SUPREME COURT OF NOVA SCOTIA
Citation: *R v Young*, 2021 NSSC 361

Date: 2021-07-07
Docket: Sydney No. 504931
Registry: Sydney

Between:

Her Majesty the Queen

v.

Georgette Young, Lydia Saker, Nadia Saker, Angela MacDonald and Latatia Advertising Incorporated, The Spaghetti Benders Limited, 25132004 Incorporated, 25132002 Incorporated, Kishk Incorporated, Maddie and Bella's Children's Clothing Incorporated, Artisan Hair Loss Therapy Incorporated, Housewives in Heels Incorporated, Juliette and John Incorporated and New and Chic Incorporated

Ruling on Jarvis Application

ss. 7 and 8 of the Canadian Charter of Rights and Freedoms

Judge:	The Honourable Justice Robin Gogan
Heard:	June 28, 29, 30, July 5 and 6, 2021, in Sydney, Nova Scotia
Written Release of Oral Decision:	January 13, 2022
Counsel:	Mark Donohue and Constantin Draghici-Vasilescu for the Crown Georgette Young, Angela MacDonald, Nadia Saker, and Lydia Saker, self-represented Defendants

By the Court:

Introduction

[1] Georgette Young, Angela MacDonald, Nadia Saker and Lydia Saker are self-represented accused. They are co-accused in this proceeding, along with ten companies, charged with a multitude of offences contrary to both the ***Criminal Code of Canada*** and the ***Excise Tax Act***. The offences are alleged to have occurred between January 1, 2011 and July 31, 2015.

[2] The co-accused have advanced a ***Jarvis*** application in this proceeding and seek exclusion of evidence.

[3] During the course of the trial, I provided a bottom line decision on this application to allow the trial to continue. That decision was delivered in order to be efficient about the conduct of the proceeding and avoid losing court time. I promised written reasons would follow. What follows are the reasons in support of that decision.

[4] The ***Jarvis*** application was brought by the applicants who allege breaches of their ss. 7 and 8 ***Charter*** rights as a result of the intended use of the information gathered in the context of a civil audit. The applicants are of the view that their

rights were infringed by the ability of the Canada Revenue Agency ("**CRA**") to use evidence obtained in a civil audit process against them in a criminal proceeding. The burden is on the accused to establish a violation of their ***Charter*** rights and any remedy.

[5] The Crown conceded the need for a ***Jarvis*** *voir dire* and called evidence on the application. These witnesses were cross-examined. None of the accused testified on this application.

[6] As I have already determined in an oral ruling, I find no breach of the applicants' ***Charter*** rights. The application is dismissed.

Background

[7] The decision on this application is made in the context of an ongoing trial in which the accused are charged with a multitude of ***Criminal Code*** and ***Excise Tax Act*** offences alleged to have occurred between January 1, 2011 and July 31, 2015.

[8] In the course of the *voir dire*, the evidence established that the individual accused were operating a variety of companies that were claiming GST refunds under the ***Excise Tax Act.*** For various reasons, the credit return filings of the companies came under the scrutiny of auditors at the CRA. Auditor Carol Power

was assigned the audits and she testified during the *voir dire,* as did several other employees of CRA. This evidence will be reviewed below.

[9] Beforehand, I will frame the issue, confirm my understanding of the position of the parties, and review the applicable law.

Issue

[10] The issue in this ruling is whether there has been an infringement of any or all of the applicants' ss. 7 or 8 ***Charter*** rights as a result of the use of the information gathered during the CRA civil audit process. The real issue for determination is at what point the predominant purpose of the CRA process became the investigation of criminal liability. The point at which the predominant purpose is the assessment of criminal liability is the point at which the full scope of the applicants ***Charter*** rights are triggered.

[11] I note here that a subsequent issue arose about the statements made by each of the accused to Power during her telephone conversations and in person interviews. The issue of voluntariness arose in the context of the Crown's intention to introduce Power's T2020 file memorandums into evidence. The T2020s purported to record all of Power's contact with each of the accused and included a written record of the statements made to her. The Crown sought to rely on the content of the T2020s

including any statements made by the accused. The T2020s were admitted into evidence, including the record of statements made by the individual accused to Power during the various related audits (*VD 1 – Housewives in Heels, VD 14 – Juliette & John Inc., VD 16 – New & Chic Inc., VD 17 – Artisan Hair Loss Therapy Inc., VD 18 - Maddie & Bella's Children's Clothing Inc.,VD 19 – Kishk Inc., VD 21 – 25132004 Inc., VD 22 – 25132002 Inc.,*).

[12] Before determining the issues, I turn to a brief review of the positions of the parties.

Positions of the Parties

The Applicants

[13] This was an application brought by the accused in a series of ***Charter*** applications filed seeking the exclusion of evidence. They relied on the decision of the Supreme Court of Canada in ***R. v. Jarvis***, 2002 SCC 73. They were collectively of the view that the use of the information obtained in the civil audit was improper and this evidence should be excluded from evidence in the criminal proceeding.

[14] In the end, none of the accused offered evidence on the application. They cross-examined the Crown witnesses. The only submission made was an argument

that the formal CRA document initiating the criminal investigation, the T134, was flawed in a multitude of ways. As I understood this lone argument, the flawed referral meant that the subsequent criminal investigation was not properly initiated with the result that the entire criminal process was vitiated in some way. More will be said about that later in these reasons.

The Crown

[15] The Crown asked that the application be dismissed. It provided multiple written submissions and an extensive oral submission in support of its position. The general position was that there had been no breach of the accused ***Charter*** rights and no basis for any iteration of the relief sought to be granted. In a subsequent submission on the admissibility of the statements of the accused in Power's T2020s, the Crown took the view that such statements were compelled under s. 288 of the ***Excise Tax Act*** and as a result must be distinguished from voluntary statements made to persons in authority.

[16] The Crown relied on the key authorities as well as a number of decisions which applied the established analysis in a variety of circumstances. The key authorities were the decisions in ***Jarvis*** and ***R. v. Tiffin***, while others included, ***R. v. Ostrowski***, 91 O.R. (3d) 541, ***R. v. Schiel et al***, 2005 BCPC 0501, ***R. v. Martin***, 2015

NSSC 8, and ***R. v. Mariani***, 2019 ONCJ 128. On the specific issue relating to the admissibility of compelled statements, the Crown relied on ***Jarvis***, as well as ***R. v. Martin***, 2017 NSCA 39, ***R. v. Fitzpatrick***, 1995 CanLII 44 (SCC), ***R. v. White***, 1999 CanLII 689 (SCC) and ***R. v. McMahon***, 2012 ABPC 296.

Analysis

The Law and Authorities

[17] The authority for this application begins with various sections of the ***Charter*** set out here for convenience:

> *Canadian Charter of Right and Freedoms*
>
> **7.** Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.
>
> **8.** Everyone has the right to be secure against unreasonable search and seizure.
>
> **…**
>
> **24.** (1) Anyone whose rights and freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.
>
> (2) Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall; be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

[15] The key legal principles guiding the determination of this application are as set out by the Supreme Court of Canada in ***Jarvis.*** In that case, a taxpayer was charged with tax evasion under s. 239 of the ***Income Tax Act*** and argued that his ***Charter*** rights had been infringed by the use of information he was statutorily compelled to provide under ss. 231(1) and 231(2) of the ***Act*** while he was being audited. The court was required to consider the statutory scheme and determine the point at which the taxpayers ***Charter*** rights were triggered. It developed a contextual assessment described as the "predominant purpose test".

[16] This analysis in ***Jarvis*** recognized that the regulatory scheme contained both administrative and penal provisions and that it was critical for the ***Charter*** analysis to determine whether the tax authority was merely seeking taxpayer compliance with administrative provisions or compiling evidence in support of laying charges. At para. 88 of ***Jarvis***, the Court discussed the distinction:

> 88 In our view, where the predominant purpose of a particular inquiry is the determination of penal liability, CCRA officials must relinquish the authority to use the inspection and requirement powers under ss. 231.1(1) and 231.2(1). In essence, officials "cross the Rubicon" when the inquiry in question engages the adversarial relationship between the tax payer 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 at all the factors that bear upon the nature of the inquiry.

[17] The elements of the predominant purpose test were detailed by the Court at paras. 93 and 94:

> 93 To reiterate, 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 into account of all relevant factors. In our opinion, the following list of factors will assist in ascertaining whether the predominant purpose of any inquiry is the determination of penal liability. Apart from a clear decision to pursue a criminal investigation, no one factor is necessarily determinative in and of itself, but courts must assess the totality of circumstances, and make a determination as to whether the inquiry or question in issue engages the adversarial relationship between the state and the individual.
>
> 94 In this connection, the trial judge will look at all the factors, including but not limited to such questions as:
>
> (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 material 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.

[18] If the assessment is conducted and it is apparent that CRA officials are engaged in the determination of penal liability, an adversarial relationship between the state and the individual exists. It is at this point where the Rubicon is crossed and ***Charter*** protections engaged. The consequences of this change in the nature of the inquiry was set out at paras. 95 and 96 of the reasons in ***Jarvis***:

> 95 With respect to the consequences related to s. 8 of the *Charter*, *McKinlay Transport, supra*, makes it clear that taxpayers have very little privacy interest in the materials and records that they are obliged to keep under the ITA, and that they are obliged to produce during an audit. Moreover, once an auditor has inspected or required a given document under ss. 231.1(1) and 231.2(1), the taxpayer cannot be truly be said to have a reasonable expectation that the auditor will guard its confidentiality. It is well known, as Laskin C.J. stated in *Smerchanski, supra*, at p. 32, that "[t]he threat of prosecution underlies every tax return if a false statement is knowingly made in it". It follows that there is nothing preventing auditors from passing to investigators their files containing validly obtained audit materials. That is, 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 the CCRA's audit function. Nor, in respect of validly obtained audit information, is there any principle of use immunity that would require the trial judge to apply the "but for" test from *S. (R.J.), supra*. If a particular piece of evidence comes to light as a result of information validly contained in the auditor's file, then the investigators may make use of it.
>
> 96 On the other hand, with respect to s. 7 of the *Charter*, when the predominant purpose of a question or inquiry is the determination of penal liability, the "full panoply" of *Charter* rights are engaged for the taxpayer's protection. There are a number of consequences that flow from this. First, no further statements may be compelled from the taxpayer by way of s. 231.1(1)(d) for the purpose of advancing the criminal investigation. Likewise, no written documents may be inspected or examined, except by way of judicial warrant under s. 231.3 of the ITA or s. 487 of the Criminal Code, and no documents may be required, from the taxpayer or any third party for the purpose of advancing the criminal investigation. CCRA officials conducting inquiries, the predominant purpose of which is the determination of penal liability, do not have the benefit of the ss. 231.1(1) and 231.2(1) requirement powers.

[19] The determination as to when the predominant purpose of the inquiry has changed to an assessment of criminal liability is a heavily fact based inquiry. For this reason, I now turn to a review of the evidence.

The Evidence

[18] The evidence on this application came from Crown witnesses Carol Power, Helena Evans, Joe Ricketts and Michael Boudreau. I will briefly review the testimony. I refer here only to the salient points of the evidence to give context to this decision. But I have considered all of the evidence.

[19] Carol Power was an auditor with the CRA in 2015. She worked in the Aggressive GST Planning Unit located in the St. John's, Newfoundland Tax Services Office. Her overall function was to ensure compliance with the tax laws of Canada. This was accomplished mainly through review of the books and records of companies. In terms of assessing compliance, Power indicated that she looked to ensure that sales were reported and properly recorded. On the expense side, she would review to ensure that input tax credits were recorded appropriately.

[20] Power explained the basic operation of the Aggressive GST Planning Section. Matters referred to the section required more time to complete an audit. One of the goals of the referrals made to this section was to review credit returns at a point

before the refunds were processed. This was not a criminal investigation. Power testified that often audits were triggered by claim for large credits or a single large acquisition. She explained the audit and appeal process. An audit could result in adjustments to the returns which could be appealed by the tax payer by filing a Notice of Objection. Such an appeal could be allowed and the matter returned to the auditor. For this reason, her work was done carefully to avoid matters being returned after appeal.

[21] Power also explained a "credit return" which was a return filed for a company that had more input tax credits ("**ITCs**") than GST payable. This resulted in a return or refund owing to the company.

[22] Before turning to Power's evidence on the audits she conducted, I note that she gave evidence at various points about the records she kept. Amongst those records were file memos referred to internally as T2020s. It was her testimony that these T2020s were intended to document everything that happened in the audit, including every contact with the registrant. At various points in her evidence, Power was permitted to review her T2020 to refresh her memory. When her memory was not revived, the T2020 was admitted as evidence of past recollection recorded (see for example *Exhibit VD14 – T2020 for Juliette & John*).

[23] Power's first contact with the any of the applicants was a referral for Housewives in Heels. This audit was assigned to her by her Team Leader Joe Ricketts. After initial review, it was her recommendation that this company's returns be further reviewed by the Sydney Tax Office. This recommendation was reviewed but Power was directed to retain the audit. She then contacted registrant Nadia Saker and asked about the company books and records. This initial contact occurred on April 15, 2015.

[24] Saker called back the following day and advised that her documents had been destroyed in a flood. Power made suggestions as to how Saker could obtain replacement documentation. She encouraged her to go back to her suppliers for duplicate invoices. After this initial contact, Power sent Saker a contact letter (*VD 12 – April 17, 2015(Housewives in Heels/Nadia Saker*). This letter confirmed the initial contact and the information required. Power said that there was nothing unusual about the information being sought.

[25] Following the referral for Housewives in Heels, Power was assigned review of credit returns for related companies. Some of those referrals came from "Refund Integrity". Each credit return under review was a separate file. Power explained that the Refund Integrity Program was a national program and the referrals of the related credit returns may have come from anywhere in the country.

[26] In the period between initial contact in April of 2015 and August of 2015, Power's audit expanded to additional related companies. As these were assigned to her, she made contract with the registrant, and sent additional contact letters (*Exhibit VD 12 – June 30, 2015 (25132002 Inc./Georgette Young), July 6, 2015 (25132004 Inc./Georgette Young), July 9, 2015 (New & Chic Inc./Angela MacDonald), July 22, 2015 (Artisan Hair Loss Therapy/Lydia Saker) July 27, 2015 (Kishk Inc./Georgette Young) August 5, 2015 (Maddie & Bella's Children's Clothing Inc./Georgette Young) and August 7, 2015 (Juliette & John Inc./Angela MacDonald)*). In this period, Power began to receive requests to amend the credit returns under review. It was in this period that she had her first contact with Georgette Young.

[27] Power noted that by sometime in July, she still had not received any information from Nadia Saker. She testified that in the absence of any information to review, her audit work had really not begun. Power contacted Saker and also spoke with Young. Power was advised that "boxes had been sent". The boxes arrived a few days later. Power was also advised by Young that further requests to amend credit returns were coming for several of the companies then under audit.

[28] Power reviewed the information from the boxes sent on August 5 and 6 of 2015. She indicated that this was really when her work began as she had information she could review. She testified that most of the documents reviewed were

handwritten and separated into ziplock bags (*Exhibit VD 7*). Samples of the documents received in this box are in evidence and were cross-referenced to an inventory of documents Power later prepared (*Exhibit VD 6*). Power observed that she had seen better and worse levels of organization than the material submitted to her during her audit work in this matter.

[29] Power explained the general process followed for her review of information received. She said that she would "key in" the information as she reviewed it. Samples of the information reviewed are in evidence (*Exhibits VD8 – Housewives in Heels Inc., VD9 – New & Chic Inc., VD10 – Artisan Hair Loss Therapy Inc., VD11 – 25132002 Inc., VD 13 – Juliette & John Inc.*). Power explained that her initial impression was that sales were high and that related companies were buying and selling to and from one another. As she noted discrepancies, she sought further information.

[30] Power noted that by July 8, 2015, she was aware that Young was "involved" with all of the companies under audit. Young was the owner of four of the companies (25132002 Inc., 25132004 Inc., Kishk Inc., and Maddie and Bella's Children's Clothing Inc.), and was or became the authorized representative for the other four (Housewives in Heels Inc., Juliette & John Inc., New & Chic Inc., and Artisan Hair Loss Therapy Inc.) . Young said that she was "looking after things for

her mother" (Lydia Saker) in relation to Artisan Hair Loss Therapy Inc. Nadia Saker and MacDonald said that Young "looked after things" for them such as the preparation of invoices.

[31] It was Power's evidence that she received "many" requests to amend credit returns for various companies on September 18, 2015. These proposed amendments were not requested or expected. They served to expand the scope of the review which by this time involved eight related companies. Power was then only working part time. The audit was starting to take a lot of her time. She was "always" talking to her team leader about the increasing scope. She also became aware that "Ottawa was interested" in how this audit was going but was waiting for her to complete her work.

[32] Power testified that by September 2015, she had not made any decisions on the audit. She "had questions but no decisions". As she received requests to amend, she sought explanations and supporting documentation. She reviewed information sent by the registrants and asked follow up questions. She observed that she was getting some of the requested information but not all, and that the supply of information was "always disjointed".

[33] Power maintained that her questions and requests for documentation during this period was still audit work and not criminal investigation. She noted that she had spent years of her career doing investigations and that she was not doing an investigation. She characterized her work in this period as "what we do – we audit for discrepancies". She observed that the sales recorded by the various companies seemed high but that as an auditor she simply asked for support for the amounts claimed so she could ascertain whether or not to allow a refund as claimed. She explained that the audit must be done thoroughly. If she disallowed a claim, it triggered the registrant's right to appeal by filing a Notice of Objection. This process just resulted in more work for CRA and had the potential to return the file to the auditor if the objection was allowed.

[34] By late September, 2015, Power had received information in response to contact letters or conversations with Young, Nadia Saker and MacDonald. Power had no prior experience or knowledge of the various companies and determined that a "field visit" was necessary to observe their operations. These visits were scheduled for October 6 and 7, 2015. Power confirmed that such visits were a normal part of the audit process and permitted her to speak to employees, view the inventory, equipment, the business premises and the general operation of the business. In this particular case, Power said that she wanted to get a picture of what was going on

with the circle of related companies. She was specifically interested in observing production of the various goods. By this point, Power was aware, *inter alia*, that the companies had been operating without bank accounts or employees and all claimed to rely on large cash transactions.

[35] Power described her preparation for the interviews in the week prior to her trip to Sydney. She said that she prepared questions for each of the interviews. This was a process she followed for all audits. In this case, she wanted to understand why there were so many requests to amend returns. She wanted to see production and speak to any employees. She had questions about who was doing all the work as she was told there were no payroll accounts.

[36] All of the interview issues and questions were prepared in writing and were used as a guide to the various interviews. All of the questionnaires are in evidence (*VD 23 -Housewives in Heels Inc., VD 25 - Juliette & John Inc., VD 27 – New & Chic Inc., VD 29 – Artisan Hair Loss Therapy Inc., VD 31 – Maddie & Bella Children's Clothing Inc., VD 33 – Kishk Inc., VD 35 – 25132004 Inc., and VD 37 – 25132002 Inc.*) as are the notes taken during the course of the interviews (*VD 24 - Housewives in Heels Inc., VD 26 - Juliette & John Inc., VD 28 – New & Chic Inc., VD 30 – Artisan Hair Loss Therapy Inc., VD 32 – Maddie & Bella Children's*

Clothing Inc., VD 34 – Kishk Inc., VD 36 – 25132004 Inc., and VD 38 – 25132002 Inc.).

[37] Power testified about the interviews conducted referencing her interview notes. It is not necessary to recount the details of each interview. Suffice to say that Power conducted the interviews in Sydney on October 6 and 7, 2015 and recorded her observations and the information gathered. All interviews followed the same process and similar format. Power characterized her various inquiries as "standard" or "typical" audit questions. She noted, for example, asking about major customers, vehicle purchases, product storage, intercompany sales, and bottling facilities. All interviews took place at a business premises in Boularderie, Nova Scotia, except for the Housewives in Heels interview of Nadia Saker which took place at Saker's home. Power said that the process and substance of all of these interviews were part of the "normal audit process".

[38] By the end of these interviews, Power said that she had obtained information but had received a significant volume of amendments to credit returns. She asked Young to provide more information to support the new amendment requests. By this point, Power felt that the amendments were getting confusing and needed further review.

[39] Power returned to her office, prepared her interview notes and "keyed in all of the documentation". She concluded this process in November of 2015. She reviewed the matters further and testified that she intended to disallow many of the ITCs in the absence of sufficient information to support them. She did not contact the CRA Criminal Investigation Directorate ("**CID**") and no one from CID contacted her.

[40] Power went on leave in November of 2015. Before her departure, she discussed the various audit files with her Team Leader, Joe Ricketts. She had concluded her audit work but wanted adjustments processed reflecting her decision to deny ITCs and refunds. For this reason, the audit files were to be transferred to another auditor. During this meeting she suggested referring the matter to CID to see if they wanted to commence a criminal investigation.

[41] Power's T2020 notes for each of the eight companies recorded her final meeting with her Team Leader and "HQ" on November 10, 2015. After discussions, Power's notes record the CRA decision to expand the audit to the start of each company's registration and to deny all unsupported or questionable ITCs. Significantly, she recorded the following:

> … Today, HQ(Amelia Andrijasevic) advised one position paper can be done for all companies involved; we can refer to all companies as it is CRA's sham position.

> Position is to leave G/HST collected; there is no case law that says we have to do otherwise. We will deny unsupported or questionable ITCs. Our backup position is that the ITCs claimed were not supported to meet documentary requirements; purchase invoices were not provided as we were told the purchases were from Chinese suppliers and Customs did not provide any import documentation.

[42] Power was cross-examined by Georgette Young. Power maintained that she made no conclusions until the end of her audit work. She questioned the high sales and expense numbers and the volume of intercompany business but she sought information to answer her questions. She testified that she found it "odd" to see so many related companies set up and "cumbersome" from a bookkeeping perspective but she was not suspicious of anything – she said people have reasons for organizing their business in various ways. She was "looking into it" and doing her audit work. Its why she wanted to see the business premises.

[43] Power was asked about the process to conclude her audit work. She testified that she would have keyed in all of the documentation following her October interviews and done some further analysis by November, 2015. She came to her audit conclusions about the credit returns. She had concluded that the ITCs should not be allowed. But someone else concluded the administrative work. She explained that all completed audits are sent to a Team Leader for review. Once approved by the Team Leader, the audit work is uploaded to the system. Once uploaded, it was subject to a review by the section's Quality Review. If not selected, then the audit

is considered complete with the issuance of a Notice of Assessment. Records would be kept for ninety days following conclusion in case a Notice of Objection was filed.

[44] Power testified that she left for a three-month leave in November of 2015. The audit files were then transferred to another auditor, Helena Evans, and she had no further involvement in the matter. Evans would have had access to all of her T2020s. Power clarified that although she suggested that the file be sent to CID, she was not part of the decision to actually make the referral. Her paper files were transferred to a separate locked file room when she finished her work. Power also clarified that she did not have any company books and records. If she had received those, they would have been receipted and returned. What she had was information provided by the registrant.

[45] Power recalled giving Helena Evans a quick verbal update as part of the transfer process. She did not tell Evans about her discussion with Joe Ricketts (suggesting a CID referral) as Evans still had processing work to do to finish the audit. She clarified that she did not make any referral to CID. She simply suggested to Ricketts that he consider such a referral. She recalled that there was still outstanding documentation when she finished her work but nothing at that point would have changed her audit opinion.

[46] Power noted that the exact times and dates are all in her T2020s. She also noted that the inventory she prepared (*Exhibit VD 6*) was a complete list of the documentation she received before her departure in November of 2015.

[47] Helena Evans is a senior technical officer with CRA Aggressive GST Planning. She testified about her work. At the relevant time, she was in Newfoundland working as an ATP auditor. As with Power, she was charged with reviewing GST returns and auditing them to ensure accuracy. She became involved in this matter when Power was preparing to go on leave.

[48] Evans testified that she received all of Power's work and had a very brief telephone conversation with Young on November 19, 2015 to advise her of the transfer. Evans said that she asked Young if there were any further records she could provide. Young replied that she did not have anything further. Evans said that it was after this conversation that she reviewed Power's work. Evans went on to complete the working papers, proposal, reassessment. Her work was completed internally on July 28, 2016. In the end, she denied all of the ITCs in the credit returns under s. 169(4) of the *Excise Tax Act*. She explained that the section refers to documentary requirements.

[49] Evans prepared and sent a T134 Referral to CID (part of *Exhibit VD 39*). The referral document is undated and contains an attached narrative of the reasons for referral. She referred all of the eight related companies to CID. The referral reasons explain that the eight companies "appear to be participating in a scheme whereby they are reporting sales amongst themselves to obtain large ITC refunds." Details of facts and examples apparent from the audit follow in support of the referral.

[50] The T134 Referral itself is not dated and Evans could not recall the date it was prepared. She noted that receipt was acknowledged by CID staff on February 15, 2016 (*Exhibit 39*). It was Evans' testimony that the referral would have been made within sixty days prior to the date of its receipt. She also testified that all of the civil audit work was completed prior to the referral. Evans noted that the Aggressive Tax Planning unit was new at the time and was a completely civil unit. If they developed any suspicion of criminal activity, they referred the matter to CID. From there, CID reviewed the matter and had the option to accept it for criminal investigation or not.

[51] On cross-examination, Evans confirmed that she had called Young the day following the transfer of the audit files to her and asked for information. By this point, Evans said that she was aware of discussions about a referral to CID but it had not been done. No information was provided in response to Evans call to Young.

[52] The Team Leader supervising the work of Power and Evans was Joe Ricketts. It was his evidence that he received regular updates from Power and Evans during their periods of work. He did not have good recollection of the specifics of these updates, even when permitted to review notes. He recalled having discussions about impressions that were developing based on the fact that it appeared that supplies were not in accord with the documentation. He recalled discussions about "sham transaction" but did not recall when those discussions occurred. He was the one who assigned the file to Evans when Power left on leave. It was his recollection that the audits were not complete when Power left and that Evans completed the internal work required to finish.

[53] Ricketts could not recall the exact date of the file transfer between Power and Evans. He recalled that Evans prepared the T134 Referral to CID. His evidence was that he approved the referral on February 2, 2016.

[54] Michael Boudreau testified. He is with CID and is the Lead Investigator in this matter. It was assigned to him in June of 2016 by his Team Leader. By that time, the file had already been accepted by CID for investigation. Once referred to him, Boudreau reviewed the T134 which he characterized as "standard" and he reviewed documentation up to and including the interviews conducted by Power on October 6 and 7, 2015. He did not receive any information from the period after

these interviews. He went on to have contact with Ricketts, Evans and Power but denied having any communication with them before June of 2016. He confirmed that he received information from the period after October 7, 2015 but he had decided to "cut off" the investigation effective October 7, 2015.

[55] Boudreau recalled that the referral to him was in relation to eight related companies. He noted that the T134 is a standard form that only has room to refer to one company. In this case that company was 25132004 Inc. but the remaining seven companies were included in the attachments to the T134 form. By the end of his investigation, Boudreau said he had actually investigated ten related companies. He provided an update to Helena Evans (as the referral source) on November 28, 2017 confirming that searches had taken place on November 22, 2017.

[56] When cross-examined, Boudreau explained that someone else in his unit accepted the matter for investigation and that a Case Plan was developed. Other persons in CID may have had earlier contact with Evans or Power but not him. He acknowledged that CID had received a Sham Position Paper in relation to the matter created by Evans. He had never dealt with one before but in this context he believed that "sham" meant that a transaction did not occur as documented. This was something that originated in the civil audit section and had did not form the basis for his criminal investigation. Boudreau was not aware of the outcome of the civil audit.

[57] At this point, I note that defendant Young cross-examined each of the Crown witnesses. The other defendants did not conduct much, if any, cross-examination deferring largely to Young. None of the defendants offered any evidence.

[58] On the basis of the foregoing, it was the Crown position that the predominant purpose of the inquiries did not become penal until sometime in November of 2015. No information was received from any of the parties under the civil audit after the last interview conducted by Power on October 7, 2015.

[59] Although not examined in detail above, much of the information on the course of the civil audit is documented in the contact letters and T2020 notes that Power used to record all of her interactions with parties. The contact letters all followed an initial contact or attempt to contact the registrant. They go on to identify the period under review and request documentation designed to assist Power determine the accuracy of the information in the credit returns. The evidence supports that the initial contact was made with Nadia Saker (Housewives in Heels) on April 17, 2015, with the remaining seven companies being contacted by Power between June 30 and August 7, 2015. As noted above, Power testified that her work did not really begin before receiving two boxes of documents relevant to four of the companies under review on August 5 and 6, 2015.

[60] The portion of the T2020s that record the interviews on October 6 and 7, 2015 are insightful. They reflect the preparation for each interview, what was known and unknown before the interviews (see also *Interview Issues – VD 23 Housewives in Heels Inc., VD 25 Julliette & John Inc., VD 27 New & Chic Inc., VD 29 Artisan Hair Loss Therapy Inc., VD 31 Maddie & Bella's Children's Clothing Inc., VD 33 Kishk Inc., VD 35 25132004 Inc. and VD 37 25132002 Inc.*), the subject matter of Power's inquiries, the ever expanding scope of the reviews and Power's immediate observations.

[61] Emerging from the interviews, Power confirmed that all of the companies under review had either no bank account or only just opened bank accounts, none of the companies appeared to have contracts with suppliers or customers, Young was the bookkeeper for all the companies and prepared all the invoices, there were no employees, and all transactions were in cash with scant documentation of payments made (if any). Power recorded throughout her interviews her concerns or issues related to Young's "mix ups", "errors" and "mistakes" and the "constant" requests to amend credit returns in response to audit questions. Power noted that there were many changes requested to reflect that 25132002 Inc. was supplying all the other companies, mostly with zero rated goods and collecting no tax. ITCs to 25132002 Inc. were not documented with the explanation that the supplies came from China.

[62] As Power concluded the interviews, she advised Young that all of the requests to amend required documentation to support and that all of that information would take time to review. No further information was supplied by any of the registrants at any point after the last interview on October 7, 2015. Young subsequently told both Power and Evans that she had nothing further to give and "there is nothing else".

[63] The evidence is uncontested that Power's work substantively concluded with a meeting on November 10, 2015, during which she suggested all companies be referred to CID. Evans subsequently completed the internal audit work and the T134 Referral to CID that Ricketts approved on February 2, 2016. The referral document noted as follows:

> As of January 26, 2016, these companies have claimed $5,579,806.30 in ITCs and reported $2,572,419.90 in HST collected. This has resulted in a net tax refund claimed of $3,007,386.00. Of this amount, $239,069.34 has been paid out by CRA. By placing inhibits on these accounts we have stopped $2,768,326.66 in credits from being paid out.

[64] The referral was acknowledged by CID staff on February 15, 2016, and subsequently accepted. Boudreau became the Lead CID Investigator in June 2016, and later obtained search warrants which were executed on November 22, 2017.

Decision

[65] Moving on to the disposition of this application, it is my view that the required analysis turns heavily on the evidence of Power and the documentation she produced. Power was a strong witness. Although she did not always have a precise recollection of details, her work was well documented. She was a seasoned auditor with previous experience in investigations. She was able to clearly articulate a working distinction between the two different functions. Overall, her evidence was professional and credible. If anything, these conclusions were reinforced by her cross-examination.

[66] The allegations on this application are that ss. 7 and 8 ***Charter*** rights have been violated by the actions of CRA during the civil audit. As I understand the argument being advanced, the applicants' say that this misconduct resulted CRA obtaining evidence that it would not have otherwise. The relief sought is exclusion of evidence.

[67] The burden is on the accused to show that CRA's conduct fell below ***Charter*** standards. The outcome turns on the analysis in ***Jarvis*** which compels consideration of all the circumstances, including a specific set of factors. In the present case, it is clear that a decision was made begin a criminal investigation sometime between February 15, 2016 (when CID acknowledged receipt of the T134 Referral) and June 2016 (when the matter was referred to Boudreau to investigate). This point in time

is where the bright line exists absent evidence of a change in the predominant purpose earlier in time. It is also clear that the last information collected from any of the applicants was during the interviews conducted on October 6 and 7, 2015. The question then becomes whether the predominant purpose of the audit was the investigation of criminal liability at any point before October 6 and 7, 2015.

[68] The challenge in this assessment was recently noted in ***R. v. Mariani***, 2019 ONCJ 128 at para. 36:

> [36] While one would have thought that determining the predominant purpose of an inquiry by a CRA officer would be a relatively simple task, in my view it is not. Jarvis motions … are sources of great difficulty for judges. The difficulty arises from the simple reality that the *ITA* and *ETA* allow for both civil and penal sanctions for similar acts. Section 163 of the *ITA* allows for civil penalties to be imposed on a tax payer who willfully misleads the CRA and does not properly declare his/her income. Section 239(1)(d) of the *ITA* and 327(1)(d) of the *ETA* also create an offence to willfully evade taxes by providing misleading or false information. There appears to be no clear line between when a CRA auditor will chose (sic) to administer a civil penalty as opposed to transferring the matter over to investigations for the laying of actual charges and for the imposition of penal sanctions. There is no known policy in place that identifies where the line is between civil and penal liability. It appears to be at the sole discretion of the CRA auditor whether or not the taxpayer's conduct should be considered for penal penalties. Given the absence of a clear identification of what conduct will attract penal as opposed to civil liability really becomes focused on the state of mind and the intentions of the auditor.

[69] The reasons in ***Tiffin*** confirm that the purpose of an inquiry may be dependant on the subjective intent of the CRA employee:

> [134] The existence of discretion adds a layer of complexity to the task of applying the Jarvis test. The discretion may be exercised on the basis of the amount of unpaid tax involved, rather than on when the information being collected bears on the elements of the criminal tax offences. The purpose of an inquiry depends in some measure on the subjective intent of the CRA official making it.
>
> [135] The fact that the CRA inquiry seeks information that is technically relevant to a criminal charge is not enough to conclude that the predominant purpose of the inquiry, at the time it is made, is the investigation of criminal liability.

To similar effect see the reasons of Van den Eynden, J. (as she then was) in ***R. v. Martin***.

[70] On a related point, I am mindful of the direction in ***Tiffen*** that the predominant purpose assessment is not a simple choice between alternatives. It is a misnomer to identify a demarcation line between audit and investigation The proper approach is a contextual and one-sided:

> [123] The second significant aspect of the test is that it is not a matter of choosing between two evenly balanced alternatives: whether the predominant purpose of the inquiry is penal investigation or whether the predominant purpose of the inquiry is regulatory enforcement. The test is one-sided. The task is to determine whether the predominant purpose of the inquiry is the determination of penal liability of the taxpayer. …

[71] With the foregoing in mind, I turn now to the assessment of the Jarvis factors:

(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?

[72] The question here is whether the decision to proceed with a criminal investigation could have been made at some point earlier than it formally did.

[73] I conclude from the record that CRA had a basis to proceed with a criminal investigation at some point after the interviews were completed on October 6 and 7, 2015. In my view, this basis did not exist before the interviews. This conclusion considers the overall context of the matters presenting themselves to Power. Let me explain.

[74] This proceeding began with a audit referral for Housewives in Heels for the period January 31, 2013 to February 28, 2015. The registrant was Nadia Saker. The history of this company included previous reviews which disallowed ITCs and notations suggesting poor manual record keeping. When contacted, Saker indicated that her records had been destroyed in a flood. Power instructed her to try and replace the records and gave her time to do that. Saker did not provide any records. Instead, within a month, Saker began to request amendments to her returns. The requests were to reduce Line 108 in the returns to 0. Line 108 is the line dealing with total ITCs claimed.

[75] Saker's amendment request in response to audit inquiries flagged the file. Power did some research and discovered related companies. Over the next two

months, Power began to consolidate all the review work amongst the group of companies beginning with 25132002 Inc. in June, 2015 (a referral from the Refund Integrity Unit) and concluding with Juliette & John Inc. in August of 2015 (a transfer to Power from Refund Integrity). In the course of this consolidation, Power also became aware that Young was the bookkeeper for all of these companies. She began to have increasing and exclusive dealings with Young in response to the audit inquiries. Power did receive information from Young that raised more lines of inquiry. For example, Power was told there were no electronic records, no corporate bank accounts and therefore no bank records to produce, there were no employees, and no customs documentation to support claims. All of this against the backdrop of credit returns suggesting a large volume of business activity involving large sums of money. When Power asked for other forms of documentation to fill a gap, Young promised to provide it.

[76] It was Power's evidence that she received no documents to review until two boxes were received on August 5 and 6, 2015, containing information for four of the companies. It was only upon receipt of these documents that Power could begin her audit work. In the meantime, Young was also sending more and more amendment requests and the audit work was constantly expanding. Power reviewed the information provided and noted the evolving pattern of amendments, all of which

raised more questions. One of those questions was why Young was making all of these changes. Power's T2020s document her observations about receiving conflicting information and about Young's many "errors" and "mistakes". At this point in the audit, there was little evidence and no reasonable grounds to proceed with a criminal investigation. There were questions that needed answers. There was a relationship between this group of companies that needed to be understood. Power characterized the identification of issues and verification for accuracy as normal audit work.

[77] By September of 2015, Power had eight related companies before her for various review periods. By mid-September, more requests for amendments were made. By the end of September, Power decided that she would make a site view to view the business premises and interview the registrants. She wanted to take a look at the production facilities and better understand the operations and interaction between amongst the companies. Power advised each of the registrants by the end of September that she was coming to conduct interviews on October 6 and 7, 2015. Again, at this point, I find no basis to say that the audit had become a *de facto* criminal investigation. Nor do I believe reasonable grounds existed at this point for any of the subsequent charges.

[78] Power's subsequent site visits and interviews were a turning point. The preparation and execution of the interviews has been reviewed. The amendment requests continued throughout the series of meetings. Although Power had little time to review or digest these amendments, a picture was beginning to emerge that the amendments were intended to reflect that 25132002 Inc. was "doing all the work for the family-related companies" and supplying zero-rated product to the other companies. Power needed time to review and analyze the new information.

[79] By early November, Young confirmed that she had no further information to provide. Power finished reviewing the information and was preparing for a three month leave. She met with Ricketts on November 10, 2015, and for the first time suggested that the matter should be referred to CID. On this date, the T2020s mention a "sham position" for the first time. I conclude that by this date, there was a view that the credit returns contained statements that could be false. There was no doubt that there were statements that were not supported in any way and a lack of integrity to the information supplied. There was some evidence of motivation emerging. There was a basis to begin a criminal investigation. The internal audit work was finalized following which a formal referral was made. But the criminal investigation did not begin until June of 2016.

[80] To be clear, I do not believe that reasonable grounds existed to lay any charges at any point before Power concluded her audit work in November of 2015. There was an increasing level of suspicion, and a basis for a criminal investigation, but not enough evidence to charge. Even if I concluded otherwise, the existence of reasonable grounds to charge is but one factor to consider.

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

[81] In my view, the conduct of auditor was scrupulously focused on the audit work. There is no evidence on which to conclude that her conduct was consistent with the pursuit of a criminal investigation. Her evidence on this point was clear and direct and unimpeached. Although some of her work later assisted in the criminal investigation, I find all of her inquiries completely consistent with the work she was required to do as an auditor.

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

[82] As I understand the evidence, the "files" were never turned over to investigators. The file was the subject of a T134 Referral to CID in February of 2016. The referral was accompanied by a summary of the audit findings. It was accepted and the investigation began in June of 2016. There is no evidence of any

contact between the auditors and anyone at CID before the audit was complete and the formal referral was made.

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

[83] In my view, there is no evidence to support such a conclusion. Power had past experience in investigations and clearly articulated the dividing line between audit work and investigation of criminal liability. She had concerns about various aspects of the audit including the constant amendments and lack of supporting documentation. None of Power's work can be characterized as *de facto* investigation. It was related to her work to try and verify the information in the credit returns.

[84] In the end, she was unable to verify much and her audit opinion to disallow ITCs and adjust the returns accordingly rested mainly on the lack of supporting information. There is no question that the conduct of the registrants, their inability to provide support for the claims made in credit returns and the constantly evolving presentation of the various company operations triggered suspicion by the time interviews concluded. However, no further information was collected after that point in the audits.

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

[85] There is no evidence that investigators were involved or directing the audit work whatsoever. This kind of interaction was specifically denied by both Power and Boudreau.

(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?

[86] In my view, the evidence sought during the audit process was relevant to the general liability of the tax payer. Power was clearly focused on verifying the claims being made and understanding the basis for the constant amendment requests. In my view, only at the very end of the interview process did evidence began to emerge about a possible motivation to make false or fraudulent statements. If 25132002 Inc. absorbed all the tax liability, the other seven companies could benefit by having large ITC claims and receiving large GST refunds.

[87] I also observe that it is a nuanced distinction to assess relevance as between a registrant being unable to support claims made (the audit conclusion and one potentially explained by poor record keeping) and a registrant making false or

fraudulent statements to CRA (a criminal conclusion potentially explained by having no legitimate records). In this case, I am satisfied that any evidence obtained came as a result of Power's audit inquiries.

(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.

[87] In my view, there are no other circumstances or factors that support such a conclusion. As I say this, I pause here to note that the sheer volume of claims under review, the very large quantum of the claims being advanced with little or no support, and the pattern of requesting amendments to claims under review stand out as circumstances that could raise a very high level of suspicion of criminal activity. Having listened to Power's evidence however, I am completely satisfied that she was focused on her work as an auditor and following the review and verification process.

[88] Before moving to a conclusion, I wanted to note the submission made by each of the accused that the T134 Referral to CID was flawed in some way that impacted the subsequent criminal investigation. As I understand the position, it was the view of the accused the referral form was not complete and therefore the matter was not properly referred to CID for a criminal investigation.

[89] The evidence on this point was that the T134 Referral form (part of *Exhibit VD 39*) was internal to CRA. It is a standard form that calls for various kinds of information. In this case, it was auditor Evans that completed the form and Team Leader Ricketts who approved the referral itself. It is not dated and only refers to one of the companies – general information on the referral and the particulars of the other companies is included in an attachment. There does not appear to be any legal requirement for this form to be completed as part of the referral process. It is an administrative step that formalizes the referral process from audit to criminal investigation.

[90] The evidence establishes that once received by CID, a referral form is reviewed and CID had the option to decline the investigation. In theory then, a referral may not result in an investigation and that decision is with CID. In this case, CID accepted the investigation and Boudreau was appointed Lead Investigator.

[91] I am not aware of any basis on which to say that the form was flawed or substantially incomplete. Completing the form was a bureaucratic exercise with no legal standard of assessment. Neither am I aware of any basis to conclude that a flawed internal CRA form could vitiate the subsequent criminal investigation. This submission has no merit and has no bearing whatsoever on this ***Charter*** application.

Conclusion

[92] The evidence on this application came from four employees of CRA and the documentation each created. The witnesses had various roles, degrees of involvement, and recollections of relevant events. However, the particulars of the audit process and the pathway to a criminal investigation were well documented. The main witness, auditor Carol Power, was a senior and seasoned audit professional and a credible witness who gave unequivocal evidence.

[93] In the end, after considering the evidence and the authorities on this ***Jarvis*** application, I find that the predominant purpose of the investigation did not turn to criminal or penal liability until after the completion of Power's interviews with each of the accused. This means that at no point prior to the conclusion of the interviews on October 7, 2015, did the nature of the investigation change in a manner that triggered ***Charter*** protections.

[94] Therefore, I find that the applicants have not established any breach of ss. 7 or 8 of the ***Charter*** and there is no basis on this application to exclude any evidence obtained in the course of the CRA audit process.

[93] The ***Jarvis*** application is dismissed.

Gogan, J.