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Attorning to Canada's *Income Tax Act* Office (or, Why is the Name in ALL CAPS?)

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1 Summary

The party charged under Canada's *Income Tax Act* ("*ITA*") offences that is styled in ALL CAPS, or *capitis diminutio maxima,* on a sworn Information is the *ITA* "officer". Officers are artificial legal persons that individuals can choose to represent and thereby gain the powers, privileges and duties of that office, since the officer and the office are legally indivisible. As the same "office" from the *ITA* is also used for *Canada Pension Plan* ("*CPP*"), *Employment Insurance Act* ("*EI*"), and *Excise Tax Act ("ETA"),* charges under the *ITA* also affect that officer's CPP, EI, and GST.

The *ITA* "office" is identified with a nine-digit number ("SIN") used as a "social insurance number". The same nine digits originated from a Social Insurance Number (also "SIN") that an individual applied for with Services Canada, but then identifies the individual as legally liable as an *ITA* "legal representative". "JOHN DOE" has two capacities: as individual John Doe who thinks, speaks and acts for officer JOHN DOE. As offices and officers are legally indivisible, JOHN DOE and SIN could be used to mean three different legal capacities.

Taxes calculated from CRA's T1 form are payable to the Receiver General. The *Financial Administration Act ("FAA")* says, "*all* ***public money*** *shall be deposited to the credit of the Receiver Genera*l". The *FAA* further defines "public money" as "*money belonging to Canada*" i.e. Her Majesty (and not private property belonging to individuals). Profit for the *ITA* "office", after deducting allowable expenses (a privilege of that office), becomes "taxable income".

An individual who has a private contract, which says that income is to be private property and that he does not wish to work for the *CPP*/*EI*/*GST*/*ITA* "office", earns private property that qualifies as *ITA* "exempt income". This private property cannot be filed on a T1, which is only for reporting the "public money" earned by the individual as an officer belonging to the CPP/EI/GST/ITA office of Her Majesty identified with the all lower case "social insurance number", as on the T1. Such "exempt income" has to be reported instead by letter with the individual's name styled as "John Doe" and with the nine-digit SIN used as a Social Insurance Number.

Tax evasion is adjudicated through two courts - PROVINCIAL COURT for criminal liability, and Tax Court of Canada ("TCC") for civil liability. First, Her Majesty has to prove that the property in question is Canada's "public money"; if so, then the individual is an *ITA* "officer" handling "public money", has fiduciary duties to report all "public money", and it is an offence against the public if it was not all reported. The PROVINCIAL COURT is a court of common law and equity as it adjudicates whether the accused *ITA* "officer" had a guilty mind and whether it performed a guilty act. Next, the TCC recovers the "public money" through disgorgement. TCC is a court of law and of strict liability where intent is irrelevant.

2 Background

For years people wondered if there is a legal significance of the name in legal documents styled in full upper case i.e. "JOHN DOE". One theory is the Roman law legal concept of *capitis diminutio* (Latin for "reduction of status"), so that *capitis diminutio minima* ("John Doe") a person retained both citizenship and freedom, while *capitis diminutio maxima* ("JOHN DOE") a person's legal status was reduced to slavery[1]. In *Baudais*[2] the Court said this is incorrect as Canada is not under Roman law. If so, then who or what is JOHN DOE? From *Unreported Income Not on a CRA T1 Form is Not Always Tax Evasion*[3], I concluded that (a quick recap follows after the list below):

John Doe: an individual, who may or may not be under legal age and/or of sound mind
John Doe + **applied for a Social Insurance Number**: an individual who has consented, by his or her signature, to being liable as an *ITA* s.248(1) "legal representative". John Doe therefore has the *legal capacity* as an *ITA* "legal representative".
Social Insurance Number ("SIN"): a nine digit number that signifies an individual's capacity as *ITA* "legal representative".
social insurance number (also "SIN[4]"): the same nine digits, but now identifies an *ITA* s. 248(1) "office" of Her Majesty that deals with *Financial Administration Act*[5] ("*FAA*") s.2 "public money" (as opposed to private property) for Canada's Consolidated Revenue Fund.

As Canada is a constitutional monarchy, Her Majesty (in Right of Canada) is merely the legal equivalent of all Canadians[6]. In *The Queen v. The Canadian Broadcasting Corporation*[7], the court said,

> **35** It is important that at the outset we should understand the connotation of the words "Her Majesty" in the Act. When Parliament names Her Majesty in a statute it means Her Majesty, not in her capacity as a natural person but in her capacity as a corporation sole, a *persona ficta*. In *Salmond on Jurisprudence*, 9th ed. at p. 444, the author refers to this dual capacity as follows:--
>
> > He (the King) **has a double capacity**, being not only a natural person but a body politic, that is to say, a corporation sole. **The visible wearer of the crown is merely the living representative and agent for the time being of this invisible and underlying persona ficta**, in whom by our law the powers and prerogatives of the government of this realm are vested.

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[1] *Black's Law Dictionary*, 9th Ed, 2011

[2] *R. v. Baudias*, 2014 BCSC 419, at [33]. This is missing from www.CanLii.org

[3] *Nahasapeemapetilon, Apu, Unreported Income Not on a CRA T1 Form is Not Always Tax Evasion (June 25, 2016). Available at SSRN:* http://ssrn.com/abstract=2800623 *;* referred to as *"Unreported".*

[4] CRA has used "SIN" to denote both the Social Insurance Number and also the social insurance number since 2001: see 2000 & 2001 T1 forms at: http://www.cra-arc.gc.ca/formspubs/t1gnrl/llyrs-eng.html .

[5] *Financial Administration Act*, R.S.C., 1985, c. F-11

[6] *Discover Canada*, Citizenship and Immigration Canada , 2009, Queen's Printer for Canada, page 2.

[7] *The Queen v. The Canadian Broadcasting Corporation,* [1957] O.J. No. 655, at [35].

36 It is in that capacity that the Queen as sovereign, exercises her executive powers. The statute that regulates the conduct of persons within Canada, -- in the instant case, The Lord's Day Act, -- could have no application to natural persons outside of Canada and therefore would not apply to Her Majesty in her capacity as a natural person because in that capacity she is outside of Canada. **The legal fiction which recognizes this duality of persons in Her Majesty** must also recognize that **in her capacity as a corporation sole Her Majesty at all times is in every part of her realm. In those parts of her realm in which she is not physically present she is represented by her constitutional agents**.

In *Porisky*[8] the court said, "… *(the law) has recognised a* ***corporation sole*** *which applies to an* ***office***…". Sir Frederick Pollock also says in his *Principles of Contract*[9] that an officer is an artificial person in law.

If Her Majesty has a second legal capacity as an officer, then all Canadians can also have a second legal capacity as an officer, since Her Majesty is the legal equivalent of all Canadians. The legal relationship between an officer and the office it represents is explained in *The Queen's Other Realms* which says[10], "*The office and the office-holder are conceptually divisible but* ***legally indivisible****… the office cannot exist without the office-holder* (officer)".

We are familiar with police officers, court officers (lawyers, judges, prosecutors), corporate officers (i.e. CEOs). As an officer is a second individual capacity recognized in law, this is one way an individual (or even a police dog[11]) can consent to represent an artificial person.

Officers gain the powers, privileges and duties of that office. For example, judges have the power to be immune from libel; prosecutors have the power to be virtually immune from prosecution as long as they operate in good faith; CRA officers can view taxpayer files; Members of Parliament are exempt from slander from what they say in Parliament.

Corporations also are artificial persons. Corporate names in their legal sense are in ALL CAPS; if they do not have a name, they are then a numbered company also styled in upper case, i.e. 123456789 CANADA LIMITED. Since Her Majesty is not physically in Canada, she has to be legally present through her corporation sole, her office of the Governor General. Crown styles Her Majesty as an officer in Canada as HER MAJESTY THE QUEEN. Therefore JOHN DOE identifies the individual John Doe as an artificial person, as an *ITA* s.248(1) "officer" (a corporation sole), and the office could be identified by the SIN, but used as a **social insurance number:**

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[8] *R. v. Porisky and Gould*, 2012 BCSC 67, at [46]; canlii.ca/t/fppg9

[9] *Principles of Contract*, Sir Frederick Pollock, 6th Ed., p.107: *Officer: "The Roman invention, adopted and largely developed in modern law, of constituting the official characters of the holders of the same office… into an artificial person… of legal capacities and duties."*

[10] *The Queen's Other Realms*, Peter Boyce, (2009), Canberra Federation Press, page 5. Peter Boyce, AO, is an Emeritus Professor in political science at the Universities of Queensland and Western Australia.

[11] An example of police dogs sworn in as police officers: http://www.newsnet5.com/news/local-news/oh-cuyahoga/garfield-heights-two-welcome-two-new-k-9-officers. *Criminal Code* s.445.01 has been added to give police dogs the same protection as human police officers: https://openparliament.ca/bills/41-2/C-35/.

JOHN DOE: individual as *ITA* "officer[12]"
JOHN DOE + social insurance number 987 654 321: An *ITA* "officer" representing Her Majesty's office; the office profit is *FAA* s.2"public money" and not private property
JOHN DOE + social insurance number 987 654 321 + applied for a Social Insurance Number: the individual, as an *CPP/EI Act/ETA/ITA* officer, receives money for Her Majesty's office[13] that is not private property, but *FAA* s.2 "public money", and is also liable as *ITA* s. 248(1) "legal representative" for accounting of all the profit for that office and payment for use of the benefits of that office, as listed on the T1 (including permissible deductions).

What if the taxpayer never applied for a Social Insurance Number? **JOHN DOE + social insurance number**[14] **987 654 321 + never applied for a Social Insurance Number:** the individual, as an *CPP/EI/ETA/ITA* officer, receives money for Her Majesty's office that is not his private property, but as *FAA* s.2 "public money", and is ***not*** liable as *ITA* s.248(1) "legal representative" for payment for use of the benefits of that office.

I have an affidavit from an individual who has a sizable income tax debt that is over four years old for his *ITA* officer (he became a corporation director), but CRA has never taken collection action, *and* there was also a corporate audit which resulted in all shareholders being reassessed - ***except*** this individual. I believe this is because CRA has nothing on record that he agreed to be liable.

What if one writes his name as John Doe but fills out a form with "social insurance number"?
John Doe + social insurance number 987 654 321: Since the social insurance number is unique to the identification of Her Majesty's office related to the Consolidated Revenue Fund, it is irrelevant whether the name is styled as John Doe or JOHN DOE; the income is "public money" and not your private property.

3 T1 Income Tax and Benefit Return

Since most Canadians applied for a Social Insurance Number anticipating applying for CPP someday, it is reasonable for the Minister of National Revenue to deem[15] through the *ITA* that an individual wishes to work as an *CPP/EI/ETA/ITA* officer[16].

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[12] From *Unreported*, it is also the same "officer" for the *Excise Tax Act* ("*ETA*") for GST, *Employment Insurance Act* ("*EI*"), and the *Canada Pension Plan* ("*CPP*"). Accepting benefits from any one of these Acts triggers benefits from all other Acts listed here (if you qualify).

[13] "*Offices were originally regarded as a form of property.*" *The Law of Restitution*, Goff and Jones, 6th Ed., 2002, page 689.

[14] In this particular case the number is a TTN or "Temporary Tax Number" that starts with the digits 033, since the taxpayer has declined 4 times to apply for a Social Insurance Number.

[15] *The Composition of Legislation*, Driedger, 2nd Ed., 1976, The Department of Justice, Ottawa: "**Deemed***: Used to establish legal fictions. For a statutory purpose it is often necessary to deem a thing to be something it is not.*"

[16] *ITA* 6(3) for individuals, business, property, office and employment sources of income as an *ITA* "officer".

CRA's T1 Income Tax and Benefit Return uses[17] the "social insurance number" and directs[18] any taxes owed to be payable to the Receiver General of Canada. This means a T1 is filing of the income received by the individual ("John Doe") but only as that officer ("JOHN DOE") for Her Majesty's office (the nine-digit SIN used as a "social insurance number"). Corroborating that money received for that office of Her Majesty and payable to the Receiver General is not private property but *FAA* s.2 "public money" is *FAA* s.17(1) which says, "… *all* ***public money*** *shall be deposited to the credit of the* ***Receiver General***."

Note that the *FAA* says money reported on a T1 **is** *FAA* s.2 "public money" **before** it "*shall be deposited to the Receiver General*." It does *not* say that your private property becomes "public money" upon being deposited to the Receiver General. This makes sense only if the money reported on the T1 is not your private property, but already[19] is Canada's "public money" that is identified with the SIN used as a "social insurance number" - which you voluntarily filled out either by hand or typed in by computer onto page 1 of the T1 form.

4 Offices of Profit

Court cases[20] dating back to the 1600's refer to profits of an office. Even then most offices were positions granted by His or Her Majesty; anyone lucky enough to be granted to hold such an office was often financially better off. This incited individuals to illegally take over (usurp) such offices and keep the money for themselves, resulting in such cases . It was, of course, also illegal to sell an office of the Crown, as money collected for that Crown office belongs to the Crown. This became such a problem that England had to enact[21] the *Sale of Offices Act,*1551 (it was later repealed in 1825).

Offices are regarded as a form of property[22]. This is corroborated by *An Introduction to the Law of Restitution*[23]*,* which says:

> "*If you usurp*[24] ***my office*** *and take the money* ***which is due to me*** *you must make restitution to me; and it is clear that, because they are '****my****'* ***profits*** *(even though I have never actually received them) I do not have to base myself on your wrongful usurpation*."

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[17] *Unreported* compared this with ten CRA forms that use instead the "Social Insurance Number": p.27-28

[18] On page 4 of the T1 or, from 2014 onwards, Line 485 of the 5000G Guide to the T1.

[19] Taxpayers, as agents of Canada are allowed (implied by conduct) to spend all the "public money" they earned as an *ITA* "officer" minus the income tax ('office rent') paid for using the benefits of that office. This **privilege** also hides the taxpayer's consensual conversion of his money from being his private property to "public money".

[20] *Arris v. Stukley* (1677) 2 Mod. 260; *Howard v. Wood* (1679) 2 Show. K.B. 21; *Boswell v. Milbank* (1772) 1 T.R.

[21] *Sale of Offices Act,*1551, https://en.wikipedia.org/wiki/Sale_of_Offices_Act_1551

[22] *The Law of Restitution*, Goff and Jones, 6th Ed., 2002, Chapter 29, "Usurpers of Offices", p. 689

[23] *An Introduction to the Law of Restitution,* Peter Birks, 1989, page 134

[24] **Usurp**: An illegitimate claim to power. Recall an officer gains the **powers**, privileges and duties of that office.

It is obvious that property (profit) of the office belongs to the office/officer **and not to the individual**. In these old court cases someone *pretended* to be the officer to illegitimately take the funds of that office. We can see a somewhat parallel situation with Canadian income tax: having been *deemed*[25] (a form of pretense?) to be an *ITA* "officer" receiving only "public money" for Her Majesty's *ITA* "office", any income that is not reported on the T1 is usurpation, because all income is *deemed* **not** to be your private property. Two questions then are, did you accept being deemed to be that officer, and what did you do to indicate to Her Majesty that you accepted, or that you did not accept, that deeming?

5 Attornment's Three Definitions

Most law dictionaries define[26] attornment only as an "*agreement to become a new owner's tenant or a mortgagee's tenant*." Today this definition is largely unused. The **second** definition[27] is: "*The act of granting authority or jurisdiction to a party even though no legal rights exist.*" We will also discuss a third definition later.

I will now give three examples of the Canadian legal system using this **second** definition. Oddly, despite these three examples of attornment being "*the act of granting authority or jurisdiction to a party even though no legal rights exist"*, I am unable to find this particular definition in either the *Canadian Law Dictionary* by Yogis (3rd to 7th Ed.), *Dictionary of Canadian Law* by Dukelow and Nuse, *Jacob's Law Dictionary* of 1811, or *Black's Law Dictionary* (2nd to 9th Ed.) There seems to be obfuscation as to how this process of "*granting authority or jurisdiction to a party even though no legal rights exist"* works.

In the first example, in the case of *Mitchell* below the court referred to the first definition as "*a relic of the past*" and talked about the second definition at paragraph 39. In *Mitchell*, a Justice of the Peace ("JP") argued lack of attornment and let a driver/owner off from having to pay some traffic tickets. The higher court here said that the JP acted incorrectly and overturned the JP's decision. I have reproduced this case here as it is missing from CanLii:

R. v. Mitchell

Between

Her Majesty the Queen, applicant, and

Jeffrey Mitchell, respondent

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[25] *ITA* s.6(3); also *ITA s.152(7)*: an assessment is not dependent on return or information supplied by the taxpayer; also *ITA s.152(8)*: an assessment is deemed to be valid and binding.

[26] *The Dictionary of Canadian Law*, Dukelow & Nuse, 1991

[27] Investopedia Dictionary: http://www.investopedia.com/terms/a/attornment.asp

32 In this case, the Justice of the Peace purported to rely on attornment and common law powers in holding that he had the power to take jurisdiction under the motion presented to the court by Mr. Mitchell. I have already quoted from his ruling at p. 2 of the transcript. A more fully developed statement of his position is set out at p. 10 where he says this:

> It's the opinion of this Court that any defendant at any time can become attorned to the jurisdiction of the Court by common law. It's the position of this Court that, pursuant to Section 69, that it is a collection section. It's for the purpose of collecting fines. That having been said, it also gives the defendant an opportunity to have a hearing, as I read it, before a justice of the peace to allow the justice of the peace to determine whether or not the person can in fact pay the fine within a reasonable period of time.

33 With respect, I cannot agree with the Justice of the Peace as to his interpretation of s.69 and his conclusion that he had the power to act under that section in virtue of Mr. Mitchell's motion and his alleged "attornment" to the jurisdiction of the Court.

34 If the Justice of the Peace is ruling that he has common-law or inherent power to take on jurisdiction - as I think he did - then he is clearly wrong in law and has exceeded his jurisdiction.

35 Subsection 17(2) of the Justices of the Peace Act, already cited, makes it abundantly clear that a Justice of the Peace receives only those powers and jurisdiction which are devolved upon him or her by statute, nothing more and nothing less. As the subsection says, the justice "shall exercise the powers and perform the duties conferred or imposed ... by or under an Act of the Legislature or of the Parliament of Canada."

36 Equally, there is no power vested in the Justice of the Peace by statute or, for that matter, otherwise, to rely on the alleged doctrine or rule of "attornment" as a basis for what he did here.

37 The doctrine of attornment - if there is such a doctrine - has vague antecedents and seems to be a vestigial remnant of English feudal law pertaining largely to real property law. In Mozley & Whiteley's Law Dictionary (10th ed. by Professor E.R. Hardy Ivamy) one finds this useful explanation of the terms "attorn" and "attornment":

> 1. In feudal times a lord could not alienate or transfer the fealty which he claimed from a vassal without the consent of the latter. In giving this consent, the vassal was said to attorn (or turn over his fealty to the new lord), and the proceeding was called an attornment. This doctrine of attornment was extended to all lessees for life or years, and became very troublesome, until, by an Act of Queen Anne, attornments were made no longer necessary. By the Law of Property Act 1925, s. 151 the conveyance of a reversion

> is valid without any attornment of the lessee, and an attornment by the lessee, if made without the consent of the lessor, is void, except in certain cases.
>
> 2. To turn over or entrust business to another. Hence the word attorney is used to signify a person entrusted with the transaction of another's business.

38 I have examined several other Canadian and English law and general dictionaries and all of them have similar definitions or explanations of these terms. Most certainly, none of them suggests that there is a credible and recognized meaning given to attornment such as is argued by the Justice of the Peace.

39 It is true that one sometimes hears a lawyer using the term "attorn" in the sense of "attorning to the jurisdiction of the court" but that usage is colloquial and can only mean that a particular litigant is acknowledging that the court may adjudicate upon his rights. As used in this sense, **the attornment or submission of rights to a given court always assumes that the court otherwise has jurisdiction over the subject matter of the litigation** on accepted statutory or rule-of-practice principles.

40 Within the realm of criminal prosecutions, or provincial prosecutions, such as those at issue here, there is simply no room for dredging up a feudal property law concept as a basis for assuming jurisdiction. In short, no judge, at any court level, has the right to use such a relic of the past for the purpose of exercising jurisdiction - no matter how benevolent the purpose might appear. Either the jurisdiction is in the statute or it is not and attornment cannot assist.

In the second example, "attornment" is used in the *British Columbia Practice Notes* to explain the Supreme Court Rules of Civil Procedure for B.C. by The Continuing Legal Education Society of B.C. to practicing lawyers. Since *Mitchell* says this second definition's "*usage is colloquial*", it is odd that it is used here 20 times. I reproduce it in the **Appendix** merely to show the use of "attornment" in its second definition, as it is a *very* dry read!

The third example of attornment meaning "*The act of granting authority or jurisdiction to a party even though no legal rights exist"* is *R. v. BOTHWELL*[28]. In this case Hugh Bothwell refused to answer to the name on the Information which was styled as HUGH BOTHWELL. The Crown, court officer MR. MARTIN (note the style in ALL CAPS), stated at page 45:

> MR. MARTIN: Your Honour, I'm sorry I've got to rise and just indicate he has to understand that by coming across that bar he's attorning to the jurisdiction of the Court. Attorning means that he is before the Court, Your Honour has got that jurisdiction to find him guilty or not guilty and the bottom line is I can't sit here and have us not make sure that's on the record because that's what this is about. This is the fact that this Court has got to have jurisdiction over individuals and by coming across the bar he is before the Court. He is answering the name that, and he can refer to himself as anything he wants but he has to answer to that name, he has to come across into the jurisdiction of the Court. That's what the recognizance is talking about. That doesn't affect his charter rights, in fact his God-given rights. There is a jurisdiction issue here which is fundamental to all of us.

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[28] *HMTQ v. BOTHWELL*, http://www.wethepeoplepress.ca/georgehugh/2010Transcripts/20101102-JusticeThompson-Martin-GeorgeHugh-Proceedings.pdf

Attornment also has a **third** meaning. *The Law of Restitution*[29] says: "*it creates a right of property in a specific asset*." The owner of an office has a right of property to the profits of the office; one then **attorned** to that office if one **agreed** to receive income for that office. This also fits with *An Introduction to the Law of Restitution*[30], which says:

> "*I have no claim against you unless and until you have **attorned** to me; that is, until you have told me that you are holding (property) for me. Up to that **attornment** I have no standing*."

This **third** meaning also agrees with *The Law of Restitution*[31]:

> "***In cases of attornment it is essential to show the debtor assented to hold for the plaintiff's use**. In other words, the defendant must have "**by some act attorned**" to the plaintiff.*"

In summary, court attornment is a two-step process: 1) the individual grants jurisdiction to the court as *ITA* "officer" so he has standing to argue the proposed "facts" by CRA and Crown about that office; 2) the individual and officer in court can then assent or decline to receive income as Canada's "public money".

6 *ITA* Charges Against the OFFICER

Since the *CPP/EI/ETA/ITA "*officer" is the one who has gained the powers, privileges and duties of that office, by consenting to or filling out the T1, he has also used the privileges of that office by taking benefit and deductions[32] available on a T1 and related Schedules, then, as that officer, he also has to report all income of that office (remember the money filed on the T1 is "public money" and not his private property) and also has to pay a fee[33] (an income tax) for the privilege of using the benefits of that office. One would conclude that it is that *"*officer" that is charged with tax evasion and/or false information on a form. This fits with the name on a Summons as individual "John Doe", but the charged party on the Information as JOHN DOE, the *CPP/EI/ETA/ITA "*officer". (The individual John Doe is also liable as *ITA* "legal representative" unless he resigned, or never applied to be an *ITA* "legal representative").

7 Attorning to the ALL CAPS NAME on The INFORMATION

While the *ITA* can only *deem* individuals to be an *ITA* officer, Canada, like the U.S., has used a fact-based pleading system since around 1950. This lets Crown plead assumptions as so-called "facts" that the other side can admit or deny. Court discovery and plea bargaining are

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[29] *The Law of Restitution*, Goff and Jones, 6th Ed., 2002, page 686.

[30] *An Introduction to the Law of Restitution,* Peter Birks, 1989, page 134.

[31] *The Law of Restitution*, Goff and Jones, 6th Ed., 2002, page 686-687.

[32] *ITA s.18(1)(c)*: No deductions allowed if earning exempt income from a property source of income. Income from an office is a property source of income, since it belongs to the owner of the office.

[33] *FAA s.19.1*: Her Majesty may charge a fee for a privilege conferred by Her Majesty on a class of persons (such as *CPP/EI Act/ETA/ITA* officers?); for *the ITA* the fee schedule is at *ITA s.117*.

two indicators of a fact-based pleading system[34]. This fact-based pleading system also allows CRA agents to swear INFORMATIONS against taxpayers deemed as *CPP*/*EI*/*ETA*/*ITA* "officers", so JOHN DOE is the charged party for *CPP*, *EI*, *ETA* (GST) and *ITA* offences.

Individuals then attorn (the second meaning: "*The act of granting authority or jurisdiction to a party even though no legal rights exist*") to being such officers through an Initial Appearance to the INFORMATION. However, this does NOT automatically mean the taxpayer has agreed to receive income only as "public money" for Canada (the third meaning, which is assented to receive income for Her Majesty's office). Of course, if the taxpayer wanted to receive "public money", then attorning (the third meaning) is correct.

What if the taxpayer wished to receive only private property? Attorning to JOHN DOE means the officer is on trial, but that officer in court must also be there as an individual to think and speak for that officer, like a limited company in court must have a private person there as a company director to think and speak for the company, so the individual also has standing in court to claim his income as private property. This also fits with an *ITA s.248(1) "employee*" defined as "*employee includes officer*" since includes[35] means an *ITA* "employee" can be either its ordinary meaning, an individual who is not an *ITA* "officer", or it could be an individual that is an *ITA* "officer".

8 Are The Officer's Fiduciary Duties Always "On"?

Fiduciaries can be agents, officers or trustees. Lionel Smith in *The Motive, Not The Deed*[36] says the fiduciary relationship is best understood as premised on a **voluntary** undertaking to assume an office to which the law attaches fiduciary obligations, or, outside of that, on a **voluntary** undertaking to put another's interests ahead of one's own.

That makes sense since being a fiduciary places onerous legal duties on that fiduciary. It follows that an officer of Her Majesty owes a similar duty of loyalty to Her Majesty's office. But can an individual receive income in some situations as "public money" as an *ITA* "officer", and in other situations as private property, while not that officer?

Recall the individual must be in court to think and speak for any officer. The Supreme Court of Canada says, just because a person owes a duty of loyalty in respect of some things which he does, it does not follow that he owes a duty of loyalty in respect of everything that he does.[37] *ITA s.6(3)* says that an individual "*shall be deemed*" to be an officer "*unless it is*

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[34] *Federal Income Tax Litigation in Canada*, Christina Tari, at paragraphs 6.94 & 6.95

[35] *The Composition of Legislation*, Driedger, 2nd Ed,.1976, The Department of Justice: page 46: "***includes**: to retain the ordinary meaning of a word and add a meaning it does not normally have*" or "*to settle doubt whether a word means a particular thing.*"

[36] *The Motive, Not the Deed* by Lionel Smith, ; http://papers.ssrn.com/sol3/cf_dev/AbsByAuth.cfm?per_id=118243 ; His biography is at http://www.mcgill.ca/law/about/profs/smith-lionel

[37] *Hodgkinson v. Simms* [1994] 3 SCR 377, at page 464: "*not every act in a so-called fiduciary relationship is encumbered with a fiduciary obligation…*" http://canlii.ca/t/1frpl

established that, irrespective of the agreement, if any, it cannot reasonably be regarded as having been received as consideration for accepting the office or for services as an officer." Taking all these into account, one would conclude that an individual has a right to receive income in some situations as his private property and not as "public money" for Canada and, in other situations, receives income as "public money" as an *CPP/EI/ETA/ITA* officer. I will also show later that *Halsbury's Law of England*[38] also agrees with this conclusion.

9 Legal Standing in Court to Claim Private Property and/or "Public Money"

Most *ITA* "taxpayers" have *three* capacities[39]: 1) individual; 2) *ITA* "officer"; 3) *ITA* "legal representative". The first two gives the taxpayer standing to claim his private property earned as an individual and/or any "public money" earned for Canada as an *ITA* "officer". If he has a Social Insurance Number, he also has a third capacity, *ITA* "legal representative", and has to take liability for any offences found committed by the *ITA* "officer". All three *ITA* "persons" fit the *ITA* definition of "taxpayer": "*any person whether or not liable to pay tax*".

10 Tort of Theft by Conversion

A tort is "*a wrong or a **breach of duty** committed by some person which is legally wrongful to some other person*[40]". **Theft by conversion**, a *Criminal Code* s.322(1) offence, is a tort. Theft by conversion occurs when "*one engages in conduct which denies another person's **title** to goods*[41]". *Halsbury's Laws of England*[42] also says conversion is:

> "*Such action may take the form of an action for damages, and may succeed without proof of actual damage.*"

This could explain how Her Majesty has a right to recover Canada's "public money" in the Tax Court of Canada without having to prove that there was an actual loss.

Individuals expect to receive income as their private property, but *ITA* s.6(3) deems income to be received as *ITA* "officers" of Her Majesty as Canada's "public money". Only owners can consent to convert their private property into "public money"; as stated by the Supreme Court of Canada in *373409 ALBERTA LTD. v. BANK OF MONTREAL*[43]:

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[38] I did not use the current version of *Halsbury's Laws of Canada*, because it only has 2 pages on torts, whereas *Halsbury's Laws of England*, 1913 version has over 40 pages on torts (pages 461-503). See the background on *Halsbury's* at Wikipedia: https://en.wikipedia.org/wiki/Halsbury%27s_Laws_of_England

[39] "*When two rights concur in one person, it is the same as if they were two separate persons.*" Bouvier's Maxims of Law, 1856, 4 Co 118. The individual could have other capacities, i,e as agent of Her Majesty.

[40] *Halsbury's Laws of England*, 1913, Volume 27, Torts, page 463-464, para. 906.

[41] *384238 Ontario Ltd. v. Canada,* [1982] 1 F.C. 61

[42] *Halsbury's Laws of England*, 1913, Volume 27, para. 918

[43] *373409 ALBERTA LTD. v. BANK OF MONTREAL*, 2002 SCC 81, para. [8], http://canlii.ca/t/1fwx6

> "*An owner's right of possession includes the right to authorize others to deal with his or her chattel in any manner specified. As a result, dealing with another's chattel in a manner authorized by the rightful owner is consistent with the owner's right of possession, and does not qualify as* ***wrongful interference****. The principle is reiterated in A. Grubb, ed., The Law of Tort (2002), at para. 11.170:*
>
> > *No action lies in* ***conversion*** *or trespass to chattels for* ***consensual interferences*** *with goods: the nature of these torts involves wrongful interference with goods and an interference that is consented to cannot be wrongful. Consent may be express, as in a contract or agreement for bailment or lease,* ***or it may be implied from the circumstances****."*

To avoid having to explain how the *ITA* works to taxpayers (explaining how their private property gets converted into Canada's "public money" might discourage taxpayers from consenting to further conversions), CRA and Crown instead entice owners to "*imply from the circumstances*" they want to convert income into "public money" from the items listed below. Another reason is it is no defence to claim that the tort was committed in all innocence[44].

11 Evidence of Receiving Income as Canada's "Public Money"

Evidence of receiving income as "public money" and not as private property could be "*implied from the circumstances*" below:

1) Books and records showing income. If the records are silent, the numbers will be deemed[45] by *Interpretation Act* s.25(1) to be evidence of income received as "public money" and not as private property.
2) Bank statements. Again, if the records are silent[46], the cancelled cheques and deposits will be deemed by *Interpretation Act* s.25(1) to be evidence of income received as "public money" and not as private property.
3) T1 Return A T1 uses a "social insurance number" which identifies the *CPP*/*EI*/*ETA*/*ITA* "office" can only be used to report Canada's "public money" and not private property.
4) T1 reassessed at $1. Some taxpayers who received only private property filed T1 returns with $0. This could be ambiguous: does it mean the taxpayer intended to earn "public money" (and therefore filed a T1) but made $0 "public money", or does it mean the taxpayer intended to earn private property and not "public money" (and therefore filed

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[44] *373409 ALBERTA LTD. v. BANK OF MONTREAL*, 2002 SCC 81, para. [8], http://canlii.ca/t/1fwx6

[45] *Interpretation Act*, s.25(1): "*Where an enactment provides that a document is evidence of a fact without anything in the context to indicate that the document is conclusive evidence, then, in any judicial proceedings, the document is admissible in evidence and the fact is* ***deemed*** *to be established in the absence of any evidence to the contrary*": http://canlii.ca/t/52f1g

[46] Marking the deposited cheques, bank statements, and books and records as private property and not as *FAA* s.2 "public money" is one way to rebut the deeming in *Interpretation Act* s.25(1), as a way to claim the income as private property and that it is not public money.

$0)? CRA has changed some of these returns from $0 to $1. I think a $1 return could be evidence of intent to earn all income as "public money", underreporting, and tax evasion, if the taxpayer agrees to CRA's reassessment of $1.

5) Expense receipts. CRA helpfully files T1s for the taxpayer and deduct[47] expenses against gross income. If the taxpayer accepts[48] these expenses[49] (a benefit for the *ITA* "office"), the individual then consensually converts his own income into taxable income for the *ITA* "office", and his private property into "public money".

6) Benefits. CRA is extremely helpful in helping the taxpayer apply for any benefit that he qualifies for, such as GST rebates or child tax credits. If the taxpayer accepts *any* benefit for the *ITA* "office", he then consensually converts his own income into taxable income for the *ITA* "office", and his private property into "public money".

Since the typical taxpayer (and his lawyer) are usually silent and admit into court unmarked books, records, and bank statements, most also accept the T1s filed into court by CRA with expenses and benefits also filled in to propose[50] that the taxpayer wants the benefits of the *ITA* "office". Many taxpayers have even argued in court for higher deductions, confirming that they want a benefit available only to that office, and so consensually converted their private property into "public money", and their income into taxable income. The bottom line is, if the taxpayer is silent, then private property is consensually converted into "public money" and income into taxable income.

12 Tax Evasion: Both a Crime and a Tort

If the taxpayer is silent, private property is consensually converted into "public money", and income into taxable income. Now the situation is reversed; all income is Canada's "public money" and, if it is not reported accurately and on time, and a fee (an income tax) paid for use of the benefits of the *ITA* "office", then tax evasion and/or false information charges may be laid on the offending taxpayer, as Her Majesty is now the only one who can authorize conversion of her "public money" back into private property - and she does consent. (Her Majesty *does* allow the taxpayer to spend the net "public money" earned after the "office" rent (income tax) owed is subtracted, or paid. This is implied by conduct.)

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[47] *ITA s.18(1)(a) and 18(1)(c)*: can only deduct expenses if earning taxable income and not "exempt income"

[48] *R. v. Porisky & Gould*, 2012 BCSC 67, at [28] and [29]: "*Mr. Brunke then deducted the expenses of Paradigm which are summarized as follows*: (chart of expenses shown). *None of the above evidence was challenged by Mr. Porisky in cross- examination or in his own evidence."* Because he accepted a benefit for the office, Porisky consensually converted his income into taxable income, and his private property into *FAA* s.2 "public money", and therefore was properly found guilty of tax evasion. http://canlii.ca/t/fppg9

[49] In *R. v. Moman*, 2011MBCA 34, Moman filed T1 returns after CRA obtained a court order to force him to file returns, but he did not deduct any expenses. He was charged with false information on a form, but these charges were later dropped by Crown. Was this because accepting benefits is voluntary? http://canlii.ca/t/fl42k

[50] Due to Canada's fact-based pleading system (see Footnote 34), if the books, records, bank statements, and T1s presented by CRA in court are not rebutted, claimed as private property, and clarified, then the proposed "facts" by CRA legally stand as agreed to by both sides.

Because the deemed *ITA* "officer" is handling Canada's "public money", there is a breach of duty against the public, so tax evasion is both a crime and a tort. From *Halsbury's*[51]:

> "*The duty which is not fulfilled by the person committing the tort may be a duty imposed for the benefit of the public, and a breach of such duty may be an offence against the public, rendering the person committing it liable to legal punishment, at the same time that it is an offence against an individual giving him a right of civil action, and therefore the same act may be both a crime and a tort.*"

Applying the above quote to Canadian tax evasion, we have,

> The duty (reporting of all "public money") which is not fulfilled by the (deemed *ITA*"officer") may be a duty imposed for the benefit for the public, and a breach of such duty may be an offence against the public, rendering the (deemed officer) committing it liable to legal punishment, at the same time that it is an offence against (Canada) giving (Her Majesty) a right of civil action, and therefore the same act (tax evasion) may be both a crime and a tort.

Tax evasion therefore has to be adjudicated in two courts because first it has to determine if a crime has been committed against the public (Canada) before starting a civil action in Tax Court to recover Canada's "public money". This fits with *Halsbury's*[52]:

> "*It is the duty of every citizen to bring criminals to justice, and no court can fail to perform such duty. Therefore, when a civil action is started, the court before which the civil action is being heard may take judicial notice of the failure, if any, in the performance of such duty, which may be involved in proceeding with such action before the criminal has been punished, and* ***may refuse to allow such action to proceed until criminal proceedings have been taken***."

Substituting 'Her Majesty' for "every citizen" and 'Tax Court of Canada' (or "TCC") for "court before the civil action is being heard", we get:

> It is the duty of (Her Majesty) to bring criminals to justice, and no (provincial) court can fail to perform such duty. Therefore, when a civil action is started, the (TCC**)** may take judicial notice of the failure, if any, in the performance of such duty, which may be involved in proceeding with such action before the criminal has been punished, and **may refuse to allow such action to proceed until criminal proceedings have been taken**.

This mirrors tax evasion cases, as Crown puts the TCC civil action in abeyance pending the outcome of the tax evasion prosecution by using *ITA s.239.1(5)* "*when there has been a criminal charge for tax evasion on the same facts as the civil income tax appeal*[53]".

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[51] *Halsbury's Laws of England*, 1913, Volume 27, Torts, page 466, para. 908

[52] *Halsbury's Laws of England*, 1913, Volume 27, Torts, page 466, para. 908

[53] *Federal Income Tax Litigation in Canada*, Christina Tari, paragraph 10.12.2.

13 The Crime of Tax Evasion: in PROVINCIAL COURTS

The criminal court process in the PROVINCIAL COURTS determines from evidence at trial if the individual/officer consents being deemed by the *ITA* to convert his private property into "public money" for that office. This is silently *deemed* but never pleaded by the Crown.

The court also decides whether the taxpayer is guilty of tax evasion or false information on a return. The *ITA* taxpayer (both as individual and as *ITA* "officer") has a fiduciary duty to report all income[54] - the individual's private property and the officer's "public money". PROVINCIAL COURTS are not the forum to determine the taxability[55], but only whether all income was reported[56]. Due to the penal nature of tax evasion the Crown has to prove beyond a reasonable doubt both *mens rea* (guilty mind) and *actus rea* (guilty act).

14 Recovery of Canada's "Public Money": in Tax Court of Canada

In tax evasion trials the taxpayer usually consents, through silence or "*implied from the circumstances*" listed above, to convert his private property into "public money". After the PROVINCIAL COURT finds the taxpayer either guilty or not guilty of tax evasion, Her Majesty uses the Tax Court of Canada to recover Canada's "public money". This is why a not guilty verdict does not nullify a Tax Court civil action; what could nullify it is whether the taxpayer proved in PROVINCIAL COURT that his income stayed as his private property - and which is almost never addressed.

Recovering Canada's "Public Money"

Unjust enrichment is money gained by someone when they should not have, as the money was really for someone else. "Unjust" means the money is recoverable. Unjust enrichment is a common law remedy. Overlap between tort and unjust enrichment is common. For taxes in Canada, the Supreme Court of Canada in *Kingstreet*[57] established that taxes should be recovered by tort and not by unjust enrichment. Therefore, theft by tort of conversion is used in Canada to recover Canada's "public money". This recovery process is "disgorgement".

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[54] *ITA s.150(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.

[55] *HMTQ v. Redpath Industries Ltd. and Dominion Sugar Company Ltd.,* 84 DTC 6349

[56] If all "public money" was reported on a T1 with the "social insurance number" and all private property by letter with a Social Insurance Number, there would be no legal reason to charge the taxpayer with providing false information or with tax evasion. This result has been observed by multiple taxpayers. *ITA s.150(1)* requires returns of income to be filed **in** prescribed form and not **on** prescribed form; also, CRA's T1 forms have not been authorized by the Minister of National Revenue since 1991.

[57] *Kingstreet Investments Ltd. v. New Brunswick*, [2007] SCC 1: http://canlii.ca/t/1q7z6

Recovery by Disgorgement

Black's Law Dictionary, 9th Edition defines "disgorgement" as:

> **Disgorgement**: The act of giving up something (such as profits illegally obtained) on demand or by legal compulsion.

In Canada, there are three ways[58] to bring about disgorgement:

1) Accounting of profits (for trustees and agents) - here the obligation is primary from the responsibility of managing another's property. Once the profit is determined through the accounting, the defendant must surrender it.
2) Waiver of tort - plaintiff gives up the right to sue in tort and elects instead to base its claim on recovery of the money.
3) Constructive Trust - owes an obligation to another person to hold the benefit of that property for the other.

It seems that disgorgement of Canada's "public money" is through **all** three ways: 1) there is an accounting of profits through the TCC, where 2) Her Majesty also waives the right to sue in tort and instead seeks recovery of her "public money"; and 3) the *ITA* "officer" owes an obligation to others to hold the benefit of the "public money" for Canada, which arguably explains how CRA can legally issue Requirements to Pay on third parties.

Legal Excuse Against Theft by Tort of Conversion

Recall that theft by conversion is a *Criminal Code s.322(1)* offence. As a civil action, the standard of proof is a balance of probabilities. The TCC is a court of law and not a court of equity[59]. This fits as tort of conversion is a strict liability offense[60] which means there is no need to prove intent (a guilty mind) but only whether the act was done (or not done) so it is not a defense that the tort was committed in all innocence or that it was ordered by Crown or a superior office. The only defence to the tort of conversion is the **legal excuse** that he was not acting as an *ITA* "officer". From *Halsbury's*[61] again:

> "*There are cases in which the alleged tortfeasor is capable of acting in more than one capacity, and a* ***legal excuse*** *is available to him if he acts in one of those capacities and not if he acts in the other. In such cases it may be material to prove the intention to act in a particular capacity, and if it is shown that the tortfeasor acted maliciously and not in the exercise of his own rights, the basis of any alleged justification or excuse may cease to be available to him.*"

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[58] From: *Disgorgements of Profits in Canada* by Smith and Berryman; http://papers.ssrn.com/sol3/cf_dev/AbsByAuth.cfm?per_id=118243

[59] *Federal Income Tax Litigation in Canada*, Christina Tari, 2009, paragraph 5.14.3.

[60] *Boma Manufacturing Ltd. v. CIBC*, [1996] 3 SCR 727, at [31], page 746: http://canlii.ca/t/1fr4p

[61] *Halsbury's Laws of England*, 1913, Volume 27, Torts, page 468, para. 912.

Applying the above quote to Canadian tax evasion, we have,

> There are (tax evasion) cases in which the (individual) is capable of acting in more than one capacity, and a **legal excuse is available** to him if he acts (as an individual) and not if he acts (as an *ITA* "officer"). In such cases it may be material to prove the intention to act as (such an individual), and if it is shown that (such an individual) acted (to keep his property private), **the basis of a legal excuse is available to him**.

Therefore, a declaration, such as by a *Contract for Hire*™[62] that the income received was not "public money" as an *ITA* "officer", but as his private property, and avoidance of the items listed above which could be "*implied from the circumstances*" of receiving "public money", is the only legal excuse available to the taxpayer who wishes to receive his income as private property and not as "public money". This is summarized by *Halsbury's*[63]

> "*For the purpose of so carrying on his pursuits, every person has a right to enter into contractual relationship with any other person by means of a contract which is enforceable at law. Where such a contractual relationship exists, any person who wrongfully induces one of the parties to it to break the contract giving rise to the relationship so as to cause damages to the other party of the contract* ***commits a tort*** *in respect of which such other party has a right of action.*"

15 Conclusion

If an individual, "John Doe", answers in court during the Initial Appearance hearing to the name on the Information styled in all upper case, i.e., "JOHN DOE", the individual then has attorned (the second definition) to the court's jurisdiction and has also agreed to represent the *ITA* "officer". As the same "office" from the *ITA* is also used for the *CPP*, *EI Act*, and *ETA*, this also affects the officer's CPP and EI contributions, and GST remittances. The individual also has standing in court as he has to be there to think and speak for that officer.

Individuals who consent to receive income as "public money" as an *ITA* "officer" can also receive other income as their private property while not an *ITA* officer. The only legal excuse for tort of conversion is that the income was received while not an *CPP*/*EI*/*ETA*/*ITA* "officer". A *Contract for Hire*™, which states that it is not for the *CPP* office and is private property, should be sufficient, but the taxpayer must also be careful to not admit anything that can be *"implied from the circumstances"* as wishing to receive "public property" for Canada.

Tax evasion is adjudicated through PROVINCIAL COURT for criminal liability and TCC for civil liability. Her Majesty has to prove that the property in question is Canada's "public money"; if so, then the *ITA* "officer" has fiduciary duties to report all "public money" it is handling as it is an offence against the public if it was not all reported. The PROVINCIAL COURT is a court of common law and equity as it adjudicates whether the accused had a guilty mind and if it performed a guilty act. The TCC, a court of strict liability where innocence is no defence, recovers Canada's "public money" through disgorgement.

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[62] Common law trademark by Russ Porisky *aka* Paradigm Education Group.

[63] *Halsbury's Laws of England*, 1913, Volume 27, Torts, pages 475-476, para. 927

APPENDIX

British Columbia Practice

CIVIL RULES

Rules 21-24

Part 21 - Special Rules for Certain Proceedings

Rule 21-8 Jurisdictional Disputes

(5) Party does not submit to jurisdiction

If, within 30 days after filing a jurisdictional response in a proceeding, the filing party serves a notice of application under subrule (1)(a) or (b) or (3) on the parties of record or files a pleading or a response to petition referred to in subrule (1)(c),

(a) the party does not submit to the jurisdiction of the court in relation to the proceeding merely by filing or serving any or all of the following:

(i) the jurisdictional response;

(ii) a pleading or a response to petition under subrule (1)(c);

(iii) a notice of application and supporting affidavits under subrule (1)(a) or (b), and

(b) until the court has decided the application or the issue raised by the pleading, petition or response to petition, the party may, without submitting to the jurisdiction of the court,

(i) apply for, enforce or obey an order of the court, and

(ii) defend the proceeding on its merits.

[R. 21-8(5) is derived from SCR 1990, R. 14(6.4).]

Applications under Rule 21-8(1) and Rule 21-8(3) do not, under the domestic rules of the British Columbia court, as set out in Rule 21-8(5), constitute submission to the jurisdiction of the court. While this is true for British Columbia, the defendant in a British Columbia action served *ex juris* must consider the rules of the jurisdiction in which the defendant possesses assets which might be the target of a successful British Columbia judgment creditor's attempt to satisfy a British Columbia judgment: *Henry v. Geopresco International Ltd.*, [1975] 2 All E.R. 702, [1975] 3 W.L.R. 620 (C.A.). In *Petersen v. AB Bahco Ventilation*, [1979] B.C.J. No. 2101 , 107 D.L.R. (3d) 49 (S.C.), the plaintiffs issued and served Swedish defendants *ex juris* pursuant to what is now (approximately) Rule 4-5(1). The Swedish defendants applied for a declaration concerning jurisdiction under SCR 1990, Rule 14(6)(c), as it read until 2003. At the hearing the plaintiffs sought an amendment and the defendants sought an adjournment to consider whether they should oppose the amendment as they were concerned that their participation in the argument concerning the amendment might be construed in Sweden as attornment to British Columbia's jurisdiction. Though the defendants ultimately elected not to oppose, one commentator has offered the opinion that by the very act of seeking a declaration under SCR 1990, Rule 14(6)(c), they had already, for the purpose of their domestic

jurisdiction (Sweden) (although clearly not for British Columbia) attorned to the jurisdiction of the British Columbia courts; see Elizabeth Edinger, "Discretion in the Assumption of Jurisdiction in British Columbia" (1982) 16 U.B.C. L. Rev. 1 , at 32. The significance of British Columbia's domestic law on attornment, as regards enforcement of judgments of the court in other provinces, is not what it once was, however, because Canadian courts now recognize judgments granted in other provinces if there is a real and substantial connection between the damages suffered and the jurisdiction in which the judgment is obtained, even if the defendant did not attorn to the jurisdiction of the court of the other province; see *Morguard Investments Ltd. v. De Savoye*, [1990] S.C.J. No. 135 , [1990] 3 S.C.R. 1077 , 52 B.C.L.R. (2d) 160 . Attornment to the jurisdiction may be of greater significance if the plaintiff seeks to enforce a judgment of the court in a jurisdiction outside of Canada that has not adopted (as the Supreme Court of Canada has in *Beals v. Saldanha* , [2003] S.C.J. No. 77 , [2003] 3 S.C.R. 416) the "real and substantial connection" test for the recognition of foreign judgments.

The strict common law rule was that any submission to the jurisdiction of the court that was not made under duress (in the form of seizure by process of property of the protesting party which was in the custody of the foreign court) was considered to have been made voluntarily. Any confusion or uncertainty arising from decisions, regarding the extent to which the strict common law rule had been varied, has been settled in British Columbia for British Columbia purposes by the *Rules of Court*. Rule 21-8(1) provides for a challenge to the jurisdiction of the court and Rule 21-8(3) provides for an order setting aside an originating pleading or a petition on the basis that it is invalid, has expired, or that the purported service of the process was invalid. In both cases, a jurisdictional response in Form 108 must be filed and a notice of application and supporting affidavit filed (Rule 21-8(1)(a) or (b) or Rule 21-8(3)) or a pleading filed raising the issue of jurisdiction (Rule 21-8(1)(c)) but pursuant to Rule 21-8(5), this does not constitute, under British Columbia domestic law, a submission to the jurisdiction of the court if done within 30 days of the filing of the jurisdictional response. These provisions of the *Supreme Court Rules of Civil Procedure* are properly regarded as legislated exceptions to the strict common law rule, which otherwise prevails, that unless an appearance before the court was made under duress, it will be regarded as voluntary: *Mid-Ohio Imported Car Co. v. Tri-K Investments Ltd.*, [1995] B.C.J. No. 2199 , 13 B.C.L.R. (3d) 41 (C.A.). See too; *Imagis Technologies Inc. v. Red Herring Communications, Inc.*, [2003] B.C.J. No. 533 , 15 C.C.L.T. (3d) 140 (S.C.).

Steps taken in relation to litigation commenced in British Columbia generally do not constitute attornment to the jurisdiction of the court if the defendant has not filed documents with the court. A written admission of service by a solicitor does not constitute attornment: *Alcor Pacific Lumber Sales Ltd. v. Janet Lumber Trading Co.*, [1977] A.J. No. 778 , 82 D.L.R. (3d) 196 (S.C.). Where an insurance company provides a defence in the name of the insured pursuant to a contractual obligation under an insurance policy, this does not constitute attornment to the jurisdiction of the court for the purpose of a separate but related proceeding against the company brought by the same plaintiff: *Van der Est v. State Farm Fire and Casualty Co.*, [1983] B.C.J. No. 1796 , 45 B.C.L.R. 133 (S.C.). Acceptance of service by a defendant does not place him or her under a positive duty to inform the plaintiff that he or she is not submitting to jurisdiction. Silence on the part of the defendant should not make effective what is otherwise invalid. Mere acceptance of service does not itself amount to attornment, and failing to notify the plaintiff of this does not amount to "lulling the plaintiff to sleep": *Jordan v. Schatz*, [2000] B.C.J. No. 1303 , 77 B.C.L.R. (3d) 134 (C.A.).

An application to set aside a default judgment and damage assessment on the basis of impugned service is not a matter going to the merits of the claim, and does not result in an attornment: *Balla v. Fitch Research Corp.*, [2006] B.C.J. No. 623 , 2006 BCSC 275 . Similarly, an application to set aside an *ex parte* garnishing order that does not go the merits of the claim does not amount to an attornment to the jurisdiction (although in the event, the defendant was protected by Rule 21-8(5), having filed the necessary pleadings disputing the court's jurisdiction simpliciter within 30 days of entering an appearance, the procedure then in effect): *Iskander and Sons, Inc. v. Haghighat*, [2007] B.C.J. No. 1187 , 48 C.P.C. (6th) 102 , at paras. 27-30 (S.C.).

If the plaintiff falls within Rule 21-8(1) and Rule 21-8(5) (meaning that an application challenging jurisdiction is delivered within 30 days after filing a jurisdictional response in Form 108 or a pleading raising a jurisdictional issue is filed within that 30-day period), the issuing of a demand for discovery for documents, or the filing of an application asking the court to decline jurisdiction, does not constitute an attornment to the jurisdiction of the court: *Borgstrom v. Korean Air Lines Co.*, [2007] B.C.J. No. 878 , 46 C.P.C. (6th) 58 (C.A.) (in which, however, the issue was the effect of pleading to the merits in a statement of defence). Earlier decisions suggested that the filing of court documents, other than the documents referred to in Rule 21-8(5), generally constitute an attornment to the jurisdiction of the court; see *O'Brien v. Simard*, [2006] B.C.J. No. 1154 , 55 B.C.L.R. (4th) 384 , at paras. 22-23 (S.C.), and following that decision, *Coulson Aircrane Ltd. v. Pacific Helicopter Tours Inc.*, [2006] B.C.J. No. 1420 , 57 B.C.L.R. (4th) 226 , at paras. 38-45 (S.C.), both of which were treated, however, by the Court of Appeal in *Borgstrom* as decisions in which the issue taken before the chambers judge pertained only to whether or not the court ought to decline jurisdiction on the basis of *forum non conveniens*. As a party who falls within Rule 21-8(5) is permitted to "apply for, enforce or obey an order of the court" (which ostensibly includes an order declining jurisdiction) and "defend the proceeding on its merits" (which ostensibly includes availing oneself of discovery procedures), the conclusions in *O'Brien v. Simard*, *supra*, and *Coulson Aircrane Ltd. v. Pacific Helicopter Tours Inc.*, *supra*, even if not directly rejected by the Court of Appeal in *Borgstrom*, *supra*, appear to be incorrect.

Rule 21-8(1)(c) permits a party to "allege in a pleading or in a response to petition that the court does not have jurisdiction over that party in respect of the claim made against that party in the proceeding". A party does not submit to the jurisdiction of the court "merely" by filing "a pleading or a response to petition under subrule (1) (c)": Rule 21-8(5)(a)(ii). On a literal reading of these provisions, a party who files a response to civil claim that raises substantive defences that go to the merits of the action does not attorn to the jurisdiction of the court if the response to civil claim also raises the issue of jurisdiction. That was the conclusion arrived at by the Court of Appeal in *Borgstrom v. Korean Air Lines Co.*, [2007] B.C.J. No. 878 , 46 C.P.C. (6th) 58 , at paras. 18-21 (C.A.), wherein the court also rejected the submission that the jurisdictional challenge must have "a degree of substance sufficient to underpin an argument against territorial competence". This conclusion contrasts with the statement made in *Coulson Aircrane Ltd. v. Pacific Helicopter Tours Inc.*, [2006] B.C.J. No. 1420 , 57 B.C.L.R. (4th) 226 , at para. 37 (S.C.), wherein the chambers judge asserted that a pleading must be confined to the jurisdictional issue if the defendant is to avoid attornment, although since, during the course of submissions, the defendant conceded that the court had jurisdiction *simpliciter*, and the basis of the application was *forum non conveniens*, the Court of Appeal in *Borgstrom*, characterized the case as one in which "it appears that the issue taken before the Supreme Court judge pertained only to whether or not the Court ought to decline jurisdiction on the basis of *forum non conveniens*". What was, at the minimum, a judicial statement in *Coulson* concerning the effect of pleading the merits of the case was criticized in a previous service issue of the text (preceding *Borgstrom*), on the basis that to interpret the combination of what are now Rule 21-8(1)(c) and Rule 21-8(5) in a manner that restricts a response to civil claim to jurisdictional issues until after the issue of jurisdiction is resolved (unless there is to be attornment to the jurisdiction), after which there would have to be an amendment of the response to civil claim to raise the substantive grounds on which the claim is resisted, would be inconsistent with the object of the Supreme Court Civil Rules which is stated in Rule 1-3(1) to be "to secure the just, speedy and inexpensive determination of every proceeding on its merits".

Once a defendant attorns to the jurisdiction of the court to deal with an action brought by existing plaintiffs, that attornment is an attornment for the purposes of the action as a whole, with the result that considerations of *forum non conveniens* may not be raised in relation to a plaintiff subsequently added on an application under Rule 6-2(7) in face of opposition by the defendant. To allow the issue of *forum non conveniens* to be considered after joinder of a plaintiff would be to treat the attornment of the defendant to the jurisdiction of the court in a "piecemeal fashion". When the defendant submitted to the jurisdiction of the court to have the issues in the action heard and determined, that included the addition of parties under Rule 6-2(7)(c): *Han v. Cho*, [2006] B.C.J. No. 2918 , 62 B.C.L.R. (4th) 358 , at paras. 59-61 (S.C.)).]