

Date: 20091002

Docket: T-178-08

Citation: 2009 FC 986

Ottawa, Ontario, October 2, 2009

PRESENT: The Honourable Mr. Justice Pinard

In the matter of the *Income Tax Act*,

and

In the matter of an assessment and reassessments by the Minister of National Revenue under the *Income Tax Act*,

AGAINST:

**RAYNALD DOUVILLE
2380 Pierre-Dupuy Avenue
Apartment 701
Montréal, Quebec H3C 6N3**

REASONS FOR ORDER
AND ORDER

[1] This is an application by Raynald Douville under subsections 225.2(8) and (9) of the *Income Tax Act*, R.S.C. (1985), c. 1 (5th Supp.) (the Act), to set aside the order delivered by Justice Edmond Blanchard on February 1, 2008.

Facts

[2] Raynald Douville (the applicant) is a business person and resident of the city of Montréal. He works in factoring, mortgage loans and business loans.

[3] On May 16, 2005, Yvon Talbot, an auditor with the Montréal Tax Services Enforcement Division of the Canada Revenue Agency (the Agency), began to audit the liability of 3479552 Canada Inc. under the Act for taxation years 2000 to 2004. Mr. Talbot found that the applicant was the director of the said company and the companies 3123430 Canada Inc., 3479641 Canada Inc., Corporation financière First Liberty Inc., 3301982 Canada Inc. and La Financière Keybridge Inc., of which he was the major or sole shareholder. Noticing that the applicant's reported income for the years 2000 to 2005 seemed low and that large amounts were spent during the same period, Mr. Talbot proceeded to audit the applicant's liability under the Act for the said years.

[4] The audit, which started in May 2005 but did not finish until fall 2007, was subject to considerable delays. According to the Minister of National Revenue (the Minister), the applicant and his representatives were the cause of this because of their lack of cooperation. However, the applicant and his representatives insist that Mr. Talbot's [TRANSLATION] "belligerent and outrageous attitude" was responsible for the delay.

[5] Based on the audit, the following assessments were issued against the applicant:

Taxation year	Type	Assessment date	Amounts assessed
2000	Notice of reassessment	October 9, 2007	\$99,456.76
2001	Notice of assessment	November 20, 2007	\$57,059.39
2002	Notice of reassessment	October 9, 2007	\$179,160.25
2003	Notice of reassessment	October 9, 2007	\$82,632.40
2004	Notice of reassessment	October 9, 2007	\$114,320.97

2005	Notice of reassessment	October 9, 2007	\$124,157.15
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[6] On October 24, 2007, notices of objection were filed against the notices of reassessment and the notice of assessment listed above. As the notice of assessment was issued only in November 2007, the notice of objection for 2001 was rejected by means of a letter dated November 7, 2007, because it was filed before the assessment.

[7] On January 28, 2008, the Minister filed his *ex parte* notice of application for authorization to take forthwith the actions described in paragraphs 225.1(1)(a) to (g) of the Act. The following reasons were submitted in support of the application:

- 1) Raynald Douville's late filing of an income tax return, Raynald Douville's failure to pay an undisputed amount and failure to report employment income paid by his own company;
- 2) Raynald Douville's lack of cooperation during the tax investigation, long delays, refusal to provide crucial information and accusations against the auditor;
- 3) Mr. Douville's categorical refusal to provide documents crucial to the audit of his companies;
- 4) Failure by Mr. Douville and his representatives to challenge the major part of the net worth established by the auditor and expenses that were entirely inconsistent with the reported income;
- 5) Notice of objection without any details;
- 6) Raynald Douville's use of a nominee to hold one of his main assets and the creation of a fictitious mortgage on this asset;
- 7) Raynald Douville's disposition of the condominium at 2380 Pierre-Dupuy, #701 to Fiducie Douville, and Fiducie Douville's listing of this asset for sale;
- 8) Listing for sale of the residence at 140 Estérel Road;
- 9) Estimated net value of Raynald Douville's known assets;
- 10) Mr. Douville's tax liability.

[8] In an order dated February 1, 2008, the *ex parte* application was granted by Justice Edmond Blanchard, who was satisfied that there were reasonable grounds to believe that the collection of all or any part of the amounts would be jeopardized by a delay in the collection of the amounts. He ordered service on the applicant within the following five days to enable him to file an application to review the authorization.

[9] On March 4, 2008, the applicant filed, with the Court, a notice of application to review the authorization to proceed forthwith.

[10] On March 24, 2009, at the hearing before Justice Sean Harrington, the applicant's representative made an oral request to strike Exhibits A, B and C of Minoufa Jeannot's statutory declaration dated January 29, 2008, and the references to Ms. Jeannot's affidavit in Yvon Talbot's affidavit, also dated January 29, 2008. The applicant then requested that the seizure be set aside because of errors in the evidence. In an order dated May 8, 2009, Justice Harrington ruled that the alleged errors were not fatal errors and rejected the expungement request made by the applicant.

[11] However, Justice Harrington did not rule on the merits of the application for review that is in question here, which concerns the authorization granted on February 1, 2008, by Justice Blanchard, to Her Majesty the Queen, represented by the Minister, to take forthwith any of the actions described in paragraphs (a) to (g) of subsection 225.1(1) of the Act, in order to collect or secure the payment of the said amounts by the applicant.

Relevant legislation

[12] The following provisions of the Act are relevant in this case:

225.1 (1) If a taxpayer is liable for the payment of an amount assessed under this Act, other than an amount assessed under subsection 152(4.2), 169(3) or 220(3.1), the Minister shall not, until after the collection-commencement day in respect of the amount, do any of the following for the purpose of collecting the amount:

- (a) commence legal proceedings in a court,
- (b) certify the amount under section 223,
- (c) require a person to make a payment under subsection 224(1),
- (d) require an institution or a person to make a payment under subsection 224(1.1),
- (e) [Repealed, 2006, c. 4, s. 166(1).]
- (f) require a person to turn over moneys under subsection 224.3(1), or
- (g) give a notice, issue a certificate or make a direction under subsection 225(1).

...

225.2 (1) In this section, “judge” means a judge or a local judge of a superior court of a province or a judge of the Federal Court.

- (2) Notwithstanding section 225.1,

225.1 (1) Si un contribuable est redevable du montant d’une cotisation établie en vertu des dispositions de la présente loi, exception faite des paragraphes 152(4.2), 169(3) et 220(3.1), le ministre, pour recouvrer le montant impayé, ne peut, avant le lendemain du jour du début du recouvrement du montant, prendre les mesures suivantes :

- a) entamer une poursuite devant un tribunal;
- b) attester le montant, conformément à l’article 223;
- c) obliger une personne à faire un paiement, conformément au paragraphe 224(1);
- d) obliger une institution ou une personne visée au paragraphe 224(1.1) à faire un paiement, conformément à ce paragraphe;
- e) [Abrogé, 2006, chap. 4, art. 166(1).]
- f) obliger une personne à remettre des fonds, conformément au paragraphe 224.3(1);
- g) donner un avis, délivrer un certificat ou donner un ordre, conformément au paragraphe 225(1).

...

225.2 (1) Au présent article, « juge » s’entend d’un juge ou d’un juge local d’une cour supérieure d’une province ou d’un juge de la Cour fédérale.

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 (g) with respect to the amount.

...

(8) Where a judge of a court has granted an authorization under this section in respect of a taxpayer, the taxpayer may, on 6 clear days notice to the Deputy Attorney General of Canada, apply to a judge of the court to review the authorization.

(9) An application under subsection (8) shall be made

(a) within 30 days from the day on which the authorization was served on the taxpayer in accordance with this section; or

(b) within such further time as a judge may allow, on being satisfied that the application was made as soon as practicable.

...

(11) On an application under subsection (8), the judge shall determine the question summarily and may confirm, set aside or vary the authorization and make such other order as 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 de ce montant.

...

(8) Dans le cas où le juge saisi accorde l'autorisation visée au présent article à l'égard d'un contribuable, celui-ci peut, après avis de six jours francs au sous-procureur général du Canada, demander à un juge de la cour de réviser l'autorisation.

(9) La requête visée au paragraphe (8) doit être présentée :

a) dans les 30 jours suivant la date où l'autorisation a été signifiée au contribuable en application du présent article;

b) dans le délai supplémentaire que le juge peut accorder s'il est convaincu que le contribuable a présenté la requête dès que matériellement possible.

...

(11) Dans le cas d'une requête visée au paragraphe (8), le juge statue sur la question de façon sommaire et peut confirmer, annuler ou modifier l'autorisation et rendre toute autre ordonnance qu'il juge

judge considers appropriate.

indiquée.

Analysis

[13] The principles and the case law applicable to reviewing the authorization granted in accordance with subsection 225.2(2) of the Act were well summarized by Justice Lemieux in *Canada (Minister of National Revenue) v. Services M.L. Marengère Inc.*, [1999] F.C.J. No. 1840 (T.D.) (QL), 2000 D.T.C. 6032 (*Services M.L. Marengère*). In particular, on the issue of burden of evidence in an application for review he points out the following:

[63] . . .

(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.

[14] Under subsection 225.2(2) of the Act, the Minister may “act . . . to meet any situation in which the taxpayer’s assets may vanish in thin air because of the passage of time” (*Services M.L. Marengère*, at paragraph 63). Nevertheless, an *ex parte* collection order is an extraordinary remedy (*Canada (Minister of National Revenue) v. Thériault-Sabourin*, [2003] F.C.J. No. 168 (T.D.) (QL), 2003 FCT 124, at paragraph 13; mere suspicion or mere concern is not sufficient.

[15] Unlike Justice Blanchard, I have the advantage of having before me the evidence submitted by the applicant, which includes the following affidavits:

1. Affidavit of Raynald Douville dated July 10, 2008;
2. Affidavit of Jules Brossard, counsel, dated June 27, 2008;
3. Affidavit of Michel Bernucci, accountant, dated July 3, 2008;
4. Affidavit of Barbara Bell, real estate agent, dated July 4, 2008;
5. Affidavit of Paule Faubert, personal damage insurance broker, dated October 22, 2008;
6. Affidavit of Philippe E. Jones, damage insurance broker, dated November 7, 2008;
7. Affidavit of Raynald Douville, business person, dated November 4, 2008; and
8. Affidavit of Nick Matni, controller of Holand Leasing (1995) Ltd., dated November 4, 2008.

[16] A reading of the parties' submissions reveals two things: (1) many aspects of the evidence are seriously challenged, and (2) a clearly strained relationship exists between the applicant and his representatives and the auditor, Mr. Talbot.

[17] First, the applicant systematically challenged the Minister's allegations in his written submissions. For example, the applicant explained that the late filing of his 2001 income tax return was simply through inadvertence, which is corroborated by his accountant, Mr. Bernucci. Moreover, regarding the unpaid amount for 2006, he indicated that his accountant had told him that as he was owed money for 2001, he could ask that this refund be used to offset his debt.

[18] With respect to his principal residence, the applicant and his representatives denied the claim that it was purchased by Mr. Douville in 1998, as stated by Mr. Talbot. According to them, this property was initially bought by Mr. Douville's former spouse, Nathalie Fontaine. Following the couple's split, in 2001 she sold the property to the applicant, who assumed the existing mortgage and executed a mortgage to secure the balance of the purchase price. Later, the mortgage was the

subject of a donation by Ms. Fontaine to The Ray Trust. Therefore, according to them, this is not an issue of using a nominee but rather an allowable transaction.

[19] Regarding the allegation that the applicant attempted to dissipate his principal asset, his counsel provided the following explanation in his affidavit dated June 27, 2008:

[TRANSLATION]

26. Regarding the sale of Mr. Douville's principal residence located at 2380 Pierre Dupuy, Apartment 701 to Fiducie Douville, which took place on May 30, 2007, I emphasize that this transfer was made as per my recommendation. In fact, I told Mr. Douville that I systematically recommend to my clients who are in business that their principal residence and their secondary residence be held by a trust;

[20] The Minister suggested that this conduct demonstrates a desire on the part of the applicant to squander his assets. However, faced with the expert sworn statements by the accountant, Mr. Bernucci, I cannot unreservedly accept the interpretation of facts put forth by the respondent.

[21] Moreover, the Minister stated that the applicant refused to cooperate with the auditor and to provide crucial information. The applicant responded that he did everything to accommodate the audit and that it was the auditor who acted inexcusably. In particular, the applicant expressed his dismay that the auditor contacted third parties during his investigation and informed them of the fact that he was the subject of a tax audit. Mr. Douville claims that it was partly because of Mr. Talbot's [TRANSLATION] "cavalier" attitude that he refused to provide him with his clients' telephone numbers and loan agreements. According to Mr. Bernucci,

[TRANSLATION]

33. Mr. Douville never refused to provide any information whatsoever to the Canada Revenue Agency except for when it was a matter of submitting cell phone statements and copies of loan agreements to the auditor because Mr. Talbot had already said that he would contact the people mentioned in the phone statements and the borrowers for investigative purposes;

[22] This emphasizes the above-mentioned tension, which constitutes, in my opinion, an important element of the factual background. I believe that the words of Justice Andrew MacKay in *Q. v. Satellite Earth Station Technology Inc.*, [1989] F.C.J. No. 912 (T.D.) (QL), also apply in this case:

42. In this case considerable mistrust appears to have developed between department officers and Brough. Brough may well have appeared less than open and truthful in his dealings with representatives of the department and he may well have perceived the officers as less than fair and cooperative. From the perspective of each their mistrust may appear warranted, but it is unfortunate. It appears to have generated suspicion on the part of the taxation officers that Brough was simply seeking to evade payment of taxes deemed due from the company. That suspicion might have been inferred from the facts that those responsible for the company were aware of the audit and subsequent correspondence about liability of the company for past taxes and that assets of the company, which was already in some financial difficulty, were distributed between the principals in less than orthodox fashion. But there is not evidence, in my view, that would warrant this suspicion as a reasonable conclusion and suspicion in itself is not a reasonable basis for authorization to avoid delay in collection which section 225.1 of the Act specifies as the normal case.

(Emphasis added.)

[23] Therefore, I am satisfied, despite Ilinca Ghibu's able presentation for the Agency, that the applicant met his burden of evidence in establishing that there are reasonable grounds to believe that the criterion stated in subsection 225.2(2) of the Act was not respected. Generally, the applicant

offered a reasonable response to the Minister's allegations, a response supported by his counsel's and his accountant's statements. Moreover, I note that the Minister chose not to cross-examine them. The reasons for the Minister's decision are based mainly on the applicant's conduct during the audit and on reasonably challenged facts in support of his application for authorization to proceed forthwith. In my view, assessing these facts would be more conclusive within the objection process in progress. Therefore, I am not satisfied that there is evidence demonstrating that, on a balance of probability, it is more likely than not that granting a delay would jeopardize the collection.

[24] Finally, I note that the applicant, to demonstrate his good will, stated in his affidavit that if this application is granted, he will undertake to give 30 days' notice to the Agency of any important change affecting his asset base; he added that if the condominium is sold, he will deposit the net profit of the sale in a trust. Such an undertaking was acknowledged by Justice Johanne Gauthier in *Income Tax Act and Sagman*, 2004 FC 1630.

Conclusion

[25] For all of these reasons, the application to review the order delivered by Justice Blanchard on February 1, 2008, authorizing Her Majesty the Queen, represented by the Minister, to take forthwith any of the actions described in paragraphs 225.1(1)(a) to (g) of the Act, in order to collect or secure the payment by the applicant of the amounts that are the subject of a notice of assessment, is granted. Consequently, this order dated February 1, 2008, is set aside and the collection measures taken under it are declared null and void, with the result that all of the amounts seized further to these collection measures are to be reimbursed to the applicant. With costs.

ORDER

The application for review is granted and the order delivered by Justice Blanchard on February 1, 2008, authorizing Her Majesty the Queen, represented by the Minister of National Revenue, to take forthwith any of the actions described in paragraphs 225.1(1)(a) to (g) of the Act, in order to collect or secure the payment by the applicant of amounts that are the subject of a notice of assessment, is set aside. Consequently, the collection measures taken under this order dated February 1, 2008, are declared null and void, with the result that all of the amounts seized further to these collection measures are to be reimbursed to the applicant.

With costs.

“Yvon Pinard”

Judge

Certified true translation
Janine Anderson, Translator

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-178-08

STYLE OF CAUSE: IN THE MATTER OF THE *INCOME TAX ACT* and
RAYNALD DOUVILLE

PLACE OF HEARING: Montréal, Quebec

DATE OF HEARING: September 15, 2009

**REASONS FOR ORDER
AND ORDER:** PINARD J.

DATED: October 2, 2009

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