PROVINCIAL COURT OF NOVA SCOTIA
Citation: *R. v. O'Hara*, 2017 NSPC 31

Date: 2017-04-28
Docket: 2316404 & 2316405; 2316443 to 2316448; 2316694 to 2316699; 2316706 & 2316707; 2316717 to 2316722; 2316751 to 2316755;
Registry: Dartmouth

Between:

Her Majesty The Queen

v.

Linda O'Hara and Colleen O'Hara-Gallant

Judge:	The Honourable Judge Theodore Tax,
Heard:	April 24, 2013; April 25, 2013; October 4, 2013; June 30, 2014; January 30, 2014; March 31, 2014; March 25, 2015; July 29, 2015; July 30, 2015; August 28, 2015; September 25, 2015; October 30, 2015; November 27, 2015; February 8, 2016; February 17, 2016; April 26, 2016; May 31, 2016; September 20, 2016; December 6, 2016; December 9, 2016, in Dartmouth, Nova Scotia
Decision	April 28, 2017
Charge:	27 counts under Section 238(1) of Income Tax Act.
Counsel:	Constantin Draghici-Vasilescu, for the Federal Crown Attorney David Grant, for the Linda O'Hara and Colleen O'Hara-Gallant

By the Court:

INTRODUCTION:

[1] On January 19, 2010, Ms. Colleen O'Hara-Gallant was personally served with Requirements to file corporate (T-2) tax returns for Hawthorne Communications Limited (hereafter referred to as "Hawthorne") pursuant to the provisions of Section 231.2(1) of the ITA (hereafter referred to as "the ITA") of Canada in relation to six taxation years, being the 2003 to 2008 taxation years. The Notice of Requirement provided four months or 120 days to comply with the requirements by filing the corporate tax returns on or before May 19, 2010.

[2] In addition, on January 19, 2010, Ms. O'Hara-Gallant was personally served with Requirements to file corporate (T-2) tax returns for Wicklow Properties Limited (hereafter referred to as "Wicklow") pursuant to the provisions of Section 231.2(1) of the ITA in relation to five taxation years, being the 2004 to 2008 taxation years. The Notice of Requirement provided 90 days or three months for the filing of the corporate tax returns on or before April 19, 2010.

[3] On February 26, 2010, Ms. O'Hara-Gallant was also personally served with Requirements to file corporate (T-2) tax returns for Waterford Communications Limited (hereafter referred to as "Waterford") pursuant to the provisions of Section 231.2(1) of the ITA in relation to two taxation years, being the 2004 and 2005 taxation years. The Notice of Requirement provided 45 days for compliance on or before April 12, 2010.

[4] In addition, on February 26, 2010, Ms. O'Hara-Gallant was personally served with Requirements to file corporate (T-2) tax returns for GKO Holdings Limited (hereafter referred to as "GKO") pursuant to the provisions of Section 231.2(1) of the ITA in relation to seven taxation years, being the 2002 to 2008 taxation years. The Notices of Requirement provided 150 days or five months for the filing of the corporate tax returns on or before July 26, 2010.

[5] Based upon the information obtained from the Nova Scotia Registry of Joint Stock Companies, the Canada Revenue Agency (hereafter referred to as "the CRA") Field Officer served Ms. O'Hara-Gallant with several Requirements to file corporate (Form T-2) tax returns for four different corporations, for which she was

listed as a Director and Officer during the relevant time periods. Since there were overlapping time frames to file the required tax returns, the CRA Field Officer [Mr. Dean Robinson] extended the time for the filing of all the required corporate tax returns to the expiration of the time provided by the issuance of the last of those Notices of Requirement, that is, July 26, 2010.

[6] On January 22, 2010, Ms. Linda O'Hara was personally served with requirements to file her personal (T-1) tax returns pursuant to the provisions of Section 231.2(1) of the ITA for six taxation years, being the 2003 to 2008 taxation years. The Notices of Requirement provided Ms. O'Hara with 105 days or three and a half months to comply with the requirements by filing her personal income tax returns for those six taxation years on or before May 7, 2010.

[7] In addition, on January 22, 2010 Ms. Linda O'Hara was personally served with Requirements to file corporate (T-2) tax returns for Waterford pursuant to the provisions of Section 231.2(1) of the ITA for two taxation years, being the 2006 and 2007 taxation years. The Notices of Requirement provided Ms. Linda O'Hara with a total of two and a half months or 75 days for complying with those requirements by filing the corporate tax returns for those taxation years on or before April 7, 2010.

[8] By virtue of the Requirement served upon Ms. Linda O'Hara, she was required to file six personal (Form T-1) tax returns and two corporate (T-2) tax returns, based upon the CRA Field Officer's belief that the corporate filings of Waterford in the Provincial Registry had indicated that she was an Officer and Director during the taxation years in question. Given the fact that Ms. Linda O'Hara was required to file several personal tax returns and corporate tax returns, the CRA Field Officer exercised his discretion and extended the time for the filing of all the required personal income tax returns and corporate tax returns to the expiration of the time provided to Ms. Colleen O'Hara-Gallant. As a result, Ms. Linda O'Hara was advised that she had until July 26, 2010 to comply with the Requirements to file the income tax returns.

[9] On May 17, 2011, the CRA Field Officer [Mr. Dean Robinson] attended at Provincial Court to swear six Informations comprising a total of 20 charges for which the following offences were alleged:

1. Ms. Linda O'Hara, as President of Waterford. was charged with directing, authorizing, assenting to, acquiescing in or participating in the failure of Waterford to file its 2006 corporate (T-2) tax return by

March 24, 2010, following a Notice of Requirement served upon her on January 22, 2010 and did thereby commit an offence contrary to the provisions of Subsection 238(1) of the ITA and she is a party to the same offence by virtue of Section 242 of the ITA. Ms. Linda O'Hara was also charged with the same offence in relation to Waterford for failing to file the 2007 corporate (T-2) tax return April 8, 2010;

2. In a separate Information, Ms. Linda O'Hara was also charged with failing to file her personal (T-1) tax returns pursuant to the Notices of Requirement, which was served upon her on January 22, 2010 pursuant to Section 231.2(1)(a) of the ITA as well as for the 2003 tax year by February 23, 2010; the 2004 tax year by March 9, 2010; the 2005 tax year by March 24, 2010; the 2006 tax year by 8 April 2010, the 2007 tax year by April 23, 2010 and the 2008 tax year by May 10, 2010. All of the charges for failing to file personal (T-1) income tax returns were alleged to be an offence contrary to Subsection 238 (1) of the ITA.

3. Ms. Colleen O'Hara-Gallant, as President of Wicklow was charged with directing, authorizing, assenting to, acquiescing in or participating in the failure of Wicklow to file its 2004 corporate (T-2) tax return by February 19, 2010 following a Notice of Requirement which was served upon her on January 19, 2010 as well as the 2005 corporate tax return by March 8, 2010; the 2006 corporate tax return by March 23, 2010; the 2007 corporate tax return by April 7, 2010 and the 2008 corporate tax return by April 20, 2010 and in doing so, it was alleged that Ms. O'Hara-Gallant and the Corporation did thereby commit offences contrary to the provisions of Subsection 238(1) of the ITA and she is a party to the same offence by virtue of Section 242 of the ITA.

4. Ms. Colleen O'Hara-Gallant, as President of GKO was charged with directing, authorizing, assenting to, acquiescing in or participating in the failure of GKO to file its 2003 corporate (T-2) tax return on or about May 13, 2010 following a Notice of Requirement which was served upon her on February 26, 2010; the 2004 corporate tax return by May 28, 2010; the 2005 corporate tax return by June 14, 2010; the 2006 corporate tax return by June 28, 2010, the 2007 corporate tax return by July 12, 2010 and the 2008 corporate tax return by July 27,

2010 and in doing so, it was alleged that Ms. O'Hara-Gallant and the Corporation did thereby commit offences contrary to the provisions of Subsection 238(1) of the ITA and that she is a party to the same offence by virtue of Section 242 of the ITA. During the trial, the allegation in relation to the failure to file the 2002 corporate tax return required to be filed by GKO by April 28, 2010 was dismissed by the Court on March 31, 2014;

5. Ms. Colleen O'Hara-Gallant, as President of Waterford. was charged with directing, authorizing, assenting to, acquiescing in or participating in the failure of Waterford to file its 2004 corporate (T-2) tax return by March 30, 2010, following a notice of the requirement served upon her on February 26, 2010 and did thereby commit an offence contrary to the provisions of Subsection 238(1) of the ITA and is a party to the same offence by virtue of Section 242 of the ITA. Ms. Colleen O'Hara-Gallant was also charged with the same offence in relation to Waterford for failing to file the 2005 corporate (T-2) tax return by April 13, 2010;

6. Ms. Colleen O'Hara-Gallant, as President of Hawthorne was charged with directing, authorizing, assenting to, acquiescing in or participating in the failure of Hawthorne to file its 2003 corporate (T-2) tax return on about March 8, 2010 following a Notice of Requirement which was served upon her on January 19, 2010, as well as for the 2004 corporate tax return by March 23, 2010; the 2005 corporate tax return by April 7, 2010; the 2006 corporate tax return by April 20, 2010; the 2007 corporate tax return by May 5, 2010 and the 2008 corporate tax return by May 20, 2010 and in doing so, it was alleged that Ms. O'Hara-Gallant and the Corporation did thereby commit offences contrary to the provisions of Subsection 238(1) of the ITA and that she is a party to the same offence by virtue of Section 242 of the ITA.

[10] The Crown proceeded by way of summary conviction on all charges before the Court.

Brief Overview of the Proceedings Before the Court:

[11] The parties made their first appearance in court pursuant to a summons on June 22, 2011. At that appearance, Ms. Linda O'Hara was represented by her

husband, Mr. Gerald O'Hara as agent and Mr. O'Hara also appeared as agent for his daughter, Ms. Colleen O'Hara-Gallant. At the first appearance, issues were raised with respect to the disclosure of information on the CRA files in relation to these prosecutions to Mr. O'Hara as their agent. CRA had stated that they were required to ensure the privacy and confidentiality of taxpayers' information and not disclose that information to third parties without the taxpayer's express consent. It took several appearances in court to confirm that Ms. Linda O'Hara and Ms. Colleen O'Hara-Gallant had specifically authorized CRA to provide their disclosure information to Mr. O'Hara. Finally, pleas of not guilty on all charges were entered on June 27, 2012 and the Court scheduled two days for trial on April 24 and April 25, 2013.

[12] The court scheduled a status date of October 10, 2012 to consider any outstanding disclosure issues or alternate arrangements for the retention of counsel. When the trial date was set, Ms. Linda O'Hara and Ms. Colleen O'Hara-Gallant had stated that it was their plan to have Mr. Gerald O'Hara represent them as their agent and that they were not planning to retain a lawyer.

[13] On April 24, 2013, during the opening statement by the Crown Attorney, it became apparent that Mr. Gerald O'Hara was planning to be the agent and representative for his wife and his daughter and that he also intended to be one of the witnesses in the trial. In addition, the Court had been previously advised that the accused had wished to maintain their own confidentiality of the CRA documents by Mr. O'Hara, which had raised the issue of whether he could continue as agent and representative of his wife and daughter given their instructions to him, the potential conflicts of interest between the parties and the fact that he planned to be a witness in the trial. After hearing submissions on both sides on the issue of whether Mr. O'Hara could continue as the agent and representative of his wife and daughter, the Court reserved its decision until the next day.

[14] On April 25, 2013, the Court ruled that Mr. O'Hara would not be allowed to continue as the representative and agent of his wife and daughter during the trial, but he would be entitled to be present in court, if the Crown did not make a motion to exclude witnesses. In that way, Ms. Linda O'Hara and Ms. Colleen O'Hara-Gallant would have the opportunity to consult with Mr. O'Hara at any breaks in the court proceedings and of course, at their convenience, at any time outside of court.

[15] In light of that decision by the Court, Ms. Linda O'Hara and Ms. Colleen O'Hara-Gallant requested that the trial be adjourned and rescheduled as they were not in a position to represent themselves at that point in time. In addition, the Court was advised that there was a possibility that Ms. O'Hara and Ms. O'Hara-Gallant would retain legal counsel. In those circumstances, the court scheduled a status date on July 17, 2013 to determine whether legal counsel had been retained and would be available on the trial date, which had been adjourned to October 4, 2013.

[16] On July 17, 2013, Ms. O'Hara and Ms. O'Hara-Gallant appeared in court and the trial date of October 4, 2013, was confirmed. They also advised the Court that they intended to represent themselves during the trial. They were reminded that the Court had previously determined that, if they were representing themselves, they would be able to consult with and seek the assistance of Mr. Gerald O'Hara, but he would be premitted not to act as their agent in court.

[17] On the October 4, 2013 trial date, Ms. Linda O'Hara and Ms. Colleen O'Hara-Gallant appeared with Mr. David Grant as their lawyer. Mr. Grant advised the Court that he had been recently retained by Ms. O'Hara and Ms. O'Hara-Gallant and was not in a position to proceed with the trial. The defence requested an adjournment of the trial and a new trial date was set for January 30, 2014.

[18] During Defence Counsel's first appearance, the Crown Attorney raised the issue of sharing an individual taxpayer's confidential information and both the Crown Attorney and the Court had raised the issue of whether there was a conflict of interest if there was one lawyer representing the defendants. As a result, the Court scheduled a further status date for October 30, 2013 to determine whether Mr. Grant would be able to represent both Ms. O'Hara and Ms. O'Hara-Gallant or whether they wished to have separate trials.

[19] On October 30, 2013, Mr. Grant advised the Court that he was prepared to represent both of the defendants and that they had requested a joint trial, and not separate trials for each of them.

[20] On January 30, 2014, the trial commenced with a brief opening statement by the Crown Attorney and Defence Counsel outlining their position on the issues in the trial. Neither side requested an order excluding witnesses, and as a result, Mr. O'Hara was not excluded from the courtroom during any trial evidence.

[21] The only witness called by the Crown Attorney was Mr. Dean Robinson, the CRA Field Officer who was involved in the service of the Notices of Requirement

to file the personal tax returns of Ms. Linda O'Hara and served the Officers and Directors with Notices of Requirement to file corporate tax returns for the corporations noted in the Informations before the Court. As Mr. Robinson's direct evidence was not completed on January 30, 2014, a trial continuation date was scheduled for March 31, 2014.

[22] The trial continued with the direct examination of Mr. Robinson on March 31, 2014. However, at the end of the day, the Crown Attorney advised that he required approximately 30 minutes to complete the direct examination of Mr. Robinson and close the case for the Crown. Defence Counsel estimated that the cross examination of Mr. Robinson would be at least two hours and that he planned to call three witnesses, which he believed would take a half day, at a minimum. Based upon those representations, and the possibility of the evidence taking longer than anticipated, the court scheduled two full days for the trial continuation, being March 25 and March 26, 2015. In addition, Court also scheduled a status date of July 4, 2014 to determine if earlier dates could be secured and confirmed for the trial continuation.

[23] On the July 4, 2014 status date, a representative for the Crown Attorney was present in court, but neither one of the accused persons nor their counsel were in court. As a result, the court confirmed that the trial continuation dates on March 25 and 26, 2015 would stand.

[24] On March 17, 2015, Defence Counsel wrote a letter to the Court with a copy to the Crown Attorney that there had been unreasonable institutional delay in this case. In the letter, Defence Counsel stated that he would be seeking a stay of proceedings since there had been a two and a half year delay from the time that the Informations were laid until the commencement of the trial.

[25] On March 25, 2015, the parties were in court, however, Defence Counsel indicated that he was not feeling well and would not able to proceed with the trial. In those circumstances, Defence Counsel requested an adjournment of the trial. Since the Court was advised that it was unlikely that Defence Counsel's situation would be improved on the second scheduled day of the trial continuation [March 26, 2015], the Court adjourned both days which had been set for trial and scheduled a hearing to set a trial continuation date on April 8, 2015.

[26] In addition, during the proceedings on March 25, 2015, the Court acknowledged receipt of the letter from Defence Counsel which purported to be notice of a Section 11(b) **Charter** Application. It was noted by the Crown

Attorney that the letter had only been received days before the trial continuation date and that there was no formal notice of a **Charter** Application with the particulars of the application set out by the Defence. Moreover, the Court noted that if Defence Counsel was intending to move forward on a Section 11(b) **Charter** Application, since the onus would be on the Defence to establish the unreasonable delay, it would be the obligation of the Defence to obtain transcripts of all previous occasions that this matter was before the court.

[27] On April 8, 2015, the trial continuation dates were set for two full days on July 29 and 30, 2015. In addition, the Court indicated that if Defence Counsel wished to pursue a Section 11(b) **Charter** Application, the formal notice of that application was to be served on the Crown Attorney with a copy provided to the court on or before May 15, 2015.

[28] On May 19, 2015, a copy of a Form-1 Application with respect to the Section 11(b) **Charter** Application was forwarded to the Court and to the Crown Attorney. In that application Defence Counsel requested that the **Charter** Application be heard on the next scheduled trial continuation date, that is, July 29, 2015.

[29] Based on the formal notice of the **Charter** Application, the Crown Attorney requested and court scheduled a status date on the **Charter** Application and the trial for June 25, 2015. On that status date, the Court and the Crown Attorney reminded Defence Counsel that transcripts of all previous days in court would be required as part of his **Charter** Application. The Court noted that this status date was the 22nd appearance in court by the parties.

[30] In addition, during the June 25, 2015 status date hearing, the Crown Attorney took the position that the proposed **Charter** application by the Defence lacked any merit and should be summarily dismissed. The Court reminded Defence Counsel that it was his obligation to obtain transcripts of all previous court appearances, up to and including the June 25, 2015 status hearing. Defence Counsel advised the Court that he had obtained some previous transcripts, but would have to get instructions from his clients before he ordered the balance of the transcripts. Since the Crown had indicated that they would bring an application for a summary dismissal of the **Charter** Application, the Court scheduled a further status date with respect to the potential availability of transcripts on July 23, 2015.

[31] On the July 23, 2015 status hearing, which was only six days before the scheduled trial continuation, Defence Counsel indicated that there had been no

progress made with respect to getting instructions to order the transcripts of all previous proceedings before the court. Since the trial continuation dates were upcoming and there was no realistic possibility that the transcripts would be available by July 29, 2015, the Court directed that the parties be prepared to proceed with the trial evidence on that date. It was expected that the Crown Attorney would complete his direct examination of Mr. Dean Robinson and that there would be time for Defence Counsel to complete his cross examination of Mr. Robinson. In addition, if any time remained, the Defence could call one of its witnesses and/or there could be further discussion as to whether the Section 11(b) **Charter** Application would proceed on a later date.

[32] On July 29, 2015, the Crown Attorney completed his direct examination of Mr. Robinson and Defence Counsel completed his cross examination.

[33] Prior to calling any defence evidence, Defence Counsel advised the court that he had received instructions to proceed with the Section 11(b) **Charter** Application and advised that it may take two or three months to obtain the transcripts of the previous proceedings.

[34] In addition, Defence Counsel made a motion for a directed verdict with respect to the charges against the Directors and Officers of the corporations, as he submitted that there was no evidence that the CRA Field Officer [Mr. Robinson] had reviewed the Minute Books of the corporations to determine who were the actual Officers and Directors of the corporations. It was the Defence position that Mr. Robinson's review of the information on file in the Nova Scotia Registry of Joint Stock Companies was not sufficient evidence to establish the identification of the Officers and Directors of the corporations.

[35] Furthermore, Defence Counsel submitted that Section 242 of the ITA creates a *mens rea* offence in relation to an Officer or Director and that the Crown would have to introduce evidence of the Officer's or Director's intention to either authorize or acquiesce to the lack of filing of the corporate tax returns. Defence Counsel stated that there was no evidence that either Ms. Linda O'Hara or Ms. Colleen O'Hara-Gallant had done anything other than receive the Requirements and there was no evidence of them having authorized, assented to, acquiesced in or participated in the failure of any of the corporations to file their corporate tax returns pursuant to the Requirements.

[36] On the other hand, the Crown Attorney submitted that these are strict liability offences and that the Crown had established the prohibited act beyond a

reasonable doubt. In addition, there was evidence tendered by Mr. Robinson with respect to the identification of the Officers and Directors of the corporations at the relevant periods of time. Therefore, it was the position of the Crown that the directed verdict motion should be dismissed and that the only trial issue which remain to be determined was whether Ms. O'Hara or Ms. O'Hara-Gallant had exercised due diligence in performing their duties as Officers and Directors of the corporations at the relevant times.

[37] On July 30, 2015, the Court briefly adjourned to review cases which had been provided by the Crown Attorney and to consider the submissions of counsel. Based on the decision of **R. v. Sedhu**, 2013 BCSC 2323 and **R. v. Bodnarchuk**, 2004 BCPC 235 as well as Section 98 of the Nova Scotia Companies Act, Sections 8 and 9 of the Corporations Registration Act and various provisions of the ITA, the Court ruled that the directed verdict motion should be dismissed.

[38] Since most of the July 30, 2015 trial time had been utilized dealing with the matters referred to above, the court scheduled November 27, 2015 as the trial continuation date for Defence evidence and the Section 11(b) **Charter** Application if the Defence had all the transcripts available for review and the **Charter** Application was ready to proceed on that date. If not, it was anticipated that Defence Counsel would call his witnesses on that trial continuation date. Since the Crown Attorney had advised the court that he would be making a motion to summarily dismiss any Section 11(b) **Charter** Application if it was advanced by the Defence, the Court scheduled a status date of August 28, 2015 to determine the progress of the Defence application and the proposed Crown application.

[39] On August 28, 2015, the Crown Attorney filed an Application Response with the court stating that the Section 11(b) **Charter** Application proposed by the Defence would bring the administration of justice into disrepute if the Court was to seriously consider that application. The Crown Attorney put forward several reasons for opposing the **Charter** Application and filed an affidavit of Mr. Dean Robinson to provide some of the factual background and history of this prosecution.

[40] During the August 28, 2015 status hearing, Defence Counsel advised the Court that the transcripts of the previous proceedings had not been ordered and that they would not be available within the next three or four months. The Crown Attorney advised the court that he was waiting to see the transcripts of those earlier proceedings before he prepared materials for his motion to summarily dismiss the

Section 11(b) **Charter** Application. In those circumstances, the court set a further status date for all these matters on September 25, 2015.

[41] In a letter dated September 21, 2015, Defence Counsel advised the Court that no transcript had been ordered and that he had not received instructions from his clients to order the transcripts, due to the time it would take to prepare them and the "substantial" costs involved. Defence Counsel filed an affidavit of Mr. Gerald O'Hara with that letter, in which Mr. O'Hara outlined certain facts with respect to his involvement in the trial issues before the court. Attached to that affidavit was a transcript of one appearance before the Court on August 8, 2011.

[42] On September 25, 2015, Defence Counsel advised the Court that he was not able to advance the Section 11(b) **Charter** Application, because he had not obtained the transcripts of the previous proceedings. Defence Counsel stated that he would withdraw or abandon his Section 11(b) **Charter** Application and submitted that the Court not summarily dismiss it, since Mr. O'Hara had filed an affidavit and one transcript of the previous proceedings. On the other hand, the Crown Attorney submitted that the Court should dismiss the **Charter** Application based upon the affidavit of Mr. Robinson filed in support of their motions.

[43] The Court noted that the Section 11(b) **Charter** Application required transcripts of proceedings for obvious reasons as affidavits like the ones before the court were based upon the affiant's impressions of what they believed had occurred during the Court's proceedings and affidavits did not contain a transcript of the exact words spoken during a hearing. In addition, the affidavits would be subject to cross examination which would only further delay the proceedings.

[44] On the status date of October 30, 2015 to determine if the Section 11(b) **Charter** Application would be reinstituted before the trial continuation date [November 27, 2015], Defence Counsel advised the Court that the **Charter** Application had been abandoned.

[45] On November 27, 2015, the Defence called his first witness, Ms. Linda O'Hara and the Crown Attorney completed his cross examination. The second witness called by the Defence was Ms. Colleen O'Hara-Gallant of her direct examination and large majority of her cross-examination was completed on that date. As a result, the Court scheduled a further half-day to complete Ms. O'Hara Gallant's evidence and for the evidence of Mr. Gerald O'Hara on February 8, 2016 in the Halifax Provincial Court.

[46] On February 8, 2016, Mr. O'Hara was experiencing health issues and Mr. Grant was experiencing mobility issues due to the winter conditions and in those circumstances, Defence Counsel requested an adjournment of the trial. The trial continuation was scheduled for April 26, 2016.

[47] On April 26, 2016, Defence Counsel called Mr. Gerald O'Hara and completed his direct examination. However, due to the amount of time that the direct examination had taken, the Crown Attorney was only able to start his cross examination that day. The Crown Attorney advised the court that he would require another half day of trial time to complete his cross examination of Mr. O'Hara.

[48] On May 13, 2016, the Court scheduled the trial continuation date for September 20, 2016. When the trial resumed, the Crown Attorney completed his cross examination of Mr. O'Hara and the defence closed its case. The Crown Attorney advised the Court that they did not plan to call any rebuttal evidence. The Court scheduled the filing of written closing submissions by Defence Counsel by October 25, 2016 and the Crown Attorney by November 10, 2016. Focused oral submissions were then scheduled to be heard on December 9, 2016.

[49] On December 9, 2016, the parties made their closing submissions. Given the Court's schedule, the availability of the parties and their counsel, the length of the trial and the number of issues to address, the Court adjourned its decision until April 28th, 2017.

[50] On April 18, 2017, Defence Counsel wrote a letter to ask the Court to reconsider the issue of whether there had been a breach of Section 11(b) of the **Charter** on the basis that the accused had not been tried within a reasonable time. Defence Counsel acknowledged that it had not been possible to proceed with the application in the fall of 2015 because no transcripts were available. Based upon the case of **R v. Jordan**, Defence Counsel stated that the accused wished to make their application prior to the conclusion of the matter.

[51] In response, on April 25, 2017, the Crown Attorney opposed the Defence's application to postpone the Court's decision on the substantive issues of the trial, which was scheduled for April 28, 2017. The Crown Attorney was of the view that the matter should proceed to a decision by the Court on the merits and depending on the outcome, there could be a discussion of when and if the accused were in a position to actually proceed with a Section 11(b) **Charter** Application.

[52] Following the receipt of the reply from the Crown Attorney, Defence Counsel forwarded a letter dated April 26, 2017 to the Court stating that based upon a recent decision of the Nova Scotia Supreme Court, prejudice in this situation was presumed because of the passage of time probably affected the ability of witnesses to recall material that might be offered to the Court as part of the due diligence defence. Defence Counsel requested that the **Charter** Application be permitted to proceed, prior to the Court rendering its substantive decision on the merits of the case.

[53] The Court ruled that the **Charter** Application been abandoned and that it could not reinstated within a reasonable time and therefore, the trial decision on the substantive issues would be delivered on April 28, 2017.

POSITIONS OF THE PARTIES:

[54] It is the position of the Defence that Ms. Linda O'Hara and Ms. Colleen O'Hara-Gallant were mere "nominal directors, officers or agents" of the corporations for which they were charged with offences contrary to section 238 of the ITA for failing to comply with Notices of Requirement to file corporate (T-2) income tax returns pursuant to Section 231.2(1)(a) of the ITA and therefore, they had no duty or responsibility to take any actions themselves.

[55] With regard to charges relating to the failure to file Ms. Linda O'Hara's personal (T-1) tax returns, Defence Counsel submits that she was experiencing a severe illness at the time that the Notices of Requirement were served upon her, and that she proceeded as she had done in the past, by giving the information to her husband, Mr. Gerald O'Hara to complete the taxation returns. It is the position of the Defence that this was reasonable conduct in the circumstances and should result in an acquittal.

[56] In addition, Defence Counsel submits that his clients have a defence of an officially induced error and that, the Crown has not established the *mens rea* requirement by section 242 of the ITA in relation to Ms. Linda O'Hara or Ms. Colleen O'Hara-Gallant since they were not the "operating or controlling mind" of the corporations. Moreover, the CRA Field Officer did not serve the "operating mind" of the corporations with the Notices of Requirement to file and therefore, there was no effective service on the corporations as it was clear to CRA that only GKO and Wicklow were operating companies. Finally, it is the position of the

defence that neither Ms. O'Hara nor Ms. O'Hara-Gallant had a reasonable amount of time to reply to the Notices of Requirement.

[57] For his part, the Crown Attorney submits that these are strict liability offences and that the essential elements of an offence of failing to comply with a Notice of Requirement to file under Section 231.2(1)(a) of the ITA require the Crown to prove, beyond a reasonable doubt, the identity of the defendants, the jurisdiction, the proper service of the Notices of Requirement and the failure to comply with the Notice. If those essential elements are proved beyond a reasonable doubt, then the accused person must be given the opportunity to demonstrate the defence of due diligence.

[58] With respect to the issue of whether the CRA must provide a reasonable time for compliance with the Notices of Requirement to file either personal or corporate income tax returns, it is the position of the Crown that Section 231.2(1)(a) of the ITA requires the person served with a Requirement to produce information including a return of income "within such reasonable time as stipulated in the notice." The Crown Attorney submits that the CRA officials provided a reasonable amount of time to comply with the Requirements, there was no need for a bookkeeper or professional accountant to do the work and that, in effect, Ms. O'Hara and Ms. O'Hara-Gallant had a *de facto* cumulative time for compliance of about six months. Moreover, if there had been some progress and they needed some additional time to complete the preparation of the tax returns that could have been discussed with CRA. However, a request for an extension was not discussed with CRA, and in any event, the Crown Attorney noted that the formal charges were only sworn on May 17, 2011, which was almost 16 months after the Notices of Requirement were served upon the defendants.

[59] The Crown Attorney submits that these are strict liability offences and not *mens rea* offences. It is the position of the Crown that once the essential elements of the prohibited act have been established beyond a reasonable doubt, then the defendants would have the opportunity to establish facts upon which they could advance, on a balance of probabilities, a defence of due diligence. In this case, the Crown Attorney submits that the two defendants did not take reasonable steps during the "reasonable time as stipulated in the notice" to comply with the CRA Requirements and that any subsequent actions are completely irrelevant to the defence of due diligence. As for the possible defence of "officially induced error" there is simply no factual foundation for the support of that possible defence in this case.

[60] Finally, it is the position of the Crown that the CRA Field Officer served the appropriate Officers and Directors as identified in the current filings by the corporations under section 9 of the Nova Scotia Corporations Registration Act and that there was no requirement to review the Minute Books of those corporations. While Defence Counsel has submitted that Mr. Gerald O'Hara was the "operating and controlling mind" of the corporations and the nominal Officers and Directors of the corporation should be excused from liability for their actions or inactions due to a reduced level of control, the Crown Attorney submits that due diligence cannot be delegated. The defendants did not exercise "due diligence" in taking all reasonable steps necessary to avoid the prohibited act, in this case, the failure to file personal and corporate tax returns.

FACTUAL BACKGROUND:

[61] Mr. Dean Robinson of CRA stated that he dealt with all the Notices of Requirement issued pursuant to para. 231.2(1)(a) of the ITA which outlined a time frame for the recipients of that Notice, in the case of Ms. Linda O'Hara to file completed and signed personal (Form T-1) income tax and benefit returns, including a statement of income and expenses for each business activity carried on during the year, for the taxation years indicated in the various notices.

[62] Mr. Robinson also stated that, with respect to the corporations for which Notices of Requirement were issued, pursuant to para. 231.2(1)(a) of the ITA, to either Ms. Linda O'Hara or Ms. Colleen O'Hara-Gallant in their capacity as Officers and Directors of the named corporations, they were required to file completed and signed corporate income tax returns (Form T-2) within the timeframe outlined and include schedules and a general index of financial information for the corporations.

[63] Mr. Robinson stated that he personally served the Notices of Requirement issued pursuant to para. 231.2(1)(a) of the ITA on Ms. Linda O'Hara and also on Ms. Colleen O'Hara-Gallant. Mr. Robinson stated that he had previously checked the CRA computer to verify what tax returns had been filed by the corporations and what tax returns were outstanding, and also verified with the CRA computer system what personal income tax returns were outstanding for Ms. Linda O'Hara.

[64] Mr. Robinson testified that when he served the Notices of Requirement on Ms. Colleen O'Hara-Gallant, he went to the business address of the corporations, located at 75 McDonald Avenue in Dartmouth, Nova Scotia. At the time that he

served Ms. O'Hara-Gallant at the business office, Mr. Gerald O'Hara was also present and, Ms. O'Hara-Gallant asked Mr. O'Hara to join her. After a short discussion about the Notices of Requirement, Mr. Robinson asked if they needed any information from CRA to assist in preparing the required corporate tax returns. He advised them that they would have until the expiration of the last of the Notices of Requirement in July, 2010 to file the corporate tax returns.

[65] On cross examination, Mr. Robinson also indicated that on May 6, 2010, he dropped by the business office located at 75 McDonald Avenue to see how work was progressing and to see if Ms. O'Hara-Gallant needed any T4 slips or payroll slips. He indicated that Ms. O'Hara-Gallant was not in the office at that time, so he left his business card with the receptionist and wrote on the card that she could contact him if she needed something from him. Mr. Robinson never heard back from Ms. O'Hara-Gallant.

[66] Mr. Robinson also testified that when he served Ms. Linda O'Hara with the Notices of Requirement to file her personal income tax returns as well as some corporate income tax returns, she advised him to speak to Mr. O'Hara. He added that she did not know anything about this and told Mr. Robinson that he would have to talk Mr. O'Hara.

[67] During Mr. Robinson's testimony, the Crown Attorney tendered Exhibits numbered 1 to13 and Exhibits 16 to 35, which each contained documents which were either directed to Ms. Linda O'Hara in her personal capacity or as an Officer and Director of Waterford for the 2006 and 2007 taxation year. With respect to Ms. Colleen O'Hara-Gallant, the Exhibits which were served upon her based upon Mr. Robinson's belief, supported by documentation from the Nova Scotia Registry of Joint Stock Companies, that she was an Officer and Director of Hawthorne, Wicklow, Waterford and GKO for the taxation years mentioned in the Notices of Requirement issued pursuant to para. 231.2(1)(a) of the ITA.

[68] While Exhibits numbered 1 to 8, 12 and 13 as well as Exhibits numbered 16 to 35 were served on different people in relation to different corporations, each one of them contained the identical package of information. In each one of those Exhibits, there was a Notices of Requirement to complete either personal or corporate income tax returns within a certain number of days of service of that notice, which were issued pursuant to pursuant to para. 231.2(1)(a) of the ITA and was signed by Kim Cholock, Manager Revenue Collections for the Nova Scotia Tax Services Office. Mr. Cholock was an officer authorized pursuant to Section

220 (2.01) of the ITA to exercise powers or perform duties of the Minister under Section 231.2 of the ITA.

[69] On each one of those Notices of Requirement Mr. Robinson's name and telephone number were at the top and bottom of the Notice. Ms. Linda O'Hara or Ms. Colleen O'Hara-Gallant were advised that they were required to file the tax returns at the Nova Scotia Tax Services Office, located at 1557 Hollis Street, Halifax Nova Scotia to the attention of Mr. D Robinson. In the bottom right-hand corner of those Notices, Mr. Robinson entered the date of service and placed his initials beside that date. Mr. Robinson prepared an affidavit of personal service which was sworn in front of a Commissioner for Oaths to establish that he had personally served either Ms. Linda O'Hara or Ms. Colleen O'Hara-Gallant with the Notices of Requirement.

[70] In addition, Mr. Robinson prepared an affidavit of failure to comply with the Requirements which confirmed that the Nova Scotia Tax Services Office had not received the required personal income tax returns for the years in question from Ms. Linda O'Hara or the corporate income tax returns from either Ms. Linda O'Hara or Ms. Colleen O'Hara-Gallant in their capacity as Officers and Directors of the named corporations. Those Affidavits of Failure to Comply-Tax Services Office were sworn before a Commissioner of Oaths.

[71] The final document in each one of those Exhibits relating to the Notices of Requirement which were served upon either Ms. Linda O'Hara or Ms. Colleen O'Hara-Gallant were Affidavits of Failure to Comply- Tax Center which were sworn before a Commissioner of Oaths by Ms. Michelle Kelly, an officer of the CRA in charge of the appropriate records in the St. John's Tax Center. In those affidavits, Ms. Kelly confirmed that she had made a careful examination and search of the appropriate records for the corporate tax returns which had been required to be filed by certain dates on Form 2 in the St. John's Tax Center which was responsible for the corporate income tax returns. She confirmed that no completed corporate tax returns had been filed by those corporations on the date specified in her affidavit.

[72] The Crown Attorney pointed out that the affidavits which were filed pursuant to Section 244(6) of the ITA, address the issue of proof of personal service by an officer of the CRA, sworn before a Commissioner of Oaths. The affidavit attached a true copy of the request, notice or demand, which shall, in the

absence of proof to the contrary, be received as evidence of personal service and of the request, notice or demand.

[73] The Crown Attorney also pointed out that the affidavits filed pursuant to Section 244(7) of the ITA, address the issue of proof of failure to comply with the requirement to file a return, statement, answer or certificate. Pursuant to Section 244(7) of the ITA, an affidavit of an officer of CRA, sworn before a Commissioner for Oaths, setting out that the officer has charge of the appropriate records and that after a careful examination and search of those records, the officer has been unable to find in a given case that the return, statement or answer as the case may be has been made by the person who was required to do so, the affidavit, shall, in the absence of proof to the contrary, the affidavit is received as evidence that the person or corporation did not make and file the tax return, statement or answer which was required.

[74] In addition, for each one of the personal income tax returns which were required pursuant to a Requirement to Ms. Linda O'Hara, Mr. Robinson signed a series of Affidavits of Failure to Comply – Tax Services Office. Mr. Robinson's affidavit was signed on February 23, 2011 and confirmed that, as of that date, that Ms. Linda O'Hara had not complied with the Requirements to file personal income tax returns.

[75] With respect to the Requirements which were served on the designated officials for the corporate tax returns, Mr. Robinson signed several Affidavits of Failure to Comply – Tax Services Office on February 23, 2011 to confirm that no corporate tax returns had been filed pursuant to the Requirements which he had served on the designated officials of the Corporations. On May 3, 2011, Ms. Michelle Kelly, an appropriate official at the St. John's Tax Center swore several Affidavits of Failure to Comply – Tax Center to confirm that the corporations which were required to file tax returns pursuant to Requirement served upon one of their designated officers had not been made and filed or provided to CRA up to and including May 2, 2011.

[76] When Mr. Robinson's evidence continued on March 31, 2014, he tendered as Exhibits 10, 14 and 15, which were certified copies of documents that he obtained from the Nova Scotia Registry of Joint Stock Companies to confirm that Ms. Linda O'Hara was an Officer and Director of Waterford during the relevant periods of time for which the Notice of Requirement to file a corporate return was served upon her. A certified copy of Exhibit 14 confirmed that Ms. Linda O'Hara

resigned as the Recognized Agent, Director and President/Secretary of Waterford effective March 16, 2007.

[77] Mr. Robinson also tendered Exhibits 21 and 21A which were certified copies of documents from of the Nova Scotia Registry of Joint Stock Companies which certified that Ms. Colleen O'Hara-Gallant was an Officer and Director of Wicklow during certain relevant periods of time. In addition, Mr. Robinson also tendered Exhibit 36 and 36A which were certified copies of documents from the Nova Scotia Registry of Joint Stock Companies which certified that Ms. Colleen O'Hara-Gallant was an Officer and Director of Hawthorne at the relevant times to the matters before the court. In addition, Exhibit nine tendered by Mr. Robinson was a certified copy of a document obtained from the Nova Scotia Registry of Joint Stock Companies which certified that at all relevant periods of time. Ms. Colleen O'Hara-Gallant was an Officer and Director of Waterford. Mr. Robinson also tendered Exhibits 29 and 29A which was a certified copy of the filing obtained from the Nova Scotia Registry of Joint Stock Companies which indicated that at times relevant to the matters before the court Ms. Colleen O'Hara-Gallant was a Director and Officer of GKO.

[78] On cross examination, Mr. Robinson confirmed that, in this case, he took over the file from another CRA official and was directed the issue the Requirements. In some cases, CRA officials will follow up with the taxpayer to see why they have not filed their returns, usually in cases where there is a new taxpayer or returns have always been filed, but for some unknown reason there is a gap. In those cases, CRA will attempt to find out why the taxpayer has not filed, but that was not the case here, since the corporations and the individual were not new taxpayers, who might be unaware of the filing requirements.

[79] Mr. Robinson stated that he only learned about the accountant's death in January 2010 from Ms. Colleen O'Hara-Gallant and Mr. Gerald O'Hara. Mr. Robinson did not have any personal dealings with the accountant for the corporations and stated that he was not previously aware that the corporation had an accountant.

[80] On further cross examination, Mr. Robinson stated that he was not privy to any conversations with Mr. O'Hara relating to lost records, although he had heard that Mr. O'Hara had mentioned this to other people at CRA. Mr. Robinson understood that CRA officials had provided written responses to Mr. O'Hara, but this was not part of his conversations with Mr. O'Hara..

[81] On January 19, 2010, Mr. Robinson confirmed that he served Ms. O'Hara-Gallant with Requirements and that when he did so, Mr. O'Hara was there. At that time, Mr. O'Hara told him that there were several reasons for why he did not have access to the background documents for filing returns. Mr. Robinson outlined the kind of documents that would be needed to file returns and confirmed that Mr. O'Hara told him that the documents were not available because the accountant had been deceased for a couple of years. In addition, Mr. O'Hara had said that the documents were in his computer records for the corporations and they were password protected and no one knew the passwords to get into the accountant's computer system.

[82] Mr. Robinson confirmed that no one requested an extension of time to file the tax returns for Ms. Linda O'Hara or any of the corporate returns which were listed in the various Requirements. He also confirmed that no one at CRA had advised him that Mr. O'Hara, Ms. Linda O'Hara or Ms. Colleen O'Hara-Gallant had made a specific request to extend the time for the filing of returns pursuant to the Requirements. Mr. Robinson stated that he did learn, at some point, that Ms. O'Hara was not well, but did not recall the nature of the illness.

[83] Mr. Robinson confirmed that he served the Requirements on Ms. Colleen O'Hara-Gallant and Ms. Linda O'Hara based upon the information that they were listed as Officers and Directors of the various corporations in the Nova Scotia Registry of Joint Stock Companies. He agreed that there would be a list of Directors in the corporation's Minute Book as well as the Shareholders Register, but gaining access to those documents was not part of his work as he relied on the information made publicly available.

[84] Mr. Robinson confirmed that by relying upon the information at the Nova Scotia Registry of Joint Stock Companies, he could see whether a person was an Officer and Director of a corporation during the relevant time periods or whether there had been a Notice of Resignation filed with the registry. He also ordered certified copies of the documents listing the current Officers and Directors of the various corporations.

[85] As an example, Mr. Robinson pointed to Exhibit 36, which showed the Notice of Officers and Directors of Hawthorne, which listed Colleen O'Hara-Gallant as an Officer and Director, effective September 26, 2002, and there was no notice of resignation. He pointed to the fact that the Notice had been signed by Ms. O'Hara-Gallant on September 26, 2002 and that he had obtained a certified copy of

that document on November 16, 2010. Mr. Robinson also added that Exhibit 36 also contained a handwritten Notice of Officers and Directors for Hawthorne, which was dated August 8, 2007 and signed by Mr. Gerald O'Hara to confirm that he had been added as an Officer and Director of that company.

[86] With respect to the time limits provided to taxpayers to comply with the Requirements which had been served upon them, Mr. Robinson stated that CRA in Nova Scotia provides 30 days for the first Requirement and then an additional 15 days for each additional Requirement. The policy of CRA is to require all of the returns to be filed pursuant to the Requirements and forwarded to the CRA office by the time of the last Requirement. In Mr. Robinson's opinion, this provided a reasonable amount of time to comply with the Requirement to file tax returns.

[87] Following Mr. Robinson's testimony on July 29, 2015 the Crown Attorney closed his case and tendered the Exhibits in support. At that point, there was not sufficient time to start the defence case and as result, the continuation of the trial was adjourned to November 27, 2015.

[88] On November 27, 2015, when the trial continued, Defence Counsel advised the Court that Mr. Gerald O'Hara had developed a heart problem the previous day and was in the hospital. Defence Counsel wished to call Mr. O'Hara first to provide background to the corporations and then call the two defendants, as he referred to Mr. O'Hara as the "controlling mind" of the corporations. Defence Counsel indicated that Mr. O'Hara's evidence would be relevant to the defences that he would be raising during his submissions. However, the Court ruled that, if there were witnesses present, the court time should be utilized and further continuation dates would be established once Defence Counsel had an update on Mr. O'Hara's medical status and ability to appear in court as a witness.

[89] The first witness called by the Defence was Ms. Linda O'Hara. Ms. O'Hara confirmed that she received the Requirements from the CRA official with respect to filing personal income tax returns, but added that she had "no idea" because everything that she received was passed on to the office for her husband to handle.

[90] Ms. O'Hara stated that she has experienced several serious medical issues, which have, in the past, required being taken to the hospital in an ambulance. In addition, due to her medical conditions, her doctor had restricted her from doing physical work around the house or in her consulting business. She added that a letter had been sent to CRA from her doctor, dated September 30, 2013, to explain the nature of her medical issues in the spring of 2009 to the winter of 2010. The

letter from Dr. Ann Wadden to Canada Revenue Agency dated September 30, 2013 was introduced as Exhibit 37 in these proceedings.

[91] Ms. O'Hara indicated that because of her medical issues, she was severely weakened and was on the verge of malnutrition when other serious medical issues were discovered. As a result, she was not aware that there were returns to be filed with CRA and she repeated that everything went to the office for her husband [Mr. Gerald O'Hara] "to take care of." She added that no one had ever discussed with her that she had any responsibility to file corporate tax returns as a Director of a company. She added that with respect to Waterford, if her husband gave her something to sign, she signed the documents, as she had no control over the company and had no defined responsibilities.

[92] On cross examination, Ms. Linda O'Hara confirmed that she did not have any real involvement with Waterford, she just regularly signed documents that her husband put in front of her. In addition, she stated that she had "no idea" how many companies have listed her name as a Director. She also confirmed that she never had any control or understanding of the role of a Director and candidly acknowledged in response to this questioning, that she realized this "sounds ridiculous." Ms. O'Hara repeated that on several occasions, over the years, she had signed documents for a corporation, which had been prepared by her husband.

[93] On further cross examination, Ms. O'Hara confirmed that she was not aware of any history of noncompliance with respect to the filing of corporate tax returns of corporations for which she was a Director. Once again, she stated that she didn't have any reason to believe there was a problem or that proper steps had not been taken care of, and she delegated everything to her husband, Mr. Gerald O'Hara. In addition, she stated that she had no reason to think that the tax documents had not been filed, as she was not involved in any of the conversations with respect to "his companies."

[94] When questioned about the filing history of her own personal income tax returns, Ms. O'Hara did not recall any personal visits or calls made by the Field Officer with her, nor did she recall ever having received registered mail notices. If any registered mail notices were sent, they were probably addressed to a PO Box number and in that event, Mr. O'Hara would have picked up the mail. When it was suggested that Field Officers made visits in 1995, 1996 and 1997 and that registered mail was sent and further calls were made in 1998, Ms. O'Hara again

stated that she did not recall talking to anyone at CRA and that she did not receive any mail from CRA.

[95] During her cross examination, Ms. O'Hara stated that she was never aware of what Mr. Gerald O'Hara had filed on her behalf. She stated that her husband kept all of the business affairs to himself and that they did not talk about business activities in their relationship. With respect to her personal T-4 income tax returns, they were all handed to her husband for the accountant to do all of the paperwork. She "trusted" that her husband had taken care of all of the required filings and was now surprised that they were not. She recalled that when Requirements to file her personal income tax returns were served upon her, she was sick and thought that those returns would be filed by her husband.

[96] With respect to the preparation of her personal income tax returns, Ms. O'Hara stated that if she got a cheque or any information, she simply handed it to her husband for him to deal with all issues related to her tax returns. When asked about what steps she had taken after being personally served with Requirements to file personal and corporate tax returns by Mr. Robinson, Ms. Linda O'Hara stated that she did not even read any of those Notices of Requirement. She simply handed them over to Mr. Gerald O'Hara to be dealt with. She confirmed that Mr. O'Hara's office is at 75 McDonald Avenue, Burnside, Nova Scotia, and has been since the late 1990's, and not at their house..

[97] Ms. Colleen O'Hara-Gallant stated that she is the daughter of Gerald and Linda O'Hara and that she worked with her father at the office for several companies, located at 75 McDonald Avenue in Burnside, Nova Scotia. Her role was to answer the telephone, handle administrative matters and to deal with customers for Wicklow Properties, GKO Holdings, Waterford Communications and Hawthorne Communications. She added that those companies are run by her father and that Mr. O'Hara is the only one with control over anything. Mr. O'Hara controls, decides and approves everything in relation to those companies.

[98] Ms. O'Hara-Gallant said that she has not received any salary payments for over a year, but stayed on in the office to help her father. With respect to signing of the corporate income tax forms for CRA, she stated that she would sign anything that her father put in front of her for signature. She added that she had no involvement with any of those companies, she did not do any day-to-day work for them and had no power or direction to do anything for any of them.

[99] With respect to the issue of not filing corporate tax returns after she was served with the Notices of Requirements, Ms. O'Hara-Gallant stated that she did not feel there was enough time, from an accounting point of view, to comply with the Requirements, given the "mess that things are in at the office." She added that she never directed anything to be done, participated in or acquiesced in anything not being done with respect to those companies because she had no control, no power and no say-so in any of them.

[100] Ms. O'Hara-Gallant recalled that Mr. Robinson came to the office while she was there, but he spoke with her father. She recalled that he may have come to the office another time to deliver papers when she was not there and added that Mr. Robinson came on the third occasion to the office of the corporations when she was there. She was "never aware" of any responsibility or liability as a Director to file tax returns. She now realizes that she had "apparently" been a Director of some companies for some time, but believed she was just a "figurehead" on paper and that her father would deal with all issues. She never felt that she would be personally responsible for anything, she was just signing the company's banking documents.

[101] Ms. O'Hara-Gallant stated that, years ago, her husband had been a Director of one of her father's companies and she recalled that a similar situation arose with CRA at that time. She did not recall when or which company, but she did recall that there was an issue with him being a Director and that he was just signing documents without being involved in the company's business in any way. At that time, CRA came after him for failing to file corporate tax returns, but he was released from any future liability as a Director because CRA was satisfied that he was not involved in the business. Thereafter, CRA dealt with Mr. Gerald O'Hara, who was the "*de facto*" owner and operator of the corporations.

[102] On cross examination, Ms. O'Hara-Gallant confirmed that her husband had been listed as a Director of one of the companies, run by her father and that CRA had pursued her husband in the past. While it was some time ago, she did recall that it took some time to straighten out situation, but ultimately, her husband was released when he signed a letter confirming that he was not a Director nor did he have any control over that company.

[103] Ms. O'Hara-Gallant confirmed receiving the Notices of Requirement which were served on her by Mr. Robinson, but added that she only scanned them and did not recall telling him to serve her father. However, she added that she did give the

Notices of Requirement to her father, but did not monitor what he did with them. She assumed that he was looking after them, because she had nothing to do with those corporations. Although she confirmed that her husband had been placed in a similar situation years earlier and it had caused stress, she still felt her father would look after what was required. While she acknowledged that she was listed as a Director of the various companies, it "never crossed her mind" that she had any responsibility as a Director and she thought that she was only signing banking documents.

[104] Finally, during her cross examination, Ms. O'Hara-Gallant was questioned about meetings that she had with Mr. Robinson in the presence of her father. She confirmed that she met with Mr. Robinson on a couple of occasions but could not recall the specific dates. She recalled that, on January 19, 2010, Mr. Robinson came to 75 McDonald Avenue, her father was present and he had mentioned the death of the company accountant [Marcel] to Mr. Robinson. Mr. Robinson also talked about the consequences of failing to meet the deadlines, but she believed that the conversation was directed to her father, even though Mr. Robinson was speaking to both of them. Ms. O'Hara-Gallant agreed that the company's books were a "mess."

[105] Mr. Gerald O'Hara was called as the final defence witness in this case. Mr. O'Hara stated that Wicklow Properties has its registered office at 75 McDonald Avenue in Burnside, Nova Scotia, and that he "controls" the decisions of that company. He stated that the Registry of Joint Stock Companies shows that his daughter, Ms. Colleen O'Hara-Gallant is a Director of that company, but he stated that she would sign cheques "on my behalf when I directed her to do so." He added that CRA was "fully aware" of how his companies were set up for 15 years, if not more.

[106] Mr. O'Hara confirmed that he had made many visits to CRA to deal with issues that arose about 20 years ago when he was asked to provide receipts for expenses. There was a dispute as to whether they were the proper expenses for the company and in his words, "things went downhill from there" when he experienced other financial difficulties.

[107] Mr. O'Hara stated that the returns for all of his companies were done by Mr. Marcel Landry, who was his bookkeeper/accountant. In addition, his bookkeeper also did the personal returns for his wife, Linda O'Hara until Mr. Landry died on September 30, 2006. When Mr. Landry died, Mr. O'Hara stated that he was not

able to access the company records stored on Mr. Landry's computer and although he obtained the hard drive and sent it to Toronto to see if the information could be retrieved, it was not possible to get the information off the computer.

[108] With respect to Waterford, Mr. O'Hara confirmed that he owned that company but it has been "defunct" since 2008. As for GKO Holdings, he confirmed that he also owns that company and its corporate office is at his house, which is owned by him and his wife.

[109] In discussing Hawthorne, Mr. O'Hara stated that the company does several things at the present time, but in the past, it also had an answering service. It also did alarm monitoring, but that part of the company's business no longer exists. While the Registry of Joint Stocks Companies showed Colleen O'Hara-Gallant as a Director, Mr. O'Hara stated that her role was to answer the phone and perform general office duties with Mr. Landry.

[110] Mr. O'Hara confirmed that the decision-making for all three companies that he had just referred to was with him and not his daughter. She had no experience and no control over those three companies. With respect to Wicklow Properties, Mr. O'Hara believed that CRA officials were "well aware" that he was the controlling mind and that he was also the controlling mind of Waterford, GKO and Hawthorne. Neither his daughter nor his wife ever met with CRA and Mr. O'Hara confirmed that he was the only person who ever had any face-to-face meetings with CRA officials relating to those companies.

[111] Mr. O'Hara maintained that after Mr. Landry died, and he could not access his bookkeeper/accountant's computer records, he informed several CRA officials about the loss and asked what could be done about it. He added that the response from CRA officials was that "we'll see and will get back to you." Mr. O'Hara added that between 2006 and 2010, no one at CRA answered his questions. However, he realized that the answer to his questions came when CRA issued the Requirements or demands to file tax returns.

[112] Mr. O'Hara added that, in addition to the loss of access to the records in Mr. Landry's computer, they also lost records when they moved from their office on Dutch Village Road to 75 McDonald Avenue in January, 2005. He stated that the records which were stored at their location on Dutch Village Road were destroyed by the landlord after they left that premises. Mr. O'Hara maintained that he met with Ms. Linda Walker and Mr. Foster Lohnes of CRA to discuss his problems of accessing records at the Dutch Village Road office.

[113] As far as Mr. O'Hara was concerned, after Mr. Landry died, CRA was not interested in "solving anything" except to issue Demands knowing that some would be impossible to complete due to the absence of complete records. He confirmed that he was present when Mr. Robinson served the Requirements to file the corporate tax returns for Hawthorne, Wicklow and Waterford on his daughter on January 19, 2010. Mr. O'Hara confirmed that his daughter gave him those Requirements. He added that he was in the office when Mr. Robinson came back on February 26, 2010 to serve the requirements relating to GKO.

[114] When Mr. O'Hara received the Requirements from his daughter, he reviewed them and noted that Mr. Robinson had told him when they were served that he could file all of the returns for the corporations on the last day that had been provided by all of the Requirements. Mr. O'Hara realized that he had several years of tax returns to be filed for the 4 companies and there were also the personal tax returns to be filed by his wife, Linda.

[115] After receiving all of the Requirements, Mr. O'Hara realized that a lot of work was involved, but he did not say that to the CRA Field Officer. He realized, as well, that records were not available prior to 2006, as they were lost in Mr. Landry's computer or seized by the landlord. In addition, he realized that it would be difficult to complete his wife's tax returns because she was quite sick at the time and he told her that he would deal with the Requirements. Mr. O'Hara had dealt with her personal tax returns in the past when either he or his wife gave her tax information and filings to Mr. Landry, who would deal with CRA.

[116] Mr. O'Hara stated that he wrote a letter to Mr. Robert Sheldon, Assistant Director CRA, Taxpayer Services Debt Management on January 16, 2015 [Exhibit 38] to state that he had never been convicted of tax evasion. Mr. O'Hara believed that the source of his problems with CRA related to the fact that CRA officials were of the opinion that he had been convicted of tax evasion. However, Mr. O'Hara said that the reply from CRA, dated March 3, 2015, written by Mr. Greg Keeping for the Assistant Director of Revenue Collections, only informed him that in January 2004, several companies under Mr. O'Hara's control were found guilty of charges under the ITA and the Excise Tax Act. Mr. O'Hara added that, as far as Mr. Keeping was concerned, although the charges were not pursued against him personally, at that time, under Section 242 of the ITA, the Court had found him guilty of being a party to the offences and ordered him to pay the fines levied as well as the taxes owing, plus penalty and interest.

[117] With respect to any of the corporate income tax returns, for example, for the years during which CRA has alleged that Waterford did not file their returns, Mr. O'Hara stated that his daughter, Colleen O'Hara-Gallant did not direct, authorize, assent or acquiesce to the non-filing of corporate tax returns. After the Requirements were served on his daughter, Mr. O'Hara stated that he phoned some accountants to give them the "scope" of the problem. However, none of them were prepared to assist him because it was coming to the time for the filing of corporate and personal income tax returns and they all essentially stated that it would be a difficult exercise, due to the lack of documents.

[118] As a result, Mr. O'Hara stated that he met with CRA officials on July 26, 2010, which was the final date for the filing of all of the tax returns. At that time, he said that he met with Leslie Theriault and Ainsley Cardinal who were acting assistant Directors at CRA and asked them what could be done with respect to the timing of the returns. Mr. O'Hara said that after he left the meeting, he never heard another thing from CRA officials, no notes, letters or phone calls were ever sent to him. He felt that CRA could extend the deadlines, but they did not do so.

[119] On May 20, 2011, Mr. O'Hara said that he met with Mr. Kevin Ryan, who was then an Acting Director and gave him an overview of his situation and asked what could be done. Mr. Ryan's reply was provided by Ms. Kim Cholack, Manager Revenue Collections on May 27, 2011 and she advised Mr. O'Hara that there was no authority to grant any extensions.

[120] After these matters first appeared in court, Mr. O'Hara said that he had discussions with the Crown Attorney with respect to filing the corporate tax returns of GKO and Wicklow. He stated that he was able to prepare those returns because he had accumulated information over time and those companies owned one building each, so the preparation of their corporate tax returns was somewhat easier to "reverse engineer" information because the insurance, rent and mortgages on the properties was available information. Mr. O'Hara alleged that there had been an arrangement to settle the case if those returns were filed and that during a meeting with the Crown Attorney and Mr. Robinson, after the returns were filed, Mr. Robinson said that there was "no deal" with respect to the prosecution.

[121] On cross examination, the Crown Attorney questioned Mr. O'Hara on the filing of tax returns by Wicklow and GKO in in mid-May and mid-June, 2012. Mr. O'Hara stated that it took three to four months to prepare those returns and that he had filed them as part of a "possible resolution." Mr. O'Hara said that a

bookkeeper was hired and once information was located, they could "reverse engineer" information relating to those corporation's activities for each year. Given that it was several years after the fact, Mr. O'Hara stated that the information was an estimate and there were still gaps in the information.

[122] With respect to Wicklow, he filed five years of corporate tax returns and was satisfied that he got all of the information he could up to the 2008 tax year. Mr. O'Hara did not file anything for the tax returns after 2008 because too much information was missing. He confirmed that he was aware that companies are required to file income tax returns on an annual basis. Mr. O'Hara maintained that his primary motivation in preparing the tax returns when he did was that he believed he had an "deal" with the Crown, but Mr. Robinson stated that there would be "no deal." Once again, Mr. O'Hara confirmed that the information contained in the tax returns filed for Wicklow and GKO had "several holes," but they were completed when he "felt there was enough information" to file them.

[123] Mr. O'Hara confirmed that when his accountant died on September 30, 2006, he knew he was behind in the filings required for CRA. Mr. Landry had been dealing with CRA on instructions from Mr. O'Hara. He pointed out that Wicklow did not exist in 2004, but he would have known that the companies were two, four or six years behind in their filings with CRA at the time of Mr. Landry's death. Mr. O'Hara added that Mr. Landry worked diligently, but was always behind in his CRA filings.

[124] On September 20, 2016, further half-day for evidence was scheduled for the Crown Attorney to complete his cross examination of Mr. O'Hara. On that day, Mr. O'Hara was questioned about Exhibit 38 which contained three letters, which had been filed by the defence. Mr. O'Hara agreed that the letters which were written in January and March, 2015 were "long after" the Requirements to file returns had been served and the time for filing the required corporate and personal tax returns had passed. Mr. O'Hara maintained that CRA officials had not dealt with him fairly because their correspondence had inaccurately stated that he had been previously convicted of tax evasion. The Crown Attorney pointed out that Exhibit 38 which was filed by the Defence was not a complete document and that the original document contained a briefing note from CRA as an attachment which he wished to file as Exhibit 39, to ensure that the complete document that had been made available to Mr. O'Hara by CRA, was before the Court.

[125] At this point in the proceedings, Defence Counsel raised an issue, which had been raised on a prior date, whether the correspondence and the discussions between Mr. O'Hara, Mr. Robinson and the Crown Attorney with respect to a possible resolution, would require the Crown Attorney to step aside to be a witness in the trial. After hearing submissions from both sides, the Court ruled that Exhibit 39 would be admissible since Mr. O'Hara and the Crown Attorney have identified it as having been part of the package originally forwarded to Mr. O'Hara.

[126] As the cross examination continued, Mr. O'Hara repeated that Mr. Keeping's letter dated March 3, 2015 addressed to him was incorrect as he had not been convicted of tax evasion, he was not a Director of the company at the relevant time and that he had not been ordered to pay the fine imposed by the Nova Scotia Supreme Court. Mr. O'Hara stated that court order was the result of an "plea bargain" and that it only required Bromwick Holdings Limited to pay the fine for not paying taxes and not paying source deductions to CRA. He added that his son-in-law was a nominee Director of that company which was controlled by him and that his son-in-law was not charged with the offences under the ITA.

[127] When questioned about the meeting that he had requested with CRA officials in July 2010, Mr. O'Hara claimed that he asked for an extension of six months to file the tax returns which were subject to the Notices of Requirement. At the time, he did not know how many returns could be filed within that time. Mr. O'Hara maintained that it was "impossible" to do any returns by July 30, 2010 as CRA "doubled up" the Requirements and that they were all essentially due at the same time. In terms of the specific information that he had available to him on July 30, 2010, Mr. O'Hara stated that he had "bits and pieces of information" and some receipts." Once again, Mr. O'Hara maintained that there was little that he could do because Mr. Landry had been his accountant/bookkeeper for 16 years and had died suddenly on September 30, 2006.

[128] On further cross examination, Mr. O'Hara stated that he is not a bookkeeper or accountant and after Mr. Landry's death, he realized that source documents were lost or destroyed. As a result, Mr. O'Hara was unable to estimate, at this time, how long it would take to comply with an order to file returns, since some returns go back twelve years and in his words, "nothing accurate will come out." He added that Hawthorne's last return was filed in 2002 and at that time, there was a $95,000 loss. The records do not exist now and the codes to obtain the records were lost when Mr. Landry died as he kept them in his head. Mr. O'Hara maintained that he has advised CRA of the lost or destroyed information since 2006, but he never

received an answer from CRA until the "demands" or Requirements were issued four years later.

ANALYSIS:

[129] Based upon the submissions of counsel, there were several issues to be determined by the Court.

The Nature of the Offences Charged, Evidence and Onus of Proof

[130] The offences charged by CRA against Ms. Linda O'Hara and Ms. Colleen O'Hara-Gallant, relate to the failure to file income tax returns "within such reasonable time as stipulated in the notice" after having been served with a Notice of Requirement pursuant to Section 231.2(1)(a) of the ITA, which is an offence contrary to Subsection 238(1) of the ITA.

[131] In the case of Ms. Linda O'Hara, the charges relate to a failure to file personal income tax returns for several years and the corporate tax returns of Waterford for two years. With respect to Ms. Colleen O'Hara-Gallant, the charges that she is facing relate to a failure to file corporate tax returns for several years in relation to Hawthorne, Wicklow, Waterford and GKO. As a result, Ms. Colleen O'Hara-Gallant faces several charges contrary to Subsection 238(1) of the ITA.

[132] With respect to the charges against Ms. Linda O'Hara and Ms. Colleen O'Hara-Gallant in relation to the failure to comply with the Notice of Requirement to file corporate (T-2) tax returns by the dates specified in the Information, they have been charged under Section 238 of the ITA for failing to comply with the Requirements to file an income tax return for the corporation pursuant to Section 231.2(1)(a) of the ITA and that they were parties to that offence pursuant to Section 242 of the ITA by virtue of their position as an officer or director or agent of the corporation who directed, authorized, assented to, acquiesced in or participated in the commission of the offence.

[133] During his submissions, Defence Counsel argued that there was no requirement for Ms. Linda O'Hara to file her personal income tax returns since he submitted there was no income tax to be paid during the years. As a result, he submitted that since Ms. O'Hara was not liable to pay any income tax for the years in question, the ITA did not require her to file personal (T-1) income tax returns for the 2003-2008 taxation years as alleged in the Information.

[134] For the reasons which follow, I cannot agree with this proposition advanced by Defence Counsel with respect to Ms. O'Hara's personal income tax returns. I find that Ms. Linda O'Hara was required to file personal income tax returns with the CRA within the reasonable time specified in the "Notices of Requirement" issued by the Minister and personally served upon her pursuant to Section 231.2(1)(a) of the ITA.

[135] Pursuant to Section 150(1) of the ITA, as a general rule, every taxpayer, whether an individual or corporation, is required to file an income tax return in the prescribed form for each taxation year of a taxpayer. The Act does, however. provide an exception which applies to an individual taxpayer only, in Subsection 150(1.1)(b)(i) of the ITA, that an individual does not have to file a return unless there is tax payable for the year. However, the Minister does have the ability in Section 150(2) of the Act, to issue a "demand" to file an individual tax return, within such reasonable time stipulated in the demand, regardless of whether or not the person is liable to pay any tax.

[136] With respect to corporations, Section 150(1)(a) of the ITA outlines the requirements for a Corporation to file its income tax return with the Minister within six months after the end of its taxation year, subject to very limited exceptions itemized in Section 150(1)(a) of the ITA.

[137] Notwithstanding that general rule, for an individual taxpayer, there are two distinct routes by which an individual taxpayer may be required to file an income tax return within a stipulated time. The first is pursuant to Section 150(2) which allows the Minister to issue an "demand" to an individual taxpayer, regardless of whether or not the person is liable to pay tax for a taxation year and whether or not the return has been filed, to file a return in the prescribed form, within such reasonable time as stipulated in the "demand."

[138] The relevant provisions of Section 150 of the ITA provide as follows:

> **Filing returns of income — general rule**
>
> (1) Subject to Subsection (1.1), a return of income that is in prescribed form and that contains prescribed information shall be filed with the Minister, without notice or demand for the return, for each taxation year of a taxpayer,
>
> **Corporations**
>
> (*a*) in the case of a corporation, by or on behalf of the corporation within six months after the end of the year if

(i) at any time in the year the corporation

(A) is resident in Canada,

(B) carries on business in Canada, unless the corporation's only revenue from carrying on business in Canada in the year consists of amounts in respect of which tax was payable by the corporation under subsection 212(5.1),

(C) has a taxable capital gain (otherwise than from an excluded disposition), or

(D) disposes of a taxable Canadian property (otherwise than in an excluded disposition), or

(ii) tax under this Part

(A) is payable by the corporation for the year,

Exception

(1.1) Subsection (1) does not apply to a taxation year of a taxpayer if

(*a*) the taxpayer is a corporation that was a registered charity throughout the year; or

(*b*) the taxpayer is an individual unless

(i) tax is payable under this Part by the individual for the year,

Demands for returns

(2) Every person, whether or not the person is liable to pay tax under this Part for a taxation year and whether or not a return has been filed under Subsection 150(1) or 150(3), shall, on demand from the Minister, served personally or by registered letter, file, within such reasonable time as may be stipulated in the demand, with the Minister in prescribed form and containing prescribed information a return of the income for the taxation year designated in the demand.

[139] It should also be noted that Section 151 of the ITA also specifies that if a "demand" is issued by the Minister, every person who is required to file a return pursuant to Section 150 of the ITA, shall estimate the amount of tax payable and then the Minister will conduct an examination of the return to assess the tax payable for the year.

[140] It should be noted that there was no indication in the evidence that the CRA officials acting on the authority of the Minister issued at "demand" to Ms. O'Hara to file personal income tax returns and estimate the amount of tax payable which could be assessed by CRA. However, I find that the ITA does not require the Minister to issue a "demand" before proceeding with a second route to "require" an

individual or corporation to file a tax return within a reasonable time and if the taxpayer fails to do so, they may be subject to prosecution.

[141] In this case, with respect to Ms. Linda O'Hara's personal income tax returns and the 2006 and 2007 corporate income tax returns for Waterford for which she had been identified as an Officer or Director, CRA officials utilized the second route to require the filing of a personal income tax return or corporate income tax return, regardless of whether any tax was payable by either the individual or the corporation, under Section 231.2(1)(a) of the ITA. As a result, the designated CRA officials proceeded on the basis of the authority of the Minister, for any purpose related to the administration or enforcement of the ITA, to serve a "notice to require" a taxpayer, whether the taxpayer was an individual or a corporation to provide a tax return "within such reasonable time as stipulated in the notice."

[142] Subsection 231.2(1)(a) of the ITA provides as follows:

> **Requirement to provide documents or information**
>
> 231.2 (1) Notwithstanding any other provision of this Act, the Minister may, subject to subsection (2), for any purpose related to the administration or enforcement of this Act (including the collection of any amount payable under this Act by any person), of a comprehensive tax information exchange agreement between Canada and another country or jurisdiction that is in force and has effect or, for greater certainty, of a tax treaty with another country, by notice served personally or by registered or certified mail, require that any person provide, within such reasonable time as stipulated in the notice,
>
> > (*a*) any information or additional information, including a return of income or a supplementary return; or
> >
> > (*b*) any document.

[143] The specific offence and punishment of an individual taxpayer or a corporation for failing to comply with the "Notice of Requirement" to file or make a tax return as and when required by the ITA or for failing to comply with any parts of sections 230-232 of the ITA, is found in section 238 of the ITA which provides as follows:

> **Offences and punishment**
>
> 238. (1) Every person who has failed to file or make a return as and when required by or under this Act or a regulation or who has failed to comply with Subsection 116(3), 127(3.1) or 127(3.2), 147.1(7) or 153(1), any of Sections 230 to 232 or a regulation made under Subsection 147.1(18) or with an order made

> under Subsection 238(2) is guilty of an offence and, in addition to any penalty otherwise provided, is liable on summary conviction to
>
> (*a*) a fine of not less than $1,000 and not more than $25,000; or
>
> (*b*) both the fine described in paragraph 238(1)(*a*) and imprisonment for a term not exceeding twelve months.

[144] I find that the foregoing provisions of the ITA have been designed to work in concert with each other. First, the Minister has the authority to "require" that a tax return be provided by an individual, regardless of whether any tax is payable, or a corporation for purposes related to the administration or enforcement of the ITA, which includes a collection of any amount payable under the ITA by that individual or corporation. Then, section 238 of the ITA makes it an offence if the corporation or individual taxpayer has failed to comply with that "requirement" to file a tax return.

[145] In terms of the essential elements of the offence contrary to Section 238(1) of the ITA, I agree with and would adopt the reasoning of the Court in **R. v. Sedhu**, 2013 BCSC 2323 which was adopted and accepted by the British Columbia Court of Appeal in **R. v. Logan**, 2014 BCCA 240, which involved an appeal of a case from an individual taxpayer who was convicted of failing to comply with Notices of Requirement to file completed tax returns for several years, contrary to Section 232.2(1) and Section 238(1) of the ITA.

[146] In **Sedhu**, *supra*, at para. 44, the Court held that the two essential elements of the offence of failing to comply with the Notice of Requirement to file under Section 231.2(1) of the ITA, which the Crown must prove beyond a reasonable doubt are: (1) service of the Notice and (2) failure to comply with that Notice. Of course, the essential elements of establishing the identity of the accused and jurisdiction are common elements for all offences that the Crown must prove. Once those essential elements are established, beyond a reasonable doubt, the *actus reus* of the offence has been established. These comments by Williams J as the summary appeal court judge in **Sedhu**, *supra*, were subsequently upheld on further appeal in **R. v. Sedhu**, 2015 BCCA 92 at para. 37.

[147] In addition, Williams J concluded in **Sedhu**, *supra*, at para. 25, after a thorough review of the relevant jurisprudence that Section 238(1) which is the offence for failing to comply with a "requirement" issued under Section 232.2 of the ITA creates a strict liability offence. Accordingly, it follows that the Crown must prove the *actus reus* of the offence beyond a reasonable doubt and if so, then

the burden shifts to the accused to prove, on a balance of probabilities, that he or she acted with due diligence and should not be convicted.

[148] It is clear from the **Sedhu**, *supra*, at para. 22, that Williams J relied upon the seminal decision in **R. v. Sault Ste. Marie** (**City**), [1978] 2 SCR 1299, where Mr. Justice Dickson categorized three types of criminal offences – absolute liability offences, strict liability offences and offences which requires the Crown to prove *mens rea*, that is, that the accused had some positive state of mind, such as intent, knowledge or recklessness. Strict liability offences only demand that the Crown prove that the accused committed the prohibited act, but it is open to the accused to defend himself by showing that he or she took all reasonable care.

[149] After canvassing jurisprudence, Williams J concluded in **Sedhu**, *supra*, at paras. 23 to 25 that Canadian tax legislation contains "fiscal offences of the regulatory nature" which are public welfare offences and are *prima facie*, strict liability offences. Moreover, it was also noted, in **R. v. Voth**, 2002 SKCA 47 that the Section 238(1) offence for a failure to comply with Section 231.2 of the ITA is a strict liability offence.

[150] One further point on the essential elements, which was noted by Williams J in **Sedhu**, *supra*, at paras 47-48 which were approved and adopted by the BCCA in **Logan**, *supra*, at paras 31-32, is that the Crown is not required to prove that the timeframe given in the Notice was reasonable, since Parliament has delegated to the Minister the task of determining what is a reasonable time for compliance with the Notice in any given case. However, Williams J did also note that, as part of the defence of due diligence, the accused may argue that the time given in the Notice was unreasonable and that, despite having taken reasonable steps, he or she could not be expected to comply within the timeframe given.

[151] In the further appeal of **Sedhu**, *supra*, at para. 35, the British Columbia Court of Appeal agreed with the comments of Williams J on the issue of whether the Crown had to prove the reasonableness of the timeframe provided in the Notice of Requirement to file income tax returns. The Court of Appeal noted that the Court should seek to avoid any interpretation that would lead to an absurd result. Parliament cannot have intended to impose upon the Minister an obligation to prove subjective reasonableness because evidence with respect to that issue lies particularly in the hands of the person obliged to comply with the demand. The Court of Appeal also noted that requiring the Crown to prove an element

"peculiarity within the knowledge and ability of the regulated accused" would render the enforcement of the offence "virtually impossible."

[152] The Court of Appeal added in **Sedhu**, *supra*, at para. 36 that it was not Parliament's intention to require the Crown to establish objective reasonableness of the demand as an element of the *actus reus*. The scheme is consistent with the requirement that the Minister consider an objectively reasonable time for compliance on the basis of information in the hands of the Minister when the notice is served. It cannot have been the intention of Parliament to require evidence of the manner in which that period was determined or prove beyond reasonable doubt that the time specified was reasonable at the time of the issuance of the notice in every case.

[153] In addition, the Court of Appeal stated in **Logan**, supra, at para. 32 that the Crown does not need to prove, as an element of the offence, that the requirement was issued "for purposes of a genuine and serious inquiry into the tax liability of the individual." The British Columbia Court of Appeal concluded that, in the absence of evidence to the contrary, the Crown's service of a "demand" or Requirement pursuant to Section 231.2(1) of the ITA, stated to be for purposes related to the administration or enforcement of the ITA, is *prima facie* proof of the validity of the demand or requirement to file a tax return.

[154] As I indicated above, I agree with and adopt the reasoning of Williams J in **Sedhu**, *supra*, and I agree with and adopt the reasoning of the British Columbia Court of Appeal in **Logan**, *supra*, and the reasoning of that Court of Appeal in **Sedhu**, *supra*, with respect to the essential elements of this offence, the offence being one of strict liability as a public welfare offence, and that the issuance of the requirement pursuant to Section 231.2(1) of the ITA stated to be for purposes related to the administration or enforcement of the ITA, is *prima facie* proof of the validity of that requirement.

[155] With respect to the evidence to be brought forward by the prosecution, it is important to note that the Section 244 of the ITA under the heading "procedure and evidence" will apply in the circumstances of this case.

[156] First, Subsection 244(6) of the ITA provides for affidavit evidence to be received as proof of personal service. In that subsection, where the ITA requires personal service of a "notice," an affidavit of an officer of the CRA, sworn before a Commissioner or other person authorized to take affidavits, setting out the officer's knowledge of the facts in the particular case, that the "notice" was served

personally on the person to whom it was directed on the date specified and the officer attaches the "notice" as an exhibit, the affidavit, shall, in the absence of evidence to the contrary, be received as evidence of the personal service and of the "notice" itself.

[157] Secondly, Subsection 244(7) of the ITA provides for affidavit evidence to be received as proof of failure to comply with a requirement where a person is required by the ITA or a regulation to make a return. In that subsection, an affidavit of an officer of CRA, sworn before a Commissioner or other person authorized to take affidavits, setting out that the officer has charge of the appropriate records and that after careful examination and search of those records, the officer has been unable to find the tax return [or other required information] has been made by that person, the affidavit, shall, in the absence of proof to the contrary, be received as evidence in that case that the person did not make the return [or comply with the requirement to provide other information]

[158] Given the evidence of the CRA Field Officer, Mr. Dean Robinson and the affidavit evidence that was filed during his testimony by the Crown, there can be no doubt of the *prima facie* proof of two essential elements of the *actus reus* the offences before the court. First, Mr. Robinson's evidence and the Exhibits which contained his Affidavits of Personal Service, together with the Notice of Requirement letter would be *prima facie* proof of the first essential element of the *actus reus*, namely, proof of service of the Notice of Requirement.

[159] Secondly, Mr. Robinson's evidence and his Affidavit of Failure to Comply – Tax Services Office in relation to Ms. Linda O'Hara's personal income tax returns which were required to filed, were *prima facie* proof of the fact that Ms. O'Hara had failed to comply with the requirements to file her personal income tax returns and that a careful search of the records up to and including February 23, 2011 revealed that no return had been filed and forwarded to CRA. With respect to the corporate (T-2) income tax returns required to be filed by the officer or director served, namely Ms. Linda O'Hara or Ms. Colleen O'Hara- Gallant, in addition to Mr. Robinson's evidence during the trial, the Crown Attorney filed Mr. Robinson's Affidavit of Failure to Comply – Tax Services Office to indicate that the corporate turn returns had not been filed on or before February 23, 2011. In addition, in relation to the corporate (T-2) income tax returns which were required to be filed, the Crown Attorney also filed Affidavits of Failure to Comply – Tax Centre [St. John's] sworn by Michelle Kelly which were *prima facie* proof that a careful search and examination of the appropriate records at the Tax Centre in St. John's

Newfoundland confirmed that no return had been made and filed up to and including May 2, 2011.

[160] In addition, I find that there was no dispute in the evidence on these points, as the evidence of Ms. Linda O'Hara, Ms. Colleen O'Hara- Gallant and Mr. Gerald O'Hara all confirmed that none of the required income tax returns had been filed before the dates specified in the Affidavits sworn by CRA officials, which were filed as Exhibits in this trial pursuant to section 244(6) and (7) of the ITA.

[161] Furthermore, given the evidence of Mr. Robinson, Ms. Linda O'Hara and Mr. O'Hara with respect to the history of Ms. O'Hara's non-filing of tax returns and confirmation that corporate tax returns had not been filed for many years, I find that there is absolutely no issue with respect to the legitimacy of the various Notices of Requirement served on Ms. Linda O'Hara for her personal income tax returns and the two defendants in their capacity as Officers and/or Directors of the corporations for the "required" corporate (T-2) income tax returns. I find that the evidence of Mr. Robinson established that the Notices of Requirements were served upon Ms. Linda O'Hara and Ms. Colleen O'Hara-Gallant for purposes related to the administration or enforcement of the ITA.

[162] With respect to the legitimacy of the Notices of Requirement served upon the defendants for the purpose of the administration or enforcement of the ITA, Mr. O'Hara had testified that he believed the Notices were served based upon a history of antagonism between himself and CRA officials. Mr. O'Hara claimed that the antagonism towards him was based upon a much earlier prosecution for tax evasion in relation to a Bromwick Holdings Limited, which he later acknowledged to being the "controlling mind" even though his son-in-law had been named as the Officer and/or Director. Mr. O'Hara believed that CRA officials had inaccurately stated in a briefing note that he had been previously convicted of tax evasion and therefore, he maintained that CRA might not be pursuing the corporations for reasons relating to the administration or enforcement of the ITA.

[163] First, with respect to Mr. O'Hara's claim that "antagonism" against him was the motivation for the issuance of the Notices of Requirement, it flies in the face of a long history of non-filing corporate tax returns of corporations which Mr. O'Hara acknowledged during the trial that he was the "controlling mind," despite the fact that his wife or his daughter were listed as the Officers and/Directors of the particular Corporation. Secondly, the briefing note that was provided as part of the disclosure in this prosecution, was prepared in advance of the meeting with Mr.

O'Hara several years **after** the confirmation of the failure to comply with the Notices of Requirement in affidavit evidence.

[164] I find that this claim of "antagonism" as the rationale for pursuing this prosecution is a so-called "red herring" designed to obfuscate the real issue in this case. I find that it is a very plain and simple fact, which in reality is not disputed, that none of the individual (T-1) tax returns required to be prepared and filed by Ms. Linda O'Hara or the corporate (T-2) tax returns of the various corporations were prepared and filed with CRA on or before July 26, 2010, which was the cumulative reasonable time provided in the Notices of Requirement issued pursuant to Section 231.2(1) of the ITA. Moreover, none of the individual tax returns or corporate tax returns had been prepared and filed with CRA on or before May 2, 2011, which was approximately 8 months after the time provided by the Notices of Requirement.

[165] Although there was no request for an extension of time to prepare and file the "required" income tax returns, I find that CRA did not institute criminal proceedings until May 17, 2011. On that date, Mr. Robinson, the CRA Field Officer attended at Provincial Court to swear an Information for charges under Section 238(1) of the ITA for failure to comply with the Notices of Requirement issued pursuant to Section 231.2(1)(a) of the ITA. In those circumstances, I find that Ms. Linda O'Hara and Ms. Colleen O'Hara-Gallant had approximately 15 months to comply with Notices of Requirement had been served on them by Mr. Robinson on January 19 and January 22, 2010, as well as on February 26, 2010.

[166] Clearly, the issuance of a "Requirement" to file an income tax return or provide information to CRA is for the determination of the taxpayer's liability to pay tax and that is a purpose related to the administration and enforcement of the ITA. It is obvious that, without the required information and the personal (T-1) income tax return or the corporate (T-2) income tax return, the CRA on behalf of the Minister would not be able to determine the tax liability of the named taxpayer. Section 231.2(1) gives the Minister the broad authority to obtain information for the determination of the tax liability and this is a "low threshold" which I find to have been met in the circumstances of this case. Given the facts and circumstances of this case, I find that the Notices of Requirement were issued for the purpose of the administration and enforcement of the ITA, that is, to obtain the required information to determine the taxpayer's tax liability for the years in question: see **Minister of National Revenue v. Tower, Kitsch et al**, 2003 FCA 307(Federal Court of Appeal) at paragraphs 27-34.

Were the Officers and/or Directors Properly Served with the Notices of Requirement issued pursuant to Section 231.1(2) of the ITA?

[167] Although Defence Counsel has raised this issue in his written submissions, I find that this issue was previously determined by the Court on July 30, 2015 in response to a Defence motion for a directed verdict. On July 29, 2015, Defence Counsel made a motion for directed verdict as he submitted that there was no evidence that the CRA Field Officer had reviewed Minute Books of the various corporations to determine who were the actual Officers and Directors of the Corporation. He submitted then, as he did his written brief at the conclusion of the trial, that CRA officials knew, at all material times, that Mr. O'Hara was the "controlling mind" of the corporations and that the nomination Ms. Linda O'Hara and Ms. Colleen O'Hara-Gallant was a formality and that they were only "nominal" agents or Directors of those corporations.

[168] Simply put, the position advanced by Defence Counsel with respect to this issue is entirely without any merit. A brief review of the Nova Scotia Corporations Registration Act, RSNS 1989, c. 101 provides the authority to completely reject the defence position and those provisions were referred to during the decision on the directed verdict motion on July 30, 2015.

[169] Subsection 9(1) of the Nova Scotia Corporations Registration Act requires every corporation holding a certificate of registration to appoint and have a recognized agent resident within the province, service upon whom of any order, summons, process, notice or other document shall be deemed to be sufficient service upon the corporation. That subsection also includes the liability for a penalty if any Corporation fails to appoint and have such agent resident in the province.

[170] Subsection 9(2) of the Nova Scotia Corporations Registration Act requires a statement showing the name and address of such agent and from time to time a statement showing any change of such agent or his address to be filed with the Registrar.

[171] Section 10 of the Nova Scotia Corporations Registration Act requires every corporation holding a certificate of registration to annually, in the month during which the anniversary of the incorporation of the corporation occurs, to file with the Registrar a statement showing the name of its recognized agent in the Province, the names of its directors and of its officers and such other information as the Registrar requires.

[172] Subsection 10(4) of the Nova Scotia Corporations Registration requires the statements referred to above to be signed by the recognized agent of the Corporation resident within the Province or, with the consent of the Registrar, by the secretary-treasurer or other officer of the Corporation who has knowledge of the facts.

[173] Therefore, there can be no doubt that the position advanced by Defence Counsel is completely contradicted by the provisions of the Nova Scotia Corporations Registration Act which requires the appointment of an agent in the province for the service of notices or court documents. The requirement to provide the Registrar with annual updates of the names of the directors of a corporation and its officers means that there is a publicly available registry, which anyone doing business with the corporation in Nova Scotia can access to determine the names of the authorized agent of the Corporation, its Directors and officers as well as the address for its registered office.

[174] Clearly, Subsection 9(1) of the Nova Scotia Corporations Registrations Act provides the legal authority of a person to rely on the certificate of registration for the service of any order, notice or other documents on that corporation. In this case, the CRA Field Officer went to the Registry of Joint Stock Companies of Nova Scotia where the corporate filings for Hawthorne, Wicklow, GKO and Waterford, were filed, and he obtained certified true copies of those registrations to determine who were the Officers and/or Directors of those corporations for the time period during which the Notices of Requirement were to be served on the recognized agent. All of those certified true copies of Notice of Officers and Directors for an Incorporated Company, which were date stamped by the Registrar on the date that they were received, have been filed as Exhibits in this trial.

[175] If Mr. O'Hara was, in fact, the "controlling mind" of the four corporations which were served with the Notices of Requirement to file corporate income tax returns, I find that the CRA Field Officer was not required to search the Minute Book of those corporations to determine the identity of the Officers and/or Directors of those corporations. I find that Mr. Robinson could rely upon the corporate registrations publicly available in the Registry of Joint Stock Companies to determine identity of the appropriate person to serve on behalf of those corporations.

[176] In addition, one would assume that if, in fact, Mr. O'Hara was the "controlling mind" of the corporations, he had some legitimate business, personal

or tax reason or rationale for naming his wife and his daughter as what he referred to as the "nominal" Directors and Officers of the corporations. The fact that this position has been raised in the first place by the Defence seems to confuse the issue of level of control over a corporation with the fact that regardless of the actual or *de facto* control of the corporations, CRA had served the officially designated agents, Officers and Directors of the corporations with the Notices of Requirement to prepare and file corporate (T-2) income tax returns. In fact, the level of control of Ms. Linda O'Hara or Ms. Colleen O'Hara-Gallant has nothing to do with the gravamen of the offence of failing to comply with the Notices of Requirement which I have found to have been properly served by CRA upon them.

Does Section 242 ITA Require the Crown to Establish Men's Rea of an Officer or Director Charged as a Party to an Offence?

[177] As a starting point with respect to the analysis of this question, both the Crown Attorney and Defence Counsel appeared to agree that the case law has established that the offence contrary to Section 238 of the ITA of failing to comply with the requirement against the Corporation is one of strict liability. In the preceding paragraphs, after analyzing that issue, I have also concluded that the corporation's failure to comply with a Section 231.2(1) ITA Notice of Requirement served on one of its Directors or Officers to file its corporate (T-2) income tax returns, is a strict liability offence.

[178] Section 242 of the ITA provides as follows:

> Where a corporation commits an offence under this Act, any officer, director or agent of the corporation who directed, authorized, assented to, acquiesced in or participated in the commission of the offence is a party to and guilty of the offence and is liable on conviction to the punishment provided for the offence whether or not the corporation has been prosecuted or convicted.

[179] Defence Counsel submits that while the Section 238(1) ITA offence against the Corporation may be one of strict liability, and a conviction could be entered against it, in the absence of due diligence or a mistake of fact defence, he submits that in order to convict an officer or director or agent as a party to that offence under Section 242 of the ITA, requires the Crown to prove *mens rea*.

[180] I find that Section 242 of the ITA operates in the same manner as Section 21 of the **Criminal Code of Canada** which makes parties to the offence subject to the same liability as a principal and essentially eliminates the distinction between

principals and parties. I find that Section 242 of the ITA is worded in a similar manner to Section 21 of the **Criminal Code** and describes the ways in which an Officer or Director may become a party to an offence which has been committed by a Corporation, regardless of whether the corporation has been prosecuted or convicted.

[181] It must also be borne in mind that while a corporation is a legal entity, any actions or inaction by a corporation can only be performed by the people who act as its Directors, Officers or the employees of the corporation acting within the scope of their employment. In that context, I find that one can easily see the parallels between Section 21 of the **Criminal Code** and Section 242 of the ITA.

[182] Pursuant to Section 21 of the **Criminal Code**, a person is a party to the offence if they actually committed it or acted with someone else in committing the offence [which in the context of Section 242 of the ITA would equate to the directing, authorizing or assenting to the act which amounted to the offence] or does or omits to do anything for the purpose of aiding or abetting any person to commit the offence [which in the context of Section 242 of the ITA would equate to acquiescing in or participating in the act which amounted to the offence].

[183] In **R. v. Whissell-MacLeod Ventures Ltd and George Whissell**, [1994] A. J. no. 889 (Alta. CA), the Alberta Court of Appeal dealt with the very same issues in very similar circumstances to the instant case. In **Whissell**, both the corporate appellant and Mr. Whissell had been served with Notices of Requirement issued by CRA under Section 232.2(1)(a) of the ITA which required the preparation and filing of the corporate income tax returns for the preceding six taxation years within 75 days. Mr. Whissell had been served with the notices of requirement as a Director and Officer of the corporation. The required income tax returns were not filed within the time provided and the Corporation and Mr. Whissell were both convicted under Section 238(1) of the ITA. Mr. Whissell was convicted as a party to the offence committed by the corporation.

[184] The Alberta Court of Appeal dismissed Mr. Whissell's appeal, *supra*, at paras 13-17 and stated as follows:

> "[13] It has long been established in criminal law that a party to an offence is in the eyes of the law as guilty as the principal, and maybe charged as a principal. The Supreme Court of Canada settle the law in that regard in **R. v. Harder**, (1956) 23 CR 295.

> [14] We think the summary conviction appeal judge was correct in concluding that section 242 of the Income Tax Act should be treated in the same manner as section 21 of the Criminal Code with respect to the laying of the charges. Section 242 provides:
>
> [Section 242 ITA was inserted here in the original text]
>
> If the appellant is a party within the meaning of that section, according to **Harder** he may be charged as a principal. Because the law does not distinguish between the party and the principal, there is no need to notify an accused in the indictment of the possibility of conviction as a party. When charging an accused as an aider and abettor, it is not customary to word the information to identify the accused as such. An officer, director or agent of a corporation charged with an offence under the Income Tax Act must be prepared to meet the possibility of being convicted either as a principal or as a party.
>
> [15] We agree with the summary conviction appeal judge that there was ample evidence before the trial judge to show that the appellant, George Whissell directed, authorized, participated and acquiesced in the decision in the failure to file the corporate tax returns.
>
> [16] The appellant George Whissell also argues that a compliance order not to have issued against him personally requiring him to file the requested information. He says that he has no right to use the corporate information to meet his personal obligations. We see no merit in this argument.
>
> [17] George Whissell was convicted as a party to the offence because of his ongoing corporate responsibility. That responsibility includes the authority to take any action necessary to comply with his own corporate legal duties."

[185] In **R. v. Bordignon**, 1981 CarswellBC 953 (BC Co. Ct.), McClellan J dealt with an issue similar to the one before this court involving the failure of a Corporation [Bordignon Construction Ltd] to remit monies which had been deducted and withheld from employees, but were required to be paid by the company to CRA. The company was charged with an offence contrary to section 238(2) of the ITA with failing to comply with a compliance order and Mr. Bordignon and to others were charged with being a party to the offence by virtue of section 242 of the ITA.

[186] Justice McClellan concluded in **Bordignon,** *supra*, at para. 11 that:

> "It would appear therefore that if section 238(2) creates the offence and section 242 does not, and that an offence under section 238(2) is one of strict liability, it can only follow that that is the test to be applied to the charge against Luigi Bordignon**.** The gravamen of the offence is the failure to remit and the evidence indicated that he was an actively engaged in the inside operations of the

> Company; that he was well acquainted with the Companies poor financial condition; that he knew cheques were being withheld by the bank at times; and yet he did nothing to assure himself that the cheques issued to the Receiver-General of Canada would be forwarded by the bank and honored by the bank when they were negotiated."

[187] In the final analysis, I find that this is a strict liability offence and that service of the Notice of Requirement to file on a designated Officer or Director of the Corporation, combined with evidence of the corporation's failure to comply with the "requirement" is *prima facie* prove of the *actus reus* of the offence. If it is established that the person charged as a party under Section 242 of the ITA was, in fact, an Officer or Director of a corporation at the relevant times, I find that would also be *prima facie* proof that they had either directed, authorized, assented to, acquiesced or participated in the failure to file the required corporate tax returns.

[188] However, since I have concluded that these are strict liability offences, it would be open to that Officer or Director to avoid liability as a party to establish, on a balance of probabilities, that they had exercised due diligence and had taken all reasonable care to avoid the prohibited act or they reasonably believed in a mistaken set of facts which, if true, would render the act or omission innocent.

[189] In this case, I am satisfied that the evidence established that Ms. Linda O'Hara was an Officer and Director of Waterford during the relevant time periods when corporate tax returns were required to be filed within a reasonable time pursuant to the Notices of Requirement which were properly served on her by Mr. Robinson of CRA on January 22, 2010. Furthermore, I am also satisfied that the evidence established that Ms. Colleen O'Hara-Gallant was an Officer and Director of Hawthorne, Wicklow, GKO and Waterford at the relevant times when the Notices of Requirement were properly served upon her by Mr. Robinson of CRA on January 19, 2010 and February 26, 2010.

[190] As I have previously stated, there is no dispute in the evidence that none of the "required" personal income tax returns of Ms. Linda O'Hara were prepared and filed by or on behalf of Ms. O'Hara with CRA, before Mr. Robinson swore the Informations involved in this prosecution on May 17, 2011. Furthermore, there is no dispute in the evidence that none of the "required" corporate tax returns were prepared and filed by or on behalf of either Ms. Linda O'Hara or Ms. Colleen O'Hara-Gallant who were Officers and/or Directors of the corporations at all relevant and material times to the prosecution of the allegations that the

corporations failed to comply with the Notices of Requirement on or before the time provided by CRA to do so.

Have the Individual Defendants Established a Due Diligence Defence to Avoid Liability?

[191] As I indicated previously, based upon the seminal decision in **R. v. Sault Ste. Marie (City)**, [1978] 2 SCR 1299 at pages 1325-26, Dickson J (as he then was) defined the three categories of offences. With respect to second category of offences, which Dickson J referred to as the offences of strict liability, the Supreme Court of Canada pointed out that they were offences for which there is no necessity for the prosecution to prove the existence of *mens rea*; the doing of the prohibited act *prima facie* imports the offence, leaving it open to the accused to avoid liability by proving that he took all reasonable care. Dickson J added that this involves consideration of what a reasonable man would have done in the circumstances. The defence will be available if the accused reasonably believed in a mistaken set of facts which, if true, would render the act or omission innocent, or if he took all reasonable steps to avoid the particular event.

[192] Justice Dickson stated that offences which are criminal, in the true sense, fall into the first category. Public welfare offences would *prima facie* be in the second category. Those public welfare offences are not subject to the presumption of full *mens rea* unless the statutory provision which created an offence of that nature contained wording such as "willfully", "with intent", "knowingly", or "intentionally". Dickson J also made it clear that offences of absolute liability would be those in respect of which the Legislature had made it clear that guilt would follow proof merely of the proscribed act.

[193] Keeping in mind those instructive comments by Dickson J in **Sault Ste. Marie**, I find that there is no doubt that the Income Tax Act is public welfare legislation as a regulatory statute for the benefit of all Canadians to ensure that the government has a system in place for the self-reporting of income which relies on the honesty and integrity of taxpayers for its success, but also contains a number of measures for the administration and enforcement of the ITA to collect revenue to finance government operations and services for the Canadian public.

[194] In **R. v. Sedhu**, 2015 BCCA 92, at para. 34, the Court of Appeal observed, on this point, "the scheme of the ITA is to establish a regime for the efficient

determination of tax liabilities, to describe record-keeping and reporting obligations and to enforce those obligations by describing offences.

[195] It is also significant to note that neither Section 238 nor Section 242 contain any of the wording such as "willfully" or "intentionally" in those sections, which would tend to indicate that it was an offence which required the Crown to establish full *mens rea*.

[196] With respect to the issue of due diligence, the Newfoundland Court of Appeal stated in **R. v. Alexander**, 1999 Canlii 18928 that due diligence does not depend, for its operation, simply on the reasonableness of the actions of the accused. In that case, the accused had disposed of waste material [domestic garbage] at a hunting camp, but he had not followed the prescribed procedures in the legislation for the disposal of that waste. The Newfoundland Court of Appeal held that the defence of due diligence requires the acts of diligence to relate to the external elements of the specific offence that is charged. The accused must establish, on a balance of probabilities, that he took all reasonable steps to avoid committing the activity. It is not sufficient simply to act reasonably in the abstract or to take care in a general sense. The due diligence must relate to the commission of the prohibited act, not some broader notion of acting reasonably.

[197] Moreover, I find that the cases which have dealt with the due diligence defence have focused on the actions or inaction of the accused person himself or herself, as the key question is whether the accused person alone established their own due diligence in response to the Crown's *prima facie* proof of the proscribed or prohibited act. As the Supreme Court of Canada noted in **Sault Ste. Marie**, *supra*, where an employer is charged for a proscribed act, which was committed by employee acting in the course of their employment, the question will be whether the accused (employer) exercised all reasonable care by establishing a proper system to prevent commission of the offence and by taking reasonable steps to ensure the effective operation of the system.

[198] In addition, in the case of **R. v. Adair**, 2000 BCSC 861 at paras.4-5, Hood J dealt with a summary conviction appeal of an acquittal of the respondent on the identical issue to the instant case, that is, a charge of failing to file his income tax return within 35 days of being served with a Notice of Requirement pursuant to the provisions of Section 231.2(1)(a) of the ITA. Justice Hood endorsed the comments of the Court in **R. v. Euerby,** [1992] BCJ no. 396 at p. 2, that the Notice of Requirement gives sufficient time to comply and explains the consequences of

failing to comply. Moreover, a person receiving such a notice is well aware of the consequences of failing to comply, and therefore, has the opportunity to avoid the consequences of this strict liability offence by establishing that he took all reasonable steps, which would have been expected of reasonable man, to comply with the Notice.

[199] Furthermore, in **R. v. Adair,** *supra***,** in paras. 7-10, I find that Justice Hood made findings which I find to be equally relevant and applicable in the facts and circumstances of this case. In that case, Hood J noted that, not only did Mr. Adair not comply with the Notice of Requirement within the timeframe provided by the Minister, the "required" tax return was not filed until two years and three months after the expiry of the Notice, on the eve of the trial. Hood J. noted and I agree with his comments that what Mr. Adair did after the expiry of the time provided in the notice has "no relevance to the issue of due diligence. It is then too late."

[200] In **Adair,** *supra***,** at para. 8**,** the Defence advanced a compassionate basis for a finding of due diligence, as it is being essentially advanced in the instant case. Mr. Adair had not filed his "required" personal income tax return based on his explanation that during the time period provided by the Minister, there were tragic medical problems for his wife and himself and he also had other problems in the years after the expiry of the 35 days which were provided by the Minister to comply with the Notice. However, Justice Hood held, at para. 8, that "what the respondent did years after the expiry of the 35 day period, does not make out due diligence. It must be made out before the event, not afterwards, what he did afterwards is irrelevant."

[201] As a result, I find that if a person is accused of a strict liability offence, he or she may avoid conviction by proving, on a balance of probabilities, either that they had an honest but mistaken belief in facts which, if true, would render the act innocent or that they exercised all reasonable care to avoid committing the offence. In other words, the due diligence defence is based on a factual finding, on a balance of probabilities, that the accused person did what a reasonable person would have done in the circumstances to avoid the occurrence of the prohibited act.

Did Ms. Linda O'Hara Establish a Due Diligence Defence with respect to the Failure to File her Personal (T-1) Income Tax Returns?

[202] I find that the evidence relating to Ms. O'Hara's income was not entirely clear, as it appeared that she had some employment income at some relevant times to the matters before the court and also had income in the form of a pension, which at some unspecified time had been garnisheed, in full, by the government.

[203] As I mentioned previously, Defence Counsel advanced the proposition that since Ms. O'Hara had no income, she did not have to file any personal income tax returns. Indeed, the evidence established that she had not filed personal income tax returns for many years and neither Ms. O'Hara nor Mr. O'Hara could recall the last year for which she had filed her personal income tax return before the end of April. However, as I have previously pointed out, the provisions of the ITA and the relevant jurisprudence establish that the existence of tax liability is not a prerequisite to the issuance of a Notice of Requirement pursuant to Section 231.2(1) of the ITA.

[204] I find that the evidence established that, after Ms. O'Hara was served with the Notices of Requirement to file her personal income tax returns, she simply passed them on to her husband to deal with them. She explained that, in the past, her husband had taken care of her personal income tax returns because she had experienced several serious medical issues. She was not aware that there had been numerous years where no taxation return had been filed by her, including the six taxation years which were the subject of the Notice of Requirement.

[205] During her cross examination, Ms. O'Hara did not provide any reasonable explanation for why she had failed to file her personal income tax returns for many years. Moreover, she knew that her husband had been experiencing issues of disagreement with CRA over the years and she must have known that there had previously been charges involving her husband's companies and her son-in-law. Despite this, Defence Counsel maintains that Ms. O'Hara exercised due diligence by placing complete trust in her husband to put together the information needed to file her personal income tax returns, without any follow-up or inquiries by her, since she claimed to be completely unaware that her personal income tax returns had not been filed as required by the Notices of Requirement.

[206] Based upon all of the facts and circumstances, I find that Ms. O'Hara's complete delegation of her responsibility to her husband to file personal income tax returns, does not amount to due diligence. After the service of the Notice of Requirement to file personal income tax returns, I find that Ms. O'Hara knew what had to be done and that positive steps had to be taken in order to comply with those

Notices. Ms. O'Hara herself, took absolutely no steps, made no effort, let alone a reasonable effort to comply with the Notices.

[207] At a minimal level, given the fact that the Notices had outlined what had to be done and the consequences for failing to do so in a timely manner, as well as her own knowledge of Mr. O'Hara's difficulties with CRA, which he had described as CRA's "antagonism" to him, I find that Ms. O'Hara, objectively speaking, could not have reasonably considered that delegating complete responsibility for the filing of her tax returns to Mr. O'Hara would have resulted in the filing of the required personal income tax returns. Even where there are compassionate circumstances, I find that due diligence cannot be reduced to making no effort whatsoever, and I am satisfied that Ms. O'Hara could have assisted in gathering relevant information and actively following up with Mr. O'Hara on a regular basis to ensure that she complied with the Notices.

[208] I find that, if Ms. O'Hara had been duly diligent, having made inquiries and determined whether she would be able to comply with her legal obligation to file her personal income tax returns in a timely manner, one would have expected her to take an active role in that project and if need be, to contact CRA for an extension of time. In these circumstances, I find that Ms. Linda O'Hara did not establish, on a balance of probabilities, that she exercised due diligence, nor did she exercise all reasonable care to avoid committing the offence of failing to file six years of personal income tax returns within the reasonable time provided by CRA officials.

[209] Moreover, as indicated in **Adair**, *supra*, there is absolutely no evidence before the court as to what positive acts were done to file the required returns by either Ms. Linda O'Hara or Mr. Gerald O'Hara before the expiration of the time provided by the Minister in the Notice. By the same token, there is really no evidence before the court as to what was done by Ms. O'Hara or Mr. O'Hara after the time provided in the Notice had expired up to and including May 17, 2011, when the Informations were sworn and filed in the court by Mr. Robinson. In reality, the steps taken after the Notice expired or after the charges were laid cannot be relevant to the issue of due diligence, since at that point, it is clearly too late to demonstrate that a person exercised all reasonable care to avoid committing the offence.

Did Ms. Linda O'Hara And/Or Ms. Colleen O'Hara-Gallant Establish a Due Diligence Defence with respect to the Failure to File Corporate Income Tax Returns?

[210] With respect to the failure to file the corporate (T-2) income tax returns within the time provided in the Notices of Requirement served upon Ms. Linda O'Hara and Ms. Colleen O'Hara-Gallant, Defence Counsel has advanced the proposition that Mr. O'Hara was the "controlling mind" of all of the corporations and that his wife and his daughter were merely "nominee officers and/or directors" without any power, control or knowledge of the corporations' operations. Therefore, he submits that, since they were not the "real directors" of the corporations when they Notices of Requirement were served upon them, the charges against them should be dismissed.

[211] For the sake of brevity, I will not repeat here my earlier comments with respect to whether Mr. Robinson properly served the Notices of Requirement on the Officers and Directors of the corporations involved in this prosecution. Simply put, the Nova Scotia Corporations Registration Act is the location where members of the general public may readily access the registry to ascertain the names of the recognized agent for a Corporation in the province, the list of their Officers or Directors and the location of their office. Subsection 9(1) of the Nova Scotia Corporations Registration Act provides the legal authority of a person to rely on the certificate of registration for the service of any order or notice or other documents on the corporation.

[212] As indicated previously, I am satisfied that Mr. Robinson obtained certified true copies of the registrations for Hawthorne, Wicklow, GKO and Waterford and those certified true copies confirmed that, at all material times to this prosecution, Ms. Colleen O'Hara-Gallant was primarily an Officer and Director of all of those corporations and that Ms. Linda O'Hara was a director of Waterford for the purpose of filing the 2006 and 2007 corporate income tax returns.

[213] Ms. O'Hara-Gallant's evidence established that she worked with her father at the corporate office for the companies located at 75 McDonald Avenue in Dartmouth or Burnside, Nova Scotia, she answered the telephone for those corporations, handled administrative matters and dealt with the customers of Wicklow, GKO, Waterford and Hawthorne. Although she stated that she had no control over anything and that Mr. O'Hara controls, decides and approves everything in relation to those companies, she believed she was just a "figurehead"

on paper and that her father would deal with all corporate issues. She signed banking documents and other documents that her father put in front of her, but was totally unaware that she might be personally responsible for anything and totally unaware of any responsibilities to CRA or anybody else as an Officer or Director of the corporations. She did not feel there was enough time to comply with the Notices of Requirement, given the "mess that things are in at the office."

[214] Ms. Linda O'Hara testified to essentially the same thing, stating that she did not have any real involvement in Waterford, she just regularly signed documents that her husband would in front of her. She had no idea how many companies have her name listed as an Officer or Director. Given the fact that she just signed documents that her husband put in front of her, Ms. O'Hara did not even read the Notices of Requirement served on her by Mr. Robinson and simply turned them over to her husband to be dealt with.

[215] I find that the evidence established that, after Ms. O'Hara and Ms. Colleen O'Hara-Gallant were served with the Notices of Requirement to file corporate income tax returns, they simply passed those Notices to Mr. Gerald O'Hara for him to deal with them. They both explained that Mr. O'Hara had an accountant/bookkeeper helping him with the financial issues of the corporations, however Mr. Landry died in late September, 2006. Moreover, neither Ms. O'Hara nor Ms. O'Hara-Gallant had any reason to believe that there was a problem or that the proper steps had not been taken by Mr. O'Hara, so they turned the Notices of Requirements over to him, without reading them or at most, after having briefly scanned them.

[216] In addition, Ms. O'Hara was not aware that there had been numerous years for which no personal taxation returns had been filed by her, including the six taxation years which were the subject of the Notices of Requirement.

[217] Once again, it must be remembered that the establishing due diligence is that of the accused alone. In addition, as I indicated above, I agree with Hood J comments in **R. v. Adair**, *supra*, at para. 7, that the key period of time for the factual analysis of whether either one of the individual accused exercised due diligence is during the time period provided by the Minister for compliance by filing the "required" corporate income tax returns and not after that time period has elapsed. There is no doubt that actions taken after the filing of the Information with the court are not relevant to an individual defendant's effort to establish due

diligence to avoid committing the offence, in this case, not filing the corporate tax returns.

[218] I find that there must have been some business, personal or tax reason for Mr. Gerald O'Hara to nominate and then leave his wife and his daughter as the Officers and the Directors of the corporations for an extended period of time, if he really was, and I have no reason to doubt that fact, the "controlling mind" of those corporations. However, given the fact that they were officially named as Officers and Directors of the corporations, I find that it is incredulous that neither Ms. O'Hara nor Ms. O'Hara-Gallant had no idea of their roles or responsibilities or potential liabilities as an Officer or Director of the corporations. Given Mr. O'Hara's belief of the history of "antagonism" between himself and the CRA, which could not have gone unnoticed over the years, I find that it is hard to believe that they never made any inquiries with Mr. O'Hara as to their legal obligations as an Officer or Director to any members of the general public who wished to deal with those corporations.

[219] Moreover**,** the fact that Ms. Colleen O'Hara-Gallant's husband had become embroiled in a very similar dispute and ultimately a prosecution many years earlier, apparently, for a failure to remit deductions to CRA, must have brought home the implications of being a "nominal Officer or Director" for one of Mr. Gerald O'Hara's corporations. Mr. O'Hara had testified about the prosecution of a similar nature brought by CRA against a corporation which was apparently "controlled" by him, which had a history of non-filing, but the corporate registrations listed his son-in-law as the Officer and Director of the Corporation. In those circumstances, it is hard to believe that either Ms. Linda O'Hara or Ms. Colleen O'Hara-Gallant could state that they had no knowledge whatsoever of their roles, responsibilities or legal liabilities as a "nominal" Officer or Director of a Corporation, with the "controlling mind" being Mr. O'Hara.

[220] In terms of exercising all reasonable care or due diligence to avoid committing the prohibited act, namely, the offence of failing to file the "required" corporate income tax returns within the reasonable time period provided by CRA, I find that the evidence of Ms. Linda O'Hara, Ms. Colleen O'Hara-Gallant and for that matter, Mr. Gerald O'Hara all confirmed that they did not take any positive steps to ensure that the corporate income tax returns were prepared and filed with CRA in a timely manner. I find that neither one of the two accused made any inquiries of Mr. O'Hara to see what was happening with the returns.

[221] Simply put, despite the fact that Ms. O'Hara and Ms. O'Hara-Gallant had been served with the Notices of Requirement which spelled out the corporate income tax returns to be filed on or before a certain date and the potential consequences for not doing so, I find that they did not make any efforts to comply with the Notices themselves, let alone any reasonable effort. It is obviously disappointing, to say the least, that Mr. O'Hara being the "controlling mind" of those corporations would let the financial state of affairs and the regular reporting of corporate income tax returns fall into such disarray that it placed his wife and his daughter in this situation where they have had to claim that they exercised due diligence by blindly relying on Mr. O'Hara to cover their legal liabilities. Once again, I find that the factual evaluation of whether an individual accused exercised due diligence must be established on a balance of probabilities based upon the actions or inaction of that accused alone.

[222] In addition to the foregoing points, I find that Ms. Colleen O'Hara-Gallant's evidence confirmed that the financial documentation in the corporate office was in her words "a mess." Mr. O'Hara, for his part, confirmed that all of the financial information which was contained in the computer of his accountant/bookkeeper, was not accessible after Mr. Landry died in late September, 2006. Mr. O'Hara also mentioned that when they moved from their previous office to 75 McDonald Avenue, the landlord at their previous office on Dutch Village Road had locked them out and he lost other documents there. Notwithstanding those unfortunate events, it was made clear by Mr. Robinson and the ITA itself, that income tax returns can be prepared by an estimate without all of the documentation being available, with the understanding that CRA officials may conduct an assessment of those returns.

[223] In **R. v. Whissell-MacLeod Ventures Ltd**, *supra*, the Corporation was found guilty of failing to file six years of corporate income tax returns within the time provided by the Notice of Requirement under Section 232.2(1)(a) of the ITA. The Alberta Court of Appeal endorsed and adopted the reasoning of an unreported BC Provincial Court decision in **R. v. Gill** on October 19, 1989, that held that a taxpayer who allows his records to get into such a state that his income tax obligations can only be fulfilled through costly efforts, does so at his own peril.

[224] In these circumstances, I find that neither Ms. Linda O'Hara nor Ms. Colleen O'Hara-Gallant have established, on a balance of probabilities, that they exercised due diligence and exercised all reasonable care to avoid committing the offence of failing to file corporate income tax returns "required" under Section 232.2(1)(a) of

the ITA. I find that the facts established that, after the Notices of Requirement were served upon them, they did little or nothing to avoid committing the offence and relied entirely on Mr. Gerald O'Hara to perform the duties that they were required to perform as even "nominee Officers or Directors."

[225] There is no doubt that the evidence established that the corporations failed to file the required income tax returns within the time provided by the Minister in the Notices of Requirement, that is, on or before July 26, 2010. Furthermore, none of the corporate income tax returns were filed on or before May 17, 2011 when the Information was sworn and filed in the Provincial Court. Finally, even today, many of those corporate income tax returns have not been filed with CRA.

Did the Accused Establish a Defence of Officially Induced Error?

[226] In his submissions, Defence Counsel advanced the proposition that Ms. Linda O'Hara and Ms. Colleen O'Hara-Gallant have established an officially induced error as a defence to their liability as a party, regardless of whether or not the corporations are found guilty of the offence. The basis to this claim revolves around the tax prosecution of Bromwick Holdings during the 1990s, which was apparently a corporation "controlled" by Mr. O'Hara, but he had placed his son-in-law as the "nominee Officer or Director" of the corporation. The corporation was charged with tax evasion and as a result, Mr. O'Hara's son-in-law was exposed to liability for tax evasion and the possibility of a criminal record.

[227] Based upon the evidence related to the Court, it appears that as a result of a "plea bargain," the company was found guilty of tax evasion, the charge was dropped against Mr. O'Hara's son-in-law and apparently, there was an understanding that Mr. O'Hara would pay the fine ordered.

[228] The essence of the Defence position of an "officially induced error" is that CRA was aware of the fact that the prior case had involved a corporation "controlled" by Mr. O'Hara with a "nominal" Director and Officer listed in the corporate filings and documents and the fact that CRA officials and the Crown had made an arrangement in the form of some sort of "plea bargain" approximately 15 to 20 years ago. As a result of those circumstances, Mr. O'Hara certainly knew and presumably, the two accused knew that CRA had concluded a negotiated settlement of that previous case and the Defence position is essentially that knowledge of the earlier case amounted to a general "official advice" to the accused in this case that the explicit legal warning given to them, both in writing

and verbally, at the time of service of the Notices of Requirement could be ignored and that they would be saved harmless from prosecution because everyone knew that Mr. O'Hara was the "*de facto* officer and director" of all the corporations when the Notices of Requirement were served.

[229] The leading case on "officially induced error" as a limited exception to the principle that ignorance of the law is no defence is **City of Levis v. Tetrault**, 2006 SCC 12. The decision of the unanimous court was written by Justice Lebel, who outlined the analytical framework for an accused to establish the defence of "officially induced error," *supra*, at para. 26. The accused must prove six elements:

1. That an error of law or mixed law and fact was made;
2. That the person who committed the act considered the legal consequences of his or her actions;
3. That the advice obtained came from an appropriate official;
4. That the advice was reasonable;
5. That the advice was erroneous; and
6. the person relied on the advice in committing the act.

[230] Given my findings of fact in this case, I find that it is not necessary to analyze each and every one of the six elements that would have to be established, on a balance of probabilities, by the two accused. Looking at the facts of this case, I find that this submission is completely without any merit whatsoever. Taking into account the background facts of this case, even a brief overview of the six elements of that limited exception that ignorance of the law is no defence, clearly demonstrates that this possible defence is wholly inapplicable in the circumstances of this case.

[231] First of all, no advice came from an appropriate official to Ms. O'Hara or Ms. O'Hara-Gallant and given the fact that no advice was given to them that they did not have to comply with the Notices of Requirement or that they would not face possible prosecution if they did not prepare and file the required corporate and personal income tax returns within the reasonable time provided, then it is impossible to satisfy the elements that the advice was reasonable, erroneous and that they relied on it in committing the act of not filing the corporate income tax returns or Ms. O'Hara's personal income tax returns.

[232] Moreover, the evidence established that neither one of the two accused really even read the Notices of Requirement or considered what Mr. Robinson had said to them, before turning the Notices of Requirement over to Mr. O'Hara to deal with them. In those circumstances, it can hardly be said that either one of the two accused who committed the act had considered the legal consequences of their actions, as they said they had no idea that they had any legal consequences from being named as a "nominal Director or Officer" of the corporations.

[233] As a result, I find that neither one of the accused have established the essential elements of the defence of an "officially induced error."

CONCLUSIONS:

[234] The offences contrary to Section 238(1) of the ITA of failing to comply with a Notices of Requirement issued pursuant to the provisions of Section 231.2(1) of the ITA are ones of strict liability;

[235] I have found that CRA officials properly served the Notices of Requirement on Ms. Linda O'Hara and Ms. Colleen O'Hara-Gallant who were listed, at all relevant times, in the publicly available registry for the Province of Nova Scotia as the Officers and Directors of the corporations involved in these prosecutions;

[236] The Crown has established, beyond a reasonable doubt, the essential elements of the *actus reus*, that is, the jurisdiction in which the offences occurred, the identity of the accused, proof of service of the Notices of Requirement and proof of the failure to comply with those Notices of Requirement to file returns;

[237] I have found that neither Ms. Linda O'Hara nor Ms. Colleen O'Hara-Gallant established a due diligence defence that they individually exercised due diligence to take all reasonable steps to avoid committing the prohibited act, that is, the failure to file the corporate tax returns for the taxation years during which they were the Officers and Directors of the relevant corporations;

[238] I have found that, by virtue of Section 242 of the ITA that Ms. Linda O'Hara and Ms. Colleen O'Hara-Gallant and the fact that the corporate tax returns were not filed with CRA within the reasonable time provided, that it constituted *prima facie* proof that they had, at the very least, acquiesced in or participated in the commission of the offence as a party to the offence committed by the corporations of failing to file corporate tax returns in a timely fashion in response to the Notices of Requirement;

[239] I have found that Ms. Linda O'Hara did not establish a due diligence defence with respect to her failure to file personal (T-1) income tax returns for the years alleged in the Information.

[240] I have concluded that neither one of the accused have established a defence of "officially induced error."

[241] Finally, in those circumstances, I find Ms. Linda O'Hara and Ms. Colleen O'Hara- Gallant guilty of all of the charges for which they were accused in the Information which were before the Court for trial.

[242] Orders Accordingly.

Theodore Tax, JPC