Audit disclosure: Do I have the right to remain silent?

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In the 2021 Federal Budget, the government proposed the allocation of more than $304 million over the next five years to support audit disclosures through the funding of the Canada Revenue Agency's (CRA) new and existing programs. The purpose of these programs is to combat tax evasion and aggressive tax avoidance. Such measures will include an increase of audits and enhancing capacity to identify tax evasion.

As we emerge from the COVID-19 pandemic, individuals and entities will be looking to improve their financial positions and the CRA will be looking to recover on its significant investment in combating tax evasion. As such, we expect to see a significant increase in the number of tax evasion investigations.

Canadian courts often grapple with the constitutional problem created by the legislative powers granted to taxation authorities and the rights guaranteed to individuals under the *Canadian Charter of Rights and Freedoms*[1] (the Charter). Provincial and federal taxation authorities have statutory powers to compel the disclosure of documents for tax auditing purposes. At the same time, Section 7 of the Charter protects an individual's right against self-incrimination and the right to remain silent throughout the audit disclosure process. These legal concepts can and often do clash when an individual (the Target) is being audited, while also being investigated for tax evasion at the same time. If the Target provides documentation to an auditor as required and such documentation or information contains incriminating evidence that could potentially be disclosed to the criminal investigative body. Where do we draw the line?

Although the jurisprudential trend has been to impose a constitutional limit on taxation authorities in favour of Charter rights, more recent jurisprudence indicates that this still remains to be a difficult determination when criminal investigations run parallel or subsequent to a tax audit.

R v. Jarvis: When the Supreme Court drew a line in the sand

In 2002, the Supreme Court of Canada (the SCC) handed down a landmark ruling in *R v. Jarvis*, 2002 SCC 73 *(Jarvis)*. In *Jarvis*, the SCC drew a line between the CRA's audit

and investigative functions. Taxpayers are statutorily bound to co-operate with the CRA auditors for tax assessment purposes. However, the SCC confirmed that an individual's Charter rights are triggered as soon as the predominant purpose behind the CRA's request to produce documents is done with the objective of determining a taxpayer's penal liability. Accordingly, the SCC held that when the predominant purpose of the CRA's inquiry changes from assessing a taxpayer's tax liability to determining whether that taxpayer has any penal liability for the amounts assessed, the CRA must relinquish its ability to rely on sections of the *Income Tax Act* (ITA) to compel the production of information and documents.[2]

Consequently, the court held that the CRA cannot rely on documents compelled pursuant to Section 231.1(1) and 231.2(1) during a criminal investigation.[3] The SCC stated that Section 231.1(1) and 231.2(1) powers are available in all circumstances except two:

1. where charges have been laid under Section 239 and the sole purpose of their exercise is to obtain prosecutorial evidence, and
2. where the laying of charges is deliberately delayed in order for prosecutors to use powers to build their case.[4]

In such circumstances, the documents compelled during a tax audit disclosure and subsequently used during a criminal investigation are generally inadmissible against the taxpayer. Failure to caution the taxpayer that they are under investigation is in direct contradiction of Section 7 of the Charter.[5] Therefore, Sections 231.1(1) and 231.2(1) do not include the prosecution of Section 239 offences.[6]

In *Jarvis*, the SCC enumerated a non-exhaustive list of factors to determine whether the predominant purpose of an inquiry is to pursue penal liability.[7] No one factor is determinative, and courts must assess the totality of the circumstances. The factors are as follows:

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 materials 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?

Is the tide turning? Recent conflicting applications of the *Jarvis* principles

Subsequent jurisprudence has strongly emphasized the *Jarvis* principles by guarding *Charter* rights in the face of audit disclosure in which there is a parallel or subsequent criminal investigation. For example, the case of *R. v Goldberg*, 2020 QCCQ 4548 involved the exchange of confidential taxpayer information between two distinct state agencies. In *Goldberg*, an inter-organization agreement existed between the ARQ (a provincial taxation authority) and the CRA whereby information could be shared between. Here, the QCCQ re-emphasized that when the predominant purpose of a civil tax audit is to help determine the penal liability of a taxpayer as per the *Jarvis* principles, the state agency must tread carefully and caution the taxpayer of the reason for the request to produce documents.

Failure to caution a taxpayer can result in the state agency violating a taxpayer's *Charter* rights. The QCCQ in *Goldberg* affirmed that the CRA cannot use its audit powers to investigate or prosecute a taxpayer under the ITA. The QCCQ most strongly condemned entities sharing information without giving notice to the taxpayer, an issue that had not been confronted in *Jarvis*.

In contrast to the jurisprudential principles reviewed above, however, the Federal Court recently provided comments that seemingly deviate from the *Jarvis* principles.

In *Canada (National Revenue) v. Edward Enterprise International Group Inc.*, 2020 FC 1044, the Federal Court gave its reasons for denying a corporation's request for an order requiring the CRA to give future notice if it shared documentation it had gathered from an audit externally with other authorities. In that case, the minister sought a compliance order under to compel a Canadian corporation to provide information needed in an audit. The corporation in question, Edward Enterprise International Group Inc. (the Corporation), requested an order that the minister give the Corporation notice if the information gathered in the audit was ever being shared outside of the CRA. Southcott J. rejected this request. In his reasons, he stated that

> [R]equiring CRA to disclose, in the course of an investigation, the fact that the investigation is taking place could compromise the investigation. [the Corporation] has identified no precedent or statutory authority for the imposition of such a requirement.[8]

Ultimately, Southcott J. granted the minister's request for outstanding information and rejected the Corporation's request for notice if the information was to be used outside of the CRA. In his reasons, Southcott J. re-stated the minister's arguments that the Corporation was "raising hypothetical *Charter* arguments in the context of speculative concerns about dissemination and use."[9] Moreover, Southcott J. cited *Jarvis* for the principle that the *Charter* "constrains only the use that may be made of compelled information in a subsequent proceeding against the person concerned, not the collection and sharing of that information."[10] Perhaps it is due to the fact that the party in this matter was a corporation and thus not afforded the same *Charter* protections, but this line of reasoning seemingly runs in contrast to *Goldberg* where the QCCQ applied *Jarvis* to bar entities from sharing information at the risk of violating *Charter* rights.

It should be noted that Southcott J. recognized that the court's ability to consider *Charter* arguments was "significantly inhibited by the Corporation's failure to file a Memorandum of Fact and Law, articulating such arguments and their jurisprudential foundation."[11] Accordingly, the apparent deviation from the *Jarvis* principles, could

makes this case an outlier. A different outcome may have resulted had it been presented with more of a focus on *Jarvis* and had the taxpayer been an individual and not a corporation. Nonetheless, it is interesting that the Federal Court was so dismissive of "speculative" Charter arguments that are well established by Canada's highest court. Indeed, investigative bodies such as the CRA Criminal Investigations Division or the RCMP having the ability to access potentially incriminating information gathered during audit, would run afoul to the rights guaranteed by the *Charter.*

There are a number of complexities encountered during tax audit and tax evasion investigations. With these challenges, combined with the serious potential penal repercussions for engaging in tax evasion, it is critical to consider the *Jarvis* principles and the need to seek legal advice should one be subject to an audit and/or investigation. Members of BLG's Tax Group and Investigations and White Collar Defence Group or the lawyers listed below are available to discuss any questions you may have regarding tax audit disclosures and your right to remain silent.

Special thanks to former BLG student Dana O'Shea for her contribution to this article.

[1] Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11, [Charter].

[2] *Ibid* at para 88.

[3] *Ibid* at para 39.

[4] *Ibid* at para 75.

[5] *Ibid* at para 39.

[6] *Ibid* at para 78.

[7] *Ibid* at paras 93-94.

[8] *Ibid* at para 37.

[9] *Ibid* at para 32.

[10] *Ibid* at para 33 [emphasis added].

[11] *Ibid*.

By

Laurie Goldbach, Jay Dyck

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BLG Offices

Calgary

Centennial Place, East Tower
520 3rd Avenue S.W.
Calgary, AB, Canada
T2P 0R3

T 403.232.9500
F 403.266.1395

Ottawa

World Exchange Plaza
100 Queen Street
Ottawa, ON, Canada
K1P 1J9

T 613.237.5160
F 613.230.8842

Vancouver

1200 Waterfront Centre
200 Burrard Street
Vancouver, BC, Canada
V7X 1T2

T 604.687.5744
F 604.687.1415

Montréal

1000 De La Gauchetière Street West
Suite 900
Montréal, QC, Canada
H3B 5H4

T 514.954.2555
F 514.879.9015

Toronto

Bay Adelaide Centre, East Tower
22 Adelaide Street West
Toronto, ON, Canada
M5H 4E3

T 416.367.6000
F 416.367.6749

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