"Crossing the Rubicon": The Supreme Court and Regulatory Investigations

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In *R. v. Jarvis*[1] and *R. v. Ling*[2], reported *ante* p. 23 and p. 64, the Supreme Court goes a considerable way towards settling an important debate in the area of regulatory law and the *Charter*. The debate concerned whether the *Charter* applies with full force to regulatory officials investigating regulatory crimes.

The debate

On one side were those who asserted that regulatory officials investigating regulatory crimes should be treated like police officers who are investigating crimes.[3] On this view, the "full panoply" of *Charter* protections is warranted and so regulatory officials must obtain search warrants in accordance with the *Hunter v. Southam* standard when they seek to obtain evidence of wrongdoing. They must also respect rights against self-incrimination and the right to silence: they must refrain from requiring suspects and witnesses to answer questions.

On the other side were those who asserted that these regulatory officials should be treated like administrative officials who are trying to ensure that the objectives of regulatory legislation are met.[4] Their position was bolstered by many

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[1]2002 SCC 73 (S.C.C.), *per* Iacobucci and Major JJ. (unanimous), affirming (2000), 193 D.L.R. (4th) 656 (Alta.C.A.), affirming (1998), [1999] 3 W.W.R. 393 (Alta. Q.B.), reversing (1997), 195 A.R. 251 (Alta. Prov. Ct.), amended (1997), 204 A.R. 123 (Alta. Prov. Ct.).

[2]2002 SCC 74 (S.C.C.), *per* Iacobucci and Major JJ. (unanimous), affirming (2000), 149 C.C.C. (3d) 127 (B.C. C.A.), affirming (1998), [1999] 3 C.T.C. 386 (B.C. S.C.).

[3]See, *e.g.*, David Stratas, "Charter Protections in Regulatory Proceedings: Do They Exist?" in *Selected Topics in Corporate Litigation* (Queen's Annual Business Law Symposium, 2000), pp. 221–246.

[4]See, *e.g.*, Gary T. Trotter, "Prosecution Is Regulation: A Reply to David Stratas" in *Selected Topics in Corporate Litigation* (Queen's Annual Business Law Symposium, 2000), pp. 252–256.

cases attenuating *Charter* protections in the regulatory context.[5] On this view, a relatively low level of *Charter* protection is warranted and so regulatory officials need not obtain search warrants to obtain evidence of wrongdoing. They are free to use any statutory powers they have to require suspects and witnesses to answer questions.

The debate raged in the cases, with courts setting the point at which persons under investigation get full *Charter* protection at different places: when the matter is put in the hands of persons whose duties are investigations into offences,[6] when such persons direct the activities,[7] when the investigator has reasonable suspicions that an offence has occurred,[8] when such persons have reasonable and probable grounds that an offence has occurred[9] and when a decision is made to lay charges.[10]

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[5]*Thomson Newspapers Ltd. v. Canada (Director of Investigation & Research)*, [1990] 1 S.C.R. 425, 76 C.R. (3d) 129 (S.C.C.) esp. at pp. 506–507 [S.C.R.]; *Stelco Inc. v. Canada (Attorney General)*, [1990] 1 S.C.R. 617 (S.C.C.); *R. v. Wholesale Travel Group Inc.*, [1991] 3 S.C.R. 154, 8 C.R. (4th) 145 (S.C.C.) esp. at pp. 221–234 [S.C.R.]; *R. v. McKinlay Transport Ltd.*, [1990] 1 S.C.R. 627, 76 C.R. (3d) 283 (S.C.C.); *Comité paritaire de l'industrie de la chemise c. Sélection Milton*, [1994] 2 S.C.R. 406 (S.C.C.).

[6]*R. v. Warawa* (1997), 208 A.R. 81 (Alta. Q.B.) at paras. 11, 12, 134; *R. v. Saplys* (1999), 132 C.C.C. (3d) 515 (Ont. Gen. Div.).

[7]*R. v. Norway Insulation Inc.* (1995), 23 O.R. (3d) 432 (Ont. Gen. Div.), *R. v. Soviak*, [1997] O.J. No. 1215, 1997 CarswellOnt 1963 (Ont. Prov. Div.), *R. v. Seaside Chevrolet Oldsmobile Ltd.*, [2002] N.B.J. No. 100, 2002 CarswellNB 329 (N.B. Prov. Ct.) and *R. v. Gaudet* (1997), 202 N.B.R. (2d) 199 (N.B. Prov. Ct.). *Contra*, *R. v. Xidos* (June 23, 1999), Ross Prov. Ct. J., [1999] N.S.J. No. 231 (N.S. Prov. Ct.) at para. 131 and *Canada (Attorney General) v. Ontario (Attorney General)*, [2002] O.J. No. 2357, 2002 CarswellOnt 2059 (Ont. S.C.J.).

[8]*R. v. Roberts* (December 18, 1998), Doc. Vancouver 17195-01, [1998] B.C.J. No. 3184 (B.C. Prov. Ct.) at paras. 39-40; *R. v. Dial Drug Stores Ltd.* (2001), 52 O.R. (3d) 367 (Ont. C.J.) at p. 387.

[9]*R. v. Bjellebo*, [1999] O.J. No. 965, 1999 CarswellOnt 937 (Ont. Gen. Div.) at para. 171; *R. v. Pheasant* (2000), [2001] G.S.T.C. 8 (Ont. C.J.) at para. 68; *R. v. Chusid* (2001), 57 O.R. (3d) 20 (Ont. S.C.J.) at para. 61; *R. v. Inco Ltd.* (2001), 54 O.R. (3d) 495 (Ont. C.A.).

[10]*R. v. Coghlan* (1993), [1994] 1 C.T.C. 164 (Ont. Prov. Div.); *semble*, *R. c. Gorenko* (23 février 1999), no C.A. Montréal 500-10-001098, [1999] J.Q. no 6268 (Que. C.A.) and *R. c. Pomerleau*, [2002] J.Q. No. 5061, 2002 CarswellQue 2516 (Que. C.A.).

The debate is settled

The Supreme Court's decisions in *Jarvis* and *Ling* settle the debate and suggest that when the regulatory officials are pursuing the predominant purpose of determining penal liability they have "crossed the Rubicon" and full *Charter* protections apply. In the words of the Court:

> In our view, where the predominant purpose of a particular inquiry is the determination of penal liability, CCRA officials must relinquish the authority to use the inspection and requirement powers under ss. 231.1(1) and 231.2(1). In essence, officials "cross the Rubicon" when the inquiry in question engages the adversarial relationship between the taxpayer and the state. There is no clear formula that can answer whether or not this is the case. Rather, to determine whether the predominant purpose of the inquiry in question is the determination of penal liability, one must look to all factors that bear upon the nature of that inquiry.[11]

The Court also set out factors in the tax investigations context that should be used in order to determine the officials' predominant purpose and suggested that the particular mix of factors might be different in other regulatory contexts.[12]

Other regulatory contexts

Jarvis concerns regulatory officials in the area of income tax. However, the line of "predominant purpose of determining penal liability" was not restricted to the tax context. Indeed, the Court seemed to accept that this line would apply to other regulatory contexts.[13] Broad powers to gather information, materials and documents and to conduct inquiries[14] and requirements in regulatory regimes

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[11] *R. v. Jarvis*, *supra*, note 1 at para. 88.

[12] *Ibid.* at para. 94.

[13] *Ibid.* at para. 94. The Court noted that the mix of particular factors that should be examined in order to determine the regulator's purpose might well be different in other contexts. See *infra*, note 26.

[14] See, *e.g.*, *Occupational Health and Safety Act*, R.S.O. 1990, c. O.1, as amended, s. 54; *Workplace Safety and Insurance Act*, S.O. 1997, c. 16, Sched. A, ss. 135-136; *Environmental Protection Act*, R.S.O. 1990, c. E.19, as amended, ss. 156, 156.1; *Competition Act*, R.S.C. 1985, c. C-34, s. 10; *Securities Act*, R.S.O. 1990, c. S.5, as amended, ss. 12-14; *Police Services Act*, R.S.O. 1990, c. P.15, ss. 26, 113; *Municipal Act*, R.S.O. 1990, c. M.45, s. 100; *Ontario Water Resources Act*, R.S.O. 1990, c. O.40, s. 15(9); *Public Inquiries Act*, R.S.O. 1990, c. P.41; *Inquiries Act*, R.S.C. 1985, c. I-11; *Fire Marshals Act*, R.S.O. 1990, c. F.17, s. 12; *Travel Industry Act*, R.S.O. 1990, c. T.19, s. 19; *Real Estate and Business Brokers Act*, R.S.O. 1990, c. R.4, s. 15; *Motor Vehicle Dealers Act*, R.S.O. 1990, c. M.42, s. 13; *Mortgage Brokers Act*, R.S.O. 1990, c. M.39, ss. 21-24; *Consumer Reporting Act*, R.S.O. 1990, c. C.33, ss. 18, 23; *Commodity Futures Act*, R.S.O. 1990, c.

that persons cooperate fully with investigators and answer their questions[15] must now be read in light of these decisions.[16] After these regulatory authorities cross the Rubicon, their activities are subject to the full panoply of *Charter* standards.[17]

R. v. Jarvis

Most of the Court's reasoning appears in the *Jarvis* decision. In *Jarvis*, Revenue Canada[18] conducted an audit of the taxpayer's affairs using its powers under s. 231.1 of the *Income Tax Act*.[19] In one meeting with the auditor, the taxpayer produced a number of records and answered questions. Shortly afterwards, based on this and other information, the auditor concluded that the taxpayer had grossly omitted revenues in his returns. She referred the matter to the branch of

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C.20, s. 7; *Business Practices Act*, R.S.O. 1990, c. B.18, s. 11; *Retail Sales Tax Act*, R.S.O. 1990, c. R.31, s. 31; *Corporations Tax Act*, R.S.O. 1990, c. C.40, s. 93. There are many other examples.

[15]See *Occupational Health and Safety Act*, *ibid.*, s. 62; *Workplace Safety and Insurance Act, ibid.*, s. 153; *Environmental Protection Act, ibid.*, s. 184; *Police Services Act, ibid.*, ss. 26, 113(9). There are many other examples.

[16]Cases outside of the income tax context are rare but do exist and seem somewhat consistent with the line drawn in *Jarvis* and *Ling*. See *R. v. Wood*, [2001] N.S.J. No. 75, 2001 CarswellNS 72 (N.S. C.A.); *R. v. Wilcox*, [2001] N.S.J. No. 85, 2001 CarswellNS 83 (N.S. C.A.); *R. v. Inco Ltd.*, *supra*, note 9. After the decision of the Court of Appeal for Ontario in *Inco* which suggested that regulatory powers to inspect and to require persons to answer questions could not be used once investigators acquire reasonable and probable grounds, the legislature hurriedly amended the *Occupational Health and Safety Act*, *supra*, note 14, by adding s. 56(1) in order to provide its investigators with statutory authority (after obtaining judicial authorization) to exercise "any investigative technique or procedure" while investigating offences. A similar provision was added to the *Environmental Protection Act* in 1998: *supra*, note 14, s. 163.1(2). In light of *Jarvis* and *Ling*, these provisions would seem to pass constitutional muster as far as the inspection of premises and the taking of things is concerned because they accord with *Hunter v. Southam* but using these provisions to require persons under investigation to answer questions may be open to challenge: see, *e.g.*, *R. v. Esposito* (1985), 24 C.C.C. (3d) 88, 49 C.R. (3d) 193 (Ont. C.A.) *per* Martin J.A.

[17]It is possible for certain regulatory officials to continue to exercise their regulatory powers without significant limitations imposed by the *Charter* if those officials are not engaged in the predominant purpose of determining penal liability and if they remain completely separate from those regulatory officials that are pursuing penal purposes. See text to note 27.

[18]Now Canada Customs and Revenue Agency ("CCRA").

[19]R.S.C. 1985, c. 1 (5th Supp.).

Revenue Canada responsible for investigating suspected tax evasion, Special Investigations. The auditor did not tell the taxpayer about the referral. The auditor continued to investigate, using her audit power[20] and serving requirements to produce[21] upon certain banks where the taxpayer held accounts.

Only later did the taxpayer become aware of Special Investigations' involvement. Special Investigations continued to investigate, at one point obtaining a search warrant on the basis of the information given by the taxpayer in the meeting. The taxpayer was later charged with tax evasion.[22] On these facts, the Court held that the auditor did not have the predominant purpose of determining penal liability.[23]

Determining the purposes of regulatory officials

Determining the purposes of regulatory officials might strike one as a tricky endeavour, fraught with difficulty. However, in *Jarvis* the Supreme Court helpfully developed a list of factors that could be applied in tax cases in order to determine the regulatory purpose:

> (a) Did the authorities have reasonable grounds to lay charges? Does it appear from the record that a decision to proceed with a criminal investigation *could have* been made? [emphasis in original]
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> (b) Was the general conduct of the authorities such that it was consistent with the pursuit of a criminal investigation?
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> (c) Had the auditor transferred his or her files and materials to the investigators?
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> (d) Was the conduct of the auditor such that he or she was effectively acting as an agent for the investigators?
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> (e) Does it appear that the investigators intended to use the auditor as their agent in the collection of evidence?
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> (f) Is the evidence sought relevant to taxpayer liability generally? Or, as is the case with evidence as to the taxpayer's mens rea, is the evidence relevant only to the taxpayer's penal liability?

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[20] *Income Tax Act, ibid.*, s. 231.1.

[21] *Income Tax Act, ibid.*, s. 231.2.

[22] The trial judge acquitted the taxpayer, the summary conviction appeal judge allowed the appeal and ordered a new trial. The Court of Appeal dismissed the appeal.

[23] *R. v. Jarvis*, *supra*, note 1 at paras. 94, 101–105.

> (g) Are there any other circumstances or factors that can lead the trial judge to the conclusion that the compliance audit had in reality become a criminal investigation?[24]

R. v. Ling: an illustration of how the factors are applied

Some further guidance on how these factors should be applied can be gleaned from the Court's decision in *R. v. Ling*. In *Ling*, Revenue Canada began by auditing the taxpayer's 1990–1993 returns, focusing on his claim for farm losses. The auditors met the taxpayer's accountant and examined books and records. They also obtained receipt books from the taxpayer and concluded from this that income had not been reported. The auditors then obtained further information, including financial records and bank documents. Next, the auditors had a meeting with the taxpayer and questioned him extensively. During questioning, the taxpayer admitted that he mistakenly failed to report income. A month later, the auditor transferred the matter to Special Investigations, which investigates suspected income tax evasion under s. 239 of the *Income Tax Act* and which builds cases for prosecution. Special Investigations officials carried out further investigations, interviewing witnesses and sending requirement letters to four banks and the taxpayer's accountant.

The Supreme Court, applying the *Jarvis* factors, concluded that Revenue Canada crossed the Rubicon after the meeting with the taxpayer where the taxpayer admitted that he failed to report income.[25] What was key in *Ling* was the transfer of the file to the branch charged with the responsibility of investigating suspected offences and that branch's activities afterwards (purely oriented towards building a case to prosecution).

The factors to be examined in other regulatory settings

In *Jarvis*, the Court emphasized that the *Jarvis* list of factors applies in tax investigations. It noted that other factors may apply in other regulatory settings. In its words, "there may well be other provincial or federal governmental departments or agencies that have different organizational settings which in turn may mean that the above factors, as well as others, will have to be applied in those

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[24] *Ibid.* at para. 94.

[25] *R. v. Ling*, *supra*, note 2 at paras. 30–32.

particular contexts".[26] However, the factors set out by the Court in *Jarvis* suggest that it will always be relevant to consider:

> (a) the status of the investigation — to assess objectively whether reasonable and probable grounds existed;
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> (b) the conduct of the officials — whether they were engaged in a focused, targeted investigation into specific conduct;
>
> (c) in the case of regulators that have a special "investigations" branch, whether information or materials passed to that branch;
>
> (d) any communication or other involvement between those conducting regulatory inspections for regulatory purposes (such as auditors) and those who investigate offences for penal purposes; and
>
> (e) the nature of the evidence obtained by the regulator and its relevance to later proceedings.

These factors may have implications for those regulators who combine spot checking, verification, auditing, inspecting and full-scale investigation in one type of individual or one department. For example, in Ontario, Ministry of Labour inspectors conduct routine inspections for the purposes of the *Occupational Health and Safety Act* but they also conduct full-scale penal investigations under that Act. They work on both sides of the Rubicon.

When the above factors are applied to the Ministry of Labour inspectors and other regulatory officials who work on both sides of the Rubicon, courts may well find that these officials are subject to the *Charter* at a far earlier stage, with the effect that otherwise legitimate regulatory activities might be curtailed. The Supreme Court in *Jarvis* emphasizes that regulatory officials who are not engaged in the predominant purpose of determining penal liability can continue to act even if others are engaged in the predominant purpose of determining penal liability.[27] But, based on the above factors, this is likely possible only if there is institutional separation and no information flow between them. Those who work on both sides of the Rubicon may well run a greater risk of being subject to the full panoply of *Charter* standards at an earlier stage in their investigation.

Other matters worthy of comment

There are some other matters worthy of comment concerning the Court's holdings.

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[26] *R. v. Jarvis*, *supra*, note 1 at para. 94.

[27] *Ibid.* at para. 97.

First of all, after the Rubicon is crossed, regulatory officials are barred from pursuing their powers whether specifically directed at the target of the investigation or not.[28] In *Jarvis*, after the Rubicon was crossed, Special Investigations could not use its inspection and requirement powers not only against the taxpayer but also against third parties such as banks. The concern is not just the narrow self-incrimination of the particular taxpayer, but a broader self-incrimination in the sense of the state using information, wherever located, created by the taxpayer against the taxpayer for the purpose of building a criminal case against the taxpayer.[29]

Once the Rubicon is crossed, auditors can still pass the information they obtained before that point to those involved in a penal investigation.[30] On the surface, this aspect of the decision seems in conflict with *R. v. Colarusso*.[31] In *Colarusso*, the coroner (akin for legal purposes to a tax auditor) voluntarily gave blood samples to the police and the police later used the analysis of the samples in a criminal prosecution. The majority of the Court found that the police needed a search warrant to seize the samples. The Court in *Jarvis* perhaps explains this seeming conflict by pointing to the lower expectation of privacy concerning tax information but *Colarusso* is not mentioned in this discussion.[32] *R. v. White*[33] and its discussion of the right against self-incrimination are also not mentioned and how *White* applies in this context will have to be worked out in future cases.

The Court does not discuss whether those subject to audits or other purely regulatory, non-penal activity have any *Charter* rights. Provided that there is at least a small expectation of privacy, it is likely that some limited protection under s. 8 of the *Charter* exists. At a minimum, this means that auditing or other purely regulatory, non-penal activity must be authorized by statute[34] although there is

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[28]*Ibid.* at para. 96 ("CCRA officials conducting inquiries, the predominant purpose of which is the determination of penal liability, do not have the benefit of the ss. 231.1(1) and 231.2(1) requirement powers.").

[29]The concept of self-incrimination in the broad sense was explained by Iacobucci J. in *R. v. S. (R.J.)*, [1995] 1 S.C.R. 451, 36 C.R. (4th) 1 (S.C.C.).

[30]*R. v. Jarvis*, *supra*, note 1 at para. 95.

[31]*R. v. Colarusso*, [1994] 1 S.C.R. 20, 26 C.R. (4th) 289 (S.C.C.).

[32]"[T]axpayers have very little privacy interest in the materials and records that they are obliged to keep under the ITA, and that they are obliged to produce during an audit": *R. v. Jarvis*, *supra*, note 1 at para. 95, citing *R. v. McKinlay Transport Ltd.*, *supra*, note 5. This aspect of the ruling seems limited to the tax context. In other regulatory contexts, the reasonable expectation of privacy over documents and information obtained as a result of purely regulatory activities would have to be assessed.

[33]*R. v. White*, [1999] 2 S.C.R. 417, 24 C.R. (5th) 201 (S.C.C.).

[34]*R. v. Collins*, [1987] 1 S.C.R. 265, 56 C.R. (3d) 193 (S.C.C.).

authority against this in the regulatory context.[35] There are also decisions concerning administrative law fairness that may come to bear.[36]

Another curiosity in *Jarvis* and *Ling* is the consistency of these cases with the Supreme Court's earlier decision in *Del Zotto v. Canada*.[37] In that decision, the Court upheld the constitutionality of s. 231.4 of the *Income Tax Act*, a provision neighbouring ss. 231.1 and 231.2 which were in issue in *Jarvis* and *Ling*, and the particular exercise of the investigative power under that section. Section 231.4 authorizes tax regulators to conduct investigations through the use of an inquiry, and to have access to many of the powers of an inquiry under the federal *Inquiries Act*,[38] including the power to subpoena the taxpayer and any persons with relevant information about the taxpayers' affairs. In *Del Zotto*, the Supreme Court merely adopted the dissenting reasons of Strayer J.A. in the Federal Court of Appeal, without further elaboration. The reasons of Strayer J.A. dismissed the taxpayer's challenge on the basis that the challenge was premature but also on the basis that the suggested "Rubicon" either did not exist or was not crossed because of the low expectation of privacy that a taxpayer has.[39]

In *Jarvis*, the Supreme Court has now confirmed the existence and location of the Rubicon and the tax investigation in *Del Zotto* surely crossed it.[40] Further, the Court pays *Del Zotto* only scant attention, citing it three times for relatively uncontroversial propositions and ignoring it completely when it discusses the existence and the location of the Rubicon.[41] *Del Zotto*, when read in light of

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[35]*Pharmaceutical Manufacturers Assn. of Canada v. British Columbia (Attorney General)*, [1997] B.C.J. No. 1902, 1997 CarswellBC 1801 (B.C. C.A.) at paras. 24-30.

[36]See, for example, *Libbey Canada Inc. v. Ontario (Ministry of Labour)* (1999), 42 O.R. (3d) 417 (Ont. C.A.).

[37][1999] 1 S.C.R. 3 (S.C.C.).

[38]R.S.C. 1985, c. I-11.

[39][1997] 3 F.C. 40 (Fed. C.A.).

[40]McGuigan J.A. for the majority of the Fed. C.A. in *Del Zotto*, *ibid.*, at paras. 42-52 finds, in effect, that Revenue Canada was pursuing the purpose of determining penal liability when it used the inquiry under s. 231.4. Strayer J.A. in dissent, whose reasons were adopted by the Supreme Court, does not disagree with this; indeed, he notes at para. 14 that "the Crown acknowledges that the predominant purpose of the inquiry is to seek evidence for possible prosecution of Del Zotto under paragraphs 239(1)*(a)* and *(d)* of the *Income Tax Act*."

[41]*R. v. Jarvis*, *supra*, note 1 at paras. 48, 57, 62. The existence and location of the Rubicon is discussed at paras. 77–99.

Jarvis, must now be regarded as a case where the challenge was held to be premature and nothing more.[42]

General assessment of *Jarvis* and *Ling*

The position taken by the Supreme Court in *Jarvis* and *Ling* makes considerable sense. In these cases, at a certain point, the regulatory officials were investigating the offence of tax evasion under s. 239 of the *Income Tax Act*. This offence is tax fraud and could also be prosecuted as fraud under the *Criminal Code*.[43] There is no difference in substance between a regulatory investigation into an offence for penal purposes and a police investigation into an offence for penal purposes.[44] In fact, the investigatory powers of regulatory officials are often broader than those of police officers and so the justification for *Charter* protections when the Rubicon is crossed is arguably greater.

These decisions are also fully consistent with the Court's approach in other cases, many of which it did not cite, concerning the propriety of other forms of state inquiry. This is no small achievement given the large number of cases and the complicated framework they create.

A quick tour of this framework shows that *Jarvis* and *Ling* fit quite nicely into it. The Court has previously adopted the "predominant purpose" approach to determining whether an inquiry is proper, and has defined certain purposes as proper purposes.[45] Conducting an inquiry to incriminate an individual for the purposes of a later criminal trial, *i.e.*, to pursue penal purposes, is not proper.[46] On the other hand, it is proper to conduct an inquiry purely for the purposes of disci-

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[42]See, *e.g.*, the interpretation given to *Del Zotto* in *Bisaillon c. R.*, [1999] F.C.J. No. 1477, 1999 CarswellNat 1805 (Fed. C.A.), *R. v. Bjellebo*, *supra*, note 9 and *R. v. Saplys*, *supra*, note 6. With *Del Zotto* so interpreted, courts now will likely hold that s. 231.4 of the *Income Tax Act* stands in the same position as ss. 231.1 and 231.2 of the *Income Tax Act* which were in issue in *Jarvis* and *Ling*, *i.e.*, not usable when the investigator's purpose is penal.

[43]R.S.C. 1985, c. C-46, s. 380.

[44]*Baron v. R.*, [1993] 1 S.C.R. 416, 18 C.R. (4th) 374 (S.C.C.) at p. 444; *R. v. Wholesale Travel Group Inc.*, *supra*, note 5 at p. 209 *per* La Forest J. ("what is ultimately important are not the labels [though these are undoubtedly useful], but the values at stake in the particular context") and at p. 189 *per* Lamer C.J. ("[j]ail is jail, whatever the reason for it").

[45]*British Columbia (Securities Commission) v. Branch*, [1995] 2 S.C.R. 3 (S.C.C.).

[46]*R. v. Primeau*, [1995] 2 S.C.R. 60, 38 C.R. (4th) 189 (S.C.C.); *R. v. Jobin*, [1995] 2 S.C.R. 78, 38 C.R. (4th) 176 (S.C.C.).

pline of participants in a regulated sector[47] or a profession[48], to use regulatory powers to monitor and verify compliance[49] or to use subpoena powers to find facts on which to base recommendations[50] as long as the actor is not pursuing the purpose of determining penal liability. *Jarvis* and *Ling* are also consistent with other cases where the Court has referred to an "adversarial relationship" between the individual and the state triggering the full panoply of *Charter* protections.[51] These cases also seem consistent in spirit with cases that register concerns about far-reaching "substitute police investigations" conducted by commissions of inquiry or government agencies:[52] the concerns are met by *Jarvis* and *Ling* which stand for the proposition that the full panoply of *Charter* standards applies as soon as the investigation is aimed at determining penal liability rather than some other proper purpose. The Court's approach in *Jarvis* and *Ling* is fundamentally sound.

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[47]*British Columbia (Securities Commission) v. Branch*, *supra*, note 45; *R. v. Fitzpatrick*, [1995] 4 S.C.R. 154, 43 C.R. (4th) 343 (S.C.C.).

[48]*Pearlman v. Law Society (Manitoba)*, [1991] 2 S.C.R. 869 (S.C.C.); *Walker v. Prince Edward Island*, [1995] 2 S.C.R. 407 (S.C.C.); *R. v. Wigglesworth*, [1987] 2 S.C.R. 541, 60 C.R. (3d) 193 (S.C.C.); (all professional disciplinary hearings where the Court failed to apply standards normally found in penal or criminal contexts).

[49]*Comité paritaire de l'industrie de la chemise c. Sélection Milton*, *supra*, note 5; *R. v. McKinlay Transport Ltd.*, *supra*, note 5.

[50]*Phillips v. Nova Scotia (Commissioner, Public Inquiries Act)*, [1995] 2 S.C.R. 97 (S.C.C.); *Canada (Attorney General) v. Canada (Commissioner of the Inquiry on the Blood System)*, [1997] 3 S.C.R. 440 (S.C.C.); *R. v. Colarusso*, *supra*, note 31 (coroners' activities).

[51]*R. v. Fitzpatrick*, *supra*, note 47; *Comité paritaire de l'industrie de la chemise c. Sélection Milton*, *supra*, note 5; *R. v. S. (R.J.)*, [1995] 1 S.C.R. 451, 36 C.R. (4th) 1 (S.C.C.) *per* Iacobucci J.

[52]See the civil liberties language employed in cases such as *Thomson Newspapers Ltd.*, *supra*, note 5 *per* Wilson J. at pp. 470–471; *Starr v. Ontario (Commissioner of Inquiry)*, [1990] 1 S.C.R. 1366 (S.C.C.); *Cock v. New Zealand (Attorney General)* (1909), 28 N.Z.L.R. 405 (New Zealand C.A.); *R. v. Faber*, [1976] 2 S.C.R. 9, 32 C.R.N.S. 3 (S.C.C.); *Di Iorio v. Montreal Jail* (1976), [1978] 1 S.C.R. 152, 35 C.R.N.S. 57 (S.C.C.); *R. v. Hoffmann-La Roche Ltd. (Nos. 1 & 2)* (1981), 33 O.R. (2d) 694, 24 C.R. (3d) 193 (Ont. C.A.); *Nelles v. Grange* (1984), 46 O.R. (2d) 210 (Ont. C.A.); *Robinson v. British Columbia*, [1987] 2 S.C.R. 591 (S.C.C.).