Date: 20081002

Docket: T-705-08

Citation: 2008 FC 1105

[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 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:

CLAUDE HERNANDEZ
1160 St. Andrews Street
Mascouche, Quebec J7L 4G9

Respondent

REASONS FOR ORDER AND ORDER

[1] The respondent, Claude Hernandez, is asking the Court today to set aside the *ex parte* order issued on May 6, 2008, that authorized the Minister of National Revenue (the Minister) to take forthwith any or all of the actions described in paragraphs (*a*) to (*g*) of subsection 225.1(1) of the *Income Tax Act*, R.S.C. 1985 (5th Supp.), c. 1 (the Act) to collect and/or guarantee payment of the amounts assessed by the Minister on April 25, 2008, against the respondent (the impugned order).

[2] On May 6, 2008, the Court issued another *ex parte* jeopardy collection order in docket T-706-08 to collect and/or guarantee payment of the amounts assessed by the Minister on April 25, 2008, against Sylvie Lépine, the respondent's spouse. 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 owed by a taxpayer to Her Majesty the Queen in right of Canada (the Crown). However, a judge may authorize the Minister to take action forthwith if the judge is satisfied that there are reasonable grounds to believe that the collection of all or any part of the amount assessed 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] On the return of the *ex parte* appplication in this docket 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 is 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 respondent's file was assigned to Daniel Goyette, an auditor with 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's spouse, Sylvie Lépine, and the respondent's father, Antoine Hernandez. Last, a limited audit was also carried out of Her-Comm Inc., whose sole shareholders were the respondent and his father, Antoine Hernandez. 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 the respondent is a 50% shareholder of Her-Comm Inc., a company specializing in the sale and rental of cellular telephones and pagers. On March 30, 2007, following an amending declaration filed with the enterprise registrar, Sylvie Lépine was designated co-shareholder of the company, replacing the respondent's father, Antoine Hernandez. Although the respondent stated that he was an employee of Her-Comm Inc., employment income only appears in his income tax returns for the 2000 to 2002 taxation years. The income reported for the subsequent years is only interest income.

[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, who had begun serving a prison sentence in November 2005. 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] The following information did not appear on the Agency's initial interview questionnaire, which the respondent completed on June 28, 2006:

- On or about September 6, 2002, the respondent acquired two vacant parcels of land located in the La Plainte sector in Terrebonne. It is clear from the deed of purchase of this land dated September 6, 2002, that the purchase price for each parcel was $12,500 and that they were unencumbered;

- On January 17, 2003, the respondent acquired a third parcel of vacant land in the same sector. As stated in the deed of purchase for this land dated January 17, 2003, the respondent bought the parcel for $8,000; and
- Two cheques signed by the respondent dated July 24, 2002, in the amount of $10,000, one payable to Pierre Giroux and the other to Giroux et Giroux Inc., are listed in the respondent's banking transactions. It appears from the information provided by Pierre Giroux that those amounts were recorded as a deposit for the purchase on April 7, 2008, by the respondent's father, Antoine Hernandez, of farmland on Laliberté Road in Mansonville in the municipality of Canton de Potton.

[10] Last, in support of his solemn affirmation, Daniel Goyette cited the decision of Judge Toupin, of the Court of Québec, dated November 28, 2000, *R. v. Hernandez*, [2000] J.Q. No. 5638, J.E. 2001-296 (C.Q.), in which Judge Toupin noted the respondent's lengthy criminal record, including charges of possession of stolen property and theft.

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

- The respondent did not file his income tax returns for the years 1996 to 1999;
- The respondent filed his income tax returns late for the years 2000 to 2002, 2004 and 2006;

- Between 2002 and 2005, the respondent received a total amount of approximately $129,120 as income replacement indemnities from the Société d'assurance automobile du Québec;
- Income replacement indemnities from the Société d'assurance automobile du Québec are not taxable and thus did not need to be reported to the Agency;
- As of February 26, 2008, Her-Comm Inc. was the owner and lessee of a number of vehicles and trailers;
- On March 20, 2008, three exemptions from seizure were registered in the register of personal and movable real rights in the respondent's name. These 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 is the sole shareholder and director of Le Groupe Centruss Inc., which was incorporated on December 16, 2004. The respondent should have declared this information in the Agency's initial interview questionnaire, which was completed on June 28, 2006, and should also have disclosed it during the audit conducted by Daniel Goyette. The Agency never received a tax return for Le Groupe Centruss Inc. It was not until November 2007 that the remittances were made by cheque;
- On or about June 15, 2007, Le Groupe Centruss Inc. acquired a commercial immovable located at 1725-1755 Gascon Road in Terrebonne. It appears from the deed of sale dated June 14, 2007, that the immovable was purchased for $1,000,000 following a promise to purchase that was accepted on December 26, 2006;

- On June 15, 2007, the Caisse populaire Desjardins registered a hypothec in the amount of $650,000 on the commercial immovable located at 1725-1755 Gascon Road in Terrebonne. The deed of hypothecary security dated June 14, 2007, discloses that on June 14, 2007, Le Groupe Centruss Inc. obtained a $650,000 term loan from the Caisse populaire de Terrebonne. The loan bears interest at 15% per year. The respondent and Sylvie Lépine stood surety for the loan. As of April 28, 2008, the balance of the loan was $613,888.90; and
- Her-Comm Inc.'s place of business is located in the commercial immovable that Le Groupe Centruss Inc. acquired.

[12] As of April 25, 2008, the respondent owed the Agency $92,556.30 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, 304 and following of the *Federal Courts Rules*, SOR/98-106 (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 clear days from May 6, 2008;

- ordered the Crown to 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 at the National Bank of Canada. Following the seizure, the Agency registered legal hypothecs on each of the respondent's three vacant parcels of vacant land in Terrebonne; on the farmland located on Laliberté Road in Mansonville in the municipality of Canton de Potton; and on the immovable situated at 1725-1755 Gascon Road in Terrebonne in the name of Groupe Centruss Inc. in Terrebonne. On September 9, 2008, as a result of the seizure at the National Bank of Canada, the Agency collected the sum of $18,029. In addition, on or about May 14, 2008, the Agency was informed that the respondent had sold two of the three parcels of land located in Terrebonne, namely, those with the cadastre numbers 1889 332 and 1889 331, for $17,000 each. The sale of these 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 for believing 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. He also alleges that the Minister breached his duty to disclose all the relevant facts to this Court on the return of 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. (At the hearing, counsel for the respondent attempted to discredit the allegations in paragraphs 5, 14, 20, 24, 30 to 32, 39 and following, 45 to 50, 52 and 56 of Daniel Goyette's affidavit.) The respondent also contends that the Agency's collection actions were carried out in an unreasonable manner (because, *inter alia*, there were sufficient income and assets to cover the amount claimed of $92,556, which has since become the subject of a notice of objection).

[18] The respondent also takes issue with the fact that reference was made to his previous charges and convictions because he served his sentence in 2005 for an offence dating back to 1995. At the hearing before this Court, learned counsel for the respondent argued, *inter alia*, that the respondent has always co-operated with the Agency. Of course, the fact that the respondent was in prison in 2005 could have delayed the audit. 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 his taxes and that, therefore, an authorization for immediate enforcement was necessary based on the respondent's alleged bad faith.

[19] The respondent takes issue with the Crown, in particular, for alleging that the respondent intended to dissipate his assets through trusts. The respondent is completely entitled to create independent and distinct patrimonies by appropriation through trust deeds. With respect to employment income after 2002, the respondent submits that, because of an automobile accident, he received non-taxable income replacement indemnities from the Société d'assurance automobile du Québec that are exempt from seizure, which explains why he stopped reporting employment income as a salaried employee of Her-Comm Inc. for the period from 2002 to 2006. In addition, with respect to Le Groupe Centruss Inc., the respondent submits that the company was completely inoperative and inactive until June 2007, while the Agency's initial interview questionnaire dealt with the period from January 1, 2000, to December 31, 2004. Thus, the respondent says, beginning in July 2007, monthly GST remittances were made and have been made every month since then.

[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. The respondent also relies on the fact that he enriched his patrimony during the period covered by the Agency's audit.

[21] In his 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 subsection 225.2(8) review of a jeopardy collection order. After considering the case law dealing with the former version

> of section 225.2 he concluded (at page 296) that in a subsection 225.2(8) application the Minister has the ultimate burden of justifying the decision despite the fact that section 225.2 as amended no longer includes the former paragraph (5) that specifically stated that "[O]n the hearing of an application under paragraph (2)(c) the burden of justifying the direction 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 disclose 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 met here. 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 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] For example, as it appears from Daniel Goyette's affidavits dated May 1, 2008, and September 9, 2008, he had to speak to third parties on a number of occasions to obtain information and documentation that had not been provided to him by the respondent, Sylvie Lépine or his accountant, Mr. Ducharme. The fact of the matter is that Daniel Goyette and Scynthia Plante discovered a number of assets as a result of their communications with third parties because the respondent had not disclosed those assets.

[25] Thus, the following assets had not been disclosed by the respondent or his representative:

- the three vacant lots located in Terrebonne on which the Agency had hypothecs registered;
- the deposit of $20,000 that Claude Hernandez paid to purchase farmland in the municipality of Canton de Potton as well as the vacant land on Maurice Côté Road.

[26] In this case, the affidavit of Scynthia Plante dated September 9, 2008, clearly shows that the fears the Agency might have had about collecting its debt were founded: two deeds of purchase dated May 12, 2008, were published on May 15, 2008, regarding the sale of two vacant parcels of land in Terrebonne, which the respondent had not disclosed to Daniel Goyette. These sales occurred only three days after the respondent was served with the order for immediate enforcement that the Agency obtained on May 6, 2008.

[27] 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.

[28] 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.

[29] For the above-noted reasons, the Court dismisses this application 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-706-08 (2008 FC 1106).

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
Mary Jo Egan, LLB