Date: 20081002

Docket: T-706-08

Citation: 2008 FC 1106

[UNREVISED CERTIFIED TRANSLATION]

Ottawa, Ontario, October 2, 2008

PRESENT: The Honourable Mr. Justice Martineau

IN THE MATTER OF the *Income Tax Act*

AND IN THE MATTER OF assessments made by the Minister of National Revenue under one or more of the *Income Tax* Act, the *Canada Pension Plan* and the *Employment Insurance Act*

AGAINST:

SYLVIE LÉPINE
1160 St-Andrews Street
Mascouche, Quebec J7L 4G9

Respondent

REASONS FOR ORDER AND ORDER

[1] The respondent, Sylvie Lépine, is asking the Court today to set aside the order made *ex parte* on May 6, 2008, authorizing the Minister of National Revenue (the Minister) to immediately take any and all collection measures set out in paragraphs 225.1(1)(*a*) to (*g*) of the *Income Tax Act*, R.S.C. 1985 (5th Supp.), c.1 (the Act), in order to collect and/or guarantee payment of the assessments made by the Minister against the respondent on April 25, 2008 (the impugned order).

[2] On May 6, 2008, the Court issued another *ex parte* jeopardy collection order in docket T-705-08, to collect and/or guarantee payment of the amounts assessed by the Minister on April 25, 2008, against Claude Hernandez, the respondent's husband. The Court is concurrently reviewing the legality of this second jeopardy collection order.

[3] In principle, the Minister must, pursuant to subsection 225.1(1) of the Act, wait 90 days after the notice of assessment is mailed before collecting the amounts owing by a taxpayer to Her Majesty the Queen in right of Canada (the Crown). However, a judge may authorize the Minister to act forthwith where the 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.

[4] Subsection 225.2(2) of the Act provides as follows:

(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	(2) Malgré l'article 225.1, sur requête *ex parte* du ministre, le juge saisi autorise le ministre à prendre immédiatement des mesures visées aux alinéas 225.1(1)*a*) à *g*) à l'égard du montant d'une cotisation établie relativement à un contribuable, aux conditions qu'il estime raisonnables dans les circonstances, s'il est convaincu qu'il existe des motifs raisonnables de croire que l'octroi à ce contribuable d'un délai pour payer le montant compromettrait le recouvrement de tout ou partie

amount. de ce montant.

[5] When the *ex parte* application was made in this case on May 6, 2008, the Court relied on the respective affidavits of Scynthia Plante and Daniel Goyette, both sworn on May 1, 2008, in issuing the impugned order. In docket T-706-08, the Court also relied on other affidavits of Scynthia Plante and Daniel Goyette dated May 1, 2008, in issuing the other collection order. Accordingly, the Court was satisfied that there are reasonable grounds to believe that the collection of all or any part of the total amounts in the assessments dated April 26, 2008, in respect of the respondent would be jeopardized by a delay in the collection of the amounts. I adopt the following from the totality of the evidence adduced by the Crown.

[6] On or about April 3, 2006, the file relating to Claude Hernandez was assigned to Daniel Goyette, an auditor in the Special Enforcement Program (SEP), Enforcement Division, at the Montréal Tax Services Office of the Canada Revenue Agency (the Agency), for an audit regarding the respondent's compliance with the Act for the 2000 to 2004 taxation years initially, to which the 2005 year inclusive was added. A simultaneous audit for the same taxation period was also conducted of the respondent, the wife of Claude Hernandez, and Antoine Hernandez, the father of Claude Hernandez. A limited audit of Her-Comm Inc., a company in which Claude Hernandez and his father Antoine Hernandez were the sole shareholders, was also carried out. The audit of the respondent's file used the so-called "net worth" method, the purpose of which is to determine the increase in the taxpayer's assets and personal expenses during the years in question.

[7] We note here that on March 30, 2007, according to an amending declaration filed with the enterprise registrar, the respondent was appointed as a 50% shareholder in Her-Comm Inc., a company that specializes in the sale and rental of cellular telephones and pagers, replacing Antoine Hernandez, the father of Claude Hernandez, in that capacity.

[8] On May 17, 2006, a meeting took place between Daniel Goyette and the respondent's accountant, Normand Ducharme, in the absence of the respondent. In the course of the audit, Jacques Gagnon replaced Normand Ducharme as the respondent's authorized representative. As part of his audit, Daniel Goyette stated that he had to speak to third parties to obtain additional information and documents in order to acquire the most complete information possible.

[9] As well, Daniel Goyette stated that in the course of his audit he was able to identify the following expenses incurred by the respondent:

- for the 2002 taxation year, although the respondent reported income of only $26,540.00, $93,373.57 was used for personal expenses;
- for the 2003 taxation year, although the respondent reported income of only $27,770.00, $82,501.19 was used for personal expenses;
- for the 2005 taxation year, although the respondent reported income of only $28,308.00, $123,940.00 was used for personal expenses;
- for the years audited, 2000 to 2005, expenses of $27,826.75 (in addition to the amounts referred to above as personal expenses) at the casino, while for the same years, the respondent was paid $13,150.00 by the casino by cheque.

[10] The following information did not appear on the Agency's initial interview questionnaire, which the respondent completed on June 28, 2006:

- On October 2, 1995, a property located at 226 11e Avenue, Ste-Anne-des-Plaines, was transferred to the respondent;
- On August 3, 2004, the respondent purchased a property located at 1160 St-Andrews Street, Mascouche, for $60,000.00. An evaluation of that property dated February 23, 2005, gives it a market value of $611,000.00;
- On March 29, 2005, the respondent obtained a hypothecary loan from the Caisse populaire Desjardins de Montcalm in the amount of $300,000.00. On December 7, 2006, the balance on that loan was $296,323.50;
- On May 24, 2007, the respondent took out a second, adjustable-rate loan in the amount of $394,263.33 from the Caisse populaire Desjardins de Montcalm;
- On May 24, 2007, the respondent sold the property located at 226 11e Avenue, Ste-Anne-des-Plaines;
- In support of her loan application for the first hypothec on the property located at 60 St-Andrews Street, Mascouche, the respondent made contradictory statements and/or submitted false documents. The information given to the Caisse populaire Desjardins de Montcalm and to date, dated December 7, 2006, states that:
    - the value of the respondent's assets was $1,070,466.75;
    - the value of the respondent's liabilities was $314,323.50;
    - the value of the respondent's net assets was $756,143.25;

- the respondent's net income from employment was $97,800.00;

- As well, it appears that among the documents in the respondent's file with the Caisse populaire Desjardins de Montcalm:
    - A notice of assessment in the respondent's name for the 2003 taxation year refers to net income of $96,000.00, while the computerized data held by the Agency indicate that the respondent reported income of $27,770.00 in her 2003 return;
    - A T1 in the respondent's name for the 2004 taxation year showed income from employment of $97,800.00; and
    - A T4 in the respondent's name for the 2004 taxation year showed income from employment of $97,800.00, while the computerized data held by the Agency indicate that the respondent reported income of $28,082.00 in her 2004 return.

[11] According to the affidavit of Scynthia Plante, Resource and Complex Case Officer, Revenue Collections, at the Agency's Tax Services Office:

- The respondent filed income tax returns for all of the 1996 to 2006 taxation years;
- For each of the 1996 to 2006 taxation years, the respondent received an income tax refund;
- On February 20, 2008, notices of reassessment were sent to the respondent for the 2004 and 2005 taxation years totalling $2,196.65;
- On January 15, 2008, the Fiducie familiale Lépine was created. The respondent, her husband Claude Hernandez and their children are the beneficiaries of the Fiducie familiale Lépine;

- On or about March 14, 2008, the respondent and Claude Hernandez signed credit applications at the Caisse populaire Desjardins in order to transfer the hypothec granted to the respondent to the Fiducie familiale Lépine, with the respondent to remain liable for the loan;
- On April 16, 2008, the respondent sold the immovable located at 1160 St-Andrews Street, Mascouche, to the Fiducie familiale Lépine, for $500,000.00;
- The balance of the sale price, about $387,706.00, is payable by the Fiducie familiale Lépine for the assumption of the hypothec on the immovable granted to the respondent by the Caisse populaire de Montcalm on May 27, 2007;
- The respondent stood surety for the Fiducie familiale Lépine to guarantee repayment of the hypothecary loan to the Caisse populaire;
- On April 23, 2008, the hypothecary loan granted to the respondent by the Caisse populaire de Montcalm in May 2007 was repaid in full;
- Since June 18, 1996, the respondent has been the owner of a 1996 Shore trailer, model PWC10;
- It appears from the register of personal and real movable rights that an entry made in the respondent's name indicates that the respondent purchased a 2003 Mercedes vehicle, model SL350, which is registered in the name of Her-Comm Inc.;
    - It also appears from entries in the respondent's name in the register of personal and real movable rights that three entries were made in the respondent's name on March 20, 2008. In fact, these were exemptions from

seizure related to monies or assets that could be remitted to a beneficiary from the income or capital of a trust;

- The respondent and Claude Hernandez stood surety for a term loan of $650,000.00 granted by the Caisse populaire de Terrebonne and secured by a hypothec on a commercial immovable located at 1725-1755 Gascon Road, Terrebonne, purchased by Le Groupe Centruss Inc. on June 15, 2007;
- The place of business of Her-Comm Inc., in which the respondent and Claude Hernandez are the sole shareholders, is located in the commercial immovable purchased by Le Groupe Centruss Inc.; and
- No payment agreement was made between the respondent and Scynthia Plante for payment of the respondent's debt arising out of the notice of assessment sent on February 20, 2008.

[12] As of April 25, 2008, the respondent owed the Agency $175,411.16 plus interest.

[13] In issuing the impugned order on May 6, 2008, the Court:

- authorized the Crown to apply paragraphs 225.1(1)(*a*) to (*g*) of the Act against the respondent with respect to the amounts assessed on April 25, 2008;
- exempted the Crown from complying with rules 301 and 304 and following of the *Federal Courts Rules*, SOR/98-106 (the Rules) with respect to the notice of application and service thereof;

- exempted the Crown from complying with rules 359 and following of the Rules regarding the notice of motion and service thereof;
- extended the 72-hour time limit in subsection 225.2(5) of the Act to ten (10) clear days from May 6, 2008;
- ordered that the Crown serve the notice on the respondent within the same ten-day period in the manner set out in subsection 225.2(5) of the Act;
- exempted the Registry from serving the impugned order on the respondent under rule 395.

[14] After the impugned order was issued, the Agency conducted an administrative seizure in respect of the respondent at the National Bank of Canada, National Bank Financial and the Caisse populaire Desjardins. The Agency also conducted a seizure in respect of the Fiducie familiale Lépine at the Caisse populaire Desjardins. A release of the seizure in respect of the Fiducie familiale was given after the Agency obtained an interim garnishment order for the bank account of the Fiducie familiale Lépine. Following those seizures, the Agency registered a hypothec on the immovable located at 1160 St-Andrews Street, Mascouche. On September 9, 2008, after various collection actions were taken against the respondent, the Agency collected $45,437.84. As well, on or about May 14, 2008, the Agency was informed that the respondent sold two of the three parcels of land located in Terrebonne, cadastre numbers 1889 332 and 1889 331, for $17,000 each. The sale of those immovables took place on May 12, 2008.

[15] Subsection 225.2(8) of the Act permits a taxpayer to bring an application to the Court to review the *ex parte* authorization granted under subsection 225.2(2) of the Act. The principles applicable in this case are well established. See, in particular, *Canada (Minister of National Revenue - M.N.R.) v. Services M.L. Marengère inc.*, [2000] 1 C.T.C. 229, [1999] F.C.J. No. 1840 (QL) (*Marengère*) and *Canada v. Satellite Earth Station Technology Inc*., [1989] 2 C.T.C. 291, [1989] F.C.J. No. 912 (QL); *Danielson v. Canada (Deputy Attorney General of Canada et al.*, [1986] F.C.J. No. 312 (QL).

[16] In *Marengère*, Mr. Justice Lemieux explained as follows at paragraph 63:

> …
> (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.
>
> (3) The evidence must show, on a balance of probability, that it is more likely than not that collection would be jeopardized by delay. The test is not whether the evidence shows beyond all reasonable doubt that the time allowed to the taxpayer would jeopardize the Minister's debt.
>
> (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 Quebec 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. …

[17] The respondent submits today that there are no reasonable grounds to believe that the collection of all or any part of the amounts set out in the assessments for the 2000 to 2005 taxation years would be jeopardized by a delay in the collection of the amounts. She also alleges that the Minister breached his duty to disclose all of the relevant facts to this Court when he made the *ex parte* application.. Therefore, the affidavits submitted by the Crown in support of the *ex parte* application contain inadequate, inaccurate or decontextualized allegations or gratuitous opinions. The respondent also contends that the Agency's collection actions were carried out in an unreasonable manner.

[18] The respondent submits that the Agency is jumping to conclusions based on the intent it is ascribing to her, which it bases on the fact that her husband, Claude Hernandez, may have had prior criminal charges or convictions. At the hearing before this Court, learned counsel for the respondent argued, *inter alia*, that the respondent has always co-operated with the Agency. Although the audit went on for years, she did not waste her assets. On the contrary: the respondent had cash in her bank

accounts. Moreover, the respondent disputes the conclusion that Ms. Plante and Mr. Goyette reached in their respective affidavits that the respondent tried to avoid payment of her taxes and that, therefore, an authorization for immediate enforcement was necessary based on the respondent's alleged bad faith. In fact, the respondent promptly paid the amount claimed in response to the notice of assessment dated February 20, 2008, by providing the Agency with a series of post-dated cheques that have since been cashed.

[19] The respondent offers her own explanations for the transactions in issue and the failure to report various amounts to the tax authorities for the taxation years in issue. That is the case, for example, for the note dated April 15, 2008, between the Fiducie familiale Lépine and her, and the undated note between Le Groupe Centruss Inc. and her providing for repayment of $100,000.00 on demand. The respondent also takes issue with the Crown, in particular, for alleging that the respondent intended to dissipate her assets through trusts. The respondent is completely entitled to create independent and distinct patrimonies by appropriation through trust deeds. On that point, the respondent argues that the transfer to the Fiducie familiale Lépine is perfectly legitimate even though it is a transaction that is reviewable by the tax authorities. The respondent also argued that most of the transactions cited by the Crown took place after the draft assessment confirming that the respondent would not be subject to the reassessments the Agency planned to make and therefore took place in the course of the ordinary use of her assets.

[20] Accordingly, the respondent concludes that the Minister's representatives presented the facts subjectively, not honestly and completely, after an inadequate investigation that, had it been exhaustive, would have discovered all the pertinent facts.

[21] In her written representations, the respondent referred to the decision in *Her Majesty the Queen v. Robert Duncan*, [1992] 1 F.C. 713, [1991] F.C.J. No. 1113 (QL), in which Associate Chief Justice Jerome wrote at paragraph 21:

> …
> In [*Satellite Earth*], MacKay J. reviewed the factors to be considered by a court on a s.225.2(8) review of a jeopardy collection order. After considering the case law dealing with the former version of s.225.2 he concluded [at D.T.C. 5510] that in a s.225.2(8) application the Minister has the ultimate burden of justifying the decision despite the fact that s.225.2 as amended no longer includes the former paragraph (5) that specifically stated that "on the hearing of an application under paragraph 2(***c***), the burden of justifying the decision is on the Minister". However, the initial burden is on the taxpayer to show that there are reasonable grounds to doubt that the test has been met. …

The respondent also referred to Justice Gibson's remarks in *Canada (Minister of National Revenue - M.N.R.) v. 159890 Canada Inc.*, [1997] F.C.J. No. 1027 (QL) at paragraph 10, [1997] 3 C.T.C. 284:

> …
>
> Full and frank disclosure does, I conclude, require the Minister to disclosure what might reasonably be regarded as weaknesses in the case for a jeopardy order that are known to the Minister.
>
> [11] I am satisfied that the Minister should only proceed by way of application for a jeopardy order under subsection 225.2(2), ex parte, where she or he is able to demonstrate to a judge that a jeopardy order is necessary to protect the Minister's position and that no alternative procedure that is more fair to the taxpayer than an ex parte procedure, is reasonably available. Neither of those conditions were here met. On the record, no evidence was placed before Mr. Justice Rouleau to demonstrate that subsection 129(2) of the Act was insufficient authority for the Minister's purposes. Further, no evidence was placed before Mr. Justice Rouleau to demonstrate that the more open procedure provided by subsection 164(1.2) could not reasonably and in accordance with law have been invoked. Finally, the evidence placed before Mr. Justice Rouleau that

> the opportunity to apply the "dividend refund" against the taxpayer's indebtedness would in fact be in jeopardy through delay, was marginal.
>
> [12] I conclude that before me the taxpayer has discharged the initial burden on it to show that there are reasonable grounds to doubt that the Minister met the burden on her or him on the application before Mr. Justice Rouleau. I also conclude that the Minister has failed to discharge the ultimate burden of justifying the decision of Mr. Justice Rouleau simply because the Minister failed to satisfy me that he or she made full and frank disclosure before Mr. Justice Rouleau of all of the information in the Minister's possession that was relevant to the decision Mr. Justice Rouleau was called upon to make. The fact that Mr. Justice Rouleau's decision might have been the same if full and frank disclosure had been made is of no consequence. Equally, the fact that another judge might issue a fresh jeopardy order on another application on which full and frank disclosure is made is of no consequence. I will not speculate on that possibility on the evidence that was before me and the argument made before me.

[22] After analyzing the evidence adduced by the parties and considering the representations of counsel, I find that the respondent has not met the initial burden of showing that there are reasonable grounds to believe that the test required by subsection 225.2(2) of the Act has not been met. The allegations in the Crown’s affidavits are verifiable. The facts set out therein are difficult to dispute. The Agency’s fears are founded and based on objective facts.

[23] The evidence must establish, on a balance of probabilities, that it is more likely that the collection would be jeopardized by the delay. The Crown submits that the balance of probabilities lies in its favour. I concur with the Crown. When the order for immediate enforcement was granted, the facts showed that, although the respondent owned certain assets, most of them had not been disclosed during Daniel Goyette’s audit and, more importantly, others had been put in the names of third parties. Accordingly, the assets in the respondent’s name could easily be dissipated, transferred

or disappear. After reviewing the respondent's record, it is clear that the respondent did not raise any determinative factual component that the Minister failed to declare or take into consideration. In this case, I conclude that the Crown satisfied its duty to adequately disclose. I am also of the view that the conditions for a jeopardy collection order were satisfied in this case.

[24] The evidence shows that the audit conducted by Daniel Goyette went on for more than two years and that he made every reasonable effort to obtain as much information and as many documents as possible so that the outcome of his audit would be as accurate a reflection of reality as possible. The respondent's bank accounts at the Caisse populaire Desjardins were not disclosed to Daniel Goyette at the time of the audit.

[25] It also appears from the affidavits of Daniel Goyette and Scynthia Plante that during the audit period, the respondent divested herself of some of her assets:

- On May 27, 2007, the respondent sold the immovable located at 226 11^{e} Avenue, Ste-Anne-des-Plaines, that she owned, for $170,000.00 (when the hypothec on the property certainly had to be below $85,000.00);
- On or about April 16, 2008, the property located at 1160 St-Andrews Street, Mascouche, which was used by the respondent and her husband Claude Hernandez as their principal residence, was sold to the Fiducie familiale Lépine for $500,000.00.

[26] The evidence is that the Fiducie familiale Lépine was created on January 15, 2008, at a time when the respondent (trustee and beneficiary), Claude Hernandez (trustee and beneficiary)

and Antoine Hernandez (settlor) knew that they were being audited by the Agency.

[27] I also note that on or about March 14, 2008, the respondent and Claude Hernandez signed credit applications at the Caisse populaire Desjardins de Montcalm in order to have the hypothec granted to the respondent transferred to the Fiducie familiale Lépine. However, as may be seen in the credit applications filed in support of the affidavit of Scynthia Plante, the respondent is still liable and stands surety for the hypothec in the amount of $385,000.00 to the Caisse populaire. When the respondent was questioned about any guarantee that the Fiducie familiale Lépine might have given her in relation to the purchase of that property, she confirmed that she did not obtain any guarantee apart from a notarized note reflecting her status as a creditor, on which the notary's name does not appear anywhere. It appears from that note that no money is payable to the respondent by the Fiducie familiale before April 15, 2014.

[28] I point out here that the respondent's criticisms, including those specifically raised in the respondent's written representations, deal primarily with the hypothetical, inadequate or decontextualized nature of certain allegations made by Mr. Goyette and Ms. Plante in their respective affidavits. I do not believe that these criticisms, even taken together, enable this Court to now conclude that the Crown breached its duty to make frank and full disclosure. Frank and full disclosure of information does not require the disclosure of material that is simply irrelevant to the test for issuance of a jeopardy collection order (*Canada (Minister of National Revenue - M.N.R.) v. Rouleau,* [1995] F.C.J. No. 1209 (QL)). Therefore, I find that it is more likely than not that the collection of the debt owing to Her Majesty would be jeopardized by a delay.

[29] Consequently, I have no basis for setting aside the impugned order. In passing, I note that if, in the respondent's view, the seizures were unreasonable in themselves (because the guarantees the respondent had already given were sufficient) or the registrations in the register of immovables were illegal (because certain assets actually belonged to third parties), it is incumbent on the respondent or any affected third party to request a discharge or to object in the manner prescribed in the Act.

[30] For the above noted reasons, the Court dismisses the application made by the respondent, with costs. Concurrent reasons for dismissing the other application to set aside the second jeopardy collection order are issued in docket T-705-08 (2008 FC 1105).

Certified true translation
Monica F. Chamberlain

ORDER

THE COURT ORDERS that the respondent's application to set aside the jeopardy collection order is dismissed, with costs.

"Luc Martineau"
Judge

Certified true translation
Monica F. Chamberlain