Federal Court Cour fédérale

Date: 20101115

Docket: T-631-09

Citation: 2010 FC 1144

[ENGLISH TRANSLATION]

Ottawa, Ontario, November 15, 2010

PRESENT: The Honourable Mr. Justice de Montigny

IN THE MATTER OF THE *INCOME TAX ACT*

and

IN THE MATTER OF ASSESSMENTS BY THE MINISTER OF NATIONAL REVENUE UNDER THE *INCOME TAX ACT*

AGAINST:

FIDUCIE DAUPHIN

and

9125-9622 QUÉBEC INC.

REASONS FOR ORDER AND ORDER

[1] The parties submitted two applications against an order made by Justice Yvon Pinard on April 22, 2009, allowing the *ex parte* application filed by Her Majesty The Queen in Right of Canada ("Her Majesty") authorizing the jeopardy collection against Fiducie Dauphin and 9125-9622 Québec Inc. Leave for a jeopardy collection under subsection 225.2(2) of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) (the "ITA") allows Her Majesty to immediately take action to collect assessed amounts to secure payment by the taxpayer if there are reasonable grounds to

believe that a delay in paying would jeopardize collection of that amount, instead of waiting 90 days as normally provided for under section 225.1.

[2] The first application, filed by Her Majesty, seeks to have the validity of the jeopardy order and the notices of assessment recognized. The second application, submitted by Fiducie Dauphin and 9125-9622 Québec Inc., seeks to have the jeopardy collection order reviewed, in accordance with subsection 225.2(8) of the ITA.

[3] For the reasons that follow, I find that the first application should be allowed, while the second should be dismissed.

I. The facts

[4] The facts giving rise to both applications under review in this case are extremely complex and involve countless transactions that are generally referred to as “real estate flips.” Put in its simplest terms, this arrangement involves successively purchasing and selling the same property in a short period of time to artificially inflate its value and finance the initial purchase using financing obtained by the subsequent purchaser. It is clearly not for this Court to decide the legality of these transactions in this case or to assess the validity of the notices of assessment issued against Fiducie Dauphin and 9125-9622 Québec Inc.

[5] Fiducie Dauphin was incorporated in 2006 to operate in the real estate sector and resumed the activities that were previously carried out by 9125-9622 Québec Inc., which appears to have ceased commercial activities on February 28, 2006. We shall see, however, that this numbered company’s situation is far from clear.

[6] The Fiducie's settlor is Sophie Lebel, the spouse of Normand Descôteaux, who acts as advisor for the Fiducie, while his son, Stéphane Descôteaux, is a loan consultant for the Fiducie. As for the trustees, the Fiducie's deed of incorporation names François Bergeron and Chantal Frégault, who is Stéphane Descôteaux's spouse, while François Bergeron is Sophie Lebel's son.

[7] All of the above-mentioned individuals, except for François Bergeron, have been in trouble with the Canada Revenue Agency (the "CRA") for unpaid tax assessments. Furthermore, Normand and Stéphane Descôteaux have a criminal record for collecting interest at criminal rates. In addition, Normand Descôteaux was convicted of leading an over-mortgage financing fraud network in the 1990s.

[8] On July 16, 2008, Mr. Justice Luc Martineau allowed the Minister of National Revenue to immediately collect the various assessments made against Fiducie Dauphin in accordance with section 225.2 of the ITA. These assessments, which at the time amounted to over $2,000,000, constitute Fiducie Dauphin's initial tax debt. On April 3, 2009, Mr. Justice Michel Beaudry upheld Mr. Justice Martineau's jeopardy collection order. To collect this initial tax debt, Her Majesty garnished three mortgage debts owed to Fiducie Dauphin.

[9] The first garnishment, ordered on February 5, 2009, was for the balance of the selling price totalling $1,575,000 owed by 9173-9698 Québec Inc. to the Fiducie following the sale of a building known as "Drugstore." The second garnishment, ordered in March 2009, was for a balance of $800,000 owed by 9177-4158 Québec Inc. to the Fiducie following the sale of a building known as "Club Sandwich." Finally, the third garnishment was for an outstanding

balance of $536,544 following the sale of a business by Fiducie Dauphin to 9116-4798 Québec Inc. As of November 4, 2009, Her Majesty had collected $323,486 of this first tax debt owed by Fiducie Dauphin, which therefore still owed Her Majesty $1,356,148 for outstanding tax debts including penalties and interest for the 2006 and 2007 taxation years.

[10] On April 9, 2009, the Fiducie granted Fiducie Cafaro a mortgage of $3,100,000 on its three above-noted hypothecary claims to secure a rotating line of credit. Counsel for Fiducie Dauphin stated that this line of credit was to pay his client's first tax debt.

[11] Fiducie Dauphin received another assessment for $1,196,539 on April 21, 2009, which is still outstanding. This represents Fiducie Dauphin's second tax debt. Collection of this assessment was subject to leave granted by Mr. Justice Pinard on April 22, 2009, and it is this order that the applicants are seeking to have set aside. This second tax debt owed by Fiducie Dauphin is evidenced by an assessment issued under section 160 of the ITA. It essentially results from the transfer by 9125-9622 Québec Inc. to Fiducie Dauphin, during the taxation year ending for 9125-9622 Québec Inc. on February 28, 2007, of the Drugstore and Club Sandwich buildings, the fair market value of which ($4,200,000 in total) exceeded the consideration allegedly given by Fiducie Dauphin ($1,196,539). The tax debt of the transferor (9125-9622 Québec Inc.) of $1,196,539 was less than that benefit received, and it is therefore this amount that was attributed to Fiducie Dauphin under section 160 de la *LIR*. On the other hand, the tax debts owed by 9125-9622 Québec Inc. in respect of its 2007 and previous taxation years were, respectively, $577,090 (first debt whose immediate collection was authorized by Mr. Justice Martineau on July 16, 2008) and $583,854 (second debt whose immediate collection was also

authorized by Mr. Justice Pinard on April 22, 2009, resulting from the same disposition of the Drugstore and Club Sandwich properties to Fiducie Dauphin).

[12] Following the order by Justice Pinard, Her Majesty garnished the same claims that had already been seized to obtain payment of the first tax debt so that the excess of these debts not required to pay the first tax debt could be applied to payment of the second debt.

[13] On May 4, 2009, Fiducie Cafaro published a 60-day notice of taking in payment in the land register. On May 21, 2009, Fiducie Cafaro published the same mortgage in the Register of Personal and Movable Real Rights and then published a notice of taking in payment on June 3, 2009. Fiducie Cafaro claims to have disbursed $1,086,933 for the loan granted to Fiducie Dauphin, and faulted it for becoming insolvent and not obtaining release of Her Majesty's garnishment against 9177-4158 Québec Inc. Counsel for Her Majesty argued that had the sale of the Drugstore scheduled for May 15, 2009, not been aborted, Her Majesty would have been paid in full for Fiducie Dauphin's first tax debt and would have removed the final garnishing order against 9177-4158 Québec Inc.

II. Impugned decision

[14] Based on the affidavits filed by Her Majesty in support of her *ex parte* application and on the evidence adduced in the case involving the first tax debt (T-1084-08), Justice Pinard was satisfied that there were reasonable grounds to believe that granting the applicants a delay for paying the second tax debt would jeopardize collection of that debt.

[15] Justice Pinard also granted Her Majesty leave to serve his order to applicants as well as any collection measures taken in conjunction with the notices of assessments, in a sealed envelope addressed to them, to be deposited in the mailbox of their residence or posted on the door or in a visible place or inside the place where the serving bailiff was posted, in the event that it could not be served in person.

[16] Justice Pinard also delayed service of the order by seventy-two hours after issuing it in accordance with Rule 395 of the *Federal Courts Rules,* SOR/98-106.

III. Issues

[17] This application raises two issues:

A. Should Justice Pinard's *ex parte* jeopardy collection order be set aside?

To answer this first question, two sub-issues must be addressed:

1. Have the applicants met their initial burden to have Justice Pinard's order set aside?

and

2. ii) If so, has Her Majesty established that the *ex parte* application was still warranted?

B. Should service of the notices of assessment and the *ex parte* order be validated?

IV. Analysis

A. *Should the collection order be set aside?*

[18] It is well established that a jeopardy collection order will only be issued if the evidence establishes to the satisfaction of the Court that the Minister has reasonable grounds to believe

that a delay will jeopardize collections of the Minister's debt. This principle was noted by the Federal Court of Appeal in *Canada v. Golbeck*, [1990] 2 C.T.C. 438, 90 D.T.C. 6575:

> 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.

[19] With respect to each party's burden of proof in the case of an application to review a jeopardy collection order under subsection 225.2(8), both parties agree that it was correctly stated by Mr. Justice François Lemieux in *Canada (Minister of National Revenue – M.N.R.) v. Services M.L. Marengère Inc.* (1999), 176 F.T.R. 1 at para 63 [*M.N.R. v. Marengère*] :

> 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.
>
> 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.

[20] The applicants argued in their written submissions that Her Majesty's application before Justice Pinard was based on mere suspicion and concern that a delay could jeopardize collection. To the contrary, far from seeking to avoid tax collection, the applicants argued that the mortgage granted to Fiducie Cafaro in exchange for a line of credit was in fact to allow them to pay their first tax debt. Consequently, the respondent's actions would only make it more difficult to collect the first debt.

[21] It was also argued that the absence of evidence of fraudulent acts by the taxpayers, coupled with their intention not to squander their assets, warranted the setting aside of the jeopardy collection order. With respect to Normand and Stéphane Descôteaux's criminal past, the applicants explained that this factor was irrelevant because they have no connection to the applicants. And as for the family connections between the applicants in docket T-1084-08, they are allegedly insufficient to establish a reasonable apprehension that the transactions are irregular or that the applicants in this case would squander their assets.

[22] Finally, the applicants argue that Her Majesty breached her duty to disclose to the Court all relevant facts when submitting the *ex parte* application and that the affidavits supporting this application contained insufficient, inaccurate or out-of-context allegations. In this regard, they dispute several paragraphs of the affidavits filed by Claudine Vinette and Yvon Talbot on April 21, 2009. The applicants also argue that they are not related businesses within the meaning of the ITA and that the reassessments on which Mr. Justice Pinard based his order are illegal because they seek to recover debts that are already subject to an initial jeopardy collection order.

[23] The applicants did not adduce any evidence supporting their written submissions, nor did they cross-examine Her Majesty's affiants. At the hearing, counsel for the applicants did attempt to challenge several of Ms. Vinette's and Mr. Talbot's statements in their affidavits and demonstrate that the many transactions carried out by Fiducie Dauphin and 9125-9622 Québec Inc. involving a host of numbered companies and other lenders were completely legitimate and in no way intended to defraud Her Majesty. Despite the skill with which Mr. Sénéchal presented his case, I am unable to find that the test required by subsection 225.2(2) was not met or that Her Majesty breached her duty to make a full and frank disclosure when submitting the *ex parte*

application before Justice Pinard. Although some of Ms. Vinette's and Mr. Talbot's statements may have been inaccurate, what is abundantly clear given the extreme complexity of the case as well as the intertwining of the actors involved and the transactions is that none of the "particulars" provided by the applicants undermine the credibility of the Minister's reasons for obtaining a jeopardy collection order. Once again, this Court's role is not to decide the validity of the assessments, which are assumed to be valid under subsection 152(8) of the ITA so long as they have not been vacated as a result of an objection or appeal. In light of the evidence before the Court, I find that the applicants have not discharged their initial burden of proving that there are reasonable grounds to believe that the test required by subsection 225.2(2) of the ITA has not been met.

[24] The case law has recognized that one or more of the following factors may justify a jeopardy collection order:

A. Fraud or unorthodox conduct by a taxpayer: *M.N.R. v. Marengère*, above, at para 63(4); *Canada (M.N.R.) v. Rouleau*, [1995] 2 C.T.C. 442; 95 D.C.T. 5597, at paras 8-9; *Canada v. Laframboise*, [1986] 3 F.C. 521, p. 524; *Canada (M.N.R.) v. Delaunière*, 2007 FC 636, at para 8; *Mann v. Canada (M.N.R.)*, 2006 FC 1358, at para 50;

B. The liquidation or transfer of assets by a taxpayer, regardless of intent: *M.N.R. v. Marengère*, above, at para 63(4); *1853-9049 Québec Inc. v. Canada*, [1986] 2 C.T.C. 486; *Canada (M.N.R.) v. Delaunière*, above, at para 6;

C. A taxpayer's lifestyle that is inconsistent with his or her tax debt: *Minister of National Revenue v. Calb*, 97 DTC 5430;

D. Nature of assessments and taxpayer tax behaviour: *Minister of National Revenue v. Moss*, 98 DTC 6016 (F.C.); *Income Tax Act of Canada v. Fiducie Dauphin et al*, 2009 FC 346, at para 86; *M.N.R. v. Rouleau*, above, at paras 8-9.

[25] In this case, the respondent submitted evidence to support each of the above-mentioned factors. Let us review them one by one. With respect to the applicants' conduct, it is clear that the respondent was not required to prove fraud on their part. However, some of the individuals connected to the applicants have a more questionable past, and the applicants are involved in transactions that are suspicious to say the least. In his decision regarding the applicants' first debt, Mr. Justice Beaudry noted [TRANSLATION] "the many transactions involving the Fiducie, in which it lends significant unsecured sums to acquire property and is then involved in reselling by financing the deposit, all in exchange for a minimal financial gain" and "the profits realized as a result of these transactions, which are distributed to individuals or companies besides the seller" (*Income Tax Act v. Fiducie Dauphin et al*, above, at para 86). Furthermore, the CRA reported 28 new transactions of this type since Justice Beaudry's decision.

[26] Not only was Normand Descôteaux one of the leaders of an overmortgage financing fraud network, but he and his son also purchased and resold buildings on the same day and realized substantial profits that they did not report on their tax return for the year in question (2007). Likewise, Fiducie Dauphin and 9125-9622 Québec Inc. financed several two-step transactions, namely acquiring a property by a purchaser and reselling it the same day or the next day for an amount higher than approximately $50,000, without ever declaring business income. Gestion Malgraf Inc. cashed several cheques representing the net proceeds of the real estate transaction, and this company was in fact the employer of Normand Descôteaux, Stéphane Descôteaux, Chantal Frégault, François Bergeron, Danielle Cléroux and 9125-9622 Québec Inc.

[27] Furthermore, in 2001 police seized $2,700,000 in three safety deposit boxes during searches carried out at two Caisses Populaires, and $1,800,000 in cash was found under a false

floorboard in the basement belonging to Martine Cléroux's brother. Ms. Cléroux was Normand Descôteaux's spouse at the time and, along with Stéphane Descôteaux, had direct access to the three safety deposit boxes. It was also at that time that Normand Descôteaux and Stéphane Descôteaux pleaded guilty to the criminal offense of collecting interest at a criminal rate.

[28] It also appears that the trustee of Fiducie Dauphin, Chantal Frégault, made withdrawals from her bank account of over $200,000 for 2006 and 2007, while she reported income of approximately $110,000 for the taxation years between 2002 and 2007 inclusive.

[29] I also note that Normand Descôteaux and Sophie Lebel have filed for mainly tax-related bankruptcies and that Normand and Stephane Descôteaux have changed address multiple times. There are also charges encumbering all or almost all of the net value of the buildings belonging to the applicants.

[30] With respect to the mortgage granted by Fiducie Dauphin on the three hypothecary claims mentioned in paragraph 9 of these reasons in favour of Fiducie Cafaro to secure an equivalent line of credit is suspicious, to say the least. On one hand, it was granted six days after Mr. Justice Beaudry's decision and, on the other hand, at least one month after obtaining its mortgage Fiducie Cafaro published a 60-day notice that it intended to take in payment of these three hypothecary claims under the pretext that Fiducie Dauphin was allegedly in default of it. However, if this $3,100,000 hypothec were valid and enforceable against Her Majesty, the three claims against it would be insufficient to discharge both the second debt owed by Fiducie Dauphin to Her Majesty and Fiducie Dauphin's debt to Fiducie Cafaro, which would amount to $1,086,933, particularly since the advances allegedly granted by Fiducie Cafaro to Fiducie

Dauphin carry interest of 24% a year. Consequently, payment by Fiducie Dauphin of the amounts owing following assessments relating to the first jeopardy collection order would not have improved Her Majesty's position since payment of the assessments in respect of the second jeopardy collection order would have been in jeopardy had it not been for Mr. Justice Pinard's order dated April 22, 2009.

[31] I also take from the evidence that at the time of providing the $3,100,000 mortgage in favour of Fiducie Cafaro on April 9, 2009, Fiducie Dauphin was aware of the existence of its two tax debts, contrary to claims by its counsel. Given that it was represented by the same counsel for its application for review of authorization to proceed forthwith dated July 16, 2008, there is no doubt that Fiducie Dauphin was aware of the first tax debt of $577,090 owed by 9125-9622 Québec Inc. With respect to the second tax debt arising from the application of section 160 of the ITA to the transfers by 9125-9622 Québec Inc. to Fiducie Dauphin without fair consideration of the Drugstore and Club Sandwich properties, Fiducie Dauphin could not ignore it (even though it had not yet been assessed), since Mr. Talbot had clearly explained it to them as early as February 10, 2009. Anyone who receives property from an insolvent individual for consideration below the fair market value of the property received (in this case the properties valued at $4,200,000 for consideration of $1,168,389$) cannot, even assuming that this person is unaware of section 160 of the ITA, do otherwise than recognize that such a transaction would adversely affect the creditors of the insolvent individual and that it could at least be challenged through a Paulian action under sections 1631 et seq. of the *Civil Code of Quebec*. Even assuming that we consider only the first tax debt owed by 9125-9622 Québec Inc. for 2004, 2005 and 2006, this is approximately $427,000 of which Her Majesty was deprived by disposition of the buildings

without fair consideration. It also seems clear that Fiducie Dauphin mortgaged the three hypothecary claims to prevent Her Majesty from seizing them on the basis of the second tax debt and not to pay its first tax debt. Furthermore, it does not appear that the Fiducie Dauphin's first tax was discharged, and there is no evidence that Fiducie Cafaro did indeed pay Fiducie Dauphin $1,086,933, as it claims. The evidence also establishes that Mr. Cafaro, trustee of Fiducie Cafaro, has conducted business with members of the "Dauphin Group" for many years and has often made fictitious loans secured by mortgages.

[32] The applicants claim that their activities have been crippled as a result of the respondent's collection actions and their debt owed to Fiducie Cafaro. If such were the case, one might wonder whether it is reasonable for Fiducie Dauphin to continue leasing three luxury vehicles, specifically a BMW, a Lexus and a Bentley. The case law has already drawn a negative inference against taxpayers who maintain a luxury lifestyle despite being heavily indebted to the tax authorities.

[33] Finally, the evidence shows that the applicants as well as Dauphin's settlor and trustee and Normand Descôteaux have repeatedly failed to report their income and have all received assessments. Furthermore, there are inexplicable delays in the publication and the alleged rectification of the charges encumbering the applicants' property, which may once again cast doubt on the applicants' good faith in conducting their business.

[34] In short, I am of the view that all of the circumstances outlined in the preceding paragraphs and more extensively supported in the affidavits filed by Her Majesty to be granted leave for the jeopardy collection fully justified the decision by my colleague Justice Pinard to

issue his order on April 22, 2009. Contrary to the applicants' submissions, these factors constituted much more than mere suspicion and met the requirement to establish reasonable grounds to believe that granting a delay to pay the second tax debt as evidence by the certificate filed in this Court on April 22, 2009 (ITA-5097-09). Consequently, the applicants have not met their initial burden of proof, and their application must therefore be dismissed.

B. *The service of the notice of assessment and Justice Pinard's order be confirmed retroactively?*

[35] Counsel for Her Majesty admitted to not fully complying with the jeopardy collection order made on April 22, 2009, as to the manner in which it was served. Mr. Justice Pinard had indeed granted Her Majesty leave to serve Fiducie Dauphin and 9125-9622 Québec Inc. with his order, as well as any collection action taken resulting from this order and the notices of assessment, in a sealed envelope addressed to them, to be deposited in the mailbox of their residence or posted on the door or in a visible place or inside the place where the serving bailiff was posted, in the event that it could not be served in person.

[36] On April 23, 2009, counsel for the applicant faxed counsel for the respondent a copy of the jeopardy collection order made on April 22, 2009, a copy of the additional notice of assessment issued on April 21, 2009 against Fiducie Dauphin and a copy of the additional notice of assessment issued against 9125-9622 Québec Inc. The same day, counsel for the applicant also sent a copy of the jeopardy collection order dated April 22, 2009, to counsel for the respondents by priority post.

[37] The same day that the copies were sent, counsel for the respondents sent a letter to counsel for the applicant stating that the respondent Fiducie Dauphin had just filed an objection

to the notice of assessment made on April 21, 2009. Then on May 20, 2009, counsel for the respondents served notice to counsel for the applicant and they submitted to the Court their application to set aside the jeopardy collection order made on April 22, 2009.

[38] It was not until May 22, 2009, that counsel for the respondents raised the service irregularities for the first time. After being informed of its failure to fully comply with the jeopardy collection order made on April 22, 2009, with respect to service, the CRA decided to have a bailiff serve copies of this order on both respondents and the notices of assessment issued on April 21, 2009. The evidence shows that the bailiff served these documents to respondent Fiducie Dauphin on May 29, 2009, and to respondent 9125-9622 Québec Inc. on June 4, 2009. In the latter case, this delay is due to the fact that the company did not notify the CRA of its change of address, which required additional searches to find the address of the last known director.

[39] Her Majesty's failure to comply with subsection 225.2(5) of the ITA with respect to the service delay is nothing but an irregularity of form that did not cause harm to the respondents. In fact, it is clear that Fiducie Dauphin and 9125-9622 Québec Inc. were not prevented from availing themselves of the remedies available to them for this appeal against the jeopardy collection order. In fact, they appear to have indeed read the jeopardy collection order made on April 22, 2009, and the notices of assessment issued on April 21, 2009, since (1) respondent Fiducie Dauphin filed a notice of objection to the notice of assessment dated April 21, 2009, within the ninety-day period stipulated in section 165 of the ITA and (2) respondents Fiducie Dauphin and 9125-9622 Québec Inc. filed by way of their counsel an application to set aside the jeopardy collection order made on April 22, 2009, within the thirty-day period set out in subsection 225.2(9) of the ITA.

[40] We must not lose sight of the purpose behind the rules for service. The purpose of these rules, it should be noted, is to prevent a party from defending its interests because it was supposedly not made aware, or was not done so in a timely manner, of the proceedings against it. Furthermore, Rule 147 of the *Federal Courts Rules* reflects this principle, in that it authorizes the Court to consider an irregular service valid when it is satisfied that the recipient has become aware of the document that was intended for him. Thus, it has already been found that when a party files a pleading in response to an initial pleading it constitutes proof that this party became aware of this initial pleading: see *Canada (Minister of Citizenship and Immigration) v. Mindich* (1999), 170 F.T.R. 148, at para 16; *The Queen v. Trudgeon*, 2001 FCT 627, at para 9.

[41] This rule is part of a broader principle, namely the procedure must not trump substance. This principle primarily finds expression in Rules 53, 55 and 56. In this case, it is clear that Fiducie Dauphin and 9125-9622 Québec Inc. were not prevented from defending their interests. In contrast, declaring the service void would undermine the very purpose of section 225.2 of the ITA, which is to preserve the taxpayer's assets when Her Majesty may assert a reasonable concern that they could be squandered if the normal period provided for by the act to take collection action is not shortened.

[42] As an analogy, it is useful to refer to the Ontario Court of Appeal's decision in *Calvert* v. *Salmon* (1994), 113 D.L.R.(4th) 156 ; O.J. No. 544. In that case, the Court held that the purpose of mortgage proceedings notice is to enable the recipients to know the intentions of their creditors within a sufficient time so that they can respond in a timely manner. Consequently, failure to comply with service of prior notice of exercise of a hypothecary right will be without effect when the recipient and his counsel have demonstrated that they were aware of the

creditor's intent that they were able to respond. See also: *Smerchanski v. Minister of National Revenue*, [1972] F.C. 227, upheld by [1974] 1 F.C. 554 (F.C.A.) and by [1977] 2 S.C.R. 23, at p. 249.

[43] Finally, it is also possible to argue that Fiducie Dauphin and 9125-9622 Québec Inc. acted in a manner demonstrating that they had waived the application of subsection 225.2(5) of the ITA in respect of them. The case law has recognized in several cases that taxpayers may expressly or implicitly waive rights conferred on them by tax statutes when these provisions are not of public order. See, for example *Smerchanski v. Minister of National Revenue*, above; *Pearce v. The Queen*, 2005 TCC 38, [2005] A.C.I. no 22, at p. 6; and *Nguyen v. The Queen*, 2005 TCC 697, [2005] A.C.I. no 541, at p. 7.

[44] For all these reasons, I allow Her Majesty's application. I declare valid the service to counsel for the respondents on April 23, 2009, of copies of the jeopardy collection order made on April 22, 2009, and the notices of assessment issued on April 22, 2009.

ORDER

THIS COURT ORDERS that:

1. The application by Fiducie Dauphin and 9125-9622 Québec Inc. to have the jeopardy collection order made on April 22, 2009, set aside is dismissed;

2. Her Majesty's application to confirm the validity of service of the jeopardy collection order made on April 22, 2009, and the notice of assessment issued on April 21, 2009, is allowed;

3. The whole with costs against Fiducie Dauphin and 9125-9622 Québec Inc., joint and severally.

"Yves de Montigny

Judge

APPENDIX

Income Tax Act (1985, c. 1 (5th Supp.))

Definition of "judge"

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.

Authorization to proceed forthwith

(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.

Notice of assessment not sent

(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

Définition de « juge »

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.

Recouvrement compromis

(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.

Recouvrement compromis par la réception d'un avis de cotisation

(3) Le juge saisi peut accorder l'autorisation visée au paragraphe (2), même si un avis de cotisation pour le montant de la cotisation établie à l'égard du contribuable n'a pas été envoyé à ce dernier au plus tard à la date de la présentation de la requête, s'il est convaincu que la réception de

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.

Affidavits

(4) Statements contained in an affidavit filed in the context of an application under this section may be based on belief with the grounds therefor.

Service of authorization and of notice of assessment

(5) An authorization granted under this section in respect of a taxpayer shall be served by the Minister on the taxpayer within 72 hours after it is granted, except where the judge orders the authorization to be served at some other time specified in the authorization, and, where a notice of assessment has not been sent to the taxpayer at or before the time of the application, the notice of assessment shall be served together with the authorization.

How service effected

(6) For the purposes of subsection 225.2(5), service on a taxpayer shall be effected by

(a) personal service on the taxpayer; or

(b) service in accordance with

cet avis par ce dernier compromettrait davantage, selon toute vraisemblance, le recouvrement du montant. Pour l'application des articles 222, 223, 224, 224.1, 224.3 et 225, le montant visé par l'autorisation est réputé être un montant payable en vertu de la présente loi.

Affidavits

(4) Les déclarations contenues dans un affidavit produit dans le cadre de la requête visée au présent article peuvent être fondées sur une opinion si des motifs à l'appui de celle-ci y sont indiqués.

Signification de l'autorisation et de l'avis de cotisation

(5) Le ministre signifie au contribuable intéressé l'autorisation visée au présent article dans les 72 heures suivant le moment où elle est accordée, sauf si le juge ordonne qu'elle soit signifiée dans un autre délai qui y est précisé. L'avis de cotisation est signifié en même temps que l'autorisation s'il n'a pas été envoyé au contribuable au plus tard au moment de la présentation de la requête.

Mode de signification

(6) Pour l'application du paragraphe (5), l'autorisation est signifiée au contribuable soit par voie de signification à personne, soit par tout autre mode ordonné par le juge.

directions, if any, of a judge.

Application to judge for direction

(7) Where service on a taxpayer cannot reasonably otherwise be effected as and when required under this section, the Minister may, as soon as practicable, apply to a judge for further direction.

Review of authorization

(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.

Limitation period for review application

(9) An application under subsection 225.2(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.

Hearing in camera

(10) An application under subsection 225.2(8) may, on the application of the taxpayer, be heard in camera, if the taxpayer establishes to the satisfaction of the judge that the circumstances of the

Demande d'instructions au juge

(7) Lorsque la signification au contribuable ne peut par ailleurs être raisonnablement effectuée conformément au présent article, le ministre peut, dès que matériellement possible, demander d'autre instructions au juge.

Révision de l'autorisation

(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.

Délai de présentation de la requête

(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.

Huis clos

(10) Une requête visée au paragraphe (8) peut, à la demande du contribuable, être entendue à huis clos si le contribuable démontre, à la satisfaction du juge, que les

case justify in camera proceedings.

circonstances le justifient.

Disposition of application

(11) On an application under subsection 225.2(8), 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.

Ordonnance

(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 indiquée.

Directions

(12) Where any question arises as to the course to be followed in connection with anything done or being done under this section and there is no direction in this section with respect thereto, a judge may give such direction with regard thereto as, in the opinion of the judge, is appropriate.

Mesures non prévues

(12) Si aucune mesure n'est prévue au présent article sur une question à résoudre en rapport avec une chose accomplie ou en voie d'accomplissement en application du présent article, un juge peut décider des mesures qu'il estime les plus aptes à atteindre le but du présent article.

No appeal from review order

(13) No appeal lies from an order of a judge made pursuant to subsection 225.2(11).

Ordonnance sans appel

(13) L'ordonnance rendue par un juge en application du paragraphe (11) est sans appel.

Rules for Regulating the Practice and Procedure in the Federal Court of Appeal and the Federal Court (SOR/98-106)

Validating service

147. Where a document has been served in a manner not authorized by these Rules or by an order of the Court, the Court may consider the document to have been validly served if it is satisfied that the document came to the notice of the person to be served or that it would have come to that person's notice except for the person's avoidance of service.

Signification considérée comme valide

147. Lorsqu'un document a été signifié d'une manière non autorisée par les présentes règles ou une ordonnance de la Cour, celle-ci peut considérer la signification comme valide si elle est convaincue que le destinataire en a pris connaissance ou qu'il en aurait pris connaissance s'il ne s'était pas soustrait à la signification.

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-631-09
STYE OF CAUSE:	In the matter of the *Income Tax Act* *v.* Fiducie Dauphin and 9125-9622 QUÉBEC INC.
PLACE OF HEARING:	Montréal, Quebec
DATE OF HEARING:	June 1, 2010
REASONS FOR ORDER AND ORDER:	de MONTIGNY J.
DATED:	November 15, 2010

APPEARANCES:

Martin Lamoureux	FOR THE APPLICANT
Sébastien Sénéchal	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Myles J. Kirvan Deputy Attorney General of Canada Montréal, Quebec	FOR THE APPLICANT
BARDAGI SÉNÉCHAL INC. Montréal, Quebec	FOR THE RESPONDENT