

Federal Court of Appeal



Cour d'appel fédérale

Date: 20140616

Docket: A-83-13

Citation: 2014 FCA 156

**CORAM: DAWSON J.A.
TRUDEL J.A.
NEAR J.A.**

BETWEEN:

JACK KLUNDERT

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Heard at Vancouver, British Columbia, on June 10, 2014.

Judgment delivered at Ottawa, Ontario, on June 16, 2014.

REASONS FOR JUDGMENT BY:

DAWSON J.A.

CONCURRED IN BY:

**TRUDEL J.A.
NEAR J.A.**

Federal Court of Appeal



Cour d'appel fédérale

Date: 20140616

Docket: A-83-13

Citation: 2014 FCA 156

**CORAM: DAWSON J.A.
TRUDEL J.A.
NEAR J.A.**

BETWEEN:

JACK KLUNDERT

Appellant

and

HER MAJESTY THE QUEEN

Respondent

REASONS FOR JUDGMENT

DAWSON J.A.

[1] For reasons cited as 2013 FC 110, a judge of the Federal Court dismissed a motion brought by the appellant. The appellant sought an order that monies collected by the Canada Revenue Agency pursuant to a jeopardy order issued by the Federal Court be applied to criminal fines imposed upon the appellant as a result of a conviction for tax evasion.

[2] The facts giving rise to the motion are uncontroversial. On June 11, 1998, the Minister of National Revenue assessed the appellant for \$927,893.89 in outstanding taxes for the 1993-1996

taxation years. Although the appellant filed notices of objection to these assessments, the Minister sought a jeopardy order under section 225.2 of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) (Act), in order to immediately enforce payment of the amounts assessed. The order was granted by a judge of the Federal Court on April 26, 1999.

[3] Part of the information used to support the Minister's application for the jeopardy order was obtained on a search of the appellant's home and business premises, conducted pursuant to a search warrant lawfully issued in the course of the Canada Revenue Agency's criminal investigation of the appellant for tax evasion.

[4] Subsequently, the jeopardy order was upheld by a judge of the Federal Court in a review conducted pursuant to subsection 225.2(8) of the Act.

[5] Approximately two years later, the appellant again sought to set aside or vary the jeopardy order to allow reasonable living expenses. The jeopardy order was again upheld; the reviewing judge found the appellant had not established that the order was unreasonable or constituted undue hardship.

[6] In 2010, the appellant was convicted of tax evasion in a trial held before the Ontario Superior Court. As a result of that conviction, the appellant was required to pay \$522,346.73 in fines in respect of the 1993 through 1997 taxation years. In a separate proceeding a further fine of \$101,398.80 was imposed for tax evasion relating to the 2000 through 2005 taxation years.

[7] The appellant now argues that because evidence obtained during the investigation of his criminal tax evasion was used to obtain the jeopardy order, amounts collected under that order should first be applied to pay his criminal fines. He seeks this relief on the basis that:

- i) The Canada Revenue Agency violated the principle articulated by the Supreme Court in *R. v. Jarvis*, 2002 SCC 73, [2002] 3 S.C.R. 757, at paragraph 84, that there must be “some measure of separation between the audit and investigative functions within” the Canada Revenue Agency;
- ii) The Canada Revenue Agency used its criminal powers, namely the right to seek and obtain a search warrant under section 487 of the Code to enforce a civil debt; and
- iii) The allocation of 100% of his income towards a civil liability together with his exposure to the issuance of a warrant for incarceration for non-payment of a fine, give rise to security of person “concerns” under section 7 of the *Charter of Rights and Freedoms*;

[8] In my view, for the following reasons, the Judge did not err in dismissing the appellant’s motion.

[9] First, the appellant reads *Jarvis* out of context. In particular, his reliance upon the portion of paragraph 84 of the Court’s reasons quoted above is misplaced.

[10] In *Jarvis*, the Supreme Court held that a criminal investigation does not suspend or prevent the Minister from conducting civil audits or civil enforcement proceedings. I accept the submission of the respondent that there is no reason why information obtained in a criminal investigation, such as information gathered pursuant to a lawful search warrant, should not be available for related civil purposes.

[11] The concern that animated the Court in *Jarvis* was that when the predominant purpose of an inquiry is the determination of penal liability, the full panoply of Charter rights are engaged for the taxpayer's protection.

[12] The appellant does not challenge the validity of any search warrant used to collect evidence for the criminal investigation. It follows that there is no basis to conclude that any of the appellant's Charter rights were violated and no reason to conclude that properly obtained evidence could not also be used in support of the motion for a jeopardy order.

[13] Second, I disagree that the Canada Revenue Agency used its criminal powers to enforce a civil debt. The Judge found as a fact that, based on the appellant's conduct (such as his position that "collecting income tax by the government is against the Constitution of Canada"), the authorities had every reason to believe the appellant would not voluntarily pay his taxes.

[14] This finding has not been shown to be palpably and overridingly wrong. It follows, in my view, that the appellant has failed to establish that the jeopardy order would not have issued but for evidence obtained by way of a search warrant.

[15] Additionally, while a criminal investigation may not be used *in terrorem* over alleged debtors, there is no evidence of any *in terrorem* threat in this case. The fact some evidence obtained through a search warrant was put before the Court in the motion to obtain a jeopardy order does not disclose any impropriety.

[16] Finally on this point, the Canada Revenue Agency's use of the jeopardy order to enforce payment of a tax debt is not analogous to the use of criminal powers to enforce a civil debt.

[17] Third, section 225.2 of the Act is a comprehensive scheme for obtaining and contesting jeopardy orders (*Tennina v. Canada* (Minister of National Revenue – M.N.R.), 2010 FCA 25, 402 N.R. 1). The only mechanism for varying or vacating a jeopardy order is an application for review by a judge of the court which originally issued the jeopardy order (subsections 225.2(8) and (13) of the Act). No appeal lies from such review.

[18] In the present case, the jeopardy order was reviewed under subsection 225.2(8). On the first review the appellant sought an order quashing the search warrants and an order excluding evidence obtained as a result of the search warrants pursuant to subsection 24(2) of the *Charter of Rights and Freedoms*. The jeopardy order was upheld. The appellant then sought a second review challenging the collection of 100% of his income. He again alleges abuse of the Canada Revenue Agency's audit/administrative and investigative powers and again asserts that 100% of his income ought not to be subject to execution. To the extent these matters were dealt with on the review of the jeopardy order, this motion constitutes a collateral attack on the jeopardy order proceedings.

[19] That leaves for consideration the appellant's argument that non-payment of the criminal fines exposes him to risk of incarceration so as to engage section 7 of the *Charter*.

[20] Assuming, without deciding that such a threat engages section 7, the appellant has failed to demonstrate that the process followed to date, or to be followed, was or is not in accordance with the principles of fundamental justice.

[21] For these reasons, I would dismiss the appeal with costs.

“Eleanor R. Dawson

J.A.

“I agree.

Johanne Trudel J.A.”

“I agree.

D.G. Near J.A.”

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-83-13

STYLE OF CAUSE: JACK KLUNDERT v.
HER MAJESTY THE QUEEN

PLACE OF HEARING: VANCOUVER, BRITISH
COLUMBIA

DATE OF HEARING: JUNE 10, 2014

REASONS FOR JUDGMENT BY: DAWSON J.A.

CONCURRED IN BY: TRUDEL J.A.
NEAR J.A.

DATED: JUNE 16, 2014

APPEARANCES:

Christopher D.R. Maddock, Q.C. FOR THE APPELLANT

Elizabeth McDonald FOR THE RESPONDENT

SOLICITORS OF RECORD:

Christopher D.R. Maddock, Q.C. FOR THE APPELLANT
Victoria, British Columbia

William F. Pentney FOR THE RESPONDENT
Deputy Attorney General of Canada