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CANADA / JUDGMENT

## R. v. Patry

2018 BCSC 591

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COURT

Supreme Court of British Columbia

DECIDED

6 March 2018

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2018 BCSC 591 R. v. Patry

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Patry,

2018 BCSC 591

Date: 20180306

Docket: X078600

Registry: New Westminster

Regina

v.

Raymond Patry

Tara Patry

Before: The Honourable Mr. Justice Blok

Oral Ruling on Vukelich Hearing

In Chambers

Counsel for the Crown:

D. Meneley

R. Whittaker

Counsel for the Accused, Raymond Patry (appearing by teleconference):

L.D. Myers, Q.C.

Counsel for the Accused, Tara Patry (appearing by teleconference);

D.L. Karp

Place and Date of Hearing:

New Westminster, B.C.

March 2, 2018

Place and Date of Judgment:

New Westminster, B.C.

March 6, 2018

- [1] THE COURT: This is my ruling on the Vukelich hearing that took place on March 2, 2018.
- [2] Raymond Patry and his spouse, Tara Patry, are charged in a six-count indictment with various offences under the Income Tax Act, R.S.C. 1985, c. 1 (5th Supp.), and the Excise Tax Act, R.S.C. 1985, c. E-15. Among other things, the Crown alleges the Patrys evaded taxes by operating a tax preparation business that caused numerous clients to claim false business losses.
- [3] The Patrys wish to bring a so-called Jarvis application to exclude evidence. Last Friday, this court embarked on a Vukelich hearing, at the request of the Crown, to determine whether there were grounds to embark on a Jarvis voir dire. I will take a moment to explain those criminal law terms.
- [4] A Jarvis application derives from R. v. Jarvis, 2002 SCC 73, where the Supreme Court of Canada emphasized the important distinction to be drawn between the audit powers granted under the Income Tax Act on the one hand and the statutory investigative powers of the Income Tax Act on the other. "Investigative powers" in this context are powers exercised for the purposes of determining penal liability, as distinct from audit powers, which are exercised for the purpose of determining a taxpayer's proper tax obligation.
- [5] As the court said in Jarvis, wherever the predominant purpose of an inquiry by the Canada Revenue Agency, or CRA, is the determination of penal liability, then all Charter protections that are relevant in the criminal context must apply. Such is not the case where an inquiry is carried out for audit purposes.
- [6] In this case, the Patrys say that the court should conduct a Jarvis voir dire to determine whether CRA's requests for information from another taxpayer were in fact done for the actual or ulterior purpose of determining the penal liability of the Patrys.

- [7] A Vukelich hearing derives from *R. v. Vukelich* (1996), 108 C.C.C. (3d) 193 (B.C.C.A.) and is a type of trial management process used to filter out applications that disclose no reasonable prospect of success. Here, the Crown says there is no basis on which to proceed with a *Jarvis voir dire*. The defence argues otherwise. I will review those submissions in more detail later in these reasons.

## I. Background

- [8] The Patrys are both former employees of CRA. Ms. Patry ceased working at CRA in July 2004 by going on leave. Mr. Patry went on leave from his CRA employment in April 2005. He resigned from that employment in February 2008.
- [9] In October 2006, a CRA officer made an audit referral concerning a taxpayer named Bill Henry. Mr. Henry had claimed large refunds in his 2004 and 2005 income tax returns. At some point this audit came to include Stephanie Henry, Mr. Henry's spouse. Both of the Henrys indicated in their returns that they had completed their returns themselves.
- [10] CRA auditor Laura Xiao received the Henry audit file in August 2007. Due to the passage of time, her audit was for the 2005 and 2006 taxation years.
- [11] In response to a telephone message that Ms. Xiao left for Mr. Henry, she was contacted by a person who identified himself as "Drew Richards". Mr. Richards told Ms. Xiao that he was representing Mr. Henry. He provided a telephone number to Ms. Xiao but would not provide her with his business address.
- [12] As a result of her audit, on January 15, 2008, Ms. Xiao referred the matter to CRA's enforcement division for investigation of possible income tax evasion by Mr. Henry. The investigation was assigned to CRA investigator Catharine Kanis.
- [13] In April 2008, Ms. Kanis sought and obtained production orders concerning the Henrys, pursuant to s. 487.012 of the Criminal Code. These orders allowed CRA to obtain: (1) from an internet service provider, the registered owner of the IP address from which the Henrys' income tax returns had been e-filed; and (2) Telus records showing the registered owner of the telephone number given to CRA by Mr. Henry's representative. These records showed that the IP address was registered to Tara Patry and the telephone number was registered to Raymond Patry.
- [14] As noted in paragraph 39 of the information to obtain (ITO) sworn by Ms. Kanis:

The informant believes that the documents or data listed in the section "Documents or data to be produced" are required as evidence of the alleged offences in that it will reveal the identity of the person or persons who filed the returns, the level of involvement in the preparation of the returns, as well as the location at which the returns were filed, which [based on her experience as an officer of the CRA] the informant believes is normally a location at which documents relating to income tax returns are stored.

## II. The Jarvis Application

- [15] The Patrys seek the exclusion of evidence pursuant to s. 7 and 24(2) of the Charter. They allege that they were already under investigation by CRA at the time of the audit of the Henrys, and the Henry audit was merely part of a larger investigation that was in fact focused on them, not Mr. Henry. Specifically, they allege that at the time the statutory audit powers were exercised in the Henry matter, CRA's primary objective was to gather evidence for a criminal prosecution against themselves. Accordingly, based on Jarvis, they say all information obtained from Mr. Henry during that "so-called audit" must be excluded from the evidence at trial.
- [16] The Patrys list a number of circumstances they say provide a factual basis for their allegations, the most salient of which are as follows:
- a) Mr. Patry had a "tumultuous history" with the CRA because he was a union steward and had been involved in 27 grievances on behalf of both other employees and himself;
  - b) CRA had investigated Mr. Patry before, specifically:
    - i. In 2001, he was investigated for alleged improper use of his CRA-provided laptop computer;
    - ii. In 2003, an anonymous informant complained that Mr. Patry was assisting individuals with their taxes and accessing CRA systems in doing so. A subsequent review determined that he had accessed CRA systems for legitimate work purposes only;
    - iii. In 2005, emails were circulated within CRA expressing concerns Mr. Patry was stockpiling office supplies; and
    - iv. In 2006, emails were circulated within CRA about the return of the Patrys' CRA laptops. I pause to note that both the Patrys were on leave from CRA at that point. One person, the same person behind the office supplies complaint, alleged Mr. Patry had been improperly using Ms. Patry's computer. These allegations were later determined to be unfounded;
  - c) "Drew Richards" is Mr. Patry's birth name. A number of persons who worked at CRA's Burnaby-Fraser office knew that he sometimes used his birth name. One of those persons was Peter Koch, who was employed in the Enforcement Division of CRA and who later became involved in the Henry investigation;
  - d) Mr. Koch made notes on the Henry file on January 24, 2008, which was after the matter was referred to the Enforcement Division of CRA. In those notes most references to "Drew Richards" are placed in quotation marks;
  - e) Ms. Xiao's supervisor was a former friend of Ms. Patry. As such, the Patrys assert she should have known that Mr. Patry sometimes used his birth name;
  - f) the audit of Mr. Henry commenced nine months after the audit referral. This was not standard CRA practice;

- g) two internal CRA documents show Drew Richards as being the representative of Mr. Henry. These are:
- i. an undated document entitled "Audit Plan" which shows Drew Richards as the taxpayer's representative; and
  - ii. an undated and unsigned document entitled "Penalty Recommendation Report" concerning Mr. Henry, which states:

As per taxpayer, he prepared and e-filed with CRA for both 2005 and 2006. No representative is involved. However, Drew Richards was showing as taxpayer's representative on CRA system when audit started.

### III. The Vukelich Application

#### A. The Crown

- [17] The Crown notes that there is nothing in its disclosure that indicates or suggests the Henry audit was a mere ruse designed to obscure the fact that the Patrys were the real targets of a CRA investigation.
- [18] The allegation that the Henry audit was carried out for the ulterior purpose of investigating the Patrys is unfounded, and is mere conjecture. The Crown says that to embark on a *voir dire* to explore these allegations would be to embark on a mere fishing expedition. The Crown also noted that there were much more direct avenues available to CRA to investigate the Patrys, had that been CRA's true object.
- [19] The Crown submits that, moreover, the witness statements of the auditor, Ms. Xiao, and the investigator, Ms. Kanis, confirm that Mr. Henry was the sole subject of the audit and the sole subject of Ms. Kanis' initial investigation. For the Jarvis application to be successful, the Patrys will have to demonstrate that both of these CRA employees lied, and in the case of Ms. Kanis, that she swore a false ITO.
- [20] The Crown submits that there is no reasonable prospect that the Patrys will show that the Henry audit was carried out for the ulterior motive of investigating the Patrys.

#### B. Defence Position

- [21] The Patrys submit that there is a need for a *voir dire* so that the court may determine whether the CRA violated their Charter rights when they requested information from the Henrys pursuant to CRA's audit powers.
- [22] They submit that there were people at CRA who knew that "Drew Richards", who is shown on some CRA documents as Mr. Henry's representative, was in fact Raymond Patry. They maintain that this establishes a connection between the Henry audit and the Patrys.

- [23] The Patrys say that the several complaints made in the mid-2000s show that someone in CRA was concerned about Mr. Patry's accounting business. That, together with Mr. Patry's adversarial history with CRA and the unusual delay between the audit referral and the commencement of the audit, is a sufficient factual basis on which to embark on a Jarvis voir dire. These "red flags" support the Patrys' suspicion that the CRA was out to get them and that CRA used the Henry audit as a vehicle to carry out that object.
- [24] The Patrys assert that the true and predominant purpose of the Henry audit was to gather evidence against them. Counsel acknowledged that there is no "smoking gun" to prove that alleged ulterior motive but said they are hopeful of cross-examining Crown witnesses to establish the necessary evidentiary basis for a successful Jarvis application.
- [25] Defence counsel noted that the Jarvis voir dire is now only expected to take three days, down from five, as the witness list has been pared from, I believe, 18 witnesses to seven witnesses. Counsel urged the court not to stifle what may be a significant aspect of the defence case through an inappropriate focus on efficiency. Counsel said the amount of time needed for the Jarvis application is minimal when compared to the jeopardy faced by the Patrys.

#### IV. Discussion

##### A. The Vukelich Test

- [26] The Vukelich test has been expressed in different ways in different cases, although those expressions are all very similar.
- [27] In Vukelich (leave to appeal dismissed [1996] SCCA 461) Chief Justice McEachern outlined the standard for holding a voir dire to address an alleged Charter breach:
- [26] Based on these authorities, it does not follow that an accused is always entitled as of right to a voir dire in the course of a criminal trial in order to challenge the constitutionality of a search. The trial judge must control the course of the proceedings, and he or she need not embark upon an enquiry that will not assist the proper trial of the real issues.
- [28] In R. v. McDonald, 2013 BCSC 314, Mr. Justice Fitch, as he then was, summarized the law as it has developed since Vukelich:
- [17] A Vukelich hearing serves an important trial management goal - it filters out proposed pre-trial applications where the circumstances, as disclosed by the submissions of counsel and references to supporting materials, are such that the remedy sought could not reasonably be granted.
- [18] The threshold test contemplated by the Vukelich line of authority has been expressed in different ways at different times. In R. v. Malik, 2002 BCSC 484, Josephson J. held that, "The threshold for embarking on an evidentiary hearing into an alleged Charter breach is low". He concluded that an applicant for relief "need only demonstrate a reasonable basis upon which the Court can find a breach of the Charter."

- [19] In *R. v. Pires*, 2005 SCC 66 ... the Court held that in controlling the course of proceedings before them, trial judges have the power to "decline to embark upon an evidentiary hearing at the request of one of the parties when that party is unable to show a reasonable likelihood that the hearing can assist in determining the issues before the court."
- [20] In *R. v. Tse*, 2008 BCSC 867, Davies J. held that "the Vukelich hearing was never intended as a tool...to prevent legitimate investigation of alleged Charter breaches when an appropriate foundation for that alleged breach can be demonstrated" nor is it intended to be used for the "protracted pre-hearing examination of the minutiae of the accused's [proposed] application."
- [21] The rigour with which Vukelich is applied and the way in which a trial judge exercises his or her discretion in relation to such an application is case-specific and highly contextual. Among the factors that will shape the exercise of that discretion are: the extent to which the facts or anticipated evidence underlying the alleged Charter breach are in legitimate dispute; the state and clarity of the law on the issue sought to be litigated; and the infinite variety of pragmatic considerations that will arise in a given case and suggest resolution of the application in one way or another. What underlies the inquiry is the need to balance an accused's fair trial interests with the public interest in the management of criminal proceedings by foreclosing lengthy and unnecessary pre-trial applications in circumstances where the remedy sought could not reasonably be granted.

#### B. Application of the Vukelich Test

- [29] The facts and circumstances referred to by the Patrys on this Vukelich hearing come down to this:
- a) Mr. Patry had a history of conflict in his employment with CRA;
  - b) there were people at CRA who knew he used the pseudonym "Drew Richards";
  - c) over the years there were some investigations that suggested CRA had concerns about Mr. Patry doing tax work on the side; and
  - d) these matters might have formed the basis of a CRA plan to "get back" at Mr. Patry.
- [30] The difficulty with this line of reasoning is that it is entirely speculative. While the Patrys might subjectively believe that CRA formed an intention to get back at one or both of them, there is no evidence to support that belief. I pause here to note that the Patrys did not actually assert that they have that subjective belief, but I have assumed that to be the case.

- [31] Much was made of the references to the "Drew Richards" pseudonym. Defence counsel submits that this shows the connection between the Henry audit and Mr. Patry. But even assuming there was knowledge within CRA of that connection - and here I pause to note there was no evidence referred to that indicated Ms. Xiao, the critical employee in question, actually knew of that connection - there is still a complete absence of evidence that the Henry audit was a ruse.
- [32] On that point, when it was pointed out during the hearing that there was nothing in the vast disclosure that took place in this matter that indicated the Henry audit was in fact a ruse, defence counsel replied in words to the effect that this is exactly what one would expect where ulterior motives are at work. This is very circular reasoning, and it does not really address the essential problem of there being no evidence showing, or even suggesting, that the Henry audit was or might have been a mere ruse to obscure the real focus of CRA's inquiries. It is only through outright conjecture or speculation that such a conclusion can be drawn.
- [33] To embark on a voir dire in these circumstances would be to abandon even the low threshold established in Vukelich and later cases. Worse yet, it would be to embark on a voir dire in circumstances where the known evidence shows the defence conjecture to be incorrect, since - as I was told - the witness statements of the auditor, Ms. Xiao, and the investigator, Ms. Kanis, confirm that there was no ulterior motive behind the Henry audit.
- [34] In *R. v. Tse*, 2008 BCSC 867, Mr. Justice Davies said, at para. 19:
- [19] Put more colloquially, the Vukelich hearing was intended to preclude embarkation upon "fishing expeditions" when the applicant could not reasonably demonstrate that there might be fish to be caught.
- [35] To apply that metaphor in this case, not only have the Patrys failed to reasonably demonstrate that there might be fish to be caught in this case, offering only speculation that there might be fish present, the persons in charge of the putative fishing hole have confirmed that there are no fish there.
- [36] Accordingly, I conclude that the Patrys have not shown a reasonable basis for embarking upon a Jarvis voir dire. I will add this, however: I expect that the relevant CRA employees will be called as witnesses at trial, and at least some of the matters raised on this Vukelich hearing may be the proper subject of cross-examination. I emphasize that I am not deciding that relevance now. The point is that if it emerges through cross-examination or otherwise that there is or may be a basis to embark on a Jarvis voir dire at a later time, then it will be open to the Patrys to revisit this issue.
- [37] That concludes my ruling.

"Blok J."

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