ONTARIO

SUPERIOR COURT OF JUSTICE

Judges' Administration
Court House
361 University Avenue
TORONTO, ONTARIO M5G 1T3
Tel: 416-327-5284 Fax: 416-327-5417

FAX COVER SHEET

Date: Feb. 19. 2008

TO: C. Walsh
P. Perlmutter
A. Graburn
S. Fenton 416.955.1237
A. Cooper, Q.C. 416.408.2372
P. West 416.364.7473
E. Levy, Q.C. 416.979.1234
J. Keefe + J. Rosenthal 416.979.1234
T. O'Sullivan + R. Di Pucchio 416.598.3730
C. Falcao + R. Stephenson 416.646.4301
I. Kozierocki 416.364.7473

FAX NO.: 6-4656

From: Mr. Justice Nordheimer

TOTAL PAGES (INCLUDING COVER PAGE): Thirty Seven

MESSAGE:

DATE: 20080219

ONTARIO

SUPERIOR COURT OF JUSTICE
Toronto Region

[*Note: These proceedings are governed by a non-publication order under section 539 of the Criminal Code respecting the evidence taken at the preliminary inquiry*]

COURT FILE NO.: M123/07

B E T W E E N:	)	
	)	
HER MAJESTY THE QUEEN	)	*C. Webb, P. Perlmutter & A. Graburn*, for the respondent
	)	
Respondent	)	
	)	
- and -	)	
	)	
EDWARD LANG	)	*S. Fenton,* for the applicant
	)	
Applicant	)	

COURT FILE NO.: M124/07

B E T W E E N:	)	
	)	
HER MAJESTY THE QUEEN	)	*C. Webb, P. Perlmutter & A. Graburn*, for the applicant
	)	
Applicant	)	
	)	
- and -	)	
	)	
DALE SISEL, JAAP UITTENBOGAARD, PIERRE BRUNELLE, PAUL NEUMANN, ROLAND KOSTANTOS and PETER MacGREGOR	)	*A. Cooper Q.C. & P. West,* for Dale Sisel
	)	*E. Levy Q.C.*, for Jaap Uittenbogaard
	)	*J. Keefe & J. Rosenthal,* for Pierre Brunelle

	)	
	)	*T. O'Sullivan & R. Di Pucchio,* for Paul
	)	Neumann
	)	
	)	*C. Paliare & R. Stephenson,* for Roland
	)	Kostantos
	)	
	)	*I. Koziebrocki,* for Peter MacGregor
	)	
Respondents	)	
	)	
	)	**HEARD:** December 17, 18 & 19, 2007 and
	)	January 17, 2008

NORDHEIMER J.:

[1] There are two applications, both seeking orders in the nature of *certiorari* respecting decisions made in the Ontario Court of Justice after the completion of a preliminary inquiry. Mr. Lang's application seeks to quash the order by which he was committed to trial on seven counts[1] – one count of conspiracy to commit fraud over $5,000 and possession of property and/or proceeds of crime and six counts of fraud over $5,000, all contrary to the *Criminal Code*. The Crown's application seeks to quash the orders by which Messrs. Sisel, Uittenbogaard, Brunelle, Neumann, Kostantos and MacGregor were discharged on those same counts. There was also an application by JTI-Macdonald Corp. (formerly known as RJR-Macdonald Inc.) for an order quashing its committal to trial on the same counts but that application was abandoned immediately prior to it being heard.

[2] I intend to deal with the two applications in the same order that they were argued, that is, I will deal with the Crown's application first. However, the background facts are common to both applications so I begin by setting out those facts. I do not intend to recite the background facts in minute detail as I do not consider that to be necessary for the proper determination of these applications. I would also note, as did the preliminary inquiry judge, that it does not appear that the material facts are greatly in dispute. When I say that, I recognize that the respondents take issue with much of what the Crown says can be taken from those facts. However, that

---

[1] The Crown has reconstituted the charges into eleven counts on the Indictment.

disagreement revolves almost entirely around the inferences and/or conclusions that can be drawn from the facts rather than any disagreement with the facts themselves. As the background facts are set out most comprehensively in the Crown's factum on its application, my recitation borrows heavily from that source.

Background

[3] The events underlying the charges date back to the early 1990's. JTI-Macdonald Corp. was one of three major Canadian tobacco manufacturers. The other two were Imperial Tobacco Limited and Rothmans, Benson & Hedges. JTI's ultimate parent company was a U.S. company, RJR Nabisco Inc.

[4] Apparently, Canadian made cigarettes have a distinct flavour that appeals to Canadian smokers but not to U.S. smokers. Canadian made cigarettes had, therefore, for all practical purposes a single market – Canada.

[5] In the early 1990's, the Federal and Provincial governments raised tobacco taxes and duties in an effort to reduce smoking in Canada. This effectively increased the retail price of cigarettes and, as that price increased, purchases of Canadian made cigarettes decreased. The tax increases also meant that the retail price of Canadian cigarettes increased over the price of U.S. made cigarettes. It is of particular importance to the issues raised in these applications to note that the increase in the Federal and Provincial taxes did not apply to Canadian made cigarettes exported from Canada. Therefore, Canadian made cigarettes were cheaper to purchase outside of Canada than they were within Canada.

[6] As a direct consequence of this price differential, an increase occurred in the smuggling of Canadian made cigarettes from the U.S. into Canada for sale on a "contraband" or "black" market. A focal point of this smuggling was the Akwesasne First Nations reserve that straddles the U.S./Canada border in and around the area of Cornwall, Ontario.

[7] In early 1992, JTI was losing Canadian market share to its competitors. JTI's data indicated that this loss in market share was attributable to a greater level of export sales by its two competitors. At this time, it was well-known that export sales by Canadian cigarette manufacturers were the principal source of the cigarettes that were being smuggled into Canada.

In response to this competitive disadvantage, JTI set out to increase its export sales of Canadian made cigarettes.

[8] In order to increase its export sales, JTI needed to find customers in the U.S. It was widely known that the principal customers in the U.S. for Canadian made cigarettes were companies who were selling those cigarettes to people who, in turn, supplied the cigarettes to smugglers. For example, as events transpired, JTI's newest and largest customer in the U.S., LBL, sold all of the product that it purchased from JTI into the Akwesasne First Nations reserve, of which almost all (95%) was sold to one person, Hart. Hart, in turn, sold these cigarettes exclusively to smugglers.

[9] Edward Lang was the Chief Executive Officer of JTI. He was also Chairman of JTI's Operating Committee that included all of the JTI Vice-Presidents. Pierre Brunelle was the President and Vice-President Operations of JTI. He oversaw the manufacture of the products and their export to the U.S. Paul Neumann was the Vice-President Finance. Roland Kostantos was originally Director of Finance but subsequently replaced Neumann as Vice-President Finance in October 1994. They were responsible for managing JTI's financial affairs, including the approval of pricing. Stanley Smith, was Vice-President Sales and was responsible for overseeing sales to U.S. based wholesalers such as LBL. Mr. Smith subsequently pleaded guilty to one count of conspiracy arising out of these events and gave evidence for the prosecution at the preliminary inquiry.

[10] In February 1992, the Federal government imposed, for a brief time, an $8.00/carton export tax on cigarettes manufactured in Canada and exported to the U.S. The tax was suspended in April 1992. The export tax virtually eliminated the price differential between Canadian tobacco products purchased in the U.S. and Canada. Its purpose was to eliminate the incentive to smuggle. To avoid the export tax, JTI shifted some production of cigarettes to a plant located in Puerto Rico. All of the cigarettes produced in Puerto Rico were sold to U.S. distributors who serviced the Akwesasne contraband market. Also in response to the export tax, JTI set up a fine cut production facility within the U.S. to meet customer demand.

[11] As JTI's export sales into the U.S. continued to increase throughout 1992, media reports and complaints from Canadian wholesalers regarding smuggling also grew. It is asserted by the

prosecution that, in order to distance JTI from these issues and to avoid customer specific packaging codes designed to assist law enforcement to track and trace the source of contraband seizures, a new company, NBI, was incorporated in the U.S. Once operational, NBI serviced U.S. distributors like LBL that were formerly JTI direct accounts. NBI employees included Les Thompson, Director of Sales, and Peter MacGregor, Manager, Finance and Administration. Thompson dealt with customers and MacGregor managed NBI's financial affairs and looked after the paperwork. MacGregor also directly managed Jr. Attea's account. Jr. Attea was JTI's second largest U.S. distributor servicing Akwesasne, after LBL. Thompson reported to Smith and MacGregor reported to Kostantos.

[12] Throughout the material times, JTI reported to RJR Tobacco International. JTI had to submit Operating and Strategic Plans to RJRTI for approval on an annual basis. Indeed, JTI's plans could not be implemented without RJRTI's approval. Dale Sisel was the Chief Executive Officer of RJRTI and Jaap Uittenbogaard was the Chief Financial Officer. They were the RJRTI executives responsible for approving JTI's plans during the material times. All of Lang, Brunelle, Neumann, Smith, and Kostantos (after he assumed the position of VP Finance in 1994) were responsible for producing the plans and submitting them for approval.

[13] The necessary approvals from RJRTI were obtained through presentations to Sisel and Uittenbogaard. These presentations explained in some detail that JTI products were being sold to a small group of U.S. distributors who were, in turn, selling onto First Nation reserves that resulted in the product then being smuggled back into Canada and sold on the contraband market. Sisel and Uittenbogaard were also advised that this smuggling activity was depriving Canadian governments of substantial tax revenues. Sisel and Uittenbogaard consistently approved JTI's plans. The approval process included draft reviews by Sisel and Uittenbogaard and the provision of feedback and/or suggested revisions. Sisel and Uittenbogaard were also provided with regular updates regarding JTI's business, through weekly briefings and business updates. It should be noted that JTI, and latterly NBI, were considered the most profitable sector in the RJR-Nabisco group of companies.

[14] Throughout the material times, there was intense media scrutiny of the smuggling phenomenon. Media reports questioned the legality of the business and noted that the Federal

and Provincial governments were losing hundreds of millions of dollars of revenue. Smith, Neumann and Kostantos often discussed their concerns about the legality of what JTI was doing, because such a large percentage of JTI's sales were into the Akwesasne market. Smith often raised his concerns with Lang, alone and during Operating Committee meetings. Lang consistently reassured him that the business was legal. Lang said that their U.S. customers were legally licensed; that their competitors Imperial and Rothmans were doing the same thing; that this business evolved from wild tax differences between two borders; and that this was not unlike how RJRTI did business in other parts of the world. Brunelle shared Lang's views in this regard.

[15] On February 27, 2003, the information was sworn by which the above-noted charges were laid against JTI and the seven employees.

Basic Principles

[16] Before turning to the actual applications, it would perhaps be helpful to set out the basic principles that apply to preliminary inquiries and to the review of a preliminary inquiry judge's conclusions. As was the case with the background facts, there does not appear to be any disagreement among the parties as to what those principles are. Many of those principles were correctly set out by the preliminary inquiry judge in this case. Rather, the divergence among the parties appears to arise from disagreement over what constitutes the proper application of those principles.

[17] Those basic principles, as established by the Supreme Court of Canada, are:

(a) The purpose of the preliminary inquiry is to ensure that there is sufficient evidence to commit the accused for trial – see *R. v. Sazant* (2004), 208 C.C.C. (3d) 225 (S.C.C.).

(b) The preliminary inquiry serves a screening purpose – see *R. v. Russell*, [2001] 2 S.C.R. 804.

(c) The test for committal is not an onerous one. The judge must commit if, looking at the case as a whole, there is any evidence upon which a properly instructed jury, acting reasonably, could return a verdict of guilt – see *R. v. Arcuri* (2001), 157 C.C.C. (3d) 21 (S.C.C.).

(d) Where there is direct evidence on each essential element of an offence charged, then the judge is required to commit the accused to stand trial on that charge – see *R. v. Arcuri, supra.*

(e) Where the evidence is circumstantial, the judge must engage in a limited "weighing" of the evidence, but may not draw factual inferences or assess credibility. The judge asks

only whether the evidence, if believed, could reasonably support an inference of guilt – see *R. v. Arcuri, supra.*

(f) A preliminary inquiry judge is not permitted to assess credibility or reliability, and where more than one inference can be drawn from the evidence, only the inferences that favour the Crown are to be considered – see *R. v. Sazant, supra.*

(g) The scope of review of an order of committal is "extremely narrow". It lies only where the committing judge committed a jurisdictional error – see *R. v. Sazant, supra.*

(h) It is jurisdictional error for the preliminary inquiry judge to fail to consider the whole of the evidence – see *R. v. Deschamplain* (2004), 196 C.C.C. (3d) 1 (S.C.C.).

(i) A reviewing court is not entitled to substitute its opinion on the sufficiency of the evidence for the opinion of the preliminary inquiry judge – see *R. v. Deschamplain, supra.*

(j) A preliminary inquiry judge may fall into jurisdictional error by misapprehending the elements of the offence charged or giving effect to a non-existent defence – see *R. v. Russell, supra.*

(k) It is jurisdictional error for a preliminary inquiry judge to act arbitrarily – see *R. v. Dubois* (1986), 25 C.C.C. (3d) 221 (S.C.C.).

(l) While there is no requirement for fulsome reasons, there must be some indication in the reasons of the preliminary inquiry judge that the mandatory requirement of the *Criminal Code* that the whole of the evidence be considered, has been complied with – see *R. v. Deschamplain, supra.*

A. <u>The Crown's application</u>

[18] The Crown seeks to quash the discharge of the six respondent employees – four of whom were below Mr. Lang in the corporate hierarchy and two of whom were above him. In considering this application, I view it as simpler to proceed on the assumption that there is some evidence that the asserted offences may have been committed. In other words, I proceed on the assumption that JTI was properly committed for trial on the offences. The question raised by the Crown's application is whether that same test is met with respect to each of these employees. The broader issue, whether there exists the minimum evidentiary foundation for the offences, is one whose determination more readily falls to be determined under Mr. Lang's application. Indeed, that is how the argument of the two applications proceeded before me.

[19] As earlier noted, JTI was committed for trial. Six of the seven employees who were charged were discharged. In considering the issue of committal as it relates to each of these six employees, it is useful to repeat the reasoning by which the preliminary inquiry judge reached the conclusion that JTI should be committed for trial. By way of clarification regarding the

preliminary inquiry judge's reasons, I repeat that JTI was formerly known as RJR-Macdonald. The preliminary inquiry judge said, at para. 55:

> "There is ample evidence that in response to increased tobacco taxes that had an adverse impact on its traditional domestic sales, as well as in response to the participation of its competitors in the Canadian contraband market, RJR-Macdonald adopted a corporate policy that sought to maintain or enhance its market share and increase its earnings by selling its products to distributors in the United States, who, it was generally known, sold to wholesalers or retailers on native reserves in New York State who in turn supplied smugglers operating at Akwesasne. It would be open to a trier, in my view to characterize as dishonest or dishonourable the corporate dealings that knowingly facilitated the smuggling of products into Canada and their sale, without taxes being paid, in the black market here. ... That it was common knowledge that their distributors sold the products to third parties who then smuggled them across the border into Canada did not, according to the company's policy, impose any obligation to eschew such business. RJR-Macdonald is clearly entitled to asset that position, but I think it is, equally clear, a matter for the trier chosen by the accused to determine whether it precludes the finding of dishonesty that the trier, if it rejects the company's contention, would be entitled to make."

[20] The preliminary inquiry judge addressed the requirement of dishonesty as an essential element of the offence of fraud in the following way, at para. 58:

> "The finding of dishonesty could reasonably be made, in my opinion, notwithstanding the evidence that those export sales were duly reported to the Government, that it was common knowledge that increasing taxes would encourage smuggling, that the Government participated in the discussions with RJR-Macdonald and the other tobacco manufacturers as to how to respond to the problem that had developed, largely as a result of its own tax policies, rather than halting exports or suspending their manufacturing licences."

[21] He concluded his analysis on this issue in the following terms, at para. 59:

> "Whether RJR-Macdonald's conduct is properly characterized as merely sharp practice, in the sense of taking advantage of a business advantage to someone else's detriment, rather than actual fraud, is again, I think, a factual issue to be determined at trial. The evidence given by the RJR-Macdonald employees called as Crown witnesses that they never participated in any fraudulent enterprise and that they understood that the company's conduct was honest and lawful could, of course, be accepted by the trier, but it could also, I think, be rejected as self-serving, deliberately delusional, or otherwise erroneous."

(i) Dale Sisel and Jaap Uittenbogaard

[22] As earlier noted, Mr. Sisel was the Chief Executive Officer of RJRTI, the immediate parent of JTI, and Mr. Uittenbogaard was the Chief Financial Officer of RJRTI. Mr. Lang reported to Mr. Sisel. While the preliminary inquiry judge considered Mr. Sisel together with Mr. Uittenbogaard in reaching his conclusions (as the prosecution had in their submissions), his reasons nonetheless make it clear that he considered the evidence separately regarding each of them, as he was required to do. The evidence against both is, however, virtually identical. I intend, therefore, to also consider the two individuals together for the purposes of this application.

[23] In discharging Mr. Sisel and Mr. Uittenbogaard, the preliminary inquiry judge said, at para. 63:

> "In my view, the evidence on which the Crown relies goes no further than demonstrating that while Mr. Sisel and Mr. Uittenbogaard may have acquired the same awareness of RJR-Macdonald's involvement in the now impugned business that was common knowledge at the time, there is no evidence that either person did or said anything to dictate or encourage any particular course of conduct, or otherwise interfered in RJR-Macdonald's affairs in any way apart from supporting the general encouragement to increase earnings that one might expect from any corporate parent to convey to its subsidiary."

[24] I pause at this juncture to make an observation regarding the preliminary inquiry judge's reasons that has ramifications for both of these applications. There are many instances in the reasons where the preliminary inquiry judge refers to "no evidence" and others were he refers to the evidence being "insufficient". There is, of course, a very significant difference between these two findings. The former is subject to review as to jurisdiction whereas the latter is not. The variance in the preliminary inquiry judge's use of this terminology is unfortunate given that legal consequence. It ultimately drove some of the respondents' counsel to take the position that the preliminary inquiry judge's references to "no evidence" were, in effect, references to the evidence being insufficient. I am not convinced that the equivalence urged by the respondents can be safely accepted. Certainly, I am not convinced of that proposition in the case of Mr. Sisel and Mr. Uittenbogaard especially given the uncompromising terms of the preliminary inquiry judge's concluding reasons.

[25] The preliminary inquiry judge, at para. 65, concluded his findings regarding Mr. Sisel and Mr. Uittenbogaard in the following clear-cut terms:

> "... there is no evidentiary basis for any inference that either the CEO or CFO of RJR-TI, preoccupied as they were with a worldwide business involving thousands of employees, played any role at all in the Canadian subsidiary's cross-border activities. There is no evidence that either person had knowledge of the particular distributors involved or any reason to doubt the legality of RJR-Macdonald's business that was carried on without any intervention by the Canadian authorities that, had it occurred, might have alerted them to the difficulties that RJR-Macdonald now faces."

[26] With respect, there was an evidentiary basis that might have allowed for such an inference to be drawn. There was evidence that:

(a) Sisel and Uittenbogaard had to review and approve JTI's annual Operating Plans before they could be implemented;
(b) Sisel and Uittenbogaard were in attendance at presentations regarding those plans where the plans indicated that JTI was going to meet its earnings targets by "exploiting" the contraband market;
(c) Sisel and Uittenbogaard were informed during presentations and in the plans themselves how this was to be done, i.e., JTI would export its products to a small group of U.S. distributors who only sold to wholesalers or retailers on Native reserves who in turn only supplied smugglers operating on the Akwesasne reserve;
(d) Sisel and Uittenbogaard were informed that JTI's product was being smuggled back into Canada through a variety of means and subsequently sold via the black market;
(e) Sisel and Uittenbogaard were informed that the smuggling activity was depriving Federal and Provincial governments of billions of dollars in tax revenue;
(f) After approving the plans of JTI, Sisel and Uittenbogaard incorporated JTI's plans into RJRTI's plans that were then submitted to their parent company, RJR Nabisco, for approval.

[27] Given the preliminary inquiry judge's conclusions, it is first difficult to see the distinction between Mr. Sisel and Mr. Uittenbogaard on the one hand and Mr. Lang on the other. While Mr. Lang may have had more detailed information on JTI's plans, the critical aspects of those plans as they purport to establish fraud and a conspiracy to defraud were equally known to all three. There is no evidence to suggest that Mr. Lang had any more reason to "doubt the legality" of JTI's business than did Mr. Sisel or Mr. Uittenbogaard. It is also not clear why it would be necessary for Mr. Sisel and Mr. Uittenbogaard to have "knowledge of the particular distributors involved" in order to be parties to any conspiracy to defraud.

[28] The most significant evidence for current purposes is the fact that JTI could not proceed with its plans without the approval of RJRTI through Mr. Sisel and Mr. Uittenbogaard. Given that reality, and given the information that Mr. Sisel and Mr. Uittenbogaard had, it is difficult to see how the conclusion could be reached that there was "no evidence that either person did or said anything to dictate or encourage any particular course of conduct". It is equally difficult to see how it could be concluded that there was "no evidentiary basis for any inference" that either Mr. Sisel or Mr. Uittenbogaard "played any role at all in the Canadian subsidiary's cross-border activities". To the contrary, the evidence would appear to establish that Mr. Sisel and Mr. Uittenbogaard had the ability to stop the plans of JTI in their tracks. They did not do so, notwithstanding their apparent knowledge as to the purpose behind those plans. Armed with that knowledge, their failure to put an end to the JTI plans could well be seen as more than mere "passive acquiescence or a failure to intervene". It could easily permit an inference to be drawn that Mr. Lang's superiors were actively encouraging those plans. While that is not an inference that would have to be drawn, it is an inference that would reasonably be available on the evidence. As earlier noted, the prosecution is entitled to the benefit of all favourable inferences when the question of committal is being considered.

[29] The conclusion and reasoning of the preliminary inquiry judge in respect of Mr. Sisel and Mr. Uittenbogaard suggests one of two errors. Either he failed to consider the evidence that I have mentioned or he rejected an inference from that evidence that was favourable to the Crown. In either case, he erred and that error goes directly to his jurisdiction. That error also means that his conclusion cannot be supported. There is clearly some evidence upon which a trier of fact could come to the conclusion that Mr. Sisel and Mr. Uittenbogaard "aided or abetted" the dishonest scheme, that the prosecution asserts JTI embarked upon, and thereby became parties to that dishonest scheme.

[30] For these reasons, the decisions to discharge Mr. Sisel and Mr. Uittenbogaard cannot stand.

(ii) Pierre Brunelle

[31] Mr. Brunelle was the President and Vice-President Operations of JTI. He had ultimate responsibility for the production of JTI's product, that is, cigarettes and fine cut tobacco. The preliminary inquiry judge's reasons for discharging Mr. Brunelle are as follows, at para. 70:

> "The difficulty, it seems to me, is that the evidence allegedly implicating Mr. Brunelle as a co-conspirator and party to the substantive fraud offences really goes no further than permitting findings that he had knowledge of the nature of RJR-Macdonald's dealings with the distributors who sold products that ended up being smuggled at Akwesasne, that he was a member of a committee where issues relating to that aspect of the business were openly discussed (without any evidence of any position he took personally on any particular issue), and that he discharged his manufacturing responsibilities as an employee of the company that had adopted a policy of selling into that market. What is missing is evidence that would permit a trier to be satisfied that he personally did anything to make the plan his own or that he personally "adhered to its object", to borrow again Doherty J.A.'s phrase in *Alexander and Blake*."

[32] I contrast the preliminary inquiry judge's analysis with the following evidence that was led with respect to Mr. Brunelle:

(a) Brunelle was aware that the only growth opportunity in the United States was through sales into the contraband market;
(b) Brunelle was a regular attendee of JTI's weekly Operating Committee meetings where the plans to exploit the contraband market were regularly discussed;
(c) It was frequently discussed in the Operating Committee and during presentations that virtually all JTI cigarettes exported to the United States were being smuggled back into Canada and sold on the black market;
(d) The Operating Committee viewed the contraband market as an opportunity to increase market share in Canada at the expense of JTI's competitors;
(e) The Operating Committee began to use euphemisms to describe the contraband market during meetings and in presentations;
(f) Brunelle met the principals of LBL and knew that LBL sold JTI products into the Akwesasne market;
(g) Brunelle participated in creating JTI's Operating and Strategic Plans and presenting them to Sisel and Uittenbogaard.

[33] In my view, the preliminary inquiry judge placed undue emphasis on the concept that in order to be party to a conspiracy, there has to be some direct evidence that the individual made the plan his own. While that is no doubt one way of establishing a person's participation in an agreement, being a party to the agreement that underlies a conspiracy can also be inferred from

the actions of others who are alleged to be part of the conspiracy. As Mr. Justice Doherty said in *R. v. Alexander* (2006), 206 C.C.C. (3d) 233 (Ont. C.A.) at para. 47:

> "Knowledge and acts in furtherance of a criminal scheme do, however, provide evidence, particularly where they co-exist, from which the existence of an agreement may be inferred."

[34] To this analysis, I would add the following observation of Mr. Justice Dickson in *R. v. Cotroni; Papalia v. The Queen* (1979), 45 C.C.C. (2d) 1 (S.C.C.) at p. 18:

> "The important inquiry is not as to the acts done in pursuance of the agreement, but whether there was, in fact, a common agreement to which the acts are referable and to which all of the alleged offenders were privy."

[35] It would be open to a trier of fact to infer from the evidence that I have mentioned that Mr. Brunelle was aware of the nature of the conspiracy and the acts undertaken in furtherance of the conspiracy and that he became a party to the conspiracy by playing his part in its implementation. It also seems to me that by referencing the fact that there was no evidence regarding Mr. Brunelle's position in the Operating Committee meetings, the preliminary inquiry judge appears to have drawn an inference favourable to the defence over one that was available to the Crown. If the conspiracy found its birth in the Operating Committee meetings, where the plan was actively discussed and refined, and Mr. Brunelle was a regular attendee at such meetings, it would be open to a trier of fact to infer that he agreed with, and was a party to, the plan. Yet the preliminary inquiry judge appears to have rejected the possibility of such an inference being open on the facts. In my view, he erred in so concluding.

[36] Another issue is also raised regarding the preliminary inquiry judge's analysis regarding Mr. Brunelle, one that he applied to each of the four individuals who were underneath Mr. Lang in the hierarchy. In the same paragraph of his reasons, the preliminary inquiry judge said:

> "... I agree with Mr. Keefe's submission that the actions of individuals further down the corporate hierarchy become too remote to allow the same inference of criminal responsibility to be drawn simply from evidence that they did their jobs."

[37] It seems difficult to conclude that Mr. Brunelle was sufficiently distant in the corporate hierarchy as to justify a distinction between his position and that of Mr. Lang. Mr. Brunelle held the next senior position to Mr. Lang. He was the President of JTI. He was directly involved in

the decision-making process of the company and he had ultimate responsibility for producing the product. Any scheme to sell cigarettes into the contraband market was going to quickly unravel if Mr. Brunelle could not ensure that the product was available to be sold. His connection to that key aspect of the alleged conspiracy might suggest that his participation in the plan was essential. It should be noted that in order to be a party to a conspiracy, each conspirator does not have to personally carry out every aspect of the conspiracy. As Mr. Justice T. Ducharme stated, in *R. v. Munoz* (2006), 205 C.C.C. (3d) 70 (Ont. S.C.J.) at para. 36:

> "However, this does not require that all the conspirators must commit, or intend to commit personally, the mutual criminal objective. It is sufficient that the intention is that one or more of the conspirators commit the offence, provided all who are conspirators agree that that is how their common purpose will be achieved: [citation omitted]"

Again, that inference would be available with respect to Mr. Brunelle on the evidence that was led at the preliminary inquiry.

[38] It is also not clear what the preliminary inquiry judge intended by his reference to an individual being "too remote" to allow for any inference of criminal responsibility. Proper inferences are to be drawn from the actions of the individual and those around him or her, not based on his or her position in the corporate structure – a principle that the preliminary inquiry judge himself referred to earlier in his reasons. In order for a corporate conspiracy to be effective, the involvement of junior persons within the corporation may be as crucial as is the participation of senior officers.

[39] Finally, in respect of Mr. Brunelle, the preliminary inquiry judge said, further in the same paragraph:

> "... evidence that Mr. Brunelle simply performed his assigned tasks as an employee, even at a very senior level, without committing any unlawful act or engaging in any dishonesty himself is insufficient to justify a finding that he was either a party to the alleged unlawful agreement or the frauds that are alleged."

With respect, the above statement assumes the very conclusion that stands to be determined. The preliminary inquiry judge had already concluded that there was sufficient evidence that JTI had committed a dishonest act. It then became important to determine how that dishonest act was

carried out and by whom. A corporation can only act through its officers and employees. It consequently became important to determine if Mr. Brunelle did, on the evidence, perform his tasks without committing any unlawful act. Instead, it appears that the preliminary inquiry judge equated the fact that Mr. Brunelle simply performed his tasks as an employee with legal conduct without assessing whether that result accorded with the facts and inferences that might be drawn from the evidence as a whole.

[40] Once again, I find in the preliminary inquiry judge's conclusions a failure to consider the whole of the evidence and the preferring of inferences favourable to the defence. On either basis, the decision to discharge Mr. Brunelle cannot stand.

(iii) Paul Neumann

[41] Paul Neumann was the Vice-President Finance of JTI. He was involved in the pricing decisions for product sold to customers such as LBL. In discharging Mr. Neumann, the preliminary inquiry judge said, at para. 72:

> "Having reached that conclusion concerning the insufficiency of the evidence against Mr. Brunelle, it is perhaps not surprising that I think the same disposition is appropriate with respect to Mr. Neumann."

[42] This is an instance where the reasons of the preliminary inquiry judge fall short of establishing that he considered the evidence separately regarding each accused. When he dealt with Mr. Sisel and Mr. Uittenbogaard together, it was apparent that he nonetheless looked at each of them separately and reflected on their slightly different roles. In the case of Mr. Neumann, the same conclusion cannot be reached. There is little, if any, reference to the different evidence that was led respecting Mr. Neumann's role. In that regard, I refer to the following by way of examples:

(a) Neumann was a regular attendee of JTI's weekly Operating Committee meetings;
(b) Neumann participated in a presentation to his superiors in March 1992 advocating for increased sales into the "cross-border" market;
(c) Neumann met with the principals of LBL after LBL was accepted as a direct account and knew that they sold JTI products into the Akwesasne market;
(d) Neumann and Thompson regularly discussed LBL's sales forecasts and pricing;
(e) Neumann was involved in setting the price respecting volume discounts to U.S. distributors like LBL;

(f) Neumann was a member of the "Pricing Committee";
(g) Neumann was involved in preparing forecasts regarding sales into the contraband market;
(h) Neumann participated in the preparation of JTI's Operating Plans.

[43] Given the nature of the scheme, that the preliminary inquiry judge had determined that JTI may have engaged in, the above evidence might give rise to an inference that Mr. Neumann played a role in the development and implementation of that plan. By way of examples, I repeat the inferences that might be drawn from Mr. Neumann's attendance at the Operating Committee meetings where the plan was discussed and developed. There is evidence of direct knowledge by Mr. Neumann regarding JTI's plan to increase sales through the black market. There is evidence of direct dealings between Mr. Neumann and JTI's largest customer for that market, LBL, and direct knowledge of the ultimate destination of the product sold.

[44] While I appreciate that Mr. Neumann argues in favour of other inferences being drawn from these facts, that reality does not preclude the drawing of the inferences for which the prosecution contends. The preliminary inquiry judge fails to explain why those inferences could not possibly be drawn. It is therefore again not clear that the preliminary inquiry judge considered the whole of the evidence in reaching his conclusion that Mr. Neumann should be discharged. Alternatively, it can be suggested that the preliminary inquiry judge may have favoured a defence inference over an inference favourable to the prosecution. In either case, the preliminary inquiry judge committed a jurisdictional error.

[45] The conclusion that Mr. Neumann should be discharged, therefore, cannot stand.

(iv) Roland Kostantos

[46] Mr. Kostantos was originally the Director of Finance for JTI. He subsequently replaced Mr. Neumann as Vice-President Finance. In discharging Mr. Kostantos, the preliminary inquiry judge first said, at para. 75:

> "A similar conclusion is required, I am sure, in the case of Mr. Kostantos."

[47] While this again might suggest a failure to treat Mr. Kostantos separately, the preliminary inquiry judge went on in his reasons to refer to evidence distinct to Mr. Kostantos so this failing is not as readily made out in this instance as it was with respect to Mr. Neumann.

[48] However, having referred to that evidence, the preliminary inquiry judge then said that there was no evidence that Mr. Kostantos "had personally devised that part of the scheme". He also again accepted counsel's submissions that the actions of Mr. Kostantos "were too remote from aiding or abetting anything that is now impugned as unlawful". I repeat that remoteness is a concept that appears to have little, if any, relevance to the issues that are presented in this case. Rather, the issue is whether Mr. Kostantos became part of a common agreement to implement the allegedly illegal scheme.

[49] The preliminary inquiry judge concluded the issues regarding Mr. Kostantos as follows, at para. 77:

> "Again, in my view, in the absence of specific evidence to support such a conclusion, a trier would not be justified in simply equating evidence of an employee's [*sic*] doing his job with a finding that the person became a party to his employer's impugned scheme or that he 'adhered' to its object."

[50] If the preliminary inquiry judge's reference to "specific evidence" is intended to be equated with "direct evidence", then he erred in not considering the inferences that might be drawn from the circumstantial evidence led. In any event, his conclusion that Mr. Kostantos was "doing his job" begs the question that was before him. An employee could be doing his job and still be party to a criminal offence being perpetrated by his employer. The preliminary inquiry judge's reference to "his employer's impugned scheme" again fails to take into account that a company can only operate through its employees. An employee cannot avoid liability for a criminal undertaking of his or her employer by simply asserting that he or she was just doing his or her job. As Mr. Justice Martin noted in *R. v. Fell* (1981), 64 C.C.C. (2d) 456 (Ont. C.A.) at p. 461:

> "We think that the trial Judge erred in two respects: the fact that the acts of the respondent were at law those of the corporation for the purpose of imposing liability on it did not prevent the conviction of the respondent as a principal or as an aider and abettor as the facts might warrant.
>
> In Glanville Williams, *Textbook of Criminal Law* (1978), the learned author says at pp. 946-7 as follows:
>
> 'The device of incorporation does not protect people who commit offences. A company can act only through human beings, and a human being who commits an

> offence on account of or for the benefit of a company will be responsible for that offence himself, just as any employee committing an offence for a human employer is liable'."

[51] Presumably each of these employees believed, in acting as they did, that they were just doing their jobs. However, if the manner by which they chose to undertake their responsibilities was criminal in nature, the fact that they also acted within the scope of their employment will not absolve them from criminal liability.

[52] The evidence led as it relates to Mr. Kostantos included the following:

(a) Kostantos met with Neumann and Thompson to discuss "what would it take to get into the grey market business";
(b) Kostantos was a "somewhat regular" attendee of the Operating Committee meetings throughout 1992;
(c) Kostantos was involved in discussions in 1992 regarding shifting all Export "A" production from Montreal to Puerto Rico to avoid media scrutiny of JTI's export sales;
(d) Kostantos participated in meetings regarding the set-up of NBI and was aware that its "benefits" included insulating JTI from smuggling activity and allowing JTI to avoid customer specific markings designed to assist tracking and tracing of contraband;
(e) Kostantos managed the financial affairs of NBI;
(f) Kostantos was involved in setting NBI's prices and approving NBI's volume discounts to LBL.

[53] It is again not clear that the preliminary inquiry judge considered all of the evidence in reaching his conclusion that Mr. Kostantos should be discharged. The above evidence, taken together with other evidence that is common to a number of the respondents, might establish Mr. Kostantos' participation in the alleged illegal scheme. It certainly permits inferences to be drawn to that end.

[54] The conclusion that Mr. Kostantos should be discharged cannot therefore stand.

(v) Peter MacGregor

[55] Peter MacGregor was the Manager, Finance and Administration, for NBI. Mr. MacGregor managed NBI's financial affairs and looked after the paperwork. He also directly managed Jr. Attea's account who was the second largest customer in the U.S. for JTI's product after LBL.

[56] In discharging Mr. MacGregor, the preliminary inquiry judge said, at para. 79:

> "In my view, the charges against Mr. MacGregor provide perhaps the clearest demonstration of over-charging in this case. I agree with the submissions made by Mr. Koziebrocki that there is no evidence that Mr. MacGregor entered into the unlawful agreement that the Crown alleges had been formed two years before he was sent to NBI, nor is there any evidence that he intended to assist anyone in pursuing its alleged criminal object. At its highest, the evidence supports a finding that he discharged the responsibilities involved in the normal, seemingly innocuous business transactions that were assigned to him."

[57] The evidence led at the preliminary inquiry as it related to Mr. MacGregor included the following:

(a) MacGregor managed the financial affairs of NBI on a day-to-day basis;
(b) MacGregor visited Akwesasne to get a "flavour" of the business NBI was servicing;
(c) MacGregor attended meetings and gave presentations regarding NBI and was aware that its "benefits" included insulating JTI from smuggling activity and allowing JTI to avoid customer specific markings designed to assist tracking and tracing of contraband;
(d) MacGregor made recommendations regarding discount pricing for LBL;
(e) MacGregor serviced Jr. Attea's account with NBI;
(f) MacGregor kept incriminating documents for a rainy day.

[58] It is true that Mr. MacGregor was much farther down the corporate hierarchy than the other individuals charged in this matter. That fact does not, however, preclude a finding that Mr. MacGregor was a party to the allegedly criminal scheme. If Mr. MacGregor was aware of the illegal scheme and played a role in helping implement it, then the fact that he was only a small player in the overall scheme does not absolve him of possible criminal liability.

[59] This is not a situation as was presented in *R. v. Alexander, supra,* where an employee merely performed his assigned tasks in ignorance of his employer's criminal scheme and how his assigned tasks fitted into that criminal scheme. In this case, an inference could be drawn from the above evidence that Mr. MacGregor was well aware of how his duties fitted into the allegedly illegal scheme and that he chose to fulfill those duties in order to assist in the implementation of that ongoing scheme.

[60] It is also not clear to me what effect the preliminary inquiry judge intended to draw from his reference to the fact that the alleged scheme "had been formed two years before" Mr. MacGregor was sent to NBI. If the scheme was ongoing, it matters not that Mr. MacGregor may

have been a late comer to that scheme. This point is made clear in *R. v. Cotroni; Papalia v. The Queen, supra*, where Mr. Justice Dickson said, at pp. 17-18:

> "The agreement reached by the co-conspirators may contemplate a number of acts or offences. Any number of persons may be privy to it. Additional persons may join the ongoing scheme while others may drop out. So long as there is a continuing overall, dominant plan there may be changes in methods of operation, personnel, or victims, without bringing the conspiracy to an end. The important inquiry is not as to the acts done in pursuance of the agreement, but whether there was, in fact, a common agreement to which the acts are referable and to which all of the alleged offenders were privy."

[61] The preliminary inquiry judge's conclusion that there was "no evidence" that Mr. MacGregor entered into the unlawful scheme is not sustainable on the record. It represents a failure by the preliminary inquiry judge to consider all of the evidence presented. That failure represents an error in jurisdiction. It also means that the decision to discharge Mr. MacGregor cannot stand.

(vi) Other matters

[62] There are two final matters that should be mentioned regarding the conclusions I have reached respecting the decisions to discharge these six employees. One is that it is superficially difficult to accept the overall conclusion reached by the preliminary inquiry judge that resulted in Mr. Lang, alone, being committed to trial.

[63] If there had been evidence that Mr. Lang, on his own, devised this scheme and then ordered its implementation while keeping both his superiors and subordinates in the dark as to its objective, the result reached by the preliminary inquiry judge would be sustainable. However, there is no evidence that that is what occurred nor was that scenario even suggested. Rather, the evidence makes it clear that the impugned plan was designed by a number of people within JTI. Different employees of JTI had differing input into that plan. Once the plan was completed, it was presented in detail to Mr. Lang's superiors who approved it. If that plan is found to be an illegal scheme constituting a fraud on the Federal and Provincial governments, it is virtually impossible to rationalize how Mr. Lang alone would face the consequences of that conclusion and all those around him would be absolved.

[64] In my view, that result is so artificial as to suggest that it reflects a decision that is, in its essence, arbitrary. As noted in *R. v. Dubois, supra*, it is an error for a preliminary inquiry judge to act arbitrarily. That concern provides a further reason to question the overall conclusions of the preliminary inquiry judge.

[65] The other matter involves the length of the preliminary inquiry judge's reasons. The preliminary inquiry lasted more than one hundred and twenty-five days over a nineteen month period. More than forty witnesses were called and more than six hundred exhibits were filed. The reasons of the preliminary inquiry judge comprise eighty-three paragraphs in twenty-seven pages. There were a number of references, some direct and some oblique, by counsel during the course of the argument to this fact. Indeed, one counsel, in an effort to deflect any concerns that were perceived to possibly arise from the relative brevity of the reasons, suggested that the reasons should be read "generously".

[66] As I noted during the course of the argument, there is nothing wrong with concise reasons. Indeed, concise reasons may reflect a more thorough and discerning analysis of the evidence. What the reasons must reflect, however, is that the preliminary inquiry judge considered all of the evidence. As Mr. Justice Major observed in *R. v. Deschamplain, supra*, at para. 34:

> "It is now plain from Canadian jurisprudence that a trial judge is not required to give extensive reasons for a decision, but is bound to indicate what he or she understands the nature of the case to be so that the parties are aware that the case they argued was the one decided: see *Sheppard, supra*. Similarly, a preliminary inquiry judge is not required to render extensive reasons but must demonstrate that he or she met the statutory and mandatory duty to consider the whole of the evidence. ... However, the mandatory duty imposed on the judge at a preliminary inquiry to consider the whole of the evidence requires some clear indication that this obligation was met. In my view, the reasons at issue here do not satisfy this requirement."

[67] Unfortunately, and for the reasons that I have given, I have reached the same conclusion with respect to the reasons of the preliminary inquiry judge in this case. That conclusion, though, turns on the content, not the length, of the reasons.

[68] In the end result, the decisions to discharge these six individuals cannot stand.

B. Mr. Lang's application

[69] As noted earlier, JTI was committed for trial as was Mr. Lang who was the CEO of JTI. Mr. Lang brings this application to quash that committal order. It is within Mr. Lang's application that it falls to consider whether the evidence led by the Crown at the preliminary inquiry provided some evidence on every element of the offences charged such that, if that evidence was believed, a reasonable jury, properly instructed, could return a verdict of guilty.

[70] In that regard, the scope of the review on certiorari is very limited. It is restricted to the narrow issue whether there is any evidence on each element of the offences. If there is, then the reviewing judge cannot interfere with the preliminary inquiry judge's decision. As Chief Justice McLachlin stated in *R. v. Russell*, [2001] 2 S.C.R. 804 at para 19:

> "Thus, review on *certiorari* does not permit a reviewing court to overturn a decision of the statutory tribunal merely because that tribunal committed an error of law or reached a conclusion different from that which the reviewing court would have reached."

[71] I begin by repeating the reasoning of the preliminary inquiry judge in committing Mr. Lang for trial. He said, at para. 67:

> "... the evidence is clear that Mr. Lang was the person who made the decisions that governed the conduct of RJR-Macdonald. The evidence supports a conclusion that the company had a very hierarchical structure with ultimate managerial authority resting with Mr. Lang as President of the RJR-TI Americas Region and the CEO of RJR-Macdonald. While the planning process and operational management may have involved many others, it was conceded by Mr. Fenton that Mr. Lang remained the functional directing mind of the accused corporation. ... Mr. Smith testified that when he became anxious about the legality of RJR-Macdonald's business, Mr. Lang told him, 'Blame me. ...If you want to blame me, blame me.' It would be open to a tier to interpret that statement not merely as an altruistic gesture on Mr. Lang's part, but also, I think, as an admission of personal responsibility for the course of conduct that RJR-Macdonald had adopted."

[72] As I earlier noted, notwithstanding that there are seven counts alleged against the employees, there are only two offences involved – fraud over $5,000 and conspiracy to commit fraud over $5,000. The number of counts reflects two different time periods and the fact that there are three different governments who are said to have been defrauded. The fact that there

were multiple counts was the subject of critical comment by the preliminary inquiry judge. However, that is not a debate in which I need to engage.

(i) Fraud

[73] I start first with the offence of fraud. The essential elements of that offence are set out in *R. v. Theroux* (1993), 79 C.C.C. (3d) 449 (S.C.C.) where Madam Justice McLachlin said, at p. 460;

> "These doctrinal observations suggest that the *actus reus* of the offence of fraud will be established by proof of:
>
> 1. the prohibited act, be it an act of deceit, a falsehood or some other fraudulent means; and
> 2. deprivation caused by the prohibited act, which may consist in actual loss or the placing of the victim's pecuniary interests at risk.
>
> Correspondingly, the *mens rea* of fraud is established by proof of:
>
> 1. Subjective knowledge of the prohibited act; and
> 2. Subjective knowledge that the prohibited act could have as a consequence the deprivation of another (which deprivation may consist in knowledge that the victim's pecuniary interests are put at risk).
>
> Where the conduct and knowledge required by these definitions are established, the accused is guilty whether he actually intended the prohibited consequence or was reckless as to whether it would occur."

[74] In this case, the prosecution relies on "some other fraudulent means" for proof of the first of the two elements of the *actus reus* of the offence. In terms of the second element, it was accepted before me that there was a deprivation caused to the governments involved from the act of smuggling, that is, they were deprived of tax revenues. There also appears not to be any dispute that Mr. Lang knew about the activities in which JTI was engaged and that those activities were part of a sequence of events that would ultimately lead to the stipulated deprivation. The issue is then distilled down to whether the acts of Mr. Lang could constitute "other fraudulent means".

[75] The Supreme Court of Canada considered this question in *R. v. Theroux, supra,* and its companion decision in *R. v. Zlatic* (1993), 79 C.C.C. (3d) 466 (S.C.C.). In *Zlatic*, Madam Justice McLachlin answered the question as follows, at p. 477:

> "The fundamental question in determining the *actus reus* of fraud within the third head of the offence of fraud is whether the means to the alleged fraud can properly be stigmatized as dishonest: *Olan, supra*. In determining this, one applies a standard of the reasonable person. Would the reasonable person stigmatize what was done as dishonest? Dishonesty is, of course, difficult to define with precision. It does, however, connote an underhanded design which has the effect, or which engenders the risk, of depriving others of what is theirs. J.D. Ewart, in his *Criminal Fraud* (1986), defines dishonest conduct as that 'which ordinary, decent people would feel was discreditable as being clearly at variance with straightforward or honourable dealings' (p. 99). Negligence does not suffice. Nor does taking advantage of an opportunity to someone else's detriment, where that taking has not been occasioned by unscrupulous conduct, regardless of whether such conduct was wilful or reckless. The dishonesty of 'other fraudulent means' has, at its heart, the wrongful use of something in which another person has an interest, in such a manner that this other's interest is extinguished or put at risk. A use is 'wrongful' in this context if it constitutes conduct which reasonable decent persons would consider dishonest and unscrupulous."

[76] As Madam Justice McLachlin noted, the concept of "dishonesty" is a difficult one. The concept was discussed at some length in *Theroux*. In that case, Madam Justice McLachlin again said that the test for what is dishonest is an objective one, based on what reasonable people would consider to be dishonest dealings. As Madam Justice McLachlin stated, at p. 464:

> "Under the third head of the offence it will be necessary to show that the impugned act is one which a reasonable person would see as dishonest."

[77] Dishonesty is not to be equated with dishonourable nor is it to be equated with acts that ordinary people might consider not to be in the best interests of society. Dishonest conduct is not the same thing as conduct that is not respectable. Businesses may conduct themselves in a manner with which the ordinary person would not agree but that does not make the acts of those businesses dishonest. For example, negligent misrepresentations do not amount to dishonesty although there is no doubt that ordinary people would generally consider a negligent misrepresentation by a business to be shameful. Dishonesty is a narrower concept that appears to

be directed at acts that lead to a corrupt or deceitful result. Dishonesty excludes a variety of otherwise questionable behaviour. As Madam Justice McLachlin said in *Theroux* at p. 464:

> "It also excludes improvident business conduct or conduct which is sharp in the sense of taking advantage of a business opportunity to the detriment of someone less astute. The accused must intentionally deceive, lie or commit some other fraudulent act for the offence to be established. Neither a negligent misstatement, nor a sharp business practice, will suffice, because in neither case will the required intent to deprive by fraudulent means be present. A statement made carelessly, even if it is untrue, will not amount to an intentional falsehood, subjectively appreciated. Nor will any seizing of a business opportunity which is not motivated by a person's subjective intent to deprive by cheating or misleading others amount to an instance of fraud. ... We are left then with deliberately practised fraudulent acts which, in the knowledge of the accused, actually put the property of others at risk. Such conduct may be appropriately criminalized, in my view."

[78] In this case, there is some evidence that Mr. Lang, in his role as Chief Executive Officer, orchestrated a plan for JTI that involved the sale of cigarettes and fine cut tobacco into the United States to persons who were, in turn, selling the product to other individuals on the Akwesasne Reserve who were, in turn, selling the product to smugglers who were then bringing the product back into Canada at which point the product was being sold without payment of the applicable taxes. There is also some evidence that Mr. Lang knew, from his involvement in this plan, of the direct correlation between the sale of product by JTI to its U.S. customers and the ultimate delivery of that product to the smugglers.

[79] In addition to that knowledge, however, Mr. Lang would also have known the following:

(a) that JTI was legally manufacturing the product;
(b) that JTI was legally exporting the product to the United States;
(c) that JTI was legally selling the product to persons in the United States;
(d) that JTI's competitors were conducting their business in exactly the same manner;
(e) that the Federal and Provincial governments were well aware that export sales by companies such as JTI into the United States were the main source of the product that was being smuggled back into Canada;
(f) that the Federal and Provincial goverments were well aware that the largest source of smuggling was through places such as the Akwesasne Reserve that straddled the Canada/U.S. border;
(g) that companies such as JTI were licenced to manufacture their products and the Federal government could revoke that licence;

(h) that the smuggling activity was being facilitated by the price differential in the products between Canada and the United States;

(i) that the Federal government had the ability to impose taxes (as it did with the export tax) in order to reduce that price differential and therefore eliminate the incentive to smuggle.

[80] Mr. Lang relies on this level of knowledge by the various governments in an effort to demonstrate that, however one characterizes the actions of JTI and its employees, those actions cannot amount to dishonest acts. The fundamental requirement for fraud, and conspiracy to commit fraud, would therefore not be made out.

[81] On this central issue, Mr. Lang points out that the knowledge of the governments, especially the Federal government, was not just a matter of knowledge gleaned generally from the media or other sources. The evidence shows that companies such as JTI had to submit detailed information to the Federal government regarding their export of products. Indeed, the Federal Government had a program in place to monitor and verify those exports. The evidence of officials from the Federal government given at the preliminary inquiry confirmed the state of their knowledge. For example, Ian Bennett, Associate Deputy Minister of Finance, gave the following evidence (December 19, 2005, p. 56):

> "Q. And at the same time, that's in that period in '91, '92, before the export tax came in, there was also a significant incidence of cross border shopping by regular Canadians going across the border and purchasing all kinds of products in the United States.
> A. Yes, that's right.
> Q. And that was a problem that was developed as a result of a differential in the Canadian dollar and the Canadian tax regime.
> A. Yes.
> Q. And you were also aware that apart from buying jeans and other things at Wal-Mart or other U.S. retailers, that Canadians were also purchasing cigarettes and bringing them in illegally.
> A. That was the supposition at the time.
> Q. And at the same time, that's in the period before 1992, you would be aware that there was no real market for the volume of Canadian cigarettes that were being exported to the United States.
> A. That's right.
> Q. So, you were aware that the products that were being exported by the Canadian manufacturers to the United States were ultimately finding their way into the hands of smugglers and being illegally smuggled back into Canada.
> A. That was the analysis that was done, yes."

[82] The Federal government not only knew that this is what was happening, they also did not take any steps (other than the brief imposition of the export tax) to prevent it. Mr. Bennett also made this clear in his evidence (December 19, 2005, pp. 57-58):

> "Q. In your discussions with the tobacco companies, were you told by them that they were not exporting product to the United states?
> A. No.
> Q. Did they tell you that they were, in fact, exporting product in large quantities to the United States?
> A. Yes, the exports were being made to the United States, yes.
> Q. And do you recall who it was that told you that?
> A. Well, it was clear from the statistics that were being gathered by Statistics Canada that that's what was happening, that large exports were taking place. So, it was common knowledge.
> Q. It was also being widely reported in the media that there were large exports, large volumes of product, Canadian product that was being exported to the United States and subsequently being smuggled back into Canada.
> A. I believe that's right.
> Q. And the cigarette companies were not telling you something different than what was being reported in the media and what was common knowledge.
> A. That's right.
> Q. And their position was that they were selling to licenced wholesalers and they had no control over it beyond that.
> A. That's what they said, yes.
> Q. And during this period of time, that's before the export tax came in, to your knowledge was any effort made by the Government of Canada to suspend the licence of the Canadian manufacturers?
> A. Not to my knowledge.
> Q. And apart from the export tax that came in, in February 1992, was there any effort made by the Canadian government to stop the Canadian manufacturers from exporting those products in that quantity to the United States?
> A. No."

[83] William McCloskey, who was at the time Director of the Sales Tax Division of the Ministry of Finance, also made it clear that this was not only the state of the knowledge of the Federal government regarding what was happening with the export of cigarettes, it was also well-known publicly. He gave the following evidence (February 14, 2006, pp. 131-133):

> "Q. Thank you. Just to recap your evidence of some of the general issues, fair to say that back in 1991, '92, '93, you knew that Canadian cigarettes were being exported and being smuggled back into Canada?
> A. Yes.

Q. And you knew that the manufacturers sold their products to wholesalers who in turn sold them to customers who, fair to say, weren't very careful who they resold them to?
A. That's correct.
Q. And you knew that people who weren't legitimate were getting their hands on those cigarettes and smuggling them back in?
A. Yes.
Q. And generally speaking, it was coming across the Indian Reservation?
A. Yes, I think among other places, but that was, the RCMP told us that was one of the prime entry points.
Q. Right. And it was coming back in, in very large quantities?
A. Yes.
Q. And the exports to the United States were in very large quantities?
A. Yes.
Q. More than could reasonably be expected to be consumed by any domestic American market?
A. Absolutely, there was a huge spike in export sales.
Q. And a huge decline in Canadian domestic sales, so it was pretty obvious to everyone that the Canadian cigarettes that were being exported were finding their way into the hands of people who were smuggling it across the border?
A. Yes.
Q. Thank you. And we've dealt with what you knew, it's fair to say that everyone in your department who you dealt with and in other departments of government knew that as well?
A. That's correct.
Q. Fair to say that that knowledge that we just described would be common knowledge within the Government of Canada?
A. I would say that's fair.
Q. And this issue was also something that had made its way into the media and was also widely published and known not just in government, but widely known within the public that this phenomenon was occurring?
A. Yes."

[84] As earlier mentioned, the Federal government attempted to quell this activity by imposing the export tax. In doing so, within their own press releases, the Federal government recognized that the source of the smuggled products were exports legitimately made by companies such as JTI. Within two months it suspended that tax. In doing so, the Federal government knew that the smuggling activity would resume. Mr. McCloskey so stated in his evidence (February 14, 2006, p. 139):

"Q. So, you knew, and others within your department knew, that the Canadian manufacturers would resume their exports to the U.S. market where they would sell to wholesalers, who would sell to other customers, and it would likely be sold to people who would smuggle it back into Canada illegally?

> A. I suppose that's correct. The additional aspect was that the product would be marked and we would be able to know where the wholesalers that it had been sold to. In other words, there would be more of a mechanism to track it back, any seized product."
> Q. So, that the initiative was to attack the problem from the policing end, in the sense that when you found smuggled product in retail stores or in trucks coming down the highway, you could clearly identify it as smuggled product and cut it off at that level?
> A. Yes.
> Q. The decision was made that it would not be an initiative of the government to cut it off at the export level, from the perspective of the Canadian manufacturers, try to stop the Canadian manufacturers from exporting?
> A. Well, that's correct. We eliminated the export tax."

[85] The issue then becomes whether a reasonable person would view the conduct of Mr. Lang (and implicitly the other employees involved) as dishonest. It would no doubt not be difficult to find ordinary people who would view the actions of companies such as JTI, knowingly selling a product to persons who were going to supply others who were then going to supply smugglers, as deplorable and disgraceful. That is not the same thing as establishing that the actions are dishonest, however. While the concept of dishonesty may be difficult to define with precision, if one returns to the decisions in *Theroux* and *Zlatic*, one sees that Chief Justice McLachlin uses words such as "underhanded", "unscrupulous", "wrongful use", "cheating" and "misleading" to characterize the conduct necessary to amount to dishonesty.

[86] In its original submissions at the preliminary inquiry, the prosecution pointed to the following evidence that it said constituted sufficient evidence of dishonest conduct. For one, the prosecution asserted that it is objectively dishonest to engage in commercial activity, the success of which depends upon the commission of indictable offences by customers within the chain of that commercial activity. No authority was cited for that proposition nor, I suggest, is it necessarily a self-evident truth. Whether one could draw that conclusion would presumably depend on the surrounding circumstances including the nature of the business, whether there was a direct as opposed to indirect connection between the sales and the offences, the nature of the product, and so on. It would cast a very wide net to suggest that the fact that some segment of the customers of a manufacturer's product may use that product for criminal purposes must inevitably lead to a conclusion that the manufacturer's sales are "objectively dishonest".

[87] Having said that, it was not just a small portion of JTI's product that was being used for criminal purposes nor were the sales that were so used an isolated or occasional occurrence. To the contrary, in this case, the vast majority of the product being sold by JTI into the United States was, to the knowledge of JTI and Mr. Lang and the other executives, being re-sold through a chain of commercial transactions where ultimately the products were sold to persons who were known to be smuggling those products back into Canada with the intent of selling them without paying taxes to the Federal, Ontario or Quebec governments. When the instances of dishonest dealings with a company's product move from the rare or occasional into the common or most frequent use, and the company knows that to be the case, and the company continues to supply its product, it seems to me that it may then be that the company's actions could fairly be characterized as dishonest.

[88] The prosecution also pointed to the fact that JTI advertised its product on the Akwesasne Reserve. Advertising is not normally viewed as part and parcel of a dishonest act. However, in the context in which it occurred in this case, it might be characterized as having been undertaken for the purpose of encouraging the smuggling activity by increasing the demand for JTI's product through the smugglers' main centre of distribution.

[89] The prosecution also places emphasis on the fact that JTI switched production to Puerto Rico to avoid the export tax. Again, that act might be viewed as being nothing more than the usual activity by which most companies, indeed most individuals, organize their affairs to avoid taxes. There is nothing dishonest in so doing. On the other hand, it might be further evidence tending to show the importance that the sales of JTI product to the illegal dealers had achieved within the overall business of JTI and the importance to JTI and the involved employees in ensuring that that business was maintained. The fact that the packaging of the cigarettes produced in Puerto Rico was made to look as much as possible like the Canadian product might also suggest a recognition by JTI that its Canadian image had to be maintained because it knew that Canadians were intended to be the final customers for the product.

[90] The prosecution points additionally to the fact that JTI paid for the "Not For Sale in Canada" labelling that had to be placed on the cigarettes it sold to customers like LBL when it knew that those customers were going to dispose of the cigarettes to people who would return

them to Canada for sale. The knowledge by JTI that this product was going to be sold in Canada might suggest that JTI's act of ensuring that they were labelled to the contrary was only intended to establish a façade of honest dealing.

[91] The degree to which JTI encouraged this black market activity in the sales of its products might also be made out from the fact that JTI gave volume discounts to LBL and that it entertained the principals of that company. It could be concluded from those acts that neither JTI nor its employees were attempting to downplay or discourage this type of customer. To the contrary, it is some evidence that JTI and its employees were promoting the illegal activity and that would, in turn, make it more difficult for JTI and its employees to argue that they were unaware of, or lacked ability to control, this illegal activity. In a similar vein, the creation of NBI might be characterized as nothing more than an artifice designed to further camouflage the true nature of the activities of JTI in this regard.

[92] In addition, there is evidence that at least some of the employees were concerned about the legality of the plan such that legal advice was sought respecting it. Given the widespread public criticism of what was going on regarding the smuggling of cigarettes and the large scale losses to governments, it would be surprising if the persons involved did not have such concerns. While the fact that legal advice was sought does not properly give rise to any inference of criminal behaviour, the ongoing concerns of some employees regarding the legitimacy of their endeavours could be used to counter any suggestion that the accused did not themselves have concerns regarding the honest nature of those endeavours.

[93] Lastly on this aspect, I should address the preliminary inquiry judge's reliance on the "blame me" statement of Mr. Lang as an admission of personal responsibility for the course of conduct that the Crown complains of. In my view, given the nature of that comment and the context in which it was made, I do not believe that any trier of fact could reasonably rely on it to establish any culpability on the part of Mr. Lang.

[94] Ultimately, all of these other instances are relevant to the inferences that a trier of fact might draw from the actions of Mr. Lang and his fellow employees. As long as those inferences arise reasonably and logically from the evidence, then a trier of fact is entitled to draw them. As Mr. Justice Moldaver said in *R. v. Katwaru*, (2001), 153 C.C.C. (3d) 433 (Ont. C.A.) at p. 444:

> "The appellant submits, correctly in my view, that the trial judge erred by inserting the word 'easily' into the equation. In order to infer a fact from established facts, all that is required is that the inference be reasonable and logical. The fact that an inference may flow less than easily does not mean that it cannot be drawn. To hold otherwise would lead to the untenable conclusion that a difficult inference could never be reasonable and logical."

It is not clear that a trier of fact would draw inferences of dishonesty from any or all of these actions but a trier of fact might do so. The prosecution is entitled to the benefit of any inferences that might be drawn in support of the charges laid. In my view, there are such inferences available on these facts.

[95] I recognize that it was not a requirement of JTI's business that Mr. Lang had to refuse to allow the company to legally sell to businesses in the United States just because he might know that Canadians would purchase JTI's products from the stores of such businesses in the United States and then smuggle the product back across the border. The difference between that situation and the one present here, however, is the magnitude of the sales along with the direct knowledge of the intent of JTI's customers. I accept that it would not be reasonable to conclude that a company was involved in dishonest activity just because a small portion of its customers, after acquiring the product, decided to engage in unlawful conduct with respect to it. On the other hand, it may be fair to consider the activity of the company dishonest if the vast majority of the customers of its product are involved in so doing and the company knows that that is their intent. Accepting that such a distinction can be drawn, it seems to me that it then becomes a matter for the trier of fact to determine whether, in any individual case, that line has been crossed.

[96] In the end result, the position of Mr. Lang depends almost entirely on the proposition that his actions, and those of JTI, cannot properly be characterized as dishonest because JTI and its employees acted openly and with the knowledge of the Governments involved. While that may be true, if one takes a high level view of the knowledge of the company and its employees on the one hand, and government officials on the other, it is not so clear that that characterization can be maintained if one descends into the details and the specifics of the knowledge and actions of JTI and its employees, especially their direct and continuing knowledge of the role that their customers played in the supply chain for the smugglers. By way of example, a trier of fact might

conclude that employees of JTI were duplicitous in their dealings with various government officials through their pretext of offering assistance to address the smuggling activity when they were, at the same time, actually encouraging such activity through their relationships with customers such as LBL and Jr. Attea.

[97] In that latter regard, I refer again to the evidence of Mr. McCloskey (February 14, 2006, p. 109):

> "Q. The discussion or the request from the manufacturers to have the RCMP provide them with information about who it was who was doing the smuggling so that they could try to address it?
>
> A. Yes, this was in discussions that we had with the tobacco manufacturers when there was the severe smuggling problem, and the fact that it was well known that the export, the tobacco that was being exported was being sold to wholesalers in the United States, and the RCMP told us that, in fact, sometimes it was being resold again and being smuggled back into Canada. And we had these discussions with the tobacco manufacturers and they basically asked us, well if you tell us who the wholesalers are or the companies are that are buying from the wholesalers and smuggling it back into Canada, we will take steps, if we can, to tell our wholesalers not to supply those wholesalers or companies that were buying from the wholesalers."

and further (February 14, 2006, p. 111):

> "Q. And did you ever have any information brought to your attention that suggested that the companies were fuelling the smuggling trade?
>
> A. Well, I think we believed at the time they were fuelling the smuggling trade by the fact that they were exporting much, the exports went through the roof compared to what the historical trends had been and they knew that much of it was being smuggled back into Canada, but had clearly said they were selling to legitimate wholesalers, and everything we knew at the time was that they were."

[98] It can, of course, be suggested that the tobacco manufacturers, including JTI, were being singularly disingenuous when they suggested to officials of the Federal government that, if those officials could provide information on which wholesalers were supplying the smugglers, they would take action to cut-off that supply. JTI knew full well who some of those wholesalers were. Those wholesalers were among its customers like LBL and Jr. Attea. A trier of fact might conclude that the manufacturers were engaged in a dissembling offer of assistance and that this, in turn, represented a conscious effort on the part of the tobacco manufacturers to keep the true

nature and extent of their actions hidden from the governments affected. That view could lead to a conclusion that, in so acting, JTI and its employees were engaged in conduct that was misleading and perhaps unscrupulous. Once again, that is not a conclusion that a trier of fact must reach but it is a conclusion that a trier of fact might reach. That possibility is sufficient, however, to satisfy the test of some evidence upon which a conviction could be made.

[99] I appreciate that the sales of JTI's products to persons such as LBL were entirely legal. If that were the extent to which the inquiry as to the possible evidence of fraud should be made, no committal of Mr. Lang, or the other employees for that matter, could be sustained. The inquiry does not properly end there, however. If the evidence were to establish that JTI, Mr. Lang and his fellow employees, were fully aware that the sales of JTI's product was a necessary link in a chain of events that ultimately resulted in an unlawful act, and continued to make those sales with that knowledge, then it seems to me that it is at least arguable that a trier of fact could conclude that those sales, even though presumptively lawful, became unlawful because of the knowledge of the eventual result of those sales. Put more simply, the conduct of JTI and its employees is conduct that a reasonable person could see as dishonest.

(ii) Conspiracy

[100] Given my conclusion regarding the offence of fraud, the offence of conspiracy to commit fraud can be dealt with more briefly. The essential elements of the offence of conspiracy are set out in *R. v. O'Brien,* [1954] S.C.R. 666 where Mr. Justice Taschereau said, at pp. 668-69:

> "The two elements of agreement and of common design are specifically stated to be essential ingredients of the crime of conspiracy. Willes, J. in *Mulcahy v. The Queen* [(1868) L.R. 3 H.L. 306 at 317]:
>
> A conspiracy consists not merely in the intention of two or more, but in the agreement of two or more to do an unlawful act, or to do a lawful act by unlawful means. So long as such a design rests in intention only, it is not indictable. When two agree to carry it into effect, the very plot is an act in itself, and the act of each of the parties ... punishable if for a criminal object ..."

[101] As may be apparent from my conclusion regarding the offence of fraud, and my conclusions respecting the other employees, in my view there is some evidence upon which a jury, properly instructed and acting reasonably, could decide that the actions of those employees

constituted fraud. There was evidence that Mr. Lang and his fellow employees agreed to sell JTI's products to persons such as LBL and others. Indeed, there was evidence that Mr. Lang and his fellow employees actively pursued those sales. There was also evidence that Mr. Lang and his fellow employees knew that, by selling JTI products to persons such as LBL, those products would ultimately get into the hands of smugglers and this would result in the sale of those products in Canada with a corresponding failure to pay applicable taxes to the Federal and Provincial governments. If those actions constitute fraud, then their agreement to so act constitutes an agreement to do an unlawful act or to do a lawful act by unlawful means. The necessary elements of the offence of conspiracy would then be made out.

[102] In my view, the preliminary inquiry judge correctly concluded that there was some evidence respecting each of the required elements of the charges. Mr. Lang was therefore properly committed for trial.

Conclusion

[103] The Crown's application regarding Messrs. Sisel, Uittenbogaard, Brunelle, Neumann, Kostantos and MacGregor is granted and the matter is remitted to the preliminary inquiry judge for reconsideration in accordance with these reasons. Mr. Lang's application is dismissed.

NORDHEIMER J.

Released: February 19, 2008

COURT FILE NO.: M123/07
M124/07

SUPERIOR COURT OF JUSTICE

B E T W E E N:

HER MAJESTY THE QUEEN

- and -

EDWARD LANG

A N D B E T W E E N:

HER MAJESTY THE QUEEN

- and -

DALE SISEL and others

REASONS FOR DECISION

NORDHEIMER J.

RELEASED: FEB 19 2008