Federal Court

Cour fédérale

Date: 20110831

Docket: T-939-10
T-940-10
T-1361-10
T-1421-10
T-1819-10
T-1980-10
T-1981-10
T-1982-10
T-2063-10
T-367-11
T-368-11
T-450-11

Citation: 2011 FC 1032

Ottawa, Ontario, August 31, 2011

PRESENT: The Honourable Madam Justice Mactavish

BETWEEN:

RAYMOND AND TARA PATRY

Applicants

and

THE ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR ORDER AND ORDER

[1] Raymond and Tara Patry have commenced 13 applications for judicial review in this Court with respect to various actions attributed to the Canada Revenue Agency (CRA) and its employees. Civil proceedings have also been commenced by the Patrys in the British Columbia Supreme Court against a criminal investigator employed by the CRA in which they allege misfeasance in public office, amongst other tort-based claims.

[2] The Patrys have now brought a motion seeking various forms of interim prohibitory and injunctive relief in 12 of their Federal Court applications. For the reasons that follow, I have concluded that all of their motions should be dismissed.

Background

[3] Mr. and Mrs. Patry both worked for the Burnaby-Fraser Tax Service Office (BFTSO) of the CRA. Mrs. Patry left the BFTSO in 2002 when she went on maternity leave. She subsequently took an extended parental leave and resigned from her position at the CRA in August of 2008. Mr. Patry began working for the CRA in 1991. He worked at the BFTSO from 1994 until April of 2005.

[4] Mr. and Mrs. Patry subsequently established a business providing accounting and tax services to the public. The couple evidently came under suspicion for tax-related offences, and the CRA obtained a warrant to search their home in September of 2008. The search was subsequently carried out, and records and computer equipment were seized.

[5] On July 20, 2010, Mr. and Mrs. Patry were charged criminally with various *Income Tax Act* and *Excise Tax Act* offences including tax evasion and making or participating in the making of false or deceptive statements in tax returns. They are scheduled to stand trial on January 12, 2012.

[6] Since September of 2008, the CRA has taken a number of enforcement and collection steps in relation to the couple's tax affairs. Mr. and Mrs. Patry take issue with the propriety of many of these actions and have commenced their various applications for judicial review in response. The details of each application will be addressed further on in these reasons.

The Relief Sought

[7] Mr. and Mrs. Patrys' motions seek the following interim relief:

1. An order quashing or staying the 30 day demands to file dated January 26, 2011 and February 3, 2011, issued to the Applicants by an anonymous official at the CRA.

2. An order that all of these applications be held in abeyance pending resolution of the criminal charges facing the Applicants.

3. An order in the nature of prohibition against the CRA that, at least on an interim basis:
   a. Criminal investigators at the Burnaby-Fraser Tax Services Office ("BFTSO") cease to use civil audit powers such as inspecting records without warrants and raising arbitrary assessments;

b. The BFTSO cease to handle the Applicants' tax affairs, at least on an interim basis because of the reasonable apprehension of bias;

c. Civil officials of the CRA cease to use civil powers against the Applicants, including information gathering powers used by collections, while liaising 'closely' with investigations.

d. Refrain from altering electronic records such as:

    i. The alternations to the Applicants' address as changed in July 2010 when the CRA changed the Applicants' address to a C/O address for the criminal investigator attempting to prosecute the Applicants at the request of the criminal investigator;

    ii. Records of dates, for example as demonstrably altered with respect to the filing date of the Applicants' GST partnership return for the period ending December 31, 2008;

    iii. Records of correspondence, such as the inaccurate records of correspondence for BN 816981617 RT0001 where many documents before the Court are not reflected in the CRA's records of correspondence.

e. An order in the nature of prohibition against the BFTSO from intercepting any other correspondence addressed to the Applicants (as appears to have been the case for the

December 7, 2010, statement of arrears for GST the original of which is in the Respondent's certified tribunal record for T-1821-10 as being received by the BFTSO on December 8, 2010).

The Quality of the Evidence Adduced in Support of the Motion

[8] The quality of the evidence adduced by the Patrys in support of their motions is very unsatisfactory.

[9] The main affidavits filed in support of the motions are sworn by Kelly Curtis, a legal assistant in the office of the Patrys' counsel. An affidavit has also been provided by Wilfred Cain, who describes himself as a client and friend of the Patrys. The final affidavit is from Ron Hampton, who describes himself as "an accountant and licensed sub-mortage broker". Neither Mr. nor Mrs. Patry has provided an affidavit.

[10] Counsel for the applicants acknowledged "there were problems with this", but suggested that the Patrys' found themselves in a difficult position because of the ongoing criminal proceedings. According to Ms. Curtis' February 23, 2011 affidavit, Mr. Patry had advised her that the couple "do not feel that they are at liberty to speak freely because of the criminal proceedings against them". As I understand counsel's argument, there was a concern on the part of his clients that there was a potential for self-incrimination if they were to expose themselves to cross-examination by filing their own affidavits in support of their motions.

[11] The applicants' argument fails to take into account the protections afforded to the Patrys by section 5 of the *Canada Evidence Act*, R.S.C., 1985, c. C-5, which provides that:

5. (1) No witness shall be excused from answering any question on the ground that the answer to the question may tend to criminate him, or may tend to establish his liability to a civil proceeding at the instance of the Crown or of any person.	5. (1) Nul témoin n'est exempté de répondre à une question pour le motif que la réponse à cette question pourrait tendre à l'incriminer, ou pourrait tendre à établir sa responsabilité dans une procédure civile à l'instance de la Couronne ou de qui que ce soit.
(2) Where with respect to any question a witness objects to answer on the ground that his answer may tend to criminate him, or may tend to establish his liability to a civil proceeding at the instance of the Crown or of any person, and if but for this Act, or the Act of any provincial legislature, the witness would therefore have been excused from answering the question, then although the witness is by reason of this Act or the provincial Act compelled to answer, the answer so given shall not be used or admissible in evidence against him in any criminal trial or other criminal proceeding against him thereafter taking place, other than a prosecution for perjury in the giving of that evidence or for the giving of contradictory evidence.	(2) Lorsque, relativement à une question, un témoin s'oppose à répondre pour le motif que sa réponse pourrait tendre à l'incriminer ou tendre à établir sa responsabilité dans une procédure civile à l'instance de la Couronne ou de qui que ce soit, et si, sans la présente loi ou toute loi provinciale, ce témoin eût été dispensé de répondre à cette question, alors, bien que ce témoin soit en vertu de la présente loi ou d'une loi provinciale forcé de répondre, sa réponse ne peut être invoquée et n'est pas admissible en preuve contre lui dans une instruction ou procédure pénale exercée contre lui par la suite, sauf dans le cas de poursuite pour parjure en rendant ce témoignage ou pour témoignage contradictoire.

[12] Mr. and Mrs. Patry would have control over the information contained in their affidavits. If they were cross-examined on their affidavits, it was open to them to refuse to answer questions that they did not wish to answer. If a Court order was subsequently obtained compelling them to answer

the disputed questions, the protection afforded by subsection 5(2) of the *Canada Evidence Act* would then apply, precluding the use of their answers in their criminal trial. The Patrys may also be entitled to protection under section 7 of the Charter.

[13] While Rule 81 of the *Federal Courts Rules* does permit affidavits sworn on information and belief to be used on motions other than motions for summary judgment, Rule 81(2) permits the drawing of an adverse inference from the failure of a party to provide evidence of persons having personal knowledge of material facts.

[14] The actions of the Patrys in hiding behind the legal assistant have also denied the respondent any meaningful opportunity to effectively challenge the evidence provided by the legal assistant through cross-examination. As a consequence, I am not prepared to give a great deal of weight to the information contained in Ms. Curtis' affidavits, particularly where it relates to the Patrys' opinions and characterization of events.

[15] That said, the respondent does not challenge the authenticity of the documents introduced through the legal assistant's affidavits, and I am prepared to consider those documents.

[16] Before leaving this section, I should note that there are also frailties with the evidence adduced by the respondent, some of which is also based upon information and belief. While I am aware of these frailties, at the end of the day the burden is on the Patrys to provide a sufficient evidentiary foundation for the interim relief that they are seeking. As will be discussed below, they have failed to do so.

Bias and the BFTSO

[17] The issue of bias on the part of the BFTSO appears to be an overarching concern of the Patrys, and their allegations of bias permeated their submissions in relation to the motions brought in relation to each of their applications for judicial review. As a consequence, I will deal with this issue at the outset.

[18] Part of the interim relief sought by the Patrys is “an order in the nature of prohibition” directing that “The BFTSO cease to handle the Applicants’ tax affairs, at least on an interim basis, because of the reasonable apprehension of bias”. While recognizing that they “are no doubt fighting an uphill battle”, the Patrys nevertheless submit that they “had a long and colourful history at the BFTSO”, which gives rise to reasonable apprehension on their part that the BFTSO is biased against them.

[19] While they have not provided affidavit evidence attesting to their apprehension of bias, the Patrys have produced documentation regarding a 1996 sexual harassment complaint brought by Mrs. Patry against an employee of the BFTSO, as well as information regarding several investigations that were carried out into Mr. Patry’s conduct during the time that he worked for the BFTSO.

[20] I am aware that in order to establish the existence of a serious issue in an underlying application for judicial review for the purposes of granting interim injunctive relief, applicants need only show that the application is neither frivolous nor vexatious: *Copello v. Canada (Minister of*

Foreign Affairs), [1998] F.C.J. No. 1301. I am nevertheless satisfied that the Patrys have not met even this low threshold insofar as their allegation of a reasonable apprehension of bias is concerned.

[21] The test for determining whether actual bias or a reasonable apprehension of bias exists in relation to a particular decision-maker is well known: that is, what would an informed person, viewing the matter realistically and practically - and having thought the matter through – conclude? That is, would he or she think it more likely than not that the decision-maker, either consciously or unconsciously, would not decide fairly: see *Committee for Justice and Liberty v. Canada (National Energy Board)*, [1978] 1 S.C.R. 369, at p. 394. See also *Wewaykum Indian Band v. Canada*, [2003] 2 S.C.R. 259 at paragraph 74.

[22] There are, however, some types of decision-makers who are not held to this standard. For example, it has been held that the standard of impartiality required of a Canadian Human Rights Commission investigator carrying out non-adjudicative responsibilities is something less than that required of the Courts. In such cases, the question is not whether there exists a reasonable apprehension of bias on the part of the investigator, but rather, whether the investigator approached the case with a "closed mind": see, for example *Canadian Broadcasting Corp. v. Canada (Canadian Human Rights Commission)*, (1993), 71 F.T.R. 214 (F.C.T.D.).

[23] There are many different actions on the part of the CRA that are in issue in these applications for judicial review. I do not need to examine what type of powers the CRA has exercised in each case in order to determine the standard of impartiality that should be applied, as I am satisfied that the Patrys have failed to show that there exists a serious issue as to a reasonable

apprehension of bias on the part of the BFTSO, even when considered against the standard most favourable to their position.

[24] The burden of demonstrating the existence of either actual or apprehended bias rests on the person alleging bias. An allegation of bias is a serious allegation, which challenges the very integrity of the person whose decision is in issue. As a consequence, a mere suspicion of bias is not sufficient: *R. v. R.D.S.*, [1997] 3 S.C.R. 484 at para. 112; *Arthur v. Canada (Attorney General)* (2001), 283 N.R. 346 at para. 8 (F.C.A.). Rather, the threshold for establishing bias is high: *R. v. R.D.S*, at para. 113.

[25] The Patrys say that the BFTSO was a small office, with approximately 700 or so CRA employees working there. Several of the people named as designated searchers in a 2008 search warrant obtained in connection with the criminal investigation into the Patrys' tax affairs were working at the BFTSO when the Patrys worked there.

[26] The Patrys also point to connections between themselves and the person who commissioned one of the affidavits filed in this proceeding by the respondent. These connections include the fact that they bought a house from the spouse of the person commissioning the affidavit. The Patrys submit that these connections give rise to a reasonable apprehension of bias on the part of the BFTSO.

[27] Ms. Curtis states in her February 23, 2011 affidavit that Mr. Patry told her that he believed that at the time that he left the BFTSO in early 2005, "upper level management was trying to build a

case to have him fired". However, there is no evidence before me, not even evidence provided on the basis of information and belief, that the Patrys have an ongoing apprehension of bias on the part of the BFTSO in relation to the office's handling of their tax matters. Moreover, even if they have such a belief, it simply cannot be said that it is reasonable insofar as it relates to the entire BFTSO.

[28] In *Zündel v. Citron*, [2000] 4 F.C. 225, [2000] F.C.J. No. 679, the Federal Court of Appeal held that there is no doctrine of "corporate taint" as relates to an allegation of bias. The Court noted that bias is a state of mind unique to an individual, with the result that an allegation of bias must be directed at a specific individual: see paras. 46-50. As a consequence, there can be no serious issue as to a reasonable apprehension of bias on the part of the BFTSO as a whole.

[29] The Patrys have also alleged bias against two specific individuals.

[30] One individual worked in the information technology area at the BFTSO. This individual appears to have some peripheral involvement in a 2001 investigation into Mr. Patry's allegedly improper installation of an unauthorized ethernet network interface card on his office laptop. The investigation report concluded that Mr. Patry had either made the unauthorized changes himself or had allowed someone else to do so. The report further found that Mr. Patry had tried to shift the blame to the individual who had sexually harassed his wife some years earlier.

[31] The investigation report contains a paragraph containing information obtained from the IT employee who is now subject to the allegation of bias. This same IT employee is named in the 2008

search warrant as an individual authorized to assist with the search, and it appears that he did in fact assist in this regard.

[32] These events do not, in my view, raise a serious issue as to a reasonable apprehension of bias on the part of the IT employee in question. There is no suggestion of any animus against the Patrys on the part of this employee. The statements attributed to the employee in the investigation report are technical in nature, and relate to the workings of the CRA computer system. There is no indication in the report that the IT employee knew why the information in question was being sought. Nor is there any indication in the record before me that the IT employee was even aware that the information was being sought in relation to a complaint involving Mr. Patry.

[33] The foundation for the allegation of a reasonable apprehension of bias on the part of the second CRA employee is even more tenuous. In 1996, Mr. Patry competed for a position in the criminal investigations unit at the BFTSO in a competition run by the employee who is now the subject of the allegation of bias. Mr. Patry came third or fourth in that competition. There is no information as to how many people participated in the competition. In 2002, a notice was sent to employees regarding an acting opportunity in the BFTSO investigations unit. The name of this same employee was given as the contact person for inquiries. There is no suggestion that Mr. Patry actually had any dealings with this person, nor is there any indication of any animus on the part of the employee towards the Patrys.

[34] This same individual subsequently served as the supervisor of the investigator carrying out the criminal investigation into the Patrys' tax affairs. The Patrys acknowledge that they have not had any personal relationship or prior dealings with the investigator herself.

[35] Once again, these events do not, in my view, raise a serious issue as to a reasonable apprehension of bias on the part of the employee in question.

The *Jarvis* Decision

[36] Because many of the Patrys' submissions rest on their interpretation of the Supreme Court of Canada's decision in *R. v. Jarvis*, 2002 SCC 73, [2002] 3 S.C.R. 757, it is important to first have regard to what it was that the Supreme Court actually said in that case before turning to examine the motions in the context of each of the Patrys' applications for judicial review.

[37] *Jarvis* was a criminal case where the accused was charged with tax evasion. At issue was the admissibility at trial of evidence obtained in the course of an audit through the use of "requirement letters" issued under s. 231.2(1) of the *Income Tax Act*.

[38] The Supreme Court held that a distinction had to be drawn between the audit and investigative powers under the *Income Tax Act*. In this regard, the Court stated that:

> Ultimately, we conclude that compliance audits and tax evasion investigations must be treated differently. While taxpayers are statutorily bound to co-operate with CCRA auditors for tax assessment purposes (which may result in the application of regulatory penalties), there is an adversarial relationship that crystallizes between the taxpayer and the tax officials when the predominant purpose of an official's inquiry

> is the determination of penal liability. When the officials exercise this authority, constitutional protections against self-incrimination prohibit CCRA officials who are investigating ITA offences from having recourse to the powerful inspection and requirement tools in ss. 231.1(1) and 231.2(1). Rather, CCRA officials who exercise the authority to conduct such investigations must seek search warrants in furtherance of their investigation. [at para. 2]

[39] Thus, the Supreme Court held that where the predominant purpose of an inquiry is the determination of criminal liability, the full panoply of Charter protections are engaged, including the right to a caution and protection against self-incrimination. The protection against self-incrimination means that tax officials investigating criminal offences cannot use the coercive powers accorded to auditors under the *Income Tax Act* to seek evidence for use in a criminal proceeding. Instead, they are required to obtain search warrants under either the *Income Tax Act* or the *Criminal Code*.

[40] The Supreme Court noted that the predominant purpose test does not prevent the CRA from conducting parallel criminal investigations and administrative audits, even in relation to the same tax years. However, the Court observed that "if an investigation into penal liability is subsequently commenced, the investigators can avail themselves of that information obtained pursuant to the audit powers prior to the commencement of the criminal investigation, but not with respect to information obtained pursuant to such powers subsequent to the commencement of the investigation into penal liability". Moreover, where the "predominant purpose of the parallel investigation actually is the determination of tax liability", auditors may continue to use the coercive powers

accorded to them by sections. 231.1(1) and 231.2(1) of the *Income Tax Act*: all quote from *Jarvis* at para. 97.

[41] The Supreme Court went on to provide guidance as to how to determine the predominant purpose of a particular inquiry.

[42] *Jarvis* thus stands for the proposition that CRA officials charged with investigating potential criminal conduct on the part of taxpayers cannot use the coercive powers given to those responsible for determining civil tax liability to circumvent the procedural and Charter protections afforded to those suspected of criminal activity.

[43] With this understanding of the decision in *Jarvis*, I will turn now to consider the relief sought by the Patrys in the context of each of their applications for judicial review.

Should Interim Relief be Granted in Any of the Applications for Judicial Review?

[44] The Patrys submit that each motion in each application for judicial review has to be viewed in light of the entire factual picture of the relationship between the Patrys and the CRA. While I have taken the whole factual situation into account in examining each motion, I will focus my analysis on the issues most germane to each individual application for judicial review in order to provide a coherent decision.

[45] The parties agree that, in determining whether the Patrys are entitled to the relief that they are seeking, the test to be applied is that established by the Supreme Court of Canada in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311.

[46] That is, the Patrys must establish:

> 1) That there is a serious issue to be tried in the underlying applications for judicial review;
>
> 2) That irreparable harm will result if the injunction is not granted; and
>
> 3) That the balance of convenience favours the granting of the stay.

[47] Given that the test is conjunctive, the Patrys have to satisfy all three elements of the test before they will be entitled to relief.

[48] Where an applicant seeks a remedy in the nature of prohibition on an interim basis, great caution should be exercised by the Court in the exercise of its discretion before granting the relief sought, where want of jurisdiction is not so apparent on the face of the record: *MacKay v. Rippon*, [1978] 1 F.C. 233 at paras. 46 and 47.

T-1361-10 and T-1982-10

[49] These applications for judicial review relate to Certificates issued by this Court in July of 2010 pursuant to the provision of the *Excise Tax Act*. Application T-1361-10 seeks to challenge the

decision of CRA to register the Certificates, whereas the application in T-1982-10 seeks to challenge an alleged decision not to withdraw the Certificates in a timely manner.

[50] The tax debt which formed the basis of the Certificates in issue was paid in full by the Patrys on October 1, 2010 and the Certificates were withdrawn on November 29, 2010. As a consequence, these applications for judicial review are clearly moot.

[51] I recognize that it would be open to the judge ultimately hearing the Patrys' applications for judicial review to decide to exercise the discretion conferred by the decision of the Supreme Court of Canada in *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342 to hear these matters notwithstanding the fact that they have become moot. It is not my role at this stage of the proceeding to determine whether this discretion should be exercised in the Patrys' favour.

[52] That said, in order to be entitled to injunctive relief, the Patrys must adduce clear and non-speculative evidence that irreparable harm will follow between now and the time that their applications for judicial review are heard if their motions are denied: see, for example, *Aventis Pharma S.A. v. Novopharm Ltd*. 2005 FC 815, (2005), at para. 59, aff'd 2005 FCA 390, 44 C.P.R. (4th) 326.

[53] That is, it will not be enough for the Patrys to show that irreparable harm *may arguably result* if interim relief is not granted. Allegations of harm that are merely hypothetical will not suffice. Rather, the burden is on them to show that irreparable harm *will result*: see *International*

Longshore and Warehouse Union, Canada v. Canada (A.G.), 2008 FCA 3, at paras. 22-25, per Chief Justice Richard.

[54] The Patrys' written submissions on the issue of irreparable harm in all 12 of their applications for judicial review are exceedingly brief, and essentially state that any violation of their Charter rights would amount to irreparable harm. In this regard I note that the Federal Court of Appeal made it clear in the *International Longshore and Warehouse Union, Canada* case cited above that such bald allegations of unconstitutionality (including Charter violations) are not sufficient to establish irreparable harm under the tripartite *RJR-MacDonald* test: at para. 26.

[55] The Patrys argued at the hearing that the registrations of the Certificates could potentially have had disastrous consequences for the family, including financial repercussions in relation to advances under their mortgage. Little information has, however, been provided with respect to the family's overall financial situation, and thus there is an insufficient evidentiary foundation for this argument.

[56] Moreover, given that the tax debt has been paid and the Certificates in issue have now been withdrawn, it has not been established that irreparable harm to the Patrys will occur between now and the time that their applications for judicial review are heard as a result of either the registration of the Certificates or any delay that may have occurred in having them withdrawn. The Patrys' contention that "if it happened once, it could happen again" is entirely speculative.

[57] Having failed to demonstrate that they will suffer irreparable harm if the interim relief sought is not granted, the motions brought in the context of these two applications for judicial review are dismissed.

T-1421-10 and T-1819-10

[58] These two applications for judicial review seek to challenge a decision of the Minister refusing to delay the collection of monies owing on account of GST, and a subsequent decision refusing to accept certain security for payment offered by the couple.

[59] The tax debt in issue in these proceedings is the same debt referred to in the previous section of these reasons. As noted above, the debt was paid in full by the Patrys on October 1, 2010. Consequently these applications for judicial review have now also become moot, and the Patrys have not established that they will suffer irreparable harm between now and the time that their applications for judicial review are finally decided if interim relief is not granted. As with the two previous applications, the Patrys' claim of potential future harm is speculative at best.

[60] As a result, the motions brought in the context of these two applications for judicial review are dismissed.

T-367-11 and T-368-11

[61] These applications for judicial review relate to decisions made by "an anonymous CRA official" to issue 30-day demands to file, on January 26, 2011 in relation to Tara Patry's 2009

taxation year (T-367-11), and on February 3, 2011 in the case of Ray Patry's 2009 taxation year (T-368-11).

[62] The Patrys seek an "order quashing or staying the thirty day demands to file dated January 26, 2011 and February 3, 2011, issued to the Applicants by an anonymous official at the Canada Revenue Agency". I am advised that the CRA has not taken any steps to enforce these demands pending the determination of these motions.

[63] The Patrys contend that these demands were served to obtain information in order to further the criminal investigation, and are thus improper. They further argue that they cannot comply with these demands because the CRA has not provided them with copies of the documents that they require to complete their tax returns, which documents were seized in the search. According to the Patrys, they should not now be put in the position of trying to piece together information to include in their tax returns at a time when they are already facing criminal charges.

[64] The evidence adduced by the respondent indicates that the demands to file were issued by an automated system and had nothing to do with the criminal investigation. In determining whether a demand to file should be issued, this system examines a number of factors including taxpayer histories and whether there is "tax potential".

[65] The Patrys point out that no demand to file was generated for the 2008 taxation year, and Tara Patry may in fact have been in a credit position, limiting the "tax potential" in her case. They also observe that there are "diary notes" associated with the notices. According to the Patrys, these

suggest that the notices were not in fact generated in the ordinary course, and were issued for an improper collateral purpose – namely to further the criminal investigation.

[66] The respondent has provided affidavit evidence addressing each of these points.

[67] I would start my analysis by observing that part of what the Patrys are seeking in their motions in these cases is essentially final relief, namely an order quashing the demands to file issued by the CRA. The granting of such relief is clearly inappropriate on an interim motion such as this.

[68] To the extent that the Patrys seek an order staying the demands on an interim basis, I need not decide if a serious issue has been shown in relation to these applications for judicial review as the Patrys have not satisfied me that they will suffer irreparable harm if the interim relief sought in connection with these applications is not granted.

[69] The Patrys have a statutory obligation to file tax returns. Requiring them to comply with their statutory obligations does not, in my view, constitute irreparable harm.

[70] I have considered the Patrys' argument that they cannot file returns for their 2009 tax years as they do not have access to the necessary documents. There are, however, a number of problems with this contention.

[71] There is, of course, no affidavit evidence from the Patrys themselves to support their claim in this regard. Ms. Curtis' February 23, 2011 affidavit states that she has been informed by Ray

Patry that "Because of the missing records and ongoing criminal investigation", the applicants did not initially file the GST return for their partnership *for 2008*. The only comments in Ms. Curtis' affidavit with respect to the demands to file the *2009* returns relate to the Patrys' belief that the demands were issued for an improper purpose.

[72] There is thus no evidentiary foundation to support the Patrys' claim that they were precluded from filing returns for their 2009 taxation years as a result of the seizure of their documents.

[73] The Patrys have also not identified which documents they need in order to comply with their statutory obligation to file. In addition, the respondent has adduced some evidence that copies of many of the documents seized have been returned to the Patrys. While the Patrys claim that not all of their documents were returned to them, and that they were also not provided with their computer equipment, they have not provided an evidentiary foundation for this assertion.

[74] Moreover, in the event that the Patrys really needed documents in the possession of the CRA in order to file their tax returns, it was open to them to bring a motion in the British Columbia courts to have the seized items returned: *R. v. Bromley*, [2002] B.C.J. No. 159. There is no evidence before me that this has occurred.

[75] Perhaps most importantly, the Patrys were advised by letter dated December 2, 2008 that "the records and things seized under sections 487 and 489 of the *Criminal Code of Canada*" were being detained at the BFTSO "*and are available to you or your authorized representative for examination during regular business hours…*". There is no suggestion that the Patrys ever

attempted to inspect the documents that they now say they needed to file their tax returns or that they were prevented from so doing in any way.

[76] Finally, in the event that the Patrys continue to believe that the demands to file were indeed issued for the purposes of gathering evidence for the criminal prosecution, it remains open to them to seek to have any evidence obtained in accordance with the demands excluded at their criminal trial.

[77] As Justice MacKay observed in *047424 NB Inc. v. Canada (Minister of National Revenue - M.N.R.)*, [1998] F.C.J. No. 1292:

> If the information is provided as demanded but no unauthorized action is taken by the respondent with any adverse effects upon the applicants, there will be no harm to the applicants. If the harm feared is possible use of the information demanded in criminal proceedings, the validity of that use may be tested in those proceedings. If it is not allowed, there will be no irreparable harm to the applicants, and if its use is allowed in other proceedings, by judicial approval, that use could not be irreparable harm. [at para. 23]

[78] Having failed to establish with clear and non-speculative evidence that they will suffer irreparable harm between now and the time that their underlying applications for judicial review are decided in the event that they have to comply with the demands to file, it follows that the motions brought by the Patrys in the context of these two applications for judicial review are dismissed.

[79] While it is not strictly necessary to address the issue of balance of convenience in relation to these motions in light of my findings in relation to the question of irreparable harm, I should note that I am further satisfied that, in this case, the balance of convenience clearly favors the respondent.

[80] As the Federal Court of Appeal has observed, the Minister has a statutory duty to enforce the provisions of the *Excise Tax Act* and the *Income Tax Act*,. A Court should not stop the Minister from carrying out his statutory duties merely because doing so will impose onerous obligations and financial hardships on the taxpayer: see *Tele-Mobile Co. Partnership v. Canada (Revenue Agency)*, [2011] F.C.J. No. 336, 2011 FCA 89, at para. 5. The Federal Court of Appeal noted that taxpayers may have other forms of recourse available to them, as is the situation here.

T-1981-10, T-2063-11 and T-450-11

[81] The application for judicial review in T-1981-10 relates to a decision by the criminal investigator to "cancel" the GST return filed by the Patrys on behalf of their partnership for the 2008 taxation year. The Patrys maintain that the CRA has no legal authority to cancel a tax return.

[82] I note that the respondent is of the view that this application was brought beyond the 30-day period allowed for the commencement of applications for judicial review. No motion for an extension of time has been brought by the Patrys, who argue that this decision represents but one part of an ongoing pattern of conduct by the CRA such that the 30-day time limit should not apply. The timeliness of this application for judicial review is not before me at this time, and I offer no opinion in this regard.

[83] T-2063-11 is brought in relation to a decision by the criminal investigator to "raise an arbitrary assessment for the Applicant[s'] 2008 and 2009 GST returns".

[84] The application for judicial review in T-450-11 relates to "a decision by anonymous officials of the Canada Revenue Agency … who appear to be taking contradictory and unauthorized actions with respect to a tax return for the Goods and Services [tax] ("GST") for the period ending December 31, 2008 … without notice or explanation for their actions".

[85] It is unclear what decision is being challenged in application T-450-11. Nor is it clear that the issues raised by the application are even amenable to judicial review. In the circumstances, the Patrys have not established that they are entitled to interim relief in this case.

[86] Insofar as applications T-1981-10 and T-2063-11 are concerned, the Patrys registered their partnership for GST purposes and began paying GST in March of 2008. A tax return was subsequently filed by the Patrys for this partial year. In the course of the criminal investigation, it was determined that the partnership had income in excess of $30,000 in 2005, with the result that the CRA determined that the Patrys should have been remitting GST in 2006 and 2007.

[87] In order to be able to assess the amount owing for these two years, the Patrys' GST registration had to be backdated to January 1, 2006. Assessments were then levied by the investigator for the 2006 and 2007 taxation years.

[88] The result of this was that the CRA's computer system could no longer accept a return for a partial filing period, and it was rejected as invalid. In order to process the return, the system needed to have a completed return for the full taxation year. As a consequence, the Patrys' tax return for the

partial year was cancelled on July 12, 2010. A letter was then sent to the Patrys advising them that their partnership return had been cancelled, and asking for a new return for the full tax year.

[89] GST assessments for the 2008 and 2009 taxation years were then issued by the CRA's compliance division in November of 2010. The information from the Patry's 2008 partnership return was then re-inputted into the CRA system and amended to reflect the entire calendar year. This replaced the GST assessment issued in November of 2010.

[90] Thus it appears that insofar as the Patrys' 2008 GST return is concerned, it is currently being processed by the CRA in accordance with the information already provided by the couple for that taxation year.

[91] The Patrys have objected to these assessments, and they remain under objection with the CRA's appeals division. The respondent submits that this provides the Patrys with a sufficient remedy with the result that there is no need for interim relief in this case. However, the Patrys argue that neither the CRA nor the Tax Court will address the concerns that they have with respect to the fairness of the process followed in connection with these assessments.

[92] I agree that these processes will not address the Patry's concerns as they relate to the fairness of the process leading up to the assessments: see *Main Rehabilitation Co. v. Canada*, [2004] F.C.J. No. 2030, at para. 8.

[93] While recognizing that the Supreme Court's decision in *Jarvis* permits parallel civil and criminal tax proceedings even for the same taxation years, the Patrys nevertheless say that it was unlawful for the criminal investigator to be involved in the civil assessment process.

[94] They further submit that the civil assessment process is being used for the purposes of gathering information in order to further the criminal prosecution. In support of this contention, they point to affidavit evidence provided by one of their clients, who states that he believes that some of his own tax information had been seized by criminal investigators without a warrant and was being used in the criminal investigation of Mr. and Mrs. Patry.

[95] The Patrys further point out that the CRA's own internal policies call for there to be a "close liason" between collections personnel and criminal investigators. They argue that such liasons between civil and criminal officials at the CRA have been grounds for quashing CRA actions: citing *Stanfield v. Canada (Minister of National Revenue - M.N.R.)*, [2005] F.C.J. No. 1249, 2005 FC 1010.

[96] I would start my analysis in these cases by observing that the decision in *Stanfield* was a final decision in an application for judicial review, and was not an order granting extraordinary injunctive and prohibitory relief as is sought here. It will be open to the judge hearing these applications on their merits to decide whether to grant relief of the sort that was granted in *Stanfield*.

[97] Once again the respondent argues that *Jarvis* does not preclude communication between civil and criminal investigators at the CRA, or between collections personnel and criminal

investigators, as long as the criminal investigators are not being provided with evidence obtained through the exercise of civil powers of compulsion in furtherance of the criminal investigation.

[98] I am prepared to accept that the Patrys have established that there is a serious issue in these cases insofar as they relate to the apparent involvement of the criminal investigator in the collections process, as it appears at least possible that there was a two-way information flow between the civil and criminal investigations of the Patrys' tax affairs.

[99] The Patrys have not, however, provided clear and compelling evidence that they will suffer irreparable harm between now and the time that these applications for judicial review are heard in the event that interim relief is not granted. As was the case in applications T-367-11 and T-368-11, it is open to the Patrys to seek to have any evidence obtained in contravention of principles articulated in the Supreme Court's decision in *Jarvis* excluded at their criminal trial.

[100] I am further satisfied that the balance of convenience favours the respondent in these cases. There is a strong public interest in allowing the Minister to continue to perform the statutory duty imposed on him by the *Excise Tax Act* . As noted above, the harm apprehended by the Patrys can be mitigated by a motion brought under section 24 of the Charter at their criminal trial for the exclusion of evidence that they believe to have been improperly obtained.

[101] As a consequence, the motions brought in the context of these applications for judicial review are also dismissed.

T-1980-10

[102] The decision in issue in this application for judicial review was made on or about July 12, 2010. The Patrys' application was commenced on November 26, 2010. No motion has been brought to extend the time for commencing the application, and thus the application is arguably out of time. That issue is not, however, before me at this time.

[103] This application relates to a decision by the CRA criminal investigator "to change the applicants' business address in the CRA's computers such that all of the applicants' civil tax matters are routed through the criminal investigator". This allegation forms part of the basis for the Patrys' request for an interim order directing the CRA to refrain from altering electronic records and intercepting their correspondence.

[104] The Patrys have identified two instances where they say that their address was changed in the CRA computer system allowing their correspondence to be intercepted by the CRA.

[105] By the conclusion of the hearing, the Patrys appeared to accept the respondent's explanation that, in one case, a document addressed to the Patrys, care of a CRA employee, had been specifically generated to produce a copy of the document in order to satisfy a Rule 317 request made by the Patrys themselves, and not to further the criminal investigation.

[106] However, the couple continues to assert that on at least one occasion, the criminal investigator unlawfully changed their address in the CRA computer system in order to obtain information to further the criminal investigation.

[107] As was noted in the previous section of these reasons, the Patrys registered their partnership for GST purposes in March of 2008, and began paying GST after that. In the course of the criminal investigation, it was determined that the partnership had earned income in excess of $30,000 in 2005, and that the Patrys should therefore have been remitting GST in 2006 and 2007. In order to be able to assess the amount owing for these two years, the Patrys' GST registration had to be backdated to January 1, 2006. Assessments were then levied by the investigator for the 2006 and 2007 taxation years.

[108] Internal CRA e-mail correspondence demonstrates that the criminal investigator asked a CRA employee to change the address on the Patrys' computer file to the investigator's own address. The investigator explained that she wanted this done in order "to ensure that any system notices are sent to me". It appears that the investigator wanted to obtain copies of the assessments for use in the criminal proceedings. The investigator notes in an email that "I cannot lay my criminal charges until after the GST assessments are posted". The investigator noted in a subsequent email that the change in address meant that the assessment notices would also be sent to the investigator, but stated that these would be manually forwarded to the Patrys.

[109] The address change took place on July 12, 2010, and it appears that the address on file was reversed once the documents in issue were obtained by the investigator. The notices of assessment were then sent to the Patrys on July 21, 2010.

[110] I would start my analysis by observing that the Patrys have not claimed this form of relief in this or any other of their applications for judicial review. Moreover, and in any event, they have not persuaded me that interim relief of this nature is necessary or appropriate in this case.

[111] I agree with the Patrys that this seems to be an unusual way of doing things, and that the delay in sending the notices to the Patrys could potentially have caused problems with respect to the time limits for the filing of objections. This did not happen, however, and the Patrys have thus not been harmed by the failure to provide them with the notice of the assessments in a timely manner. Their argument that injunctive relief is necessary to prevent this from happening again is speculative in nature, as there is nothing to suggest that this is something that is likely to be repeated.

[112] It must also be recognized that unlike the situation in *Jarvis*, the document in issue was not information produced by the taxpayer under civil compulsion, but rather the investigator's own assessment.

[113] Indeed, the respondent argues that the Patrys are trying to stand the Supreme Court's reasoning in *Jarvis* on its head in these applications. They say that this is not a case of a criminal investigator using civil tax powers of compulsion to obtain information for use against the Patrys in their criminal trial. Rather, what has happened here was a criminal investigator using information properly obtained through a criminal investigation carried out with all of the necessary procedural and constitutional safeguards in order to enforce a civil tax obligation.

[114] While I find that the Patrys have raised a serious issue in connection with this application, I am nevertheless satisfied that any concern with respect to the involvement of the criminal investigator in the assessment process can be adequately addressed in the context of the Patrys' criminal trial and that they will not otherwise suffer irreparable harm.

[115] In the absence of clear and non-speculative evidence that the Patrys will suffer irreparable harm if the interim relief sought is not granted, the motion brought in the context of this application for judicial review is also dismissed.

T-939-10

[116] In this application the Patrys seek to challenge a decision "to propose civil assessments for income tax, and the goods and service tax (GST) and multiple penalties including both gross negligence and third party penalties … at a time when there is an ongoing criminal investigation of the Applicants such that the Applicants cannot speak in defense of the proposed civil assessment without foregoing their right to silence".

[117] This decision appears to represent a preliminary step leading up to the assessment of penalties. Those penalties have evidently now been assessed, and the Patrys have filed objections in this regard. Given that the penalties have already been assessed, it is hard to see why interim relief is necessary in this case.

[118] The Patrys argue that the proposal letters represented an attempt to coerce information from them for use in their criminal trial through the use of the civil assessment and penalty process.

[119] The Patrys were given a June 17, 2010 deadline to produce whatever information they wanted to provide to the CRA in relation to the penalty question. That deadline is long past. This application for judicial review was commenced on June 15, 2010 and could have already been determined on its merits, rendering interim relief unnecessary.

[120] It is, moreover, important to keep in mind that the concern addressed by the Supreme Court of Canada in *Jarvis* is the use of what the Court described as “the powerful inspection and requirement tools in ss. 231.1(1) and 231.2(1)” to compel information for use in a criminal proceeding, without observing the safeguards afforded to criminal suspects by the warrant process. That is not what has happened here.

[121] In this case, the Patrys were offered an opportunity to make submissions prior to a preliminary decision being taken with respect to a civil penalty. It was open to them to accept that invitation or to reject it. If they chose to provide information to the CRA, they would have done so voluntarily, and their Charter rights would not have been breached. If they chose not to provide information (as they did), their right to silence was respected.

[122] To the extent that the Patrys’ concern is with respect to the fairness of the process followed in the steps leading up to the assessment of the penalties, that concern may be addressed when this application for judicial review is dealt with on its merits. They have not, however, satisfied me with clear and non-speculative evidence that irreparable harm will result between now and then if interim relief is not granted.

[123] Consequently, the motion brought in this application is dismissed.

T-940-10

[124] This application for judicial review concerns a decision of the "Third Party Penalty Review Committee" approving the application of third party penalties pursuant to section 163.2 of the *Income Tax Act*.

[125] This decision is a further preliminary step leading up to the actual assessment of the penalties. In contrast to the previous application for judicial review, where the Patrys say that it was unfair to ask them for submissions prior to a decision being taken in relation to the issue of penalties, in this case the Patrys say that it was unfair *not* to allow them to make submissions before a decision was taken in relation to the penalty question.

[126] I am once again not satisfied that interim relief is necessary or appropriate in this case in light of the fact that penalties have now been assessed and objections have been filed by the Patrys in this regard. Any procedural fairness concerns on the part of the Patrys can be addressed when this application for judicial review is addressed on its merits, and it has not been established that irreparable harm will result between now and then if interim relief is not granted.

Should These Applications be Held in Abeyance?

[127] The final form of relief sought by the Patrys is "An order that all of these applications be held in abeyance pending resolution of the criminal charges facing the Applicants."

[128] The Patrys were very clear at the hearing of these motions that they wanted their applications for judicial review put on hold, even if they did not succeed in obtaining the interim relief that they were seeking, a position that arguably undermines their claim that urgent interim relief was required in each of these cases.

[129] The respondent agrees that these 12 applications for judicial review should be held in abeyance pending the resolution of the Patrys' criminal trial. Given the agreement of the parties on this point, an order to this effect will issue.

Costs

[130] I see no reason why costs should not follow the result. The respondent seeks costs in the amount of $5,000, inclusive of disbursements. This is a reasonable amount, given the number of affidavits filed in connection with these motions and the number cross-examinations that took place together with the fact that the hearing of these motions took two days to complete.

ORDER

THIS COURT ORDERS that:

1. The motions brought by the Patrys in each of these 12 applications for judicial review are dismissed;

2. A copy of these reasons is to be placed on the file for each of the Patrys' 12 applications for judicial review;

3. The respondent shall have his costs of the motions fixed in the amount of $5,000, inclusive of disbursements; and

4. These applications for judicial review are to be held in abeyance pending the resolution of the criminal proceedings involving Mr. and Mrs. Patry. The parties shall notify the case management Prothonotary of the status of these matters within 10 days of a final resolution of the criminal charges against the Patrys.

"Anne Mactavish"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-939-10; T-940-10; T-1361-10; T-1421-10; T-1819-10; T-1980-10; T-1981-10; T-1982-10; T-2063-10; T-367-11; T-368-11; T-450-11
STYLE OF CAUSE:	RAYMOND AND TARA PATRY v. THE ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	Vancouver, British Columbia
DATE OF HEARING:	August 16, 2011
REASONS FOR ORDER AND ORDER:	Mactavish J.
DATED:	August 31, 2011

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