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Québec Court Stays Criminal Proceedings, Citing "Serious, Multiple and Systemic Violations" of Canadians' Rights

Authors: Léon H. Moubayed and Sarah Gorguos

In a recent decision,[1] the Court of Québec permanently stayed the prosecution of tax fraud charges made against a corporation and two related individuals after finding "serious, multiple and systemic"[2] violations of constitutional rights. The Court held that the violations revealed "a long-standing and systemic misunderstanding of the applicable law, all of which was to the detriment of taxpayers generally, extending far beyond" the case at bar.[3]

The prosecution has decided not to appeal this judgment.

The Facts

The QRA Audit

From late 2011 to late 2012, the Agence du Revenu du Québec (QRA) carried out a routine administrative tax audit of the corporation. Early in the audit, the QRA auditor discovered indicia of possible tax fraud. Instead of referring the matter to its investigations division, the QRA auditor continued the audit, collecting documents and information, and securing admissions against interest from representatives of the corporation. The auditor also "audited" a third-party contractor to uncover further incriminating evidence – thereby, according to the Court, confirming what the QRA auditor already knew. At the end of its audit, the QRA reassessed the affected taxpayers, levying taxes, interest and hefty penalties. All were paid without objection.

The CRA Audit

In April 2013, the Canada Revenue Agency (CRA) began its own audit of the same corporation for the same taxation years, relying on the QRA report and mirroring its conclusions. In January 2014, the CRA issued its own reassessments with additional taxes, interest and heavy penalties. Again all were paid without objection. The CRA audit division thereafter closed and archived the case. It was not then referred to the CRA criminal investigations division for further investigation.

The "Make-Work Project"

In 2013, several CRA investigations offices from western Québec were merged into the CRA's Montréal office. As a result, by 2015, the Montréal office had a significant influx of investigators without enough cases to keep them busy.[4] To remedy this unprecedented situation, the CRA criminal investigations division devised a novel method of case selection: matters to investigate were chosen from a list of past, closed audits for which significant penalties had been imposed. As a result, the corporation was selected because it matched the CRA's new investigatory profile and because the CRA investigators believed that the prosecution of this particular corporation would draw considerable attention from the public and media. As a result, a criminal investigation was launched, and the CRA investigator gained access to the QRA's complete audit file. Armed with this information, the CRA was able to persuade a judge to issue several warrants, which it then used to search corporate offices and residences, and seized a large quantity of documents and things.

In due course the matter was referred to the Crown, who charged the corporation and two individuals with counts of tax fraud offences.

The *Jarvis* Principles

Tax legislation provides the CRA and the QRA with two distinct types of inquiry powers:

- Broad administrative audit powers for the application and enforcement of tax legislation, allowing state authorities to inspect, audit or examine a wide range of documents, as well as to enter locations.
- Criminal and penal investigative powers that are adversarial and offer the persons under scrutiny the protections afforded by the *Canadian Charter of Rights and Freedoms* (*Canadian Charter*), including the right to remain silent.

In the 2002 *R v Jarvis* (*Jarvis*) case, the Supreme Court of Canada (SCC) "examined the delicate interplay between audits and investigations in the administration and enforcement of tax legislation."[5] The SCC held that once the "predominant purpose" of a particular inquiry becomes the determination of criminal liability, the tax authority must relinquish the use of its administrative powers: "In essence, officials 'cross the Rubicon' when the inquiry in question engages the adversarial relationship between the taxpayer and the state."[6]

Jarvis provided a non-exhaustive list of seven criteria to assist in identifying the otherwise elusive "predominant" purpose of a state's inquiry:

a. Did authorities have reasonable grounds to lay charges or could a decision have been made to proceed with a criminal investigation?
b. Was the general conduct of the authorities consistent with a criminal investigation?
c. Did the auditor transfer his or her file to the investigators?
d. Was the auditor's conduct such that he or she was acting as an agent for the investigators?
e. Does it appear that the investigators intended to use the auditor as their agent?
f. Is the evidence relevant to taxpayer liability generally or only to penal liability? and,
g. Do other circumstances or factors suggest that an audit became a criminal investigation?

Jarvis has now become the landmark decision that prompted "provincial and federal authorities to establish new protocols and adopt specific practices aimed at ensuring the respect of taxpayers' constitutional rights."[7]

The Court of Québec Judgment

First, the Court of Québec initially found that the CRA's novel method of file selection was not, in and of itself, abusive and contrary to the protection afforded by the *Canadian Charter* as described in *Jarvis*. However, the Court found that by "design, the method led the CRA to 'play with fire' on a case-by-case basis. While the system *may* be legitimate and unproblematic in certain theoretical cases, what matters more (to the taxpayer and to the Court) is whether or not, in its application and effect to this case, an abuse of process ensued."[8]

The Court went on to apply the *Jarvis* factors while noting that "[t]hey were not meant to be exhaustive. Moreover, they are to be applied in a flexible manner, adjusting to the factual idiosyncrasies of each case."[9] Indeed, Courts must reach beyond "the mechanical application of the traditional factors" to ensure the respect of "the very spirit of the *Jarvis* decision and the fundamental rights that the Supreme Court sought to protect."[10]

In the case at bar, the Court acknowledged that the *Jarvis* factors "apply awkwardly in the retroactive setting";[11] that "the usual course, the parallel audit and investigations functions analyzed by the Court would be taking place simultaneously"; and that similarly, "the Court would generally be assessing an audit and investigation department from the same government body."[12]

However, the case at bar differed in two aspects:

- "The investigation step occurred years after the completion of the audit step; and

– The federal investigative body used information obtained entirely by the provincial audit body."[13]

As a result, the Court had to "assess the overall history of the case to determine if the net result was a curtailment of the *Jarvis* protections."[14] The Court held that the very "danger" that *Jarvis* sought to avoid materialized in the case at bar. The CRA investigators had gone back and chosen the corporation's case "in which the [QRA] auditor had conducted the equivalent of a full investigation, for all intents and purposes."[15] The Court found that the evidence established that the QRA auditors had in fact carried out a "full investigation" essentially because they misunderstood both the safeguards afforded by the *Canadian Charter* as described in *Jarvis* and their own more limited role (versus that of investigators pursuing a true criminal investigation). The Court also determined that the QRA auditors "seemed to fundamentally misunderstand what 'tax evasion' is."[16]

Second, the Court also found that both the CRA and the QRA failed to comply with the inter-organization agreement governing the exchange of confidential taxpayer information that bound them. The Court indicated that "it is alarming" that requirements provided in the agreement were "systematically ignored by both [the QRA] and the CRA in their dealings. The evidence revealed a serious shortcoming in the organization of [the QRA's] and the CRA's operations in that regard."[17] The Court described these systemic violations as "highly problematic."[18]

Conclusion

In criminal matters, a Court can permanently stay proceedings only in the clearest of cases – namely, when proceedings are so oppressive or vexatious that they violate the fundamental notions of justice and undermine the integrity of justice. In other words, "the community's sense of fair play and decency must be compromised."[19]

Applying the principles, the Court here decided that "[c]onsidered as a whole, the history of this investigation directly harms the integrity of the justice system and irreparably compromises the community's sense of fair play and decency."[20] In summing up, the Court finally held that "holding the trial would manifest, perpetuate and aggravate the disrepute to the administration of justice. This is one of the rare cases where a stay of proceedings is warranted."[21]

Davies acted for the corporation throughout in this prosecution.

[1] *R c Goldberg* 2020 QCCQ 4548.
[2] Para 460.
[3] Para 394.
[4] Para 74.
[5] Para 4.
[6] 2002 CSC 73 para 88.
[7] Para 5.
[8] Para 163.
[9] Para 7.
[10] Para 8.
[11] Para 276 header (b).
[12] Para 278.
[13] Para 279.
[14] Para 283.
[15] Para 296.
[16] Para 324.
[17] Para 370.
[18] Para 371.
[19] Para 454.
[20] Para 469.
[21] Para 470.

Key Contacts: Léon H. Moubayed, Guy Du Pont, Ad.E., John Bodrug and Sandra A. Forbes