

Federal Court



Cour fédérale

Date: 20101110

Docket: T-976-10

Citation: 2010 FC 1125

Ottawa, Ontario, November 10, 2010

PRESENT: The Honourable Mr. Justice de Montigny

[ENGLISH TRANSLATION]

IN THE MATTER OF *THE INCOME TAX ACT*

and

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

AGAINST:

**PELLIGRINO MULE
541 Crémazie
Berthierville, Quebec
J0K 1A0**

REASONS FOR ORDER AND ORDER

[1] On June 25, 2010, the Court issued an order granting the Crown's motion and authorizing it to immediately take each and every one of the measures set out in paragraphs (a) to (g) of subsection 225.1(1) of the *Income Tax Act* (1985, c. 1 (5th Supp.)) (the Act) or one or more of them, in order to collect and/or guarantee payment by the applicant of the amount of \$171,798.64, as set out in the notices of reassessment sent to the applicant on May 12, 2008, plus interest.

[2] On July 29, 2010, the applicant filed a notice of motion asking that the order of June 25, 2010 be rescinded and that a release on all interim charges and all garnishees on his property further to the contested order be granted to him. The motion is accompanied by new evidence plus an affidavit from the applicant.

[3] For the following reasons, the Court concludes that this motion must be dismissed.

I. The facts

[4] The applicant and defendant, Mr. Mulé, is a taxpayer from Berthierville, Quebec. On May 12, 2008, the Canada Revenue Agency (CRA) issued a notice of reassessment totalling \$151,814.02, based on an analysis of the deposits made into his bank accounts for the 2002, 2003 and 2004 taxation years. In calculating the interest on that debt, the taxpayer, as of June 23, 2010, owed \$171,798.64 to the CRA.

[5] The taxpayer challenged the assessments, but the plaintiff still decided to keep them. In such a situation, subsection 225.1(2) of the Act provides for a period of 90 days (after the CRA's decision regarding the objection is sent) during which the Crown cannot take any action to collect on that debt.

[6] On June 23, 2010, the Minister of National Revenue ("the Minister") filed a notice of *ex parte* motion for an order to collect that debt. The evidence supporting his motion was submitted via an affidavit sworn by Ms. Jocelyne Déziel, dated June 21, 2010. That affidavit presents multiple

lines of evidence that the collecting would be jeopardized by the passing of the time provided for by the Act given the tax payer's tax behaviour and uncertain solvency:

- A. The tax payer has exhibited delinquent tax behaviour. He failed to report a significant portion of his business income between 2002 and 2004, and he deposited some of his company's revenue, representing several hundred thousand dollars of unreported business income, into his personal accounts.
- B. The taxpayer had owned two income properties since March 28, 2008, but did not report any rental income on his return for the year 2007.
- C. The taxpayer's uncertain solvency would jeopardize his debt. According to Ms. Déziel's affidavit, the taxpayer was highly in debt; not only does he owe \$171,798.64 to the CRA, but he also owes \$237,674 to the Quebec Ministry of Revenue and \$24,700 to two credit card issuers. Given that the taxpayer did not have sufficient assets to pay his debts (the net value of his assets is allegedly \$50,720), the Minister argued that his debt was in danger, in light of the taxpayer's financial situation.
- D. The taxpayer issued at least 33 bounced cheques over the last two years.
- E. The taxpayer had just sold his two income properties and allegedly had \$95,000 in his bank account, which was the difference between the selling price and the balance of the mortgages. Thus, he divested himself of two of his major assets and revenue sources to convert them into fungible, easily transferable amounts.

[7] Simon Noël J. likely found that the evidence submitted by the Minister was sufficient for concluding that there were reasonable grounds to believe that allowing the taxpayer time to make the payments would jeopardize the collection. In fact, and as previously mentioned, he issued the

collection order requested by the Crown on June 25, 2010, which the applicant is now asking to have rescinded.

II. Relevant legislation

[8] The following provisions from the Act are relevant to 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]

(f) require a person to turn over moneys under subsection 224.3(1), or

(g) give a notice, issue a

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, ch. 4, art. 166]

f) obliger une personne à remettre des fonds, conformément au paragraphe 224.3(1);

g) donner un avis, délivrer un

certificate or make a direction under subsection 225(1).

certificat ou donner un ordre, conformément au paragraphe 225(1).

[...]

225.1 (1.1) The collection-commencement day in respect of an amount is

[...]

225.1 (1.1) Le jour du début du recouvrement d'un montant correspond :

(a) in the case of an amount assessed under subsection 188(1.1) in respect of a notice of intention to revoke given under subsection 168(1) or any of subsections 149.1(2) to (4.1), one year after the day on which the notice was mailed;

a) dans le cas du montant d'une cotisation établie en vertu du paragraphe 188(1.1) relativement à un avis d'intention de révoquer l'enregistrement délivré en vertu du paragraphe 168(1) ou l'un des paragraphes 149.1(2) à (4.1), un an après la date de mise à la poste de l'avis d'intention;

(b) in the case of an amount assessed under section 188.1, one year after the day on which the notice of assessment was mailed; and

b) dans le cas du montant d'une cotisation établie en vertu de l'article 188.1, un an après la date de mise à la poste de l'avis de cotisation;

(c) in any other case, 90 days after the day on which the notice of assessment was mailed.

c) dans les autres cas, 90 jours suivant la date de mise à la poste de l'avis de cotisation.

225.1 (2) Where a taxpayer has served a notice of objection under this Act to an assessment of an amount payable under this Act, the Minister shall not, for the purpose of collecting the amount in controversy, take any of the actions described in paragraphs 225.1(1)(a) to 225.1(1)(g) until after the day that is 90 days after the day on which notice is mailed to the taxpayer that the Minister has confirmed or varied the

225.1 (2) Dans le cas où un contribuable signifie en vertu de la présente loi un avis d'opposition à une cotisation pour un montant payable en vertu de cette loi, le Ministre, pour recouvrer la somme en litige, ne peut prendre aucune des mesures visées aux alinéas (1)a) à g) avant le lendemain du 90^e jour suivant la date de mise à la poste d'un avis au contribuable où il confirme ou modifie la cotisation.

assessment.

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, 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.

[...]

225.2 (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.

225.2 (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

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.

(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.

[...]

225.2 (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.

225.2 (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

accordance with this section; or	application du présent article;
(b) within such further time as a judge may allow, on being satisfied that the application was made as soon as practicable.	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.
[...]	[...]
225.2 (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.	225.2 (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.

III. Analysis

[9] The case law relevant to reviewing the authorization granted under subsection 225.2(2) of the Act was well summarized by Lemieux J. in *Canada (Minister of National Revenue – MNR) v. Services M.L. Marengère inc.* (1999), 176 FTR. 1. He drew five principles from it, which he expresses as follows at paragraph 63 of his reasons:

(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 ensure full and frank disclosure. On this point, Joyal J. in *Peter Laframboise v. The Queen*, [1986] 3 F.C. 521 at page 528 said this:

The taxpayer's counsel might have an arguable point were the evidence before me limited exclusively to that particular affidavit. As Counsel for the Crown reminded me, however, I am entitled to look at all the evidence contained in the other affidavits. These affidavits might also be submitted to theological dissection by anyone who is dialectically inclined, but I find on the whole that those essential elements in these affidavits and in the evidence which they contain pass the well-known tests and are sufficiently demonstrated to justify the Minister's action.

In *Duncan, supra*, Jerome A.C.J., after quoting Joyal J. in *Laframboise, supra*, viewed the level of disclosure required by the Minister as one of adequate (reasonable) disclosure.

[10] As stated by Lemieux J., it is the applicant (the taxpayer) who 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 with respect to the collection order: see also *Canada v. Satellite Earth Station Technology Inc.* (1989), 30 F.T.R. 94 and *Canada (Minister of National Revenue - M.N.R.) v. 144945*, 2003 FCT 730, [2003] FCJ no. 937 at paragraph 9. In my opinion, the applicant has managed to raise that doubt through the following considerations that he brought to the Court's attention:

- A. The Minister accuses the taxpayer with not reporting the 2007 revenue from his two properties, yet the taxpayer did not purchase them until 2008. Given that the Minister's argument is partly based on the applicant's "delinquent" tax behaviour, the fact that the analysis of that behaviour contains such an error raises doubt about its validity.
- B. The 33 bounced cheques brought forward by the Minister as evidence of the taxpayer's uncertain solvency are actually pre-authorized payments intended for a single individual, namely the mortgage lender for the two properties, a fact that was not mentioned in Ms. Déziel's affidavit; in addition, that situation is allegedly attributable in part to an error by Revenue Québec, which apparently seized Mr. Mulé's bank account in error.
- C. The taxpayer did not put his house up for sale and therefore did not liquidate all his assets, contrary to what Ms. Déziel claimed in her affidavit.
- D. Furthermore, the net proceeds from the sale of the taxpayer's two properties was \$36,000, not \$75,000, and half of that amount was allegedly deposited into the taxpayer's bank account;

E. A considerable part of the bank withdrawals of \$60,000 on February 5, 2008 and \$103,490 on March 27, 2008 mentioned in Ms. Déziel's affidavit went towards paying for the two properties purchased on March 28, 2008 and came from the mortgage financing.

[11] These aspects enable me to find that the applicant met his initial burden of proof and that he raised reasonable doubt about the test set out in subsection 225.2(2) being met.

[12] Therefore, we have to move to the second stage of the analysis suggested by Lemieux J. in *Marengère (supra)*. Thus, the Court must consider the evidence adduced before the judge who granted the collection order and any other relevant evidence for determining whether, on a balance of probabilities, the collection would be jeopardized by allowing time (*Canada v. Satellite Earth Station Technology Inc., supra*) and *Canada (Minister of National Revenue - M.N.R.) v. 144945, supra*, at paragraph 9).

[13] After considering all the evidence submitted, the Court is of the opinion that collecting the debt would in fact be jeopardized by the passing of the time provided for by the Act. In light of the evidence submitted by both parties, I am of the opinion that Ms. Déziel made a full and frank disclosure of the information that she had at the time that she signed her affidavit, and that the errors that managed to slip into it are not attributable to any bad faith on her part. In fact, the figures put forward by Ms. Déziel are indicative of better solvency than that arising from the situation now revealed by the applicant himself.

[14] It appears from the evidence that the applicant's solvency is uncertain, that his ability to pay the amounts due to the CRA is doubtful, to say the least, and that allowing any delay would jeopardize, on a balance of probabilities, the collection of his debt by the CRA. I reach that conclusion for the following reasons:

- A. Multiple indicators suggest that Mr. Mulé is insolvent and unable to pay the amounts that he owes. His total liabilities come to \$434,000, while his assets are \$145,000 at most. He has no job, and he reported low earnings for the 2006 to 2009 taxation years. Lastly, his bank account balance is negative.
- B. The fact that Revenu Québec has not yet taken collection action against the applicant is not relevant to this case. In fact, no evidence was produced regarding Revenu Québec's intentions, and there is nothing indicating that collection action is not about to be taken. On the other hand, Ms. Déziel did in fact confirm in her affidavit that a phone call to Revenu Québec had made it possible to determine that the applicant owes them \$237,674.
- C. The taxpayer has exhibited unorthodox tax behaviour in the past, especially during the 2002 to 2004 taxation years. In fact, Mr. Mulé reported amounts much lower than those actually earned over those three years, and he deposited some business revenue into his personal bank account. On the other hand, it was mentioned at the hearing that Mr. Mulé apparently inherited a considerable amount of money that he allegedly kept at home for a number of years, which Mr. Mulé did not deny.
- D. Lastly, Mr. Mulé liquidated most of his assets, which would enable him to divest himself of them quickly, further jeopardizing the amount owed to the Crown. Moreover, Mr. Mulé could be subject to seizure or declare bankruptcy at any time.

It is true that the applicant did not divest himself of the house he lives in and that no evidence of fraud has been produced. However, as Lemieux J. recalls in *Marengère, supra*, the Minister is not required to prove fraud or fraudulent intent before taking action. All that is required is showing that there are reasonable grounds to believe that granting a delay would jeopardize his debt to the extent that there is the risk of the taxpayer squandering, liquidating or otherwise transferring his assets in order to avoid taxation: see also *Canada (Minister of National Revenue - M.N.R.) v. Ross*, 2010 FC 594, [2010] FCJ no. 671, at paragraph 8.

IV. Conclusion

[15] For all these reasons, the motion for review of the order authorizing the Crown to immediately take one or more of the measures set out in paragraphs 225.1(1)(a) to (g) of the Act in order to collect or guarantee payment by the taxpayer of the amounts stated in the notices of assessment is dismissed.

ORDER

THE COURT ORDERS that the motion for review of the order made by Noël J., on June 25, 2010, authorizing the Crown, represented by the Minister, to immediately take one or more of the measures set out in paragraphs 225.1(1)(a) to (g) of the Act in order to collect or guarantee payment by the taxpayer-applicant of the amounts stated in the notices of assessment, be dismissed.

"Yves de Montigny"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-976-10

STYLE OF CAUSE: In the matter of the *Income Tax Act* v. Pelligrino Mulé

PLACE OF HEARING: City of Québec, Quebec

DATE OF HEARING: October 4, 2010

**REASONS FOR ORDER
AND ORDER BY:** JUSTICE de MONTIGNY

DATE OF REASONS: November 10, 2010

APPEARANCES:

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