SUPREME COURT OF NOVA SCOTIA

Citation: *R. v. Martin*, 2015 NSSC 8

Date: 20150109
Docket: CRP No. 418009
(Person No. 69335)
Registry: Pictou

Between:

Her Majesty The Queen

Appellant

v.

Darren Martin

Respondent

DECISION

Judge:	The Honourable Justice E. Van den Eynden
Heard:	February 17, 2014, in Pictou, Nova Scotia
Supplemental Submissions: Written:	August 13, 2014 (Respondent); August 20, 2014 (Appellant); August 20, 2014 (Respondent); November 19, 2014 (Respondent); December 9, 2014 (Respondent) January 9, 2015
Charge Numbers:	2276770, 2276771, 2276772,2276773, 2276774,2276775, 2276776, 2276777, 2276778, 2276779, 2276780, 2276781, 2276782, 2276783, 2276784, 2276785, 2276786, 2276787, 2276788, 2276789, 2276790, 2276791, 2276792, 2276793, 2276794, 2276795
Counsel:	Mark Covan, for the Federal Crown, Appellant Darren Martin, Respondent, self-represented

By the Court:

Addendum: A copy of my decision was provided to the parties on January 9, 2015, prior to publication. Following receipt, the Respondent notified me that one of his four post hearing written submissions was not referenced in my decision; in particular, his August 20, 2014. (This was his second submission which was in response to the Crown's reply to his first submission). At paragraph 10 herein, I reference all four submissions of the Respondent; and note the latter three followed the Crown's reply of August 20, 2014. The title page of my decision inadvertently only referenced three of the Respondent's four submissions. The submission of August 20, 2014 was not referenced. The title page was amended prior to publication to include this submission date.

Brief Overview

[1] This is a summary conviction appeal pursuant to section 813 of the ***Criminal Code*** arising from two decisions of the Provincial Court of Nova Scotia rendered orally on June 20 and 21, 2013; written decisions were respectively released on September 25 and 26, 2013. The Respondent, Darren Martin, was charged with multiple charges under the ***Income Tax Act*** and the ***Excise Tax Act*** for allegedly failing to remit tax or report income as required.

[2] Evidence was collected by the Canada Revenue Agency (CRA) without warrant during the audit phase. Evidence was also gathered under warrant during

the offence-related investigation stage. The Respondent brought forward two preliminary ***Charter*** motions, one under section 7 the other under section 8.

[3] Under his June 20, 2013 decision the trial judge ruled in favour of the Respondent and found his section 7 and section 8 ***Charter*** rights had been violated. The finding under section 7 was related to the finding under section 8 in that the section 7 violation afforded the material evidence upon which the Information to Obtain was based; which in turn, resulted in the issuance of the search warrant. The search warrant resulted in the seizure of key evidence of the Crown's case against the Respondent. As a result of the ***Charter*** violations evidence collected was excluded.

[4] Notwithstanding the exclusion of evidence the Crown maintained sufficient content remained in the Information to Obtain. The trial judge determined there was insufficient evidence to substantiate and the warrant was issued in contravention of section 8 of the ***Charter***. The trial judge ordered all evidence seized thereunder be excluded from evidence.

[5] Because of the above rulings and resulting exclusions the Crown conceded it was unable to make the allegations before the court. The charges were dismissed.

[6] Determining when a routine tax audit crosses over into a criminal investigation is pivotal to the ***Charter*** analysis conducted by the trial judge. An examination of the predominant purpose of the actions of CRA and whether the predominant purpose of CRA inquiries were to determine penal liability lies at the core of such determination. Once in an offence focussed investigation, CRA can no longer rely on the statutory audit provisions to compel, without warrant, the production of material from a taxpayer.

[7] The trial judge made a specific determination when that line was crossed in the Respondent's case which then triggered ***Charter*** protection. The trial judge found the admissions of certain irregularities (deferring invoices to postpone payment of HST) made during the audit phase could be taken as an admission of all the elements of an offence and at this juncture in the audit a shift occurred. The trial judge determined the auditor was collecting evidence relevant to a criminal investigation not an audit.

[8] The Respondent volunteered to the auditor that if he could not afford to make his HST remittances when due he developed a practice of deferring invoices to a later period when cash flow would permit him to make the required remittances. The auditor then went on to try and confirm the deferred revenue was

eventually reported and tax remitted as explained by the Respondent. The trial judge found this was in effect a pursuit of the tax payers truthfulness; going to the issue of *mens rea*. The trial judge went on to find the inquiry was not an inquiry to determine overall taxpayer financial liability; rather whether the Respondent was telling the truth about reporting and properly remitting (albeit late) in a deferred quarter.

[9] The Appellant asserts the trial judge erred in this determination and his decision moved the clear goal posts established by the Supreme Court of Canada. The Appellant maintained that if the trial judge's decision were to stand, it could effectively shut done every audit conducted by CRA. The Appellant seeks relief by way of an order for a new trial pursuant to sub section 686(4) of the ***Criminal Code***.

[10] Just prior to the intended release of this decision in August 2014, the Respondent filed a further unsolicited written submission. I invited the Crown to respond, which it did. Subsequent to the Crown's reply, the Respondent filed three additional unsolicited submissions. The Respondent's submissions impacted the release date of my decision. I have addressed the subsequent submissions of the

Respondent herein. An amicus curiae was appointed at trial; the Respondent is self-represented on this appeal.

Grounds of Appeal/Issues:

[11] The grounds as stated in the Notice of Appeal are as follows:

1. The learned trial judge erred in making findings of fact that were not reasonable and were not supported by the evidence;
2. The learned trial judge erred in law and mixed fact and law with respect to his interpretation and application of s. 7 and s. 8 of the ***Canadian Charter of Rights and Freedoms***;
3. The learned trial judge erred in law and mixed fact and law with respect to his interpretation and application of s.24(2) of the ***Canadian Charter of Rights and Freedoms***; and
4. Such further and other grounds as may appear from the record.

[12] The Appellant did not proceed with ground three and refined the grounds to the following specific issues:

> 1. The trial judge erred concluding that the predominant purpose of the inquiry shifted after November 7, 2007. Specifically, he:
>
> > (a) Failed to apply the subjective component of the "predominant purpose" test; and
> >
> > (b) Overemphasized the possible relevance of the inquiry to a criminal investigation rather than focussing on the purpose of the inquiry.

> 2. The trial judge erred excluding the evidence obtained by search warrant, specifically; he erred in excising from the Information to Obtain a Search Warrant the statement of Mr. Martin as unreliable and the information obtained by the auditor after November 7, 2007 as obtained contrary to section 7 of the ***Charter***.

Summary of evidence and Trial Judge's Decisions

[13] The determinations of the trial judge, in effect, shut the audit phase down just after it got underway. The first meeting between the auditor and the Respondent was on November 5, 2007. There was a second meeting on November 7, 2007 with some communications in between. The trial judge determined that the Rubicon had been crossed on November 7, 2014; and from that time forward the relationship in effect shifted from audit to investigation and this adversarial relationship triggered ***Charter*** protection.

[14] In its factum (paragraphs 11 to 32 with cross references to the Appeal Books) the Appellant set out evidence and provided an overview of the key determinations of the trial judge relevant to the grounds of appeal.

[15] To place in context the arguments advanced by the Appellant it is helpful to review same, which is as follows:

(a) In 2007 the Respondent was selected for a random audit of income and expenses. Prior to requesting records and meeting with the Respondent, the CRA auditor (Tammy Higgins) reviewed CRA data base information, conducted a property search and obtained a credit report;

(b) On October 30, 2007, the auditor wrote the Respondent, asking he provide sales invoices, expense receipts, and bank statements, both business and personal, for the taxation years 2005 and 2006;

(c) The auditor together with her supervisor/team leader met with the Respondent on November 5, 2007. The Respondent took his bookkeeper to the meeting. During this meeting, the Respondent supplied much of the requested documentation and, together with his bookkeeper, responded to a number of pre-determined questions;

(d) Following the November 5, 2007 meeting, the auditor prepared a summary reconciliation of sales reported in the Respondent's tax returns against deposits found in the bank statements. The auditor found a $90,000.00 discrepancy in bank deposits over 2005 and 2006. The auditor testified she had no reaction to finding this discrepancy because, at that point in time, she had no information about the nature of any deposits;

(e) On November 7, 2007, the auditor and her team leader met again with the Respondent. The Respondent was asked to address this discrepancy. He provided some additional information. After inputting the new information the auditor determined there was still a discrepancy; however, she was unable to determine the quantum;

(f) In the presence of the auditor, the Respondent then called his bookkeeper (Ms. Thompson). He relayed to the auditor the bookkeeper's suggestion that "deferred invoices" may explain the remaining discrepancy. The Respondent explained that when he was unable to afford paying the HST in a quarter, he would remove the invoice he was unable to pay and postpone its payment until later;

(g) The Respondent agreed to provide copies of the invoices he had deferred. That same day (November 7, 2007), he gave the auditor some additional invoices. His bookkeeper provided one additional invoice on November 8, 2007;

(h) The auditor testified she then focused on the deferred invoices. She wanted to understand if they were claimed in a later period. The auditor testified that deferring of invoices was an improper practice. However, if she determined deferred invoices had been reported in a later quarter she would have educated the Respondent on the proper way to record and report his income and there would have been no other consequences;

(i) When asked in cross-examination whether a red flag was raised in her mind with respect to venturing into other territory (in the context, meaning 'criminal investigation'), the auditor stated: "*Not at all*" and "*The audits I deal with are businesses. Most of the times, it's just an error. Therefore, it's a lot about educating the taxpayer. And if they do something that is sometimes incorrect, I educate them on how to do it properly and we move on and just inform them not to do this the next time*." She further testified that if the errors were repeated, that error could attract administrative penalties such as gross negligence penalties;

(j) The auditor discussed the issue of the deferred invoices with her supervisor/team leader, Mr. Harnett. He expressed no opinion with respect to this practice and simply instructed her to confirm, or not, whether the deferred invoices were in fact claimed in subsequent filing periods. They did not discuss what would happen should she be unable to make that determination;

(k) The auditor could not complete her audit until she received complete banking information from the Royal Bank. The auditor continued to review the information she received from third parties and the Respondent;

(l) Once in possession of complete banking information, the auditor concluded the Respondent was not catching up with reporting deferred income and was, instead falling further and further behind. She testified she was unable to tell when the income was deferred to and the amount of the discrepancies. She determined

income continued to be underreported over several years but was unable to reconcile either bank deposits or invoice amounts with the income reported and it was impossible to determine which particular invoices were included in any particular reported amount. On February 20, 2008, the decision was made to refer the matter to Investigations;

(m) The Respondent testified that Mr. Harnett acted very, very surprised when he disclosed his invoice deferral practice during the November 7, 2007 meeting. Mr. Harnett allegedly exclaimed *"What?*" and turned around and may have also asked "*Can you explain that? What did you do*?", but made no further comments while the Respondent explained to the auditor what he meant. Ms. Higgins herself had no reaction;

(n) In cross-examination by the amicus curiae, the Respondent testified he was never told the **Income Tax Act** requires that collected HST should be reported at specified times. According to the Respondent, the only time he was corrected by the auditor was with respect to the claimable meal allowances;

Overview of Trial Judge's decision on the *Charter* motions

(o) The trial judge noted the credibility, candour and professionalism of all of the CRA witnesses including the auditor. He found they testified truthfully about the work they had done, they did not abuse their position of authority, and they demonstrated integrity throughout their involvement with this matter;

(p) Nevertheless, the Trial Judge determined that following the Respondent's November 7th statement that he was deferring invoices the predominant purpose of the auditor's inquiries was to determine penal liability;

(q) The Respondent's admission of deferring invoices "*could well have been taken as an admission of the commission of an offence, an admission of essentially all of the essential elements of an offence because Mr. Martin did not claim to have acted with inadvertence. Mr. Martin said that he did what he did on purpose."* Furthermore, the "*very complete nature of Mr. Martin's*

admission of improper conduct would have supported a decision to proceed with a criminal investigation." ;

(r) The trial judge found noteworthy the auditor did not attempt to educate the Respondent during the November 7 meeting despite the fact she never heard of such a practice before and that deferring invoices was noteworthy in her mind. The instruction the auditor received from her supervisor was to determine whether the Respondent was reporting deferred HST in the following years was not an inquiry to determine overall taxpayer liability over the years covered by the audit. Instead, it was "*credibility testing*" aimed at determining whether the Respondent told the truth about properly remitting collected HST in the following quarter;

(s) The trial judge accepted as a fact the auditor's *"complete honesty that she believed that she was acting in her capacity as an auditor. She was not acting surreptitiously as an agent for the Criminal Investigations Branch and sincerely believed that she was acting as an auditor."* However, regardless of her intent she was collecting evidence relevant to a criminal investigation; and

(t) Having determined all the information obtained by the auditor after the November 7 meeting was investigative in nature, the trial judge excised all derived information from the Information to Obtain. The Court determined the remaining grounds were insufficient to sustain the issuance of the search warrant.

Position on the parties

Appellant Position

[16] The Appellant asserts the trial judge erred in making findings of fact that were not reasonable or supported by the evidence and failed to correctly apply the predominant purpose test established by the Supreme Court of Canada in **R. v.**

Jarvis, 2002 SCC 73. The following is a summary of the Appellants arguments in support of this contention:

(a) The trial judge failed to apply the subjective component of the ***Jarvis*** test. The assessment of whether a person has reasonable grounds to believe an offence has been committed is both a subjective and objective standard. The auditor has discretion not to make a referral to proceed to the final investigative stage. This discretion makes the auditor's intentions key, so her purpose in acting informs the determination. When the auditor testified to her intention or purpose her creditability also informs the analysis. The auditor testified her purpose was to conduct an audit. Notwithstanding, the trial judge accepted the auditor's evidence as credible, he looked beyond the auditors stated purpose. He found another purpose; being, regardless of her intention after the November 7, 2007 meeting, the auditor was collecting evidence relevant to a criminal investigation. The trial judge reconciled this result by finding the other purpose was not intended. The Appellant asserts an "unintended purpose" is a paradox and not reconcilable in fact or law;

(b) This standard set by the trial judge might make it impossible for an auditor, conducting an audit in good faith to self-identify and avoid improper conduct. Furthermore, the standard set by the trial judge would encourage fast tracking criminal investigations thus extinguishing the important discretion regulatory officers have;

(c) It was reasonable and proper for the auditor to determine whether the Respondent was in fact reporting deferred income and eventually paying deferred HST remittances before deciding whether a referral to investigations was warranted. The auditor testified if deferred invoices were later reported as claimed; she would have provided instructions on proper recording and reporting methods with no other consequences. This type of discretion is to be reinforced not shackled;

(d) Relevant information gathered by an auditor is typically relevant in a criminal investigation. Possible dual relevance cannot be determinative

of the purpose of an audit. Information aimed at discovering intent behind taxpayer conduct may be equally relevant to mens rea (criminal) as to gross negligence which is a matter for the auditor to determine. Accordingly, this is why purpose (not relevance) is determinative. The Appellant asserts the trial judge failed to appreciate the importance of the auditors understanding of whether the Respondent's statement was a full admission of penal liability as the trial judge prevented the Respondent from asking her that question in cross-examination;

(e) The turning point for the trial judge was the auditor's decision to determine whether the Respondent taxpayer had done what he said in reporting the deferred invoices in a later quarter. The trial judge determined this was a search for the truth which is consistent with *mens rea* criminal investigation. By so concluding, the trial judge ignored or dismissed the relevance of this information to the auditor's core function and the trial judge misapprehended its use in a criminal prosecution. The outcome of the inquiry of whether deferred income was reported as claimed is relevant to the (civil) tax liability of the Respondent and the *actus reus* of a criminal offence (false reporting and tax evasion) if the auditor had decided to refer to investigations. The auditor's inquiry had no probative value to the *mens rea* of a criminal offence. The Respondent's statement he knowingly deferred reporting of collected HST to subsequent periods was sufficient evidence of the *mens rea* for the offence and making false statements whether it turned out to be true or not. The inquiry into whether the Respondent taxpayer had caught up was only relevant to (civil) tax liability and the *actus reus* of a criminal offence;

(f) The auditor's uncontradicted evidence accepted by the trial judge was that her purpose in carrying out her follow through function was to complete her audit. The fact an inquiry could be relevant to a criminal offence does not, by itself, transform a legitimate audit inquiry into a criminal investigation. Thus the trial judge erred in inferring criminal investigative purpose from the relevance of the inquiry to a criminal investigation;

(g) The uncontested evidence of the auditor focused on reconciling the unreported income and expenses with other records. The audit process

required she collect relevant information from the Respondent and other sources such as the bank. She could not determine whether any particular compliance steps taken by the Respondent were appropriate until she collected and analyzed all relevant information. That did not occur until February, 2008. The auditor's uncontested evidence was that on February 20, 2008, a clear decision was made to refer the matter to investigation;

(h) There was no evidence the auditor previously discussed the matter with investigations or took any direction from them. She was at all times acting as an auditor. The Appellant asserts this is compelling evidence that the auditor's earlier inquiries were genuine audit inquiries and arguably sufficient to confirm legitimate audit functions without engaging in the predominant purpose analysis. That said, even applying the predominant purpose test to the facts leads to the clear conclusion the auditors inquiries were lawfully made; not in furtherance of a criminal investigation; and

(i) The Appellant asserts the correct application of the predominant purpose test leads to the conclusion:

1. The auditor did not have reasonable grounds to lay charges;
2. The auditors general conduct demonstrates an audit purpose;
3. The audit file was not transferred to investigations until February 20, 2008;
4. The auditor was not an agent or acting effectively as an agent for the investigators;
5. No evidence the investigators intended to use the auditor as their agent to collect evidence;
6. The inquiry and evidence collected was relevant to taxpayer liability generally, not taxpayer penal liability; and
7. There are no other circumstances or factors leading to the conclusion this compliance audit had unreasonably become a criminal investigation.

[17] The Appellant asserts the Information to Obtain was sufficient. There was "some evidence" which is the test and the trial judge should not have intervened.

The following is a summary of the Appellants arguments in support of this contention:

(a) The trial judge determined the statement made by the Respondent respecting deferred invoices could not be relied upon in support of the Information to Obtain a search warrant. The trial judge reasoned the Respondent's own statement was not reliable because it was made under compulsion and without use immunity. The case the trial judge relied upon does not support the general proposition that statements given in a regulatory context are inherently unreliable and accordingly inadmissible. The trial judge relied upon **R. v. White** [1997] 2 SCL 418. In that case the Supreme Court of Canada decided that motor vehicle accident reports should be subject to use immunity to avoid the danger the deponent may make a false statement to minimize culpability and frustrate the regulatory process. The Appellants refer to ***Jarvis***, wherein the Supreme Court of Canada stated at para 95:

> …there is no principle of use immunity that prevents the investigators, in the exercise of their investigative function, from making use of evidence obtained through the proper exercise of CCR audit function.

(b) The Appellant further argues the Respondent's statement was a statement against interest which does not raise the same concerns about reliability. Furthermore, prior to making the statement, the Respondent conferred with his bookkeeper on the phone. The bookkeeper was not under a statutory compulsion or exposed to any distorting effect. In short, the Appellant asserts there is no support for the conclusion the statement of the Respondent was unreliable or so unreliable as to be inadmissible. Accordingly, the trial judge erred in excising the statement from the Information to Obtain; and the determination is an error of mixed fact and law;

(c) There is a presumption of validity to a search warrant and the sworn Information in support. The Respondent has the burden to displace the presumption. The test upon review requires deference. The reviewing judge does not substitute his or her views over that of the

authorizing judge. If the reviewing judge finds the authorizing judge could have granted authorization, there should be no interference. The test is really a "no evidence standard". For authority the Appellant references **R. v. Collins** 1989 Carswell Ont. 83 at para 38; **R. v. Garofoli** [1990] SCR (42) at 195. Respecting the sufficiency of grounds for belief required by section 8 of the ***Charter***, the reviewing court must consider the "totality of the circumstances" and weigh the factors identified in **R. v. Debot** [1989] 2 S.C.C. 1140. As discussed in ***Debot,*** in assessing the grounds for belief the appropriate standard is one of reasonable probability; and

(d) Applying the principles to this case, the Information to Obtain contains sufficient grounds to support the conclusion of the issuing Justice of the Peace that evidence would be found at the search location as it related to the tax offences under investigation. Given there was "some evidence" notwithstanding the excising, to support the search warrant the trial judge erred in intervening.

[18] Finally the Appellant also appropriately identified that in a Crown appeal from acquittal the Appellant must satisfy the court that absent the errors, the verdict would not necessarily have been the same. The Appellant asserts that test is met as in the absence of the evidence obtained under the warrant, the Crown was unable to prove its case and the charges were dismissed.

Respondent Position

[19] Other than reciting extensively from the trial judge's decisions the Respondent did not really advance many arguments or directly reply to the

arguments advanced by the Appellant. In his appeal factum, the Respondent asserts:

(a) The trial judge committed no reversible error in law or mixed fact and law in relation to his June 20, 2013 decision. He found the evidence of the auditor truthful and credible; however it was his (the Respondent's) admission that pushed the subsequent request for information into the investigative field. From this point forward the auditor was effectively acting as an agent regardless of her stated intent;

(b) Respecting the Information to Obtain a warrant, the Respondent asserts the trial judge made no error. He asserts the trial judge's conclusion that even with the Respondent's statement (which was deemed unreliable), the record was insufficient to give rise to a valid search warrant. The Respondent asserts these were findings of fact and deference should be given and, overall, the trial judge made no reversible error;

(c) In his post hearing submissions the Respondent raised additional issues respecting the authority to issue the warrant in the first instance. I address these issues later in my decision.

Overview of the Law

Standard of Review

[20] The standard of review to be applied by this Court is as follows:

- Questions of fact: Absent an error of law or a miscarriage of justice, the test is whether the findings of the trial judge are unreasonable or cannot be supported by the evidence. The appeal court is entitled to review the evidence at trial, re-examine and reweigh it, but only for the purpose of determining whether it is reasonably capable of supporting the trial judge's conclusions. If so, the appeal court is not

entitled to substitute its view of the evidence for that of the trial judge. A summary conviction appeal is neither a simple review to determine whether there was some evidence to support the trial judge's conclusion nor a new trial on the transcript. (See **R. v. Nickerson,** 1999 NSCA 168, para 6)

- Questions of mixed fact and law: The interpretation of a legal standard is a question of law. The application of a legal standard to the facts is sufficient to make it a question of law reviewable on the standard of correctness. (See **R. v. Araujo,** 2000 SCC 65, para 18)
- Questions of law: The standard of review for a question of law is correctness. (See **Housen v. Nikolaisen,** [2002] 2 S.C.R. 235, para 8)

[21] The Appellant asserts that whether the trial judge correctly interpreted and applied the predominant purpose test is a question of law reviewable on the standard of correctness; and whether a particular inquiry is in furtherance of an audit or a penal investigation is a question of mixed fact and law. I concur.

Applicable Legal Principles

[22] The key legal principles applicable to the determination of this appeal are as set out by the Supreme Court of Canada in ***Jarvis.*** The central issue under appeal is in what circumstances an inquiry by CRA officials constitutes an investigation that invokes the ***Charter*** rights of the taxpayer. A criminal investigation engages the adversarial relationship between the individual taxpayer and the state. Under the ***Jarvis*** roadmap, the Supreme Court of Canada established the adversarial

relationship is triggered when the predominant purpose of an inquiry is the determination of penal liability under s. 239 of the **Income Tax Act**. The determination of whether the relationship is adversarial or not is a contextual one. One must look to all relevant factors which impact the nature of the inquiry. In the absence of clarity to pursue a criminal investigation, no one factor is conclusive.

[23] The following legal principles extracted from the ***Jarvis*** decision are noteworthy:

> (a) Compliance audits and tax evasion investigations must be treated differently. While taxpayers are statutorily bound to cooperate with CRA auditors for tax assessment purposes (which may result in the application of regulatory penalties) there is an adversarial relationship that crystallizes between the taxpayer and the tax officials when the predominant purpose of the official inquiry is the determination of penal liability. (para 2);
>
> (b) When the predominant purpose of an inquiry is the determination of penal liability CRA officials must relinquish the authority to use the inspection and requirement powers under subsection 231.1(1) and 232.2(1). Officials cross the Rubicon when the inquiry in question engages the adversarial relationship between the taxpayer and the state. There is no clear formula that can answer whether or not this is the case. Rather, to determine whether the predominant purpose of the inquiry in question is the determination of penal liability, one must look to all factors that bear on the nature of that inquiry. (para 88);
>
> (c) The mere existence of reasonable grounds that an offence may have occurred is by itself insufficient to support the conclusion the predominant purpose of an inquiry is the determination of penal liability. Even where reasonable grounds to suspect that an offence

exists, it will not always be true the predominant purpose of an inquiry is the determination of penal liability. Courts must guard against creating procedural shackles on regulatory officials; it would be undesirable to "force the regulatory hand" by removing the possibility of seeking the lesser administrative penalties on every occasion in which reasonable grounds exist of more culpable conduct. (para 89);

(d) Also in paragraph 89 of ***Jarvis*** the Supreme Court of Canada refers to the case of ***R. v. McKinley Transport*** [1990] 1 S.C.C. 627, where Wilson, J, wrote "*The minister must be capable of exercising these [broad supervisory] powers whether or not he has reasonable grounds for believing that a particular taxpayer has breached the act."*

(e) The Supreme Court of Canada goes on to state while reasonable grounds indeed constitute a necessary condition for the issuance of a search warrant to further a criminal investigation and might in certain cases serve to indicate audit powers were misused, their existence is not a sufficient indicator that CRA is conducting a *de facto* investigation. In most cases, if all ingredients of an offence are reasonably thought to have occurred, it is likely that the investigation function is triggered. (para 89);

(f) The test is not set at the level of mere suspicion an offence has occurred. Auditors may, during the course of their inspections, suspect all manner of taxpayer wrongdoing, but it cannot be the case that, from the moment such suspicion is formed, and investigation has begun. The state interest in prosecuting those who willfully evade their taxes is of great importance, and we should be careful to avoid rendering nugatory the state's ability to investigate and obtain evidence of these offences. (para 90);

(g) It would be a fiction to say that the adversarial relationship only comes into play when charges are laid. Logically this will only happen once the investigators believe they have obtained evidence that indicates wrong doing. Because section 239 offences contain an element of mental culpability, the state will, one must presume,

usually have some evidence that the accused satisfied the *mens rea* requirement before laying an information or preferring and indictment. The active collection of such evidence indicates that the adversarial relationship has been engaged, since it is irrelevant to the determination of tax liability. (para 91);

(h) The determination of when the relationship between the state and the individual has reached the point where it is effectively adversarial is a contextual one, which takes account of all relevant facts. Apart from a clear decision to pursue a criminal investigation, no one factor is necessarily determinative in and of itself. Courts must assess the totality of the circumstances, and make a determination as to whether the inquiry or question in issue engages the adversarial relationship to the state and the individual. (para 93);

(i) The trial judge will look at all factors, including but not limited to the following questions:

(1) 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?

(2) Was the general conduct of the authorities such that it was consistent with the pursuit of a criminal investigation?

(3) Had the auditor transferred his or her files and material to the investigators?

(4) Was the conduct of the auditor such that he or she was effectively acting as an agent for the investigators?

(5) Does it appear that the investigators intended to use the auditor as their agent in the collection of evidence?

(6) 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?

(7) 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. (para 94).

(j) When in light of all relevant circumstances, it is apparent that CRA officials are not engaged in the verification of tax liability, but engaged in the determination of penal liability under section 239, the adversarial relationship between the state and the individual exists. As a result, ***Charte*****r** protections are engaged. (para 99); and

(k) Whether or not a given inquiry is auditorial or investigatory in nature is a question of mixed fact and law. It involves subjecting the facts of a case to a multi-factual legal standard. (para 100 – emphasis mine)

Decision

[24] For the reasons set out below, I respectfully find:

(1) The determination by the trial judge that the audit had become a criminal investigation prior to February, 2008 unreasonable and cannot be supported by the evidence;

(2) The trial judge erred in law in his application of the predominant purpose test; and

(3) The trial judge erred in law in finding insufficient evidence to support the Information to Obtain.

[25] Accordingly the Appeal is granted and a new trial is ordered.

Analysis

[26] The trial judge referred extensively to the relevant law including the Supreme Court of Canada's decision in ***Jarvis***. The questions for determination are

whether he applied that law correctly and secondly whether his factual determinations are reasonable and supported by the evidence.

[27] I reminded myself of the limitations respecting my review of factual sufficiency. The trial judge made factual determinations to which he applied the law. Respecting his pivotal factual findings I must not substitute my view for that of the trial judge. I must determine whether the findings of the trial judge are unreasonable or cannot be supported by the evidence. In doing so, I must review the evidence at trial, re-examine and reweigh it, but only for the above stated purpose.

[28] When a clear decision to pursue a criminal investigation is made there is no need to analyze the ***Jarvis*** factors. In this case, that clear decision was not made until February 20, 2008. Thus, the analysis of the ***Jarvis*** factors was required in order to determine whether the relationship had earlier transformed into an adversarial relationship triggering ***Charter*** protection. That determination is contextual; it takes into consideration all relevant factors not just the predominant purpose test as articulated in ***Jarvis.***

[29] In applying the ***Jarvis*** factors to the evidence before him the trial judge made the following determinations:

- The authorities head reasonable grounds to late charges;
- The general conduct of the authorities was consistent with the pursuit of a criminal investigation. Although the auditor had not transferred her file material to the investigators and the investigators did not intend to use the auditor as their agent in the collection of evidence, he still found the conduct of the auditor was, in effect, such that she was acting as an agent for the investigators;
- The evidence sought by the auditor was relevant to penal liability and not taxpayer liability. The trial judge determined the information being sought was to determine "truthfulness" which is a *mens rea* element; and
- The trial judge found there to be other circumstances or factors which led him to the conclusion the compliance audit had crossed the line into a criminal investigation.

[30] The determination as to whether the predominant purpose of the inquiry shifted is very much a fact driven exercise. As noted by the Supreme Court of Canada in ***Jarvis*** it involves subjecting the facts to a multi-factual legal standard. I have reviewed and reweighed all the evidence to determine if it is capable of supporting the trial judge's conclusions. I have determined it is not. With respect, I have determined that the trial judge's conclusions are unreasonable and cannot be supported by the evidence. The evidence does not support the trial judge's conclusion the Rubicon was crossed.

[31] In my view the evidence is clearly most consistent with and strongly supports a determination that the auditor was solely performing a legitimate audit function prior to February 20, 2008 when the decision was made to transfer to investigation. Prior to that time the auditor was asking for information in the normal course of an audit. The auditor's inquiry goes more to the determination of tax liability - a civil matter. To conclude otherwise stretches the evidence beyond its reasonable application.

[32] In my view, the trial judge incorrectly overemphasized the relevancy of the auditor's inquiry to a criminal investigation, ignored or failed to recognize the importance of the intended purpose of the auditor's inquiries, and overemphasized any criminal evidence or inculpatory statements of the accused as being tantamount to a full admission of all the elements of the offense.

[33] I refer to the evidence of the Respondent taxpayer himself. The following are excerpts from the transcript respecting his explanation as to how he was handling the reporting of his income and the payment of HST. In the excerpt below the Respondent is being cross-examined by the amicus curiae. I note for clarity the reference to Ms. Turnbull is the auditor formerly known as Ms. Higgins.

(Appeal Book, Volume 2 of 3, Part II Evidence and related materials, page 482 to 485):

Page 482-483:

Q. All right. In her notes she says, "He (meaning you) called Marsha while we were there. And she told him that the deferred invoices might make up this difference." So do you recall at some point making a phone call to your bookkeeper?

A. Yes.

Q. Yes. And the purpose of that was as is suggested in Ms. Turnbull's notes?

A. Yes, to find the amounts that were missing, I suppose, in the deferred.

Q. And more generally to come up with some explanation as to where the $90,000 disappeared to?

A. I think Marsha mentioned that I don't … I don't do…as a small business person, (inaudible) find anybody that can do all their books and perform the functions in the shop. So I never looked after the … I didn't … I did not place any … I didn't really look after the books very well at all.

And if I'm being honest, it's because you've I've got other things to do in the shop, and it's just not something that I'm going to sit down and do hours a night. So I didn't keep good books, that's…

Q. Okay. Again in Ms. Turnbull's notes she says: "Darren said that if he can't afford to pay the HST in a quarter, he will take out the invoice which he can't afford to pay and pay it later." Do you recall making that statement to the auditors…

A. Yes.

Q. …or those two people from Revenue Canada? Yes, okay. So that notation is accurate as best as you can recall, is it?

A. Yes.

……

Page 484-485

A. Well, I explained to him [being Ms. Turnbull's supervisor] what I did.

> Q. What explanation did you give as best you can recall?
>
> A. I explained to him that I had to defer invoices if I didn't have the money in the bank because you have…everybody else besides … I know … I understand that it's probably not the best course of action, but there's other commitments that you have during the month.
>
> …
>
> Q. So you said he almost or just about jumped out of his chair.
>
> A. Well, he was ex…yeah, he was …he turned around and said "What?" Like, very, very surprised that I had said that.
>
> Q. And did he say anything else other than "What? What did you say?"
>
> A. Then I explained to him what I did. But after that, I don't believe he said too much at all. My impression of him was that he was there to assist Mrs. Turnbull in performing her audit or whatever she was doing there. I think he was training her, so she pretty much asked the questions.
>
> Q. Do you recall if she reacted in any way to your comment about deferring payment of the HST?
>
> A. No, she didn't. She was sitting across from me. She didn't, no.

[34] This seems to fall short of an admission of willful evasion; in otherwords, the Respondent knowing that his actions were clearly contrary to his reporting requirements. Furthermore, I find the evidence cannot reasonably support a finding or inference the auditor's pursuit of information was aimed at determining intent behind the tax payers conduct.

[35] The decision to refer to investigation was made in February 2008. At no time prior to that is there any evidence that the auditor even communicated with the investigative division. The audit was an income audit. That was the focus of the audit once it got underway. The issue with respect to deferred reporting of income

was obviously related to the payment of HST. Charges were also laid under the *Excise Tax Act* for failure to report and pay HST as required.

[36] Although there was some prep desk work carried out by the auditor and CRA prior to the meetings with the Respondent, the audit was really just getting underway with respect to meetings with the Respondent. In particular, with the auditor being able to ask relevant questions and obtain answers as well as the Respondent providing relevant documentation as requested by the auditor.

[37] The auditor identified some discrepancies. The Respondent and his bookkeeper were responsive to her queries in an effort to explain the discrepancies. He relied on his bookkeeper to some extent to help clarify the income discrepancy. The identification of deferred invoices was put forward by the bookkeeper in the first instance, not by the Respondent, albeit the Respondent relayed the telephone communication to the auditor. It is notable the information of the deferred invoices (or if I were to characterize it as the trial judge, possible elements of an offence), came initially from the bookkeeper.

[38] In the audit phase, in the specific circumstances of this case, it was logical for the auditor to inquire into whether deferred income was in fact later recorded. If that turned out to be the case, the discrepancy would be resolved. The auditor

would have been able to confirm HST was finally remitted. In other words, these inquiries were specific to the Respondent tax payers compliance. The auditor's uncontested and unequivocal evidence was to the effect that had compliance been eventually confirmed she would have provided direction on how to properly handle in the future with no other consequences. This goes to the purpose of her audit and against any inference she was "effectively" acting as an agent for investigation

[39] I find the trial judge's conclusions respecting the auditor's failure to educate the Respondent regarding his deferral practices was also unreasonable and unsupportable on the evidence. The evidence establishes the auditor was fairly new in her audit position at the time of this audit. She was not familiar with the practice of deferring invoices. By November 7, 2007, she was in the early stages of learning of the Respondent's deferral practice. She needed to understand what he did. She was gathering information from his bookkeeper and other sources. It would have been premature or at least clearly understandable on the evidence why she did not provide that educational direction in November, 2007. The evidence does not support the negative inferences drawn from the trial judge given this limited evidence and in the overall circumstances.

[40] Respecting the issue of intention/purpose and relevancy of gathering information as argued by the Appellant, one must still objectively examine whether the conduct of the auditor crossed the line and "in effect" caused the auditor to act as an agent for the investigators – whether she intended to do so or otherwise. That said, as noted, the evidence, in my view, cannot support the conclusion she crossed into the investigative stage. I find the trial judge incorrectly inferred criminal investigative purpose from mere relevancy to a criminal investigation.

[41] From a review of the transcripts, I restate my conclusion that I find the evidence is clearly consistent with and strongly supports a finding the auditor was engaged in a legitimate audit function to determine tax payer liability more generally. In other words, a civil matter and not crossing into the territory of penal or criminal investigations which would trigger ***Charter*** protections for the Respondent. There is insufficient evidence to conclude that an investigation was underway *de facto* or otherwise prior to the crystallization of the investigative decision in February 2008.

[42] The decision of the trial judge created procedural shackles on CRA regulatory officers; something to be guarded against, assuming the regulatory officers are acting appropriately and within the scope of their authority. In my

view, the evidence consistently and strongly supports the auditor was acting appropriately, lawfully and within the scope of her authority and the trial judge erred in his application of the ***Jarvis*** factors to the evidence.

[43] Having reached this conclusion, regarding the legitimate audit function there are no ***Charter*** breaches; therefore no basis upon which to excise information from the Information to Obtain. Given my finding on this ground of appeal I need not address the Appellant's second ground of appeal respecting the sufficiency of the remaining content of the Information to Obtain. That said, I will address this issue briefly.

Sufficiency of Information to Obtain

[44] Notwithstanding the excising of information, I find the trial judge erred in his determination that the statements of the Respondent respecting certain admissions were unreliable because they were made under statutory compulsion absent use immunity. I concur with the Appellant's argument that the decision of ***R v White*** does not stand for the general proposition that statements given in a regulatory context are inherently unreliable and accordingly inadmissible.

[45] The legal test is summarized in paragraph 17 of my decision. I find there was "some evidence" (arguably credible evidence given the statement against interest), in support of the Information to Obtain.

[46] Accordingly, with respect, I find the trial judge erred by intervening and concluding there was insufficient evidence to substantiate the issuance of the search warrant and concluding the warrant was issued in contravention of section 8 of the ***Charter***.

[47] I turn briefly to address new issues raised by the Respondent in his unsolicited submissions filed post the conclusion of the appeal hearing. In summary, they dealt with allegations the warrant in question could not have been issued by a Justice of the Peace. In its reply the Appellant addressed the requisite authority to issue. As noted, further submissions were received by the Respondent respecting the warrant. None of the subsequent issues raised or submissions impact my decision. I also note that on Monday, January 5, 2015, I received a very extensive package of materials from the Respondent. The “package” contained a 50 page complaint letter to the Office of the Commissioner of CRA together with numerous attachments. The materials appear to address the Respondent’s grievances with CRA. It is obvious the Respondent takes issue with CRA

practices; however, the latest materials received just several days in advance of releasing my decision are not germaine to the matters I have to determine.

[48] I am satisfied the errors of the trial judge might have had a material bearing on the acquittal and absent the errors the verdict would not necessarily be the same.

[49] Appeal granted. New trial ordered.

Justice E. Van den Eynden

01/26/19