

# TAX COUNSEL

## THE SWINGING PENDULUM: CHANGES IN CHARTER PROTECTION



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*“...the penalties for tax evasion, including potentially lengthy prison terms, are made criminal for purely instrumental reasons.”*

In previous issues, I have discussed the Charter of Rights and how it affects the rights of taxpayers and the duties of CCRA investigators and auditors. In particular, the Charter affords every accused the right not to incriminate himself and the right to be free from unreasonable search and seizure.

The rule that came out of the Ontario case of *R v. Norway Insulation*<sup>1</sup> was that CCRA cannot perform criminal or quasi-criminal investigations under the guise of routine audits and expect uncovered evidence to be admitted in subsequent fraud trials. To do so is to breach the Charter. With *Norway*, the legal pendulum had swung to its extreme, favouring Charter protection for fraudulent or otherwise misguided taxpayers. A number of cases (described in previous issues), followed *Norway* and were, at that time, subject to appellate review. Now that those reviews are complete, it would seem that the pendulum is swinging in the other direction.

The first of those cases is *R v. Jarvis*<sup>2</sup>. In that case, an auditor deliberately deceived Mr. Jarvis as to the nature of her investigation. Judge Fradsham of our Provincial Court excluded several different categories of evidence including:

1. verbal communications between Jarvis and the auditor, at whose request the meeting took place;
2. receipt books and business records provided to the auditor at that same meeting and later seized by search warrant;
3. financial statements provided at that meeting and tax returns seized by a later search warrant;
4. bank records obtained from Jarvis's bank.

This did not sit well with CCRA, which appealed the decision, ultimately, to the Alberta Court of Appeal. Berger J., writing for that Court, agreed with Judge Fradsham that the communications

between Jarvis and the auditor were inadmissible. This was based upon the fact that the auditor's predominant purpose at that time was to obtain evidence to incriminate Jarvis, and not to further some legitimate audit or other public purpose. However, in *Jarvis*, that is where the Charter protection stopped. Berger J. held that the obligations of every taxpayer, under the *Income Tax Act*, to retain his or her books and records, and to make them available for later inspection and potential use in prosecution by the tax authorities, are essential to the self-reporting income tax system. These obligations do not arise from Charter-prohibited compulsion. In other words, although the deceptive behaviour of CCRA officials infringed Jarvis's rights against self-incrimination, he had a prior regulatory obligation to maintain and provide the documents when requested. Because CCRA knew of the existence of the documents and could have obtained them without breaching Mr. Jarvis's rights, they were admissible, notwithstanding CCRA's poor behaviour.

This follows a theme set by the Supreme Court of Canada in *Del Zotto*<sup>3</sup> that the tax evasion provisions of the *Income Tax Act* are not criminal in nature, but rather are designed to ensure compliance with a self-reporting regulatory scheme. According to the Court, the penalties for tax evasion, including potentially lengthy terms of incarceration, are made criminal for “strictly instrumental reasons” (a thought of great solace to convicted tax evaders, I am sure).

*Derosé v. The Queen*<sup>4</sup> is a recent Alberta Provincial Court decision also following this same theme. In that case, a CCRA official created something called the “castle project”. Under that initiative, CCRA selected for audit those taxpayers, including the Deroses, who paid large amounts of property tax on their homes, while reporting very little income. Counsel for the Deroses argued that once they were so identified, CCRA's audits of his clients were nothing more than thinly veiled criminal investigations. CCRA's demands of the Deroses

# CHANGES IN CHARTER PROTECTION (CONT'D)

under the audit provisions of the ITA resulted in the Deroses incriminating themselves. Their counsel applied for a court order excluding the use of the audit evidence. That application was refused, the Court holding that the expectation of privacy of the taxpayers was reduced because of the regulatory nature of the **Income Tax Act**. The Deroses were required to produce to CCRA (and ultimately the Court) the paper evidence notwithstanding its incriminating nature.

So, is this the end of Charter protection for

taxpayers? Can CCRA seize documents with impunity based on the regulatory nature of the **Income Tax Act**? Has the pendulum swung totally to the dark side? I will answer these questions and more in the next issue of **Tax Counsel**.

1. *R. v. Norway Insulation* 95 DTC 5328 (Ont. Gen. Div.)
2. *R. v. Jarvis* 2000 A.R. 304 (Alta C.A.)
3. *Del Zotto v. The Queen* 1999 D.L.R. (4<sup>th</sup>) 130 (S.C.C.)
4. *R. v. Derose* (2000) A.J. No. 1407; 2000 ABPC 192

Lord  
Denning:

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## Effective Use of Advocates’ Briefs

There are a number of “rules” of advocacy that are best observed by all who appear in court, be it the Supreme Court of Canada or Tax Court Informal proceedings. One of the more important but least observed is: “Know when to sit down”.

Opening statements and closing arguments should be organized and to the point. It does your client’s case no good whatsoever to needlessly try the patience of the Court.

The effective advocate reads signals from the bench. A Judge is likely to provide clues that your points are taken. The key is to listen and observe as much as it is to talk.

The famous English Justice, Lord Denning, was once heard to say to a particularly verbose counsel, “*You’ve exhausted time and trespassed upon eternity*”.

His point was made with brevity.



Suite 100 - 10328 - 81 Avenue  
Edmonton, Alberta  
Canada T6E 1X2

Tel (780) 439-7171  
Fax (780) 439-0475

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Donald P. Mallon, BSc LLB, a partner in Prowse Chowne LLP, is a seasoned litigator with over 20 years of experience. Focusing on administrative and tax litigation, he draws upon his courtroom and negotiation skills to effectively represent individual and business taxpayers in disputes with Revenue Canada.



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