R v He, 2012 BCCA 318

Limitations of CRA's use of ITA section 231.1 - *Richardson R*easoning Applies

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The question here was whether CRA is authorised by section 231.1 of the ITA, or the parallel provision of the *Excise Tax Act*, to seize and examine the respondent's records under the circumstances of this case - being a purported voluntary pilot project not aimed at determining tax compliance of a particular person or persons.

The British Columbia Court of Appeal ("BCCA") dismissed the Crown's appeal from the conviction, and held that the requirement imposed by the SCC in *Richardson* that there must be a "genuine or serious" inquiry into the tax liability of a specific person or persons before the CRA could rely on section 231.2 also applies to section 231.1.

The Crown was appealing the upholding of an acquittal by a summary conviction appeal judge on a charges of tax evasion, altering or destroying tax records, and making false or deceptive statements contrary to the ITA and ETA.

The Taxpayers operated a restaurant in North Vancouver. The Crown alleged that the taxpayer suppressed revenues and thereby avoided income tax and GST that would otherwise have been payable. The Crown sought to rely on evidence obtained by the CRA thought their purported exercise of authority by section 231.1, using the Electronic Records Evaluation Pilot Project. The objective and benefits of the project were identified as:

> (a) To determine if records are adequate, reliable, accessible, and available in readable format,
>
> (b) To determine if electronic taxpayer records are maintained for the required six year time period,
>
> (c) To undertake corrective action where a taxpayer's electronic record keeping is inadequate,
>
> (d) To earmark issues to be addressed with developers of electronic record keeping software systems.
>
> (e) Establish a low-cost, high-visibility project to supplement and improve efficiency of compliance audits,
>
> (f) Bring about behavioural changes leading to long-term voluntary compliance,
>
> (g) Provide information and advice to taxpayers and representatives,

(h) Ensure that CRA requirements keep pace with technological changes,

(i) Facilitate eventual audit processes by ensuring that key business information is kept in a readable format,

(j) Raise awareness of CRA's record keeping requirements among taxpayers, system vendors and software developers.

The taxpayer's restaurant was notified by letter that it has been selected for the pilot program, and was told in the letter that this was not an audit, but a review of record keeping practices, but did state that in the case of deficiency a reference to the audit division may result.

The CRA copied the data from the restaurant onto a USB key, and seized 14 back-up diskettes. The CRA"s analysis led them to believe that the restaurant had deleted records and was underreporting its revenues. The matter was referred to CRA"s Investigation Division, leading to a criminal investigation giving rise to the charges.

STATUTORY PROVISIONS

Section 231.1 of the ITA provides in part that:

231.1 (1) An authorized person may, at all reasonable times, for any purpose related to the administration or enforcement of this Act,

(a) inspect, audit or examine the books and records of a taxpayer and any document of the taxpayer or of any other person that relates or may relate to the information that is or should be in the books or records of the taxpayer or to any amount payable by the taxpayer under this Act, and

(b) examine property in an inventory of a taxpayer and any property or process of, or matter relating to, the taxpayer or any other person, an examination of which may assist the authorized person in determining the accuracy of the inventory of the taxpayer or in ascertaining the information that is or should be in the books or records of the taxpayer or any amount payable by the taxpayer under this Act,

and for those purposes the authorized person may

(c) subject to subsection 231.1(2), enter into any premises or place where any business is carried on, any property is kept, anything is done in connection with any business or any books or records are or should be kept, and

(d) require the owner or manager of the property or business and any other person on the premises or place to give the authorized person all reasonable assistance and to answer all proper questions relating to the administration or enforcement of this Act and, for that purpose, require the owner or manager to attend at the premises or place with

the authorized person.

(2) Where any premises or place referred to in paragraph 231.1(1)(c) is a dwelling-house, an authorized person may not enter that dwelling-house without the consent of the occupant except under the authority of a warrant under subsection 231.1(3).

Section 288 of the ETA is a parallel provision to s. 231.1 of the ITA and provides in part that:

288. (1) An authorized person may, at all reasonable times, for any purpose related to the administration or enforcement of this Part, inspect, audit or examine the documents, property or processes of a person that may be relevant in determining the obligations of that or any other person under this Part or the amount of any rebate or refund to which that or any other person is entitled and, for those purposes, the authorized person may

(a) subject to subsection (2), enter any premises or place where any business or commercial activity is carried on, any property is kept, anything is done in connection with any business or commercial activity or any documents are or should be kept; and

(b) require the owner or manager of the property, business or commercial activity and any other person on the premises or in the place to give to the authorized person all reasonable assistance and to answer all proper questions relating to the administration or enforcement of this Part and, for that purpose, require the owner or manager to attend at the premises or place with the authorized person.

(2) Where any premises or place referred to in paragraph (1)(a) is a dwelling-house, an authorized person may not enter that dwelling-house without the consent of the occupant, except under the authority of a warrant issued under subsection (3).

Section 231.2 of the ITA was amended in 1986 and presently provides:

(1) Notwithstanding any other provision of this Act, the Minister may, subject to subsection (2), for any purpose related to the administration or enforcement of this Act (including the collection of any amount payable under this Act by any person), of a comprehensive tax information exchange agreement between Canada and another country or jurisdiction that is in force and has effect or, for greater certainty, of a tax treaty with another country, by notice served personally or by registered or certified mail, require that any person provide, within such reasonable time as stipulated in the notice,

(a) any information or additional information, including a return of income or a supplementary return; or

(b) any document.

(2) The Minister shall not impose on any person (in this section referred to as a “third

party") a requirement under subsection 231.2(1) to provide information or any document relating to one or more unnamed persons unless the Minister first obtains the authorization of a judge under subsection 231.2(3).

(3) On ex parte application by the Minister, a judge may, subject to such conditions as the judge considers appropriate, authorize the Minister to impose on a third party a requirement under subsection 231.2(1) relating to an unnamed person or more than one unnamed person (in this section referred to as the "group") where the judge is satisfied by information on oath that

(a) the person or group is ascertainable; and

(b) the requirement is made to verify compliance by the person or persons in the group with any duty or obligation under this Act.

(c) and (d) [Repealed, 1996, c. 21, s. 58(1)]

(4) Where an authorization is granted under subsection 231.2(3), it shall be served together with the notice referred to in subsection 231.2(1).

(5) Where an authorization is granted under subsection 231.2(3), a third party on whom a notice is served under subsection 231.2(1) may, within 15 days after the service of the notice, apply to the judge who granted the authorization or, where the judge is unable to act, to another judge of the same court for a review of the authorization.

(6) On hearing an application under subsection 231.2(5), a judge may cancel the authorization previously granted if the judge is not then satisfied that the conditions in paragraphs 231.2(3)(a) and 231.2(3)(b) have been met and the judge may confirm or vary the authorization if the judge is satisfied that those conditions have been met.

Section 289 of the ETA is a parallel provision to s. 231.2 of the ITA and provides:

(1) Despite any other provision of this Part, the Minister may, subject to subsection (2), for any purpose related to the administration or enforcement of a listed international agreement or this Part, including the collection of any amount payable or remittable under this Part by any person, by notice served personally or by registered or certified mail, require that any person provide the Minister, within any reasonable time that is stipulated in the notice, with

(a) any information or additional information, including a return under this Part; or

(b) any document.

(2) The Minister shall not impose on any person (in this section referred to as a "third party") a requirement under subsection (1) to provide information or any document

relating to one or more unnamed persons unless the Minister first obtains the authorization of a judge under subsection (3).

(3) On ex parte application by the Minister, a judge may, subject to such conditions as the judge considers appropriate, authorize the Minister to impose on a third party a requirement under subsection (1) relating to an unnamed person or more than one unnamed person (in this section referred to as the “group”) where the judge is satisfied by information on oath that

(a) the person or group is ascertainable; and

(b) the requirement is made to verify compliance by the person or persons in the group with any duty or obligation under this Part.

(4) Where an authorization is granted under subsection (3), the authorization shall be served together with the notice referred to in subsection (1).

(5) Where an authorization is granted under subsection (3), a third party on whom a notice is served under subsection (1) may, within fifteen days after the service of the notice, apply to the judge who granted the authorization or, where that judge is unable to act, to another judge of the same court for a review of the authorization.

(6) On hearing an application under subsection (5), a judge may

(a) cancel the authorization previously granted if the judge is not then satisfied that the conditions in paragraphs (3)(a) and (b) have been met; or

(b) confirm or vary the authorization if the judge is satisfied that those conditions have been met.

DECISIONS BELOW

The Provincial Court held a v*oir dire* to determine the admissibility of the evidence obtained by the CRA and to determine whether the CRA officers would be permitted to give opinion evidence in relation to technical matters. The Judge stated:

> I find that the most troubling aspect of the behaviour of the CRA officers in this case, is the misleading and deceptive letter dated August 28, 2006 which was sent out to New BM Enterprises Ltd purporting to be a genuine request for a taxpayer's voluntary cooperation in participating in a research project embarked upon by the CRA. The letter goes so far as to try to reassure the taxpayer that the agency's intentions were innocuous enough when it states: "Please note that this review is not an audit, but rather a limited review of your current record keeping practices to determine if they are adequate for purposes of the Income Tax Act and Excise Tax Act". Then it seems that this seemingly innocuous letter suddenly took on the force of law when Mr.

> Dhaliwal advised the manager that the owner's participation was not optional, thereby giving the owner the unmistakable impression that this review had nothing to do with voluntary cooperation, because it had the force of law which compelled him to participate despite the fact that it was conveyed to Mr. Dhaliwal that he did not want to participate. The claim therefore by the CRA officials that they were allowed to "borrow" the records for copying, implying that somehow the owner was not compelled to turn them over, seems rather hollow, when one realizes that prior to the attendance by CRA officials to New BM premises, it was understood that the participation of the owner was not optional. I find that I must conclude that there was in fact no informed consent given by Mr. Bo Ping He to the records being taken, compounded by the fact that Mr. Bo Ping He was interviewed in English without the help of a qualified interpreter, although the officials were advised that he could not speak English. I find therefore that the records of New BM Enterprise Ltd. could hardly be described as having been "borrowed" for copying, but were in fact seized by CRA officials without the actual or implied consent of the owner and that this seizure constituted a warrantless seizure and was therefore unlawful.

The Provincial Court judge relied on the SCC decision in *Richardson & Sons v. M.N.R.*, [1984] 1 S.C.R. 614, in concluding that there was no "genuine or serious" inquiry into the tax liability of a specific person or persons, a letter of Requirement could not be issued. The CRA officials were found to have acted as if the letter sent to the taxpayer was a letter of requirement, and therefore acted without lawful authority, resulting in a violation of the taxpayer's section 7 and 8 *Charter* rights.

In considering whether the evidence was to be excluded, the Trial judge held that the CRA was aware of and took advantage of the taxpayer's belief that it had no choice but to cooperate, took advantage of the taxpayer's language constraints, and ignored the rules set out in *Richardson*. The evidence was ruled inadmissible.

The CRA appealed the admissibility of the evidence to the Supreme Court of British Columbia, where the appeal was dismissed. The Appeal judge agreed that the reasoning in *Richardson* applied not just to section 231.2, but also to section 231.1, and held that the CRA had conducted an unauthorised seizure of the data.

ANALYSIS

The BCCA began by stating that in a self-reporting system such as the ITA and ETA, (1) the Minister is entitled to information that will permit the CRA to determine if: (a) the taxpayer is keeping records at its place of business; (b) the records contain the information that will allow taxes payable to be determined; and (2) the CRA may conduct an audit to determine if the taxpayer is in compliance with the statutory requirements. Absent an audit, if the CRA may obtain information from the taxpayer that the CRA is entitled to see in the course of an audit, there are statutory constraints. If these constraints are not abided by, the search and seizure is unauthorized.

The BCCA referred to the decision of the SCC in *Canadian Imperial Bank of Commerce v. Attorney General of Canada*, [1962] S.C.R. 729, where it was held that a requirement is valid where the government is engaged in a “genuine and serious inquiry into the tax liability of some particular person or persons", thus issued for a "purpose related to the administration or enforcement of” the ITA. The equivalent provision to that in the CIBC case is 231.2(1) (with the parallel provision of the ETA).

Section 231.1 of the ITA, in contrast permit the CRA to enter a premise and inspect, audit or examine the taxpayer’s records and documents and interview the taxpayer on site without any specific requirement that the CRA give notice, “for any purpose related to the administration or enforcement of” the ITA (and ETA).

The Crown agreed that an examination or production of records must be authorized by law, and that the examination of books and records engaged the taxpayer's section 8 *Charter* rights, but argued that extending the “genuine and serious inquiry” test to s. 231.1 of the ITA extends the test well beyond the circumstances discussed in Richardson and its progeny.

The Taxpayer argued that if s. 231.1 of the ITA is relied upon by the CRA, the examination or production of the records must be undertaken for the predominant purpose of ensuring statutory compliance with the legislation, and not for a criminal investigation: *R. v. Jarvis*, 2002 SCC 73, at paras. 88 and 95, and argued that the real purpose for which the CRA administered the ERE was to enable it to educate itself as to POS systems use in Canada and not to conduct an administrative review of New BM’s books and records.

The BCCA stated that it believed that the *Richardson* test continues to apply to subsection 231.2(1). After *Richardson*, the provision was amended to deal with requests to third parties, but there may be the possibility of abuse relating to non-third party issues which would not be subject to judicial oversight under the amendments to that section: *M.N.R. v. Sand Exploration Limited*, 95 D.T.C. 5358 (F.C.T.D.); *AGT Limited v. A.G. of Canada*, [1997] 2 F.C. 878 (F.C.A.).

The Court felt that section 231.1 of the ITA, if interpreted broadly, is open to the same possibility of abuse identified in *Richardson*, and even allows for a more intrusive power than 231.2 does. As such, a correct interpretation of 231.1 requires the reasoning of *Richardson* to be applied.

The Court refereed to the SCC decision in *Redeemer Foundation v. Minister of National Revenue*, 2008 SCC 46, to identify the focus of a review under section 231.1, being on information that is or should be in the books and records of a taxpayer. Here, the CRA was seeking more information that is or should have been in the books and records of the taxpayer, as the pilot project was " a check generally on compliance with the statute by looking into the adequacy and reliability of the electronic Records to earmark issues to be addressed with software developers, and to ensure that the Minister’s requirements kept pace with technological changes and to minimize its burden." Given this purpose - more than an effort to assess taxpayer compliance with the duty to keep proper records - the examination of the taxpayer's records were not authorized by section 231.1. The Court upheld the court's below.