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Court of Québec Orders the Exclusion of Evidence Citing "Serious" and "Systemic" Breaches of the *Canadian Charter of Rights and Freedoms*

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In the *Bouchard*[1] case rendered in July 2023, many years after the Supreme Court of Canada rendered the *Jarvis* decision,[2] the Court of Québec concluded that the fundamental rights of medical specialists (i) against self-incrimination, (ii) to silence, (iii) to privacy, (iv) to security against unreasonable search and seizure, and (v) to counsel had all been violated by the *Régie de l'assurance maladie du Québec* (the Québec Health Insurance Board, RAMQ) in the course of its so-called administrative inspections.

Given the serious and systemic nature of the RAMQ's conduct, the Court ordered the exclusion of evidence gathered in the course of its inspections, which, in reality, were penal investigations.

The Facts

The Inspections

In November 2018, the RAMQ carried out what it described as inspections of two medical clinics. The purpose of these inspections was to determine whether the doctors practising in these clinics were complying with the obligation to post their medical fees in public view in their waiting rooms[3] and, if not, to impose the penal fines provided for in the *Health Insurance Act* (HIA).

In this context, a person designated as an "inspector" by the RAMQ visited the two clinics with the following objectives:

- take photos of the site;
- draw a sketch of the site; and
- complete a written statement listing the doctors working in each clinic.

To that end, the RAMQ inspector used two types of written statement forms. The first type, which contained a warning about the right to silence and the right to counsel, was given to doctors since, according to the inspector, "[translation] an inspection of this nature could lead to a penal offence report."[4] The second type did not contain this warning and was given to anyone other than a doctor, such as a receptionist, to complete.

During these inspections, the inspector also carried a document for – as she qualified them – situations of "obstruction," in the event of a refusal to cooperate or answer questions. In fact, according to the inspector, doctors are required to cooperate and cannot prevent her from doing her job.[5]

The evidence also established that, despite her good faith, the RAMQ inspector was completely unaware of the basic principles set forth in the *Canadian Charter of Rights and Freedom* and had received no relevant training on this matter.

During her visits to the clinics, the inspector did not conduct any verification of compliance, but merely gathered evidence.

The Offence Reports

After returning to her office following these inspections, the inspector analyzed the evidence she had gathered and completed an offence report for each of the doctors practising in the clinics visited. The inspector submitted this report to the *Bureau des infractions et amendes* (the Offences and Fines Offices, BIA), which then issued statements of offence against each of the doctors, giving rise to penal proceedings.

In the event of a violation of their obligation to post their medical fees, each doctor faces a minimum penal fine of $2,500.

Finally, the evidence established that all RAMQ inspections with regard to the posting of doctors' medical fees were conducted with the same *modus operandi*.

The Decision

The RAMQ's Powers of Inspection and Investigation

The Act respecting the *Régie de l'assurance maladie du Québec* (RAMQ Act) grants the RAMQ two types of powers, each governed by its own set of rules:

- on the one hand, broad **administrative powers of inspection** (or **audit**) for the application and enforcement of legislation, allowing state authorities to inspect, audit or examine a wide range of documents, as well as to enter any place where a health professional exercises functions; and
- **penal or criminal investigative powers**, creating an adversarial relationship.

Depending on the objective pursued by the RAMQ (or any other government body invested with this dual power), and consequently on the type of power used, the obligations of the persons under scrutiny vary greatly:

- **inspection and audit administrative powers** entail a correlative obligation for persons under scrutiny to answer all relevant questions, produce all relevant documents and provide all reasonable assistance;
- **penal and criminal investigative powers** trigger the full panoply of fundamental rights set out in the *Charter*, including the right against self-incrimination, the right to protection against unreasonable search and seizure and the right to counsel.

Applying the *Jarvis* principles

The Court reiterates the fundamental *Jarvis* principle that when the predominant purpose of a state examination is to establish the penal liability of an individual, inspectors must waive their right to use their powers of inspection. The "Rubicon" is then crossed and an adversarial relationship is established.

Although the interplay between an inspection and an investigation is a delicate issue, the Court reiterated the non-exhaustive factors listed in *Jarvis* that are used to identify the "predominant purpose" of the inquiry:

"a. Did the authorities have reasonable grounds to lay charges? Does it appear from the record that a decision to proceed with a criminal investigation could have been made?

b. Was the general conduct of the authorities such that it was consistent with the pursuit of a criminal investigation?

c. Had the auditor transferred his or her files and materials to the investigators?

d. Was the conduct of the auditor such that he or she was effectively acting as an agent for the investigators?

e. Does it appear that the investigators intended to use the auditor as their agent in the collection of evidence?

f. Is the evidence sought relevant to taxpayer liability generally? Or, as is the case with evidence as to the taxpayer's *mens rea*, is the evidence relevant only to the taxpayer's penal liability?

g. Are there any other circumstances or factors that can lead the trial judge to the conclusion that the compliance audit had in reality become a criminal investigation?"[6]

Application to the Facts

Although the *Jarvis* principles have been reiterated by the courts many times, the *Bouchard* case stands out as the first time a court has applied them to the RAMQ. The Court thus confirms that these principles apply to all government authorities vested with both administrative inspection powers and penal investigative powers—and not just to revenue agencies.

In this case, the Court concluded that the predominant purpose of the RAMQ inspector's visits was and has always been to establish the penal liability of the doctors for the following reasons:

"1. [translation] Clinics are specifically targeted. These are not random inspections.

2. The inspector presents herself with a written statement form which includes warnings.

3. She also carries with her a document she could use in case of obstruction.

4. She uses the form with a caution for Dr. Bouchard. Why would she do this? She recognizes that her actions may result in a penal offence report.

5. On site, she collects evidence (list of doctors, photographs).

6. After returning to her office, she fills out the 'offence report' form, in which she includes the evidence gathered during her visits.

7. The file is then forwarded to the BIA and the DPCP, leading to the present statements of offence."[7]

In other words, the inspector's visits were not intended to verify the clinics' compliance with the HIA, nor were they part of an awareness-raising process. The sole purpose of these visits was to gather evidence in order to lay penal charges.[8]

In light of the foregoing, the seriousness of the RAMQ's violations of the doctors' fundamental rights—coloured by the inspector's misunderstanding of her powers—the systemic nature of the conduct and the impact of the violations[9], the Court, after concluding that these violations had occurred, granted the doctors' request for the exclusion of the evidence gathered by the RAMQ inspector.

The Court therefore ordered the exclusion of this evidence, as it had, in reality, been obtained illegally, using coercive administrative inspection powers in what was, in fact, a penal investigation.

The Impact

This is an important judgment for the rights of all medical specialists in Québec and for all litigants.

The Court of Québec confirmed that the principles and high standards enshrined by *Jarvis* and its progeny apply with full force to the RAMQ—as well as to all government authorities vested with both administrative inspection and penal investigation powers—so as not to undermine or render theoretical citizens' fundamental rights.

This judgment also reiterates the role that the State must play in protecting and preserving citizens' rights, notably by ensuring that its inspectors receive a minimum level of training required to undertake administrative inspections or audits. Without naturally requiring inspectors to have "[translation] a thorough knowledge of the articles of the Charter and case law," the Court of Québec emphasized the

importance of "[translation] ensuring that a person working for a public body receives a minimum level of training, especially since his or her work may have repercussions on the rights of citizens."[10]

Davies acted for the *Fédération des médecins spécialistes du Québec* (FMSQ) in this constitutional challenge of the RAMQ's actions. In this case, the FMSQ was granted the right to intervene as friend of the court, in order to shed legal light on the RAMQ's inspection and investigation powers. This right is rarely granted in penal matters.

[1] *Directeur des poursuites criminelles et pénales c. Bouchard*, CQ, July 7, 2023 (*Bouchard*).
[2] *R. v. Jarvis*, 2002 SCC 73.
[3] In accordance with s. 22.0.0.1 of the *Health Insurance Act*.
[4] According to the inspector's testimony; *Bouchard*, para. 28.
[5] *Bouchard*, para. 30.
[6] *Bouchard*, para. 69; *Jarvis*, para. 94.
[7] *Bouchard*, para. 81.
[8] *Bouchard*, para. 83.
[9] *Bouchard*, para. 87.
[10] *Bouchard*, para. 80.

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