's not providing educational direction to the taxpayer in November 2007.

[30] In summary, the SCAC judge did not simply and impermissibly substitute her own view of the evidence for that of the trial judge. Rather, she applied the correct test. I see no clear error in the SCAC judge's decision with regard to the Audit Decision which would support this Court granting leave to appeal.

The Warrant Decision

[31] Did the SCAC judge err when she concluded that the search warrant should be upheld?

[32] The SCAC judge found no *Charter* violation and therefore no basis to excise information from the ITO which had led to the search warrant. It was not necessary that she address the sufficiency of the ITO's remaining content, but she did so briefly:

> [44] Notwithstanding the excising of information, I find the trial judge erred in his determination that the statements of the Respondent respecting certain

> admissions were unreliable because they were made under statutory compulsion absent use immunity. I concur with the Appellant's argument that the decision of *R v White* does not stand for the general proposition that statements given in a regulatory context are inherently unreliable and accordingly inadmissible.
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> [45] The legal test is summarized in paragraph 17 of my decision. I find there was "some evidence" (arguably credible evidence given the statement against interest), in support of the Information to Obtain.
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> [46] Accordingly, with respect, I find the trial judge erred by intervening and concluding there was insufficient evidence to substantiate the issuance of the search warrant and concluding the warrant was issued in contravention of section 8 of the *Charter*.

[33] The SCAC judge's conclusion that the trial judge erred with regard to *White* is correct. There is no general use immunity when information is gathered validly in an audit: *Jarvis* at ¶95 and *R. v. Ling*, 2002 SCC 74.

[34] The judge considering the issuance of a warrant based on the ITO had evidence that: Mr. Martin had underreported income; had deferred invoices to later dates (paragraph 8(m)); his annual income in 2004 to 2006 had varied widely; his 2007 audited income was at least five times that in any of 2004 to 2006; and, after the audit, his net income for those years rose from less than 3% to over 26% of his gross income. If the information gathered on November 7, 2007 and reflected in ITO paragraph 8(m) was considered with the remainder of the ITO information, the issuing judge could have issued a warrant. Indeed, even if that ITO paragraph was excised, the judge would have had a basis to draw an inference that the taxpayer's income tax and HST returns contained "false or deceptive statements."

[35] The SCAC judge correctly set out the standard of review in determining the sufficiency of grounds to obtain a search warrant. As stated in *R. v. Araujo*, 2000 SCC 65 at ¶51, "the question is simply whether there was at least some evidence that might reasonably be believed on the basis of which the authorization could have issued" [emphasis in original]. (See also: *R. v. Garofoli*, [1990] 2 S.C.R. 1421 at pp. 1452 and *R. v. Grant*, [1993] 3 S.C.R. 223 at p. 251).

[36] I see no error of law committed by the SCAC judge when she said the warrant was valid even if the information in the ITO gathered after November 7, 2007 was omitted.

Disposition

[37] The SCAC judge committed no clear errors of law when she reviewed the decisions of the trial judge. I would deny leave to appeal.

[38] The SCAC judge ordered a new trial. My denial of leave to appeal does not preclude Mr. Martin from pursuing on his re-trial arguments that there were other bases to support his contention that the CRA auditors were impermissibly engaged in a criminal investigation.

Oland, J.A.

Concurred in:

Beveridge, J.A.

Scanlan, J.A.