

# Breau v The Minister of National Revenue, 2012 FC 1207

## Requests for Information while Criminal Investigation is Ongoing

*Breau v The Minister of National Revenue*, [2012 FC 1207](#)

At issue was whether requirements for information (RIFs) issued by the MNR ought to be set aside on the basis that they were improperly issued for the purpose of gathering information for a criminal investigation - ie violation of section 7 *Charter* right against silence (ie self-incrimination).

The FC, after reviewing the relevant law and considering the evidence closely, held that in this case the RIFs were properly issued in furtherance to a mainly civil purpose, and not predominantly to support the parallel criminal investigation. The fact that the civil and criminal investigations were simultaneous and overlapping required close scrutiny of the circumstances. However, the mere existence of a criminal investigation doesn't preclude auditors from assessing civil liability or seeking relevant information for establishing civil liability (even if the information may also be relevant for criminal liability).

### FACTS

The Appellant (JB) was allegedly involved in a tax plan that involved the sale of business losses to other taxpayers. JB told investors that he and others provided management advice to struggling companies whose losses were sold to unit purchasers. The management services was provided by Synergy Group (2000) Inc., and JB was the officer, director, and agent of this corporation.

The CRA took three actions: (1) conducts audits of unit purchasers starting in 2005, (2) started a criminal investigation against the promoters, including applying for production orders, and (3) began civil audits of the promoters, asking for relevant information and documents.

### LEGAL FRAMEWORK

The FC began by reviewing the legal framework. The MNR has power to require taxpayers to provide information for any purpose related to the administration or enforcement of the ITA (s 231.2(1)), AND may also apply to court for a search warrant by showing reasonable and probable grounds of an offence committed under the ITA, and the place identified where the evidence is likely to be found (231.3(3)). A judge may also order third parties to produce documents relevant to an offence against any act of Parliament (*Crimina Code* s 4870.12).

The civil powers under the ITA cannot be used to circumvent the protections of section 7 of the *Charter*, including the right to silence. The SCC in *R v Jarvis*, [2002 SCC 73 \(CanLII\)](#), 2002 SCC 73, recognized that the *Charter* protects taxpayers against the use of RIFs to further a criminal investigation. The protection arises where "the predominant purpose of a particular inquiry is the determination of penal liability," (para 10), and this requires a court to look at "the totality of

the circumstances, and make a determination as to whether the inquiry or question in issue engages the adversarial relationship between the state and the individual”.

The factors relevant to the inquiry include (at para 10):

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?

RIFs can be challenged by judicial review on the basis that they were improperly issued for a penal purpose: *Kligman v Canada (Minister of National Revenue)*, [2004 FCA 152 \(CanLII\)](#), 2004 FCA 152; *Stanfield v Minister of National Revenue*, 2005 DTC 5454.

