Date: 20080218

Docket: T-1799-07

Citation: 2008 FC 208

Vancouver, British Columbia, February 18, 2008

PRESENT: The Honourable Mr. Justice Lemieux

BETWEEN:

THE MINISTER OF NATIONAL REVENUE

Applicant

and

VALLIAMMA REDDY

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. Introduction

[1] Valliamma Reddy (Mrs. Reddy) seeks, pursuant to subsection 225.2(8) of the *Income Tax Act* (the Act), the review of an *ex parte* order made on October 15, 2007, by my colleague Madam Justice Snider, pursuant to subsections 225.2(2) and (3) of that same Act, authorizing the Minister of National Revenue (the Minister) to take forthwith the collection actions described in paragraphs 225.1(1)(a) to (g) for the amount of income tax plus penalties and interest assessed against Mrs. Reddy under an assessment in the amount of $461,285.86, dated October 12, 2007 (the Jeopardy Order) and mailed the same day.

[2] Subsection 225.2(8) states, where a judge has made a Jeopardy Order, the taxpayer may, on six days' clear notice to the Deputy Attorney General of Canada, apply to a judge of the Court to review the authorization.

[3] Subsection 225.2(11) stipulates on a review application the judge "shall determine the question summarily and may confirm, set aside or vary the authorization and make such other order as the judge considers appropriate."

[4] As noted, Justice Snider was authorized to make the Jeopardy Order by subsections 225.2(2) and (3) of the Act which read:

> (2) Notwithstanding section 225.1, where, on *ex parte* application by the Minister, a judge is satisfied that there are reasonable grounds to believe that the collection of all or any part of an amount assessed in respect of a taxpayer would be jeopardized by a delay in the collection of that amount, the judge shall, on such terms as the judge considers reasonable in the circumstances, authorize the Minister to take forthwith any of the actions described in paragraphs 225.1(1)(*a*) to 225.1(1)(*g*) with respect to the amount.
>
> (3) An authorization under subsection 225.2(2) in respect of an amount assessed in respect of a taxpayer may be granted by a judge notwithstanding that a notice of assessment in respect of that amount has not been sent to the taxpayer at or before the time the application is made where the judge is satisfied that the receipt of the notice of assessment by the taxpayer would likely further jeopardize the collection of the amount, and for the purposes of sections 222, 223, 224, 224.1, 224.3 and 225, the amount in respect of which an authorization is so granted shall be deemed to be an amount payable under this Act.
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> [Emphasis mine]

[5] The assessment which gave rise to the Minister's application to Justice Snider for the Jeopardy Order was made pursuant to subsection 160(1) of the *Income Tax Act*, section 34 of the *British Columbia Tax Act* and section 36 of the *Canada Pension Plan*, for funds transferred, at a time he had a tax debt, by Ken Kaniappa Reddy (Ken Reddy) to his mother Mrs. Reddy during the period October 2000 through December 31, 2003, into a bank account in his mother's name but over which he had a power of attorney. Mrs. Reddy has now filed an objection to this assessment.

II. Legal Principles

A. *The Test on Review*

[6] The parties agree a jeopardy review under subsection 225.2(8) of the Act involves, at least, the application of the two-part test developed by Justice MacKay in *HMQ v. Satellite Earth Station Technology Inc.*, [1989] 2 C.T.C. 291 or [1989] 30 F.T.R. 94. Justice MacKay characterized a jeopardy review under subsection 225.2(8) as "involving aspects of an appeal and a hearing *de novo*."

[7] For the first part of the test, the Applicant (here Mrs. Reddy) has the initial burden "to muster evidence, whether by affidavits, by cross-examination of affiants on behalf of the Crown, or both, that there are reasonable grounds to doubt that the test required by paragraph 225.2(2) has been met."

[8] For the second part of the test, Justice MacKay stated "the ultimate burden on the Crown established by paragraph 225.2(2) continues when an order granted by the Court is reviewed." He added:

> When the evidence submitted by the taxpayer applicant raises reasonable doubt as to the sufficiency of evidence originally provided by the Crown in an *ex parte* application, it is implicit in the process established by paragraph 225.2(8) that the Court considering review of the authorization once made may consider evidence originally presented on behalf of the Minister in support of the Jeopardy Order and any additional evidence by affidavit or from cross-examination of affiants, presented by either party in relation to the motion for review. The evidence must be considered in relation to the test established by paragraph 225.2(2) itself and by relevant cases….
>
> [Emphasis mine]

[9] I say that the parties agree, at least, to the application of this test. Counsel for Mrs. Reddy would add a third element relying on Justice Sheppard's decision in *Deputy Minister of National Revenue v. Atchison*, [1989] B.C.J. No. 68: the ability to set aside the Jeopardy Order where full and frank disclosure has not been made to the judge issuing the Jeopardy Order, which he alleges occurred before Justice Snider.

B. *Interpretative Principles to the Act's Jeopardy Provisions*

[10] In *Minister of National Revenue v. Services M.L. Marengère Inc.*, [2000] 1 C.T.C. 229, 176 F.T.R. 1 at paragraphs 63 and 65, I had an opportunity to summarize the legal principles applicable to a subsection 225.2(8) review of an *ex parte* jeopardy order based on the existing jurisprudence:

63 From this jurisprudence, I take the following principles:

(1) The perspective of the jeopardy collection provision goes to the matter of collection jeopardy by reason of delay normally attributable to the appeal process. The wording of the provision indicates that it is necessary to show that because of the passage of time involved in an appeal, the taxpayer would become less able to pay the amount assessed. In other words, the issue is not whether the collection *per se* is in jeopardy but rather whether the actual jeopardy arises from the likely delay in the collection.

(2) In terms of burden, an applicant under subsection 225.2(8) has the initial burden to show that there are reasonable grounds to doubt that the test required by subsection 225.2(2) has been met, that is, the collection of all or any part of the amounts assessed would be jeopardized by the delay in the collection. However, the ultimate burden is on the Crown to justify the jeopardy collection order granted on an *ex parte* basis.

…

(4) The Minister may certainly act not only in cases of fraud or situations amounting to fraud, but also in cases where the taxpayer may waste, liquidate or otherwise transfer his property to escape the tax authorities: in short, to meet any situation in which the taxpayer's assets may vanish in thin air because of the passage of time. However, the mere suspicion or concern that delay may jeopardize collection is not sufficient *per se*. As Rouleau J. put it in *1853-9049 Québec Inc., supra*, the question is whether the Minister had reasonable grounds for believing that the taxpayer would waste, liquidate or otherwise transfer its assets, so jeopardizing the Minister's debt. What the Minister has to show is whether the taxpayer's assets can be liquidated in the meantime or be seized by other creditors and so not available to him.

(5) An *ex parte* collection order is an extraordinary remedy. Revenue Canada must exercise utmost good

> faith and insure full and frank disclosure. On this point, Joyal J. in *Laframboise v. R.*, [1986] 3 F.C. 521 (Fed. T.D.) at 528 said this:
>
> > The taxpayer's counsel might have an arguable point were the evidence before me limited exclusively to that particular affidavit. As Counsel for the Crown reminded me, however, I am entitled to look at all the evidence contained in the other affidavits. These affidavits might also be submitted to theological dissection by anyone who is dialectically inclined but I find on the whole that those essential elements in these affidavits and in the evidence which they contain pass the well-known tests and are sufficiently demonstrated to justify the Minister's action.
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> In *Duncan, supra*, Jerome A.C.J., after quoting Joyal J. in *Laframboise, supra*, viewed the level of disclosure required by the Minister as one of adequate (reasonable) disclosure.

65 The approach to be followed for the resolution of this matter was stated by Marceau J.A. in *R. v. Golbeck* (1990), 90 D.T.C. 6575 (Fed. C.A.) in the following terms at page 6576:

> It is clear to us that the learned trial judge failed to put his mind to the only question that he had to consider…. The question was whether, on the basis of the material put before the Court, it appeared that the Minister had reasonable grounds for believing that the taxpayer would waste, liquidate or otherwise transfer his assets so as to become less able to pay the amount assessed and thereby jeopardizing the Minister's debt. On an affirmative answer to the question, the judge had no alternative but to grant the application (note the use of the word "shall" in the provision).
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> [Emphasis mine]

[11] In *Canada (Minister of National Revenue – M.N.R.) v. 514659 B.C. Ltd.*, [2003] FCT 148 I interpreted the words "reasonable grounds to believe" in the phrase "reasonable grounds to believe that the collection of all or any part of an amount assessed in respect of the taxpayer would be jeopardized by the delay in the collection of that amount" in subsection 225.2(2) to mean….a standard of proof that "while falling short of a balance of probabilities, nevertheless connotes a *bona fide* belief in a serious possibility based on credible evidence (see paragraph 24 in *M.C.I. v. Qu*, [2003] 3 F.C. 3 (C.A.)

[12] In *Danielson v. Deputy Attorney General of Canada* (1986), 6 D.T.C. 6519, at paragraph 11, Justice McNair explained the taxpayer's inability to pay is insufficient justification for a jeopardy order absent compelling evidence beyond mere suspicion or conjecture of actions by the taxpayer or other creditors or claimants or the reasonable apprehension of such actions that would be likely to jeopardize the amount assessed. [Emphasis mine]

III. The Facts

[13] Mrs. Reddy is a 59-year-old widow living since 1995 with her son Ken Reddy, his wife Priya and their children in their home on Bates Street in Richmond, B.C. which is in joint ownership: one-half in the name of Mrs. Reddy and the other half in the name of her daughter-in-law, Priya.

[14] An assessment of the jurisprudence requires the Court to stay close to the statutory scheme related to jeopardy orders, which in the period after initial enactment in 1985 underwent two or

three amendments, shortly thereafter, changing the standard of proof from "it may reasonably be considered that the collection of the amount assessed…would be jeopardized" to "reasonable grounds for believing" such would be the case.

[15] Mrs. Reddy holds two jobs as a nurse's aide. She works very long hours. Her employment income between 2003 and 2006 inclusive averaged around $82,000.00 a year.

[16] Mrs. Reddy is also the sole registered owner of another residential property located on Hogarth Street also in Richmond, B.C. This residence is a rental property, but part of it is presently occupied by Mrs. Reddy's other son. Rental income is sporadic.

[17] Both the Bates Street property and the Hogarth Street property are encumbered with first and second mortgages.

[18] The Minister's jeopardy application was supported by one affidavit; that of Brian Fowles who is a collection officer in the Vancouver Tax Services Office of the Canada Revenue Agency (CRA).

[19] The main focus of Mr. Fowles' affidavit is on the intertwining of Mrs. Reddy's financial affairs with those of her son Ken Reddy. At paragraph 12 of his affidavit, he wrote "the assessment was raised because examination of [Mrs. Reddy's] bank records showed that deposits into his mother's account by way of cash and cheques totalling $606,636.83 were made by Ken Reddy

between October 2, 2000 and December 4, 2003, at a time when he had outstanding tax liabilities. Those deposits, he said, were to a bank account used by Mrs. Reddy for depositing her work cheques and paying her mortgages, and Ken Reddy has power of attorney over his mother's account.

[20] Mr. Fowles further deposed his review of the bank account records showed that between October 2, 2000 and April 24, 2007, over $1.4 million dollars was deposited into the account aside from Mrs. Reddy's employment income. He cautioned, in his affidavit, he had not obtained the source documents for the deposits after December 31, 2003, to determine where the funds after that time came from but stated, based on the documents obtained for the prior period, he believed the deposits after that time were likely done by Ken Reddy in order to avoid collection activities against him "by his numerous creditors including CRA; that Mr. Ready had not paid his taxes owing since 1994, and collection against him has been unsuccessful as he has no assets in his own name."

[21] He further informed Ken Reddy had not filed his 2004 to and including his 2006 tax returns and had a current tax debt of $461,285.86. As of April 30, 2007, the bank records showed the balance in his mother's account over which he has a power of attorney to be only $154.33 and "the deposits by Ken Reddy in the account appear to have stopped in April 2007." He concluded it appeared Ken Reddy is handling his mother's affairs since he has a power of attorney over her bank account "and is currently arranging third mortgages over her properties under a power of attorney signed September 14, 2007." He opined to the best of his knowledge Mrs. Reddy was capable of handling her own affairs as she has full-time employment "but is choosing to allow her son to handle her affairs."

[22] The record indicates Ken Reddy was in the import business of granite tiles from India and he used his mother's account for banking purposes related to his business affairs. Mr. Fowles informs us Ken Reddy became bankrupt on February 28, 2007.

[23] At paragraph 10 of his affidavit, Mr. Fowles stated collection of the amount under the October 12, 2000 assessment "is believed to be in jeopardy due to Mrs. Reddy's past payment history, limited assets and the control of her assets by her son…." He adds Mrs. Reddy "is attempting to encumber the available equity in her assets following an assessment against her [in September 2007] for $49,013.22 under the *Excise Tax Act* and subsequent registration of judgment against her properties." This assessment against Mrs. Reddy is under the *Excise Tax Act* for GST related to her son's undeclared income in 2000, 2002 and 2003 and is different from the section 160 assessment under the *Income Tax Act* for third party transfers upon which the Jeopardy Order was sought.

IV. Mrs. Reddy's Challenge to the Jeopardy Order

[24] Mrs. Reddy's counsel submitted, on this review, Mr. Fowles' affidavit considered by Justice Snider *ex parte* did not provide her with full and fair disclosure of the true value of her assets, a true picture of the refinancing efforts on the Bates Street and Hogarth Street residences and a full picture of the family's financial affairs, all of which should be viewed cumulatively. These alleged deficiencies were:

- Mr. Fowles' affidavit did not give Justice Snider an accurate picture of the equity balances on the first and second mortgages on the two residential properties because

the picture provided was a reflection of the initial principal payment but not the balance of the principal through principal payments (which only occurred for the first mortgages as the second mortgages called for interest payments only and were each for a term of one year only).

1) For the Hogarth Street property: the first mortgage was taken out in 2001 with an initial principal amount at $247,500.00 but on October 29, 2007, the principal balance had decreased to $224,759.00. The second mortgage was placed on May 30, 2006, in the principal amount of $252,690.00 and represented a refinancing of a second mortgage which had previously matured. The May 30, 2006 second mortgage matured on June 1, 2007, at $268,626.00. As at October 19, 2007, the estimated present market value of the property was said to be $635,000.00 according to the second mortgagees' approval sheet dated May 23, 2006, which was attached to Mr. Fowles' affidavit.

2) For the Bates Street property: the first mortgage was registered on November 6, 1997, in the amount of $615,000.00. As of November 2, 2007, the principal amount owing on that first mortgage was $483,992.00. In terms of the second mortgage, the principal amount placed on December 12, 2006, was $281,500.00; that mortgage was to mature on December 15, 2007, but owing to an earlier dispute with the second mortgagee it was agreed, as part of the refinancing efforts since June 2006, it would be paid out earlier. As at September 15, 2007, the principal amount required to discharge it was $299,377.00. As at October 19, 2007, an appraisal of that property indicated a present market value of $1,050,000.00 according to the second mortgagees' approval sheet dated November 27, 2006, which was attached to Mr. Fowles' affidavit.

Counsel for Mrs. Reddy states that Mr. Fowles' figures in his affidavit conveyed to Justice Snider a misleading view of the state of the equity on those two properties.

- Counsel for Mrs. Reddy argues Mr. Fowles misled Justice Snider when he stated at paragraph 16 of his affidavit Mr. Ken Reddy was currently "arranging third mortgages over her [Mrs. Reddy's] property under a power of attorney." He states there was no plan at all to place third mortgages on the property. Because the second mortgages were matured or maturing, the plan for the Bates Street property was to replace the second mortgage with a new one and for the Hogarth Street property it was to discharge both the second and first mortgage and replace it with a new first mortgage. He says Mr. Fowles had information before October 12, 2007 (the date he swore the affidavit which was before my colleague) that the second mortgages were maturing and were central to the refinancing efforts. He submits that information is contained within his affidavit placed before Justice Snider as Exhibits "C" and "D". Based on Mr. Reddy's affidavit sworn November 28, 2007, he argues Mr. Fowles never asked Ken Reddy for figures reflecting the current principal amounts owing on any of the four mortgages currently registered against the two properties.

- He argues Mr. Fowles' actions, particularly since July 2007, led to the collapse of the refinancing efforts on the two properties especially after CRA filed judgment on September 24, 2007, against the Bates and Hogarth Streets residences for $49,000.00 on account of the GST assessment. He recounts the efforts of Mr. Davies who had been appointed as counsel to Mrs. Reddy and Ken Reddy in respect of organizing the refinancing of the second mortgages. He states that by early October 2007, the issues regarding the second mortgages had been temporarily resolved with financing from new lenders lined up. He points to a July 5, 2007 memo from Mr. Fowles to his group manager (Mrs. Reddy's motion record, page 127). Counsel for Mrs. Reddy goes so far as to write at paragraph 22 of his memorandum that Mr. Fowles "was aware of the ongoing financial efforts, and was seeking approval to halt or otherwise interfere with those efforts. Those steps included the levying of assessments on September 14, 2007 and October 12, 2007, against Mrs. Reddy for GST and income tax allegedly owed by Ken Reddy."

He points to the efforts to make arrangements to pay the GST judgment from the positive balance remaining after the payouts on the refinancing of the two second mortgages, and the promise by CRA to provide a discharge of judgment, which was not forthcoming before the October 15 Jeopardy Order issued with the result that the refinancing efforts collapsed thereafter.

- Counsel for Mrs. Reddy submits Mr. Fowles' affidavit did not disclose to Justice Snider the agreement between Mrs. Reddy, through her counsel, and CRA to pay out the $49,000.00 judgment on account of the GST. Furthermore, Mr. Fowles' affidavit did not disclose to Justice Snider that the promise to discharge for October 12, 2007, was only executed on October 15, the day her Jeopardy Order was issued.

- Finally, he argues Mr. Fowles knew for several years Ken Reddy was using his mother's bank account for his own business purposes and did not disclose that to Justice Snider.

V. Analysis and Conclusions

A. *Has Mrs. Reddy submitted evidence that there are reasonable grounds to doubt the test required by subsection 225.2(2) has been met?*

[25] The first prong of the test on the review under subsection 225.2(8) of the Act is whether Mrs. Reddy mustered evidence whether by affidavits, by cross-examination of the Crown's affiants or both, to raise a reasonable doubt the evidence originally provided to Justice Snider was sufficient to establish the test required by subsection 225.2(2) has been met, that is, the evidence shows a bona fide belief in a serious possibility, based on credible evidence Mrs. Reddy or, through her, her son who is her alter ego and directing mind in financial matters, would waste, liquidate or otherwise transfer assets and thus become less able to pay the amount assessed ($461,285.86) thereby

jeopardizing the Minister's debt. In my view, Mrs. Reddy has not met this initial onus and this for several reasons.

[26] Mr. Fowles was not cross-examined. Mrs. Reddy, who was incapacitated, did not provide any affidavit although Mr. Glasner's affidavit in part speaks on her behalf. The facts Mr. Fowles recites are not controverted and are accepted by the Court.

[27] Mr. Reddy filed an affidavit and was cross-examined. The points he makes are:

- He is a guarantor in financing the two residential properties.
- He provides the current balances on the first and second mortgages because Mr. Fowles in his October 12, 2007 affidavit provided the initial principal payment "which is misleading".
- He gives the current market value (October 19, 2007) of the Hogarth property at $750,000.00 and that of the Bates property at $1,200,000.00.
- He denies the statement made by Mr. Fowles in his affidavit he transferred to his mother amounts when he had a tax debt. He says his mother's account was used as a "transactional account for the conduct of his business" and as such the money in the account was not his personal income.
- He spoke to the urgency of the situation. He states the Jeopardy Order "frustrated my ability to complete the refinancing efforts that were underway when the Jeopardy Order was issued."

[28] I should say on this last point the Minister offered to give Mrs. Ready's proposed second mortgages priority over the Minister's debt to allow for the refinancing to take place capped at a

level of the balance of the existing second mortgage plus arrears, interest and penalties which means no taking out of further equity. That offer has yet to be accepted.

[29] The test required to be met to properly ground a jeopardy order under subsection 225.2(2) does not only encompass situations of fraud or the imminent transfer of funds or assets out of the country. Rather, the test under that subsection is met when the Minister has reasonable grounds to believe the taxpayer (here Mrs. Reddy's or her son) would waste, liquidate or otherwise transfer her assets so as not to be available to the Minister.

[30] The fundamental facts are clear and are set out in Mr. Fowles' affidavit originally before Justice Snider. On October 15, 2007, the day Justice Snider issued her Jeopardy Order, the following facts were known to her:

- Mrs. Reddy had been assessed on October 12, 2007, a tax debt of close of half a million dollars which, for the purposes of a jeopardy order, must be deemed to be valid (see *Minister of National Revenue v. MacIver* (1999), 99 D.T.C. 5524, Sharlow J.).

- Mrs. Reddy, through her son, was refinancing her residences although why and the level of financing was not known to Mr. Fowles. Refinancing entails transferring for a consideration all or part of the value of an asset to a lender thus diminishing what is available to other creditors.

- Mr. Reddy had declared bankruptcy and his mother's account, through which monies had generously flowed into in the past, was down to less than a few hundred dollars.

- Through appropriate inquiries, Mrs. Reddy's only significant assets were the two residences. Some other assets were identified by Mr. Fowles. Where they were and in whose ownership they were was unclear.

[31] Based on this evidence, I cannot conclude Mrs. Reddy has met her initial onus to raise a reasonable doubt as to the sufficiency of the evidence before Justice Snider not meeting the test under subsection 225.2(2) of the Act. If I went to the second prong of the review test, I would come to the same conclusion considering all of the evidence before me, including the evidence tendered on behalf of Mrs. Reddy or elicited by the Minister's counsel on cross-examination of her affiants which establish:

- The refinancing was caused by the fact the second mortgages, interest bearing only, were in arrears and their principal amounts owing had increased because of this. The second mortgagees had in July 2007 demanded full payment because of the default.
- Moreover, the evidence is that the first mortgage payments in the property were also in arrears.
- The amount of the refinancing in principal, brokerage fees and bonus exceeded the amount lenders had previously advanced to Mrs. Reddy on the strength of her properties.
- Mr. Reddy could no longer contribute to his mother's account over which, in any event, he had a power of attorney.
- The second mortgagees were, since November 2007, foreclosing on their second mortgages.
- That in the past Mrs. Reddy or her son had drawn on the equity of the residences through second mortgages without a comparable increase in assets. In other words,

the equity was disappearing or eroding. In a real sense, the family was mining the equity in the residences whose property values were increasing, but it was not available to some creditors including the Minister.

- No satisfactory explanation was ever given why Mr. Reddy had to run his business through his mother's account over which she had no access, leaving a reasonable inference that it was to shield his business or his personal assets from creditors as had been the case for Mr. Reddy's tax debt.

B. *Full and Frank Disclosure*

[32] Counsel for Mrs. Reddy attacked what he characterized as the inadequacy or, more seriously, the inaccuracies and misleading statements put before Justice Snider in Mr. Fowles' affidavit.

[33] Counsel for the Minister accepts the principle based on *Atchison* above, that persons applying *ex parte* to the Court must "use the utmost amount of good faith and, if they do not, they cannot keep the results." In that case, Justice Sheppard set aside the *ex parte* Jeopardy Order because there was a gap in the Minister's evidence who had not spelled out how a delay in collection from either taxpayer would jeopardize the Minister's debt. He was of the view delay in collection was attributable to the Minister who also had failed to disclose negotiations on collection with the taxpayer concerned. I note that in *Laframboise* above a case decided before *Atchison*, Justice Joyal accepted the principle that serious defects in the Minister's affidavit evidence could impugn the jeopardy order cautioning, however, that the standard of disclosure was not that established for Mareva injunctions and in order to assess the appropriate level of disclosure, he was entitled to

examine all of the affidavit evidence before the issuing judge in order to determine whether those affidavits disclosed "essential elements" without reading those affidavits to "theological dissection."

[34] I also note in *The Queen v. Duncan*, [1992] 1 F.C. 713, Associate chief Justice Jerome accepts the test in *Atchison* above of utmost good faith and full and frank disclosure. He concluded the level of disclosure was adequate in the case before him.

[35] In *Minister of National Revenue v. Rouleau* (1995), 95 D.T.C. 5597, my colleague Justice Gibson ruled that full and frank disclosure did not require the disclosure of material that is irrelevant to the test for the issuance of a jeopardy order under the Act.

[36] Finally, in *M.L. Marengère Inc.* above, based on the jurisprudence cited upon, I stated the disclosure standard was "there must be full and frank disclosure by the Minister of known, relevant and material facts" to obtain a jeopardy order.

[37] For the reasons that follow, I cannot sustain the argument put forward by Mrs. Reddy's counsel that the Jeopardy Order should be set aside because the Minister breached the required level of full and frank disclosure.

[38] First, there is no substance to the argument Mr. Fowles did not disclose in his affidavit to Justice Snider the fact an agreement had been reached on the payment of the GST debt.

The disclosure of this fact is contained in paragraphs 36 to 40 of Mr. Fowles' October 12, 2007 affidavit.

[39] Second, Mr. Fowles did say in his affidavit Mrs. Reddy, through her son, was placing third mortgages on the property, which is not accurate. This inaccuracy is not material since the documentation he referred to in Appendix "C" and "D" to his affidavit shows the security charges on the refinancing to be second mortgages. In any event, Mr. Fowles did not know why and for what purpose the refinancing was required. Mr. Davies' letter of October 10, 2007, did not give that information to Mr. Fowles. He could not disclose something to Justice Snider which was unknown to him.

[40] Third, it is incorrect to say Mr. Fowles provided misleading or inaccurate information in his affidavit to Justice Snider. He clearly told her the jeopardy application was brought on quickly and he did not have time to obtain information or update it to make it current. Mr. Fowles did provide Justice Snider with all of the relevant backup documentation which shows the values of the property and the balances as of a certain date. He said the property values were estimates. He did not fail to disclose relevant information on this point. Finally, on this point I agree with counsel for the Minister: the updated information would not have materially affected the issuance of the Jeopardy Order.

[41] Fourth, counsel for Mrs. Reddy was accurate to submit Mr. Fowles did not identify to Justice Snider the fact he knew Mr. Reddy was operating his business out of his mother's bank

account over which he had a power of attorney. He did summarize for Justice Snider, for the years 2000 to 2003, the source of the payments in and out of the account. It is apparent from the amounts and sources this account was being used for business purposes. Where Mr. Fowles' disclosure is accurate and not controverted is its use for other purposes. In the circumstances, this non-disclosure of the business purpose of the account is not of much materiality as would justify the setting aside of the Jeopardy Order.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that this application to set aside the October 15, 2007 Jeopardy Order is dismissed with costs.

"François Lemieux"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

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