



## The Supreme Court Law Review: Osgoode's Annual Constitutional Cases Conference

Volume 20 (2003)

Article 8

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### Citation Information

Frater, Robert. "Should the Left Hand Get What the Right Hand's Got?: Government Information Sharing, Criminal Investigation, and Privacy Rights." *The Supreme Court Law Review: Osgoode's Annual Constitutional Cases Conference* 20. (2003).  
<http://digitalcommons.osgoode.yorku.ca/sclr/vol20/iss1/8>

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# SHOULD THE LEFT HAND GET WHAT THE RIGHT HAND'S GOT? GOVERNMENT INFORMATION SHARING, CRIMINAL INVESTIGATION, AND PRIVACY RIGHTS

Robert Frater\*

## I. INTRODUCTION

To the extent that the Supreme Court of Canada's docket is a reliable indicator of the issues most vexing the country, one thing is clear: many Canadians feel the government knows just too damn much about us. Cases concerning what may be generally characterized as "informational privacy" abound,<sup>1</sup> with those who have felt the gaze of government's prying eyes invoking a wide variety of Charter<sup>2</sup> and non-Charter means to try to stop the unwanted attention.

The Supreme Court's 2002 decisions make it evident that many Canadians feel not only that Big Brother knows too much, but also that he can't keep a

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\* Of the Ontario Bar. The views expressed are those of the author and not of the federal Department of Justice.

<sup>1</sup> Apart from the cases to be discussed in this paper, the list of notable cases includes: *Dagg v. Canada (Minister of Finance)*, [1997] 2 S.C.R. 403; *R. v. Mills*, [1999] 3 S.C.R. 668; *R. v. Arp*, [1998] 3 S.C.R. 339.

<sup>2</sup> Part I of the *Constitution Act, 1982* being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter "the Charter"].

secret. The focus of this paper is on three criminal cases — *R. v. Law*,<sup>3</sup> *Quebec (Attorney General) v. Laroche*,<sup>4</sup> *R. v. Jarvis*<sup>5</sup> — and one civil — *Smith v. Canada (Attorney General)*<sup>6</sup> — in which significant issues were raised about the extent to which the passing of personal information from one arm of the government to another attracts Charter scrutiny.

These cases are not the first criminal cases in which the Supreme Court has looked at the issue of government information sharing. Previous cases have examined provision of electrical consumption records by a hydro utility to the police,<sup>7</sup> provision of blood samples by a coroner to the police,<sup>8</sup> provision of drugs seized by a high school principal to the police,<sup>9</sup> and provision of youth court dockets by Provincial Court staff to school boards.<sup>10</sup> The application of previously articulated principles to new contexts in 2002 did not, however, substantially improve the clarity of the law.

That we should have so many Supreme Court cases in the general area in such a short time is propitious. South of the border, a congressional inquiry into the 9/11 disasters has identified problems in governmental information sharing as a contributory factor in the government's failing to prevent the terrorist strikes.<sup>11</sup> The American government's legislative response was swift and aggressive and included the enactment of the *Homeland Security Act of 2002* that rolls a large number of government agencies into a massive Department of Homeland Security to facilitate, *inter alia*, information exchange.<sup>12</sup> There has also been discussion of a controversial initiative called "Total Information Access" in which the government would have access to colossal amounts of publicly and privately held information.<sup>13</sup>

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<sup>3</sup> 2002 SCC 10.

<sup>4</sup> 2002 SCC 72.

<sup>5</sup> 2002 SCC 73. The principles set out in *Jarvis* were applied in the companion case of *R. v. Ling*, 2002 SCC 74.

<sup>6</sup> [2001] 3 S.C.R. 902. A companion case, *Re Privacy Act (Canada)*, [2001] 3 S.C.R. 905 considered a non-Charter challenge to the same information sharing problem.

<sup>7</sup> *R. v. Plant*, [1993] 3 S.C.R. 281.

<sup>8</sup> *R. v. Colarusso*, [1994] 1 S.C.R. 20.

<sup>9</sup> *R. v. M. (M.R.)*, [1998] 3 S.C.R. 393.

<sup>10</sup> *Re F. (N.)*, [2000] 1 S.C.R. 880.

<sup>11</sup> *Final Report of the Intelligence Joint Inquiry into the Terrorist Attacks of September 11, 2001* (<http://www.intelligence.senate.gov/findings.pdf> (accessed June 11, 2003)).

<sup>12</sup> The *Act* may be found on the Department of Homeland Security's website at <http://www.dhs.gov/dhspublic/> (accessed June 11, 2003), along with access to numerous speeches by President George W. Bush and Homeland Security Secretary Tom Ridge on the importance of the Department's information sharing mandate.

<sup>13</sup> See, e.g., Levy, "Why Civil Libertarians are Uneasy," *Washington Times*, Dec. 12, 2002 ([www.washingtontimes.com](http://www.washingtontimes.com)), article ID 200212120823280016 (accessed June 11, 2003); "A Snooper's Dream," *New York Times*, November 18, 2002, Section A, p. 18 ([www.nytimes.com](http://www.nytimes.com)).

Information sharing is an important constitutional issue not only for the “privacy versus security” debate. Most individuals probably would not be aware of the existence or extent of governmental information sharing had the issue not come to light due to recent litigation. Since government should be striving to abide by constitutional norms, even if its activities aren’t conspicuous to the general public, it needs to know what those norms are. As alluded to above, the contention here is that the present state of the law presents difficulties in sorting out the applicable norms.

## II. THE SECTION 8 BACKGROUND: *PLANT* AND *COLARUSSO*

To understand the significance of the 2002 information-sharing cases, some background is necessary. The leading cases on the subject in the section 8 Charter context are the Court’s 1993 decision in *R. v. Plant*,<sup>14</sup> and the 1994 decision in *R. v. Colarusso*.<sup>15</sup>

*R. v. Plant* concerned a section 8 challenge to the validity of a search warrant executed on a residence where marihuana was being grown. Plant attacked the warrant on the basis that the grounds supporting its issuance had been obtained unconstitutionally. One impugned ground was the obtaining of Plant’s electricity consumption records by the Calgary police from the City of Calgary’s utilities commission. The police obtained the records by computer, their access facilitated by a utility-provided password.

The Court held that the transfer of information between the utility and police did not infringe section 8, based on a balancing of state and individual interests. The following passage sets out the Court’s approach:

Consideration of such factors as the nature of the information itself, the nature of the relationship between the party releasing the information and the party claiming its confidentiality, the place where the information was obtained, the manner in which it was obtained, and the seriousness of the crime being investigated, allow for a balancing of the societal interests in protecting individual dignity, integrity and autonomy with effective law enforcement.<sup>16</sup>

Applying that test, the Court concluded, largely on the basis that the information was part of a commercial relationship and was not of a personal and confidential nature, that no reasonable expectation of privacy had been infringed. In that regard, the Court made the following comments:

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<sup>14</sup> *Supra*, note 7.

<sup>15</sup> *Supra*, note 8.

<sup>16</sup> *Supra*, note 7, at 293.

In fostering the underlying values of dignity, integrity and autonomy, it is fitting that section 8 of the *Charter* should seek to protect a biographical core of personal information which individuals in a free and democratic society would wish to maintain and control from dissemination to the state. This would include information which tends to reveal intimate details of the lifestyle and personal choices of the individual.<sup>17</sup>

*R. v. Colarusso* was decided four months after *Plant*, and contained no reference to it.<sup>18</sup> In *Colarusso*, hospital staff obtained blood and urine samples from Colarusso following two automobile accidents involving the vehicle he drove, the second of which resulted in the death of another driver. The samples were obtained pursuant to a standard hospital trauma protocol. Colarusso was found to have consented to use of the samples for medical purposes.<sup>19</sup> The samples were then obtained from the hospital by the coroner pursuant to the Ontario *Coroners Act*<sup>20</sup> for an investigation into the cause of the driver's death. The coroner submitted them for analysis, and the analyst subsequently testified at Colarusso's criminal trial for criminal negligence causing death (among other charges).

The Court split, 5:4, as to whether the use of the samples in the criminal prosecution infringed section 8. The majority, *per* La Forest J., concluded that the state's appropriation of the results of the analysis constituted an unreasonable seizure<sup>21</sup> — either because the acquisition of the samples by the police without warrant was itself unreasonable, or because the police action had the effect of rendering the coroner's seizure unreasonable. The minority (Lamer C.J., Cory, McLachlin and Major JJs.) jointly concluded there was no police seizure and thus no section 8 breach.

What is important about the majority approach in *Colarusso* is that it tends to obviate the need for a *Plant*-type contextual balancing of state and individual interests. Once the purpose of the state appropriation of some information shifts from a non-criminal investigation purpose to criminal investigation, the *Hunter v. Southam Inc.*<sup>22</sup> criteria apply, and a warrant is required unless the state can

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<sup>17</sup> *Id.*, at 293.

<sup>18</sup> Oral argument in *Colarusso* took place four months after oral argument in *Plant*, so the cases were under reserve together for six months before *Plant* was handed down.

<sup>19</sup> *Supra*, note 8, at 49.

<sup>20</sup> *Coroners Act*, R.S.O. c. 93, s. 16(2)(a).

<sup>21</sup> Note that there was no evidence of a physical seizure of the samples or the analyst's test results by the police; the majority was willing to bridge the evidentiary shortfall by terming the analyst's evidence an "appropriation", relying heavily on the fact that the analyst in question was frequently used by the police. Inferentially then, the analyst transferred the information to the police such that the state would have been justified in laying the charges and subpoenaing the analyst at trial.

<sup>22</sup> [1984] 2 S.C.R. 145.

demonstrate exigent circumstances. The initial, consensual seizure for medical (treatment) purposes did not infringe section 8 and neither did the subsequent seizure for *Coroner's Act* (investigation of death) purposes. The shifting of the state's purpose to criminal investigation was regarded as so fundamental that it altered the nature of the relationship between the individual and the state.

### III. THE 2002 INFORMATION SHARING CASES

To trace the development of the law in 2002, the cases will be examined chronologically. Before looking at the criminal cases, it is of some value to broaden the parameters slightly to consider briefly a civil case decided in December 2001.

#### 1. *Smith v. Canada (Attorney General)*<sup>23</sup>

Ms. Smith was a recipient of unemployment insurance benefits in 1995. She was absent from Canada on vacation for a two-week period during January and February. Upon returning to Canada by air, she filled out the required E-311 card for Customs which noted the duration of her trip. Unbeknownst to her, Canada Customs and the Unemployment Insurance Commission had entered a formal agreement pursuant to the *Customs Act*<sup>24</sup> and Treasury Board policy to permit the sharing of information. The Commission queried the fact that she had indicated in her claimant report card that she was available for work during the period of absence; benefits were denied for the period and she appealed. A Board of Referees dismissed her appeal in respect of the denial of benefits.

On further appeal, Rothstein J., sitting as Umpire, rejected the claim that the sharing of information between arms of the government infringed her section 8 rights.<sup>25</sup> Justice Rothstein considered the issue at considerable length, applying the criteria set out in *R. v. Plant* as the template for his analysis, and concluded that:

... the appellant and other Canadian residents ... cannot be said to have held a reasonable expectation of privacy in relation to their E-311 information disclosed to the Commission, which outweighs the government's interest in enforcing the laws disentitling unemployment insurance claimants from receiving benefits while outside of Canada.<sup>26</sup>

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<sup>23</sup> *Supra*, note 6.

<sup>24</sup> R.S.C. 1985, c. 1 (2nd Supp.).

<sup>25</sup> CUB 44824 (May 27, 1999) <http://www.ei-ae.gc.ca/easyk/search.asp> (accessed June 11, 2003).

<sup>26</sup> CUB 44824, at para. 136.

Justice Rothstein did not deal extensively with the difference between Customs' use of the E-311 information and the Commission's use. He did note that the *Customs Act* conferred discretion on the minister to disclose information, and that the sharing agreement between Customs and the Commission limited the type of information shared, the use to which it could be put and prohibited further disclosure by the Commission to third parties.<sup>27</sup> He also found that the sharing, because it was authorized by the *Customs Act*, was authorized by section 8(2)(b) of the *Privacy Act*.<sup>28</sup>

Justice Rothstein's judgment was upheld in very brief reasons by the Federal Court of Appeal and in a single paragraph judgment by the Supreme Court. Both courts accepted that the *R. v. Plant* test applied in the circumstances. Reference to *R. v. Colarusso* is entirely absent from the three decisions.

## 2. *R. v. Law*

At issue in *R. v. Law*<sup>29</sup> was the use, in a prosecution for GST evasion, of photocopied documents obtained by Revenue Canada investigators from police officers. The documents, which appeared to be in "Chinese characters," were found in a safe recovered in a field by the police after Law had reported that the safe had been stolen in a break and enter of his restaurant. The documents at issue were of no interest to the officer (White) conducting the theft investigation; a second officer (Desroches), who had harboured "gut feelings" about tax improprieties by the restaurateur, took them and passed copies on to tax authorities.

The Court held, 9:0, that Desroches' actions of examining and photocopying the documents constituted a search and, absent a warrant, were unreasonable. The analysis of Bastarache J. is a straightforward application of the majority judgment in *Colarusso*. The police had lawful custody of the documents for the purpose of the theft investigation. Once the purpose shifted to an unrelated investigation, a warrant was required because Desroches "lacked specific authority to examine and photocopy the contents of the appellants' safe."<sup>30</sup>

The chain of reasoning employed by Bastarache J. is somewhat opaque. Corporal Desroches' conduct is impugned because he "lacked specific authority." How his authority differed from Constable White's is not explained, because White's authority is not described. Presumably, White's authority was some or all of: the implied consent of the victim of crime to assist the police in

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<sup>27</sup> CUB 44824, at para. 59.

<sup>28</sup> R.S.C. 1985, c. P-21.

<sup>29</sup> 2002 SCC 10.

<sup>30</sup> *Id.*, at para. 24.

solving that crime;<sup>31</sup> a general statutory duty to investigate;<sup>32</sup> and a common law duty to investigate.<sup>33</sup> Desroches clearly had no consent from the victim, but whether other sources of authority, such as a common law duty to investigate, might outweigh the absence of consent in other situations, appears to be left open by Bastarache J. He discusses the possibility of the police being “lawfully positioned” to make a seizure pursuant to statute or common law authority;<sup>34</sup> he goes on to say that he makes no comment on situations where photocopying might be “reasonably necessary to investigate their theft or carry out a legitimate law enforcement objective.”<sup>35</sup> “Legitimate,” presumably, means according to some lawful authority.

Identifying the source of the authority of actions is significant because of the importance the Court placed on the shifting of the purpose of the investigation. What we should take from this case is the importance of characterizing and comparing the objectives of the state actors engaged in the information sharing. If it were fair to characterize the objective of both White and Desroches as “investigation of crime,” there may have been no Charter breach, since there would be no shifting of purpose. In *Law*, the Supreme Court obviously rejected such a broad-brush approach.

### 3. *Quebec (Attorney General) v. Laroche*<sup>36</sup>

Laroche and his auto repair business were audited by an employee of the Société de l'assurance automobile du Québec (SAAQ), which regulates garages engaged in automobile reconstruction work. In the course of the audit, the employee discovered paperwork indicating that the same auto parts had apparently been used to rebuild five different vehicles. The SAAQ employee passed this information to the police, who obtained search warrants. The warrants were subsequently quashed by Grenier J. of the Québec Superior Court, in part because the passing of the information from the regulator to the police ran afoul of a principle said to arise from *R. v. Colarusso*: that information collected in the course of an administrative investigation cannot be disclosed to the police for a criminal investigation.<sup>37</sup>

The Supreme Court rejected the reviewing judge's broad interpretation of *Colarusso*. Possibly because Laroche's counsel did not defend this part of

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<sup>31</sup> See also *D.P.P. v. Morrison*, [2003] EWHC 683, at para. 20.

<sup>32</sup> See, e.g., *Royal Canadian Mounted Police Act*, R.S.C. 1985, c. R-10, s. 18.

<sup>33</sup> See *R. v. Godoy*, [1999] 1 S.C.R. 311.

<sup>34</sup> *Supra*, note 29, at para. 25.

<sup>35</sup> *Supra*, note 29, at para. 26.

<sup>36</sup> 2002 SCC 72.

<sup>37</sup> *Id.*, at para. 83.



Grenier J.'s analysis,<sup>38</sup> the court devoted little attention to the issue. For the majority, LeBel J. suggested that the information was: (i) provided in compliance with legislated obligations; (ii) was not therefore "private in relation to government"; and (iii) that the transmittal of the information was connected to the performance of the SAAQ employee's duties.<sup>39</sup> Chief Justice McLachlin, who dissented in part but concurred with LeBel J. on this point, noted that because section 504 of the *Criminal Code*<sup>40</sup> permits bodies like the SAAQ to swear criminal informations, they can report crime to the police.<sup>41</sup>

As in *Law*, the result may seem intuitively correct but the reasoning is less than clear. Both the third factor mentioned by LeBel J. (transmittal of the information being a duty), and the factor mentioned by McLachlin C.J. (the right of both the SAAQ and the police to lay charges) suggest that the transfer of information involved no shifting of purpose. However, the first two factors raised by LeBel J., relating to the statutory obligation to produce, have not been treated by the Court as being determinative; indeed statutorily-compelled production of information has given rise to extensive Charter litigation.<sup>42</sup>

#### 4. *R. v. Jarvis*

The latest, and most comprehensive, of the Court's decisions occurred in the context of a prosecution for tax evasion. The primary issue in *R. v. Jarvis*<sup>43</sup> pertained to the distinction between the Canada Customs and Revenue Agency's (CCRA's) audit and investigation functions under the *Income Tax Act*.<sup>44</sup> Was it appropriate for the Special Investigations Section, charged with pursuing evasion cases, to use information gathered by the Business Audit section for civil assessment purposes?

The salient facts of the case were that the CCRA received a tip that Jarvis had failed to report income from the sale of his late wife's art works in his 1990 and 1991 tax returns. The Business Audit section followed up on the leads primarily through use of its statutory powers to compel production of

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<sup>38</sup> In para. 98 of his factum in the S.C.C. (file 28417), Laroche's counsel stated:

... les intimés concèdent que la base factuelle pour établir la collusion entre l'organisme administratif et les forces policières est insuffisante. Par conséquent, les intimés concèdent que cette portion du jugement dont appel devrait être révisée sur cette base.

In essence, the point was conceded because of an absence of evidence of collusion between the SAAQ and the police.

<sup>39</sup> *Id.*, at para. 84.

<sup>40</sup> R.S.C. 1985, c. C-46.

<sup>41</sup> *Supra*, note 36, at para. 6.

<sup>42</sup> See, e.g., *R. v. Fitzpatrick*, [1995] 4 S.C.R. 154; *R. v. White*, [1999] 2 S.C.R. 417.

<sup>43</sup> 2002 SCC 73.

<sup>44</sup> R.S.C. 1985, c. 1 (5th Supp.).

information under sections 231.1 and 231.2 of the *Income Tax Act*. The auditor determined that there were significant amounts of unreported income. At trial, the judge held that at a certain point in the audit, the auditor's "predominant purpose" shifted from auditing to criminal investigation. In the challenge to the validity of a search warrant conducted by Special Investigations, the trial judge concluded that he had to excise from the Information to Obtain the Warrant any information acquired following the shift in focus from civil audit to criminal investigation. Without the excised material, the warrant had to be quashed. The trial judge also excluded any evidence gathered by Special Investigations through use of the section 231.1 and section 231.2 powers on the basis that those tools could not be used after the focus shifted to furthering a criminal investigation. On subsequent appeals to the Court of Queen's Bench and the Alberta Court of Appeal it was held that the warrant was valid as the trial judge had erred by excising too much material from the search warrant information by misidentifying the point at which the purpose shifted. A new trial was ordered.

The Supreme Court settled a controversy that had raged in lower courts for several years by deciding unanimously that an audit ceases to be an audit at the point the "predominant purpose" becomes establishment of penal liability.<sup>45</sup> Information gathered by auditors before that point using sections 231.1 and 231.2 may be used by investigators to mount a case for prosecution. The investigators themselves may only rely on the search warrant powers of the Act to compel production of evidence. In the result, the order for a new trial was affirmed.

In coming to these conclusions, the Supreme Court, extensively analyzed jurisprudence under both sections 7 and 8 of the Charter. The analysis it adopted, the judgment stresses, was "contextual."<sup>46</sup> A balancing of state and individual interests was undertaken, *à la Plant*, with specific reference to the *Plant* test on "the protection afforded by s. 8 with respect to informational privacy."<sup>47</sup> A seven factor "totality of the circumstances" test was articulated to assess when the individual/state relationship was sufficiently adversarial to require full Charter protections:

- (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?

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<sup>45</sup> The Court rejected a number of competing tests developed by lower courts in coming to this result: see *supra*, note 43, at paras. 85-87.

<sup>46</sup> *Id.*, at paras. 63-64.

<sup>47</sup> *Id.*, at para. 70.

- (b) Was the general conduct of the authorities such that it was consistent with the pursuit of a criminal investigation?
- (c) Had the auditor transferred his or her files and materials to the investigators?
- (d) Was the conduct of the auditor such that he or she was effectively acting as an agent for the investigators?
- (e) Does it appear that the investigators intended to use the auditor as their agent in the collection of evidence?
- (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?
- (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?<sup>48</sup>

The balancing analysis employed by the Court in *Jarvis* adds a new layer of complexity to the case law since the balance is struck with reference to section 7 of the Charter, not section 8. Discussion of section 7 is notably absent from several other information sharing cases, despite the fact that a considerable line of cases has developed considering the acquisition of information by statutory compulsion and its use for prosecution purposes.<sup>49</sup> That line of cases has produced its own multi-factor balancing test for determining admissibility of compelled production of information, the factors being: the existence of coercion, the existence of an adversarial relationship between the individual and the state at the time production of information was compelled, whether the dangers of unreliable confessions are present and whether use of the information would encourage abusive state conduct.<sup>50</sup>

#### IV. THE WAY AHEAD AFTER *JARVIS*

Supreme Court decisions on the acquisition, use and distribution of personal information have produced a variety of tests to deal with a variety of contexts. Perhaps this is not surprising, given the Supreme Court's affection for both "contextual" Charter analysis and multi-factor, or balancing, tests.

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<sup>48</sup> *Id.*, at para. 94.

<sup>49</sup> In addition to *R. v. Fitzpatrick* and *R. v. White*, referred to *supra*, note 42, these authorities include most importantly *Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research, Restrictive Trade Practices Commission)*, [1990] 1 S.C.R. 425. See *R. v. White* for a more comprehensive list.

<sup>50</sup> *R. v. White*, *supra*, note 42, at para. 51.

With respect to information sharing, however, the jurisprudence has reached the point at which it is challenging to ascertain just what test is applicable in determining whether there has been a Charter violation: is it the balancing of interests approach characteristic of *Plant* and *White*? The bright line “shifting purpose” test of *Colarusso*? Or, the bright-line-in-multi-factor-clothing approach of *Jarvis*? It is not just the uninitiated who may be driven to despair in attempting to characterize issues for the purpose of determining which of the foregoing authorities apply.

It is possible of course, that the various tests are simply variations on a unified approach that identifies different factors as being determinative in different contexts. One of the difficulties with multi-factor balancing tests is that while the Supreme Court usually emphasizes that the list of factors is non-exhaustive (as it did in *Jarvis*, for example), lower courts are not likely to stray from the enumerated ones. The danger is that slavish adherence to the list will refocus the inquiry away from what the Court has mandated: a balancing of state and individual interests.

How this plays out is evident in *Smith*,<sup>51</sup> which sought to apply the *Plant* test in a non-criminal context. The *Plant* test makes reference to only one factor, “seriousness of the crime,”<sup>52</sup> which is clearly a government concern, but which is relevant only to the extent that Ms. Smith’s actions could have given rise to a prosecution rather than a civil reassessment. The relative unimportance of this factor should not end the inquiry as to what the relevant government interests are.<sup>53</sup>

Courts have to be vigilant to recognize how context drives the enumeration of factors. In a much different context, an American appellate court<sup>54</sup> arrived at a different list, which might be seen as an alternative articulation of the *Plant* test:

Thus, as in most other areas of the law, we must engage in the delicate task of weighing competing interests. The factors which should be considered in deciding whether an intrusion into an individual’s privacy is justified are the type of record requested, the information it does or might contain, the potential for harm in any subsequent nonconsensual disclosure, the injury from disclosure to the relationship in which the record was generated, the adequacy of safeguards to prevent

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<sup>51</sup> [2001] 3 S.C.R. 902.

<sup>52</sup> [1993], 3 S.C.R. 281, at 293.

<sup>53</sup> See, e.g., *Schreiber v. Canada (Attorney General)*, [1998] 1 S.C.R. 841, at para. 21, where Lamer C.J. (concurring) substituted another factor for “seriousness of the crime.”

<sup>54</sup> *U.S. v. Westinghouse Elec. Corp.*, 638 F.2d 570 (3d Cir., 1980). The case considered the attempt by an American administrative agency to subpoena medical records of Westinghouse employees to conduct an occupational health and safety investigation. For another application of the test, see: *In re Search Warrant (Sealed)*, 810 F.2d 67 (3rd Cir., 1987).

unauthorized disclosure, the degree of need for access, and whether there is an express statutory mandate, articulated public policy, or other recognizable public interest militating toward access.<sup>55</sup>

The point here is not that the foregoing test is any better or worse than the *Plant* test, though one measure of a test's general utility might be how readily adaptable it is to different contexts. The point is rather that if "context" and "balance" are the crucial concerns, applying a list of factors enumerated in a different context might corrupt the balancing process.

We are probably some way away from an approach that aims to be more comprehensive. The *Plant* test, for example, identifies the importance of the nature of the relationship between the individual and the government information collector; *Colarusso* appears to be much more focused on the nature of the relationship between the government collector of the information and the government user — does it transform the relationship between individual and the state such that a Charter breach occurs?

It is the exploration of the relationship between the collector and the user in which there is a lot of heavy lifting still to do. *Laroche* appears to suggest that no Charter breach will occur when the information is obtained pursuant to lawful authority, *and* both government entities are pursuing identical, or nearly identical objects. Commonality of object would not appear to be mandatory pursuant to the *Smith* analysis of Rothstein J. as long as the transfer of information accords with lawful authority and appropriate conditions are placed on subsequent use.

Characterization of the objects of the state actors can also form a contentious part of the analysis, as a recent U.S. Supreme Court case, *Ferguson v. Charleston*,<sup>56</sup> demonstrates. In that case, urine samples of pregnant women were obtained by a state-run hospital to determine the presence of narcotics, particularly cocaine. Positive results were shared with the police according to a detailed protocol. The majority of the U.S. Supreme Court (*per* Stevens J.) found the arrangement to be a violation of the American Fourth Amendment not because of any shifting of purpose in the transfer of the information, but because the initial acquisition of the sample was considered to be for the *immediate* purpose of gathering evidence (and hence a warrantless search), and not for the *ultimate* purpose of weaning pregnant women from narcotics addiction. The "immediate/ ultimate" purpose distinction was criticized both in the concurring judgment of Kennedy J. and in the dissent of Scalia J.

Just what constitutes lawful authority for transfer of information is a very difficult issue. Is specific legislative authorization required and if so, how

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<sup>55</sup> *Id.*, at 578.

<sup>56</sup> No. 99-936 (March 21, 2001).

specific must it be? Can authority recognized at common law suffice? Furthermore, assuming there is either type of legal authority, what impact does that have on the Charter analysis? Assuming the legal authority permits sharing between one government agency and criminal investigators without judicial authorization, does the legal authority have to be constitutionally challenged in order to impugn the use of the information by investigators, or is it simply subject to a balancing of interests approach?

In the federal sphere, information sharing is affected by a web of statute law<sup>57</sup> and policy.<sup>58</sup> Common law authority is also important, since in a variety of contexts, courts have been willing to recognize police power to take certain investigative measures that constitute interferences with an individual's liberty or property.<sup>59</sup> The extent of police common law authority is, however, fraught with uncertainty. The relationship between police duties and their authority to carry them out has been described in the following way by the Ontario Court of Appeal:

The law imposes general duties on the police but it provides them with only limited powers to perform those duties. Police duties and their authority to act in the performance of those duties are not co-extensive. Police conduct is not rendered lawful merely because it assisted in the performance of the duties assigned to the police. Where conduct interferes with liberty or freedom of the individual, that conduct will be lawful only if it is authorized by law. That law may be a specific statutory power or it may be the common law.<sup>60</sup>

The common law authority that permits police to take necessary investigative steps will obviously not apply in every situation in which the issue is the legal capacity of the government *holder* of the information to transfer the information to the police. Whether other common law authority (for example, an argument that the sharing of information was necessary to allow the holder of the information to carry out its duties), or a source of authority such as the prerogative,<sup>61</sup> would constitute a separate and sufficient authority, remains to be litigated.

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<sup>57</sup> See, e.g., the *Privacy Act*, R.S.C. 1985, c. P-21, s. 8, the *Customs Act*, R.S.C. 1985, c. 1 (2nd Supp.), s. 107, and the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.), s. 241.

<sup>58</sup> See, e.g., the Treasury Board *Policy on the Management of Government Information*, [http://publiservice.tbs-sct.gc.ca/pubs\\_pol/ciopubs/TB\\_GIH/mgih-grdg\\_e.asp](http://publiservice.tbs-sct.gc.ca/pubs_pol/ciopubs/TB_GIH/mgih-grdg_e.asp).

<sup>59</sup> See, e.g., *R. v. Waterfield*, [1963] 3 All E.R. 659 (C.C.A.); *R. v. Dedman*, [1985] 2 S.C.R. 2; *R. v. Simpson* (1993), 79 C.C.C. (3d) 482 (Ont. C.A.); *D.P.P. v. Morrison*; *R. v. Mann*, 2002 MBCA 121 (under appeal to S.C.C.).

<sup>60</sup> *R. v. Simpson*, *id.*, at 493.

<sup>61</sup> This would depend on how broadly the prerogative was construed. The Ontario Court of Appeal has recently suggested that the present scope of the prerogative may be narrow: see *Black v. Canada (Prime Minister)* (2001), 54 O.R. (3d) 215, at para. 27. Compare, however, Harris, "The

The current body of case law is inadequate in exploring the likely effects of any decision limiting information sharing on future government action. First, since many of these situations concern police acquisition of information needed to assemble the grounds necessary to obtain search warrants, limiting access to government-held information comes with a potential cost. If the police need prior judicial authorization to access information needed to obtain a warrant, they could find themselves in the trap of effectively needing one warrant to get another, and having insufficient grounds for either.

Even more important, perhaps, is the potential impact of this case law on the use of prosecution as a tool, as highlighted by the Court's approach in *Jarvis*. Non-payment of taxes, like false claims for unemployment insurance or other government benefits fraud, is conduct that can be dealt with by the state either by civil sanctions or criminal sanctions. Ideally, criminal sanctions should be reserved for the most serious defalcations. From the government's perspective, that discretionary decision is best made once all the information is in. Decisions such as *Jarvis*, however, encourage or perhaps require the state to make that decision earlier in the information-gathering process. It does this by making CCRA constantly assess its purpose; once it feels that an audit has progressed to the point that a court may find it could have referred the matter for prosecution, it may well do so immediately rather than risk having subsequently obtained information found inadmissible if the case is referred later. The institutional momentum may thus be tilted inexorably towards prosecution.

The focus in *Jarvis*, *Colarusso* and other cases on identification of a criminal investigation purpose behind state action is problematic. The difference between conduct which warrants civil sanction rather than criminal, or a *Criminal Code* prosecution rather than one under a regulatory statute, may often be a difference in degree, not kind.<sup>62</sup> The Court is forced to treat it as a difference in kind, however, so as not to undermine the warrant requirement of *Hunter v. Southam Inc.*,<sup>63</sup> which is treated as bedrock section 8 law. *Colarusso* might be seen as a strong reaffirmation of the *Hunter* presumption against non-warranted takings; *Plant* prefers that each situation be subject to balancing.

While the enunciation of a multi-factor test may often be a signal that the Court considers the law in a particular area to be resolved, we are far from the end of the road on the refinement of the law in this area. Even an approach as

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Third Source of Authority for Government Action" (1992) 108 Law Quarterly Rev. 626, in which the author argues that prerogative power permits government to do that which is not specifically precluded by law.

<sup>62</sup> *R. v. D'Amour* (2002), 166 C.C.C. (3d) 477, at 497 (Ont. C.A.).

<sup>63</sup> [1984] 2 S.C.R. 145.

detailed and flexible as that in *Jarvis* may be inapplicable in a different context, as the Court itself acknowledged.<sup>64</sup> The proliferation of tests and the strength of the competing interests ensure a litigious future.

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<sup>64</sup> *R. v. Jarvis*, [2002] S.C.C. No. 73, at para. 94.



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