Federal Court  Cour fédérale

Date: 20111028

Docket: T-1010-11

Citation: 2011 FC 1231

Ottawa, Ontario, October 28, 2011

PRESENT: The Honourable Mr. Justice de Montigny

BETWEEN:

HER MAJESTY THE QUEEN

Applicant

and

MARCO PROULX
(Also known as Jacques Marco Proulx)
3304 Wilhaven Drive
Cumberland, ON K4C 1K4

Respondent

REASONS FOR ORDER AND ORDER

[1] On June 21, 2011, Madam Justice Mactavish of this Court issued a jeopardy order pursuant to s. 225.2(2) of the *Income Tax Act*, RSC 1985, c 1 (5th Supp) as amended (the "*Income Tax Act*") authorizing the Minister of National Revenue (the "Minister") to take collection action against the Respondent taxpayer, Mr. Marco Proulx, forthwith.

[2] On July 20, 2011, Mr. Proulx filed an application to set aside Justice Mactavish's Order, pursuant to s. 225.2(8) of the *Income Tax Act*. Mr. Proulx's counsel submitted, on this review, that the Applicant did not make full and fair disclosure of the facts, and that he was neither in the process of liquidating his assets nor of moving to the State of Florida, in the United States.

[3] For the reasons that follow, I am of the view that this application to set aside the June 21, 2011 jeopardy Order ought to be granted.

1. Background

[4] The Respondent, Mr. Marco Proulx, was the sole shareholder of Master-Park Inc. ("MPI") , a company incorporated in 2004, involved in the parking business. The company was sold for $1.6 million in April 2008, resulting in capital gains lump sum payments of $500,000 made to him in June 2009, 2010 and 2011 on the condition that he agree not to work in the parking business in Ontario or Québec for five years. As a result, the Respondent has not worked since April 1, 2008, and has been living off the capital gains from the sale of MPI.

[5] After the sale of MPI, the Canada Revenue Agency ("CRA") commenced a general business and GST audit of MPI. The initial dispute involved the Goods and Services Tax ("GST"). Apparently, the Respondent's status as an employee and the fact that he was paid $350,000 upon the sale of MPI, created a GST issue, which the Respondent's tax professional sought to reverse by characterizing the payment as a shareholder dividend instead. Thereafter, the CRA commenced an audit on July 20, 2008. The audit was to include the Corporate Income Tax Returns for the years ending July 31, 2006 and 2007 and the Goods and Services/Harmonized Sales Tax Returns and the

Ontario Corporations tax returns for the period of August 1, 2005 to July 31, 1007. On August 19, 2008, MPI was advised in writing that the audit would commence on September 10, 2008. The CRA acknowledged at this time that in addition to the audits mentioned above, the CRA would also be reviewing the personal income tax returns of Mr. Marco Proulx.

[6] On January 7, 2011, the CRA auditor sent a proposal letter addressed to Mr. Proulx indicating that the CRA planned to adjust his personal tax returns for the 2005, 2006 and 2007 taxation years to include as income, all amounts credited to MPI's shareholder loan account during the audit period. Mr. Proulx was given the standard 30 days to respond to this proposal letter.

[7] On April 7, 2011, the CRA issued notices of re-assessment to Marco Proulx for the 2005, 2006 and 2007 taxation years. Mr. Proulx's total balance owing to the CRA following the three years of re-assessments was $883,010.61. Of this total, $457,192 represented an increase in the taxes payable, while the remainder was made up of interest and penalties. The re-assessments mirrored the adjustments proposed in the January proposal letter. As of June 17, 2011, Mr. Proulx's income tax liability had increased to $891,640.10.

[8] On March 31, 2011, the CRA issued a Goods and Services Tax/Harmonized Sales Tax notice of re-assessment to MPI for the period of July 6, 2005 to September 30, 2007. As well, on April 21, 2011 the CRA issued notices of re-assessment to MPI for the years ending July 31, 2005, 2007 and 2008. These re-assessments, however, are not relevant for the purposes of the current proceedings. That being said, it appears that the Respondent has voluntarily disclosed and paid a GST liability of approximately $283,000.

[9] On June 27 and 28, 2011, Mr. Northcote, a chartered accountant retained by Mr. Proulx to deal with the audits, filed notices of objection for all three re-assessments.

[10] With the proceeds from the sale of MPI, in December 2008 Mr. Proulx purchased a 9,000 square foot bungalow on a 73 acre property in Cumberland, for the amount of $1,725,000. He subsequently listed this property for sale for $1.9 million dollars. On September 14, 2010, however, the bungalow was destroyed by fire. The 73 acre land which now houses only a large 1700 square foot garage, was placed back on the market for private sale sometime in the spring of 2011, and in June 2011, was listed for sale through a realtor.

[11] Mr. Proulx's insurer agreed to pay off the mortgages on the property, which totalled approximately $1.4 million. The insurer also agreed to pay for Mr. Proulx to stay at a hotel for approximately four months, and made advances of approximately $100,000. To date, the insurer has refused to pay for the equity in the house (approximately $600,000, representing the difference between the mortgages paid and the value of the house), for the loss of the contents of the house, estimated at $1,300,000 and for other miscellaneous costs. Accordingly, the claim against the Respondent's insurer is for approximately $2,000,000.00, plus aggravated and punitive damages. The Respondent has sued his insurer for the balance owing and his supplementary affidavit contains two proofs of loss with supporting documentation prepared by National Fire Adjustment Co. Inc., which *prima facie* confirms the validity of the amount claimed from the insurer.

[12] After he sold his business in 2008, Mr. Proulx bought $800,000 worth of exotic cars and attempted to make a business out of it, by buying and selling these cars. The Applicant claims that Mr. Proulx owned 11 vehicles in 2008, nine of which have been sold since 2009. Mr. Proulx provides inconsistent statements as to when the sale of the vehicles took place. In his memorandum of fact and law, he claims that the bulk of the sales took place before December 15, 2008 when he purchased his house. Yet in his affidavit of July 19, 2011, a chart showing the dates his vehicles were purchased and sold does not bear this out, and confirms that most of the cars were sold in 2009, with two being sold as recently as June 3, 2011. Mr. Proulx has explained in his July 19, 2011 affidavit and in cross-examination, that he did not in fact sell these two cars, but merely transferred them into his fiancée's name for insurance purposes. Mr. Proulx also claims in cross-examination that there are many mistakes in the Collections Officer's affidavit with respect to the cars he actually bought and the dates they were sold. He explains this by the fact that they do not have to be registered if they are bought from or sold to a person residing outside the province and not put on the road in Ontario. In any event, it is unclear as to how Mr. Proulx would have bought and sold the cars within a period of eight months (from April 1 to December 15, 2008) and used the proceeds of the sale as a down-payment to purchase his property, as he has alleged.

[13] In July 2010, at the same time as the recession was taking its toll on the Respondent's purchase and sale sideline, the Respondent was offered an opportunity to get back into the parking business, by starting a business that purchased parking meters in Spain and rented them to people who owned parking lots. The Respondent had a ready-made customer base in Florida, as well as in Buffalo and upper New York State, from friends he had from Ottawa, that were now property developers in Florida. When his house burned down and his insurer refused to pay out his claims,

the Respondent became strapped for cash and started pursuing this opportunity in earnest. As a result, the Respondent and his 49% shareholder partner incorporated a company in Canada and one later in Delaware and registered in Florida, to carry on with the parking meter rental business. The Respondent and his partner claim that they intend to develop the parking meter rental business in the United States, until such time as the Respondent is able to continue his parking business in Ontario and Québec.

[14] Mr. Proulx and his fiancée bought a house in Gatineau on May 20, 2011 for the amount of $625,000, with a mortgage of $350,000. Although the sale was duly registered in the land registry office of Hull on June 7, 2011, Mr. Proulx did not disclose it to the CRA auditor in his conversation with her in late June 2011, for fear that the CRA would register a lien against this property. Mr. Proulx admits that this was a mistake, but adds that his accountant did tell the CRA auditor in late June 2011 that his client had bought a home in Gatineau; this is confirmed by way of an affidavit sworn by his accountant on August 10, 2011. In addition to the above, Mr. Proulx bought a boat in Florida that is apparently worth $120,000, and had it delivered to Gatineau.

[15] Following the jeopardy Order granted by Madam Justice Mactavish, the CRA has registered a lien against the Cumberland property of the Respondent, for the total amount of the assessment ($892,250). This would deprive him of the possibility of mortgaging this property to buy equipment for his new parking business venture.

2. The applicable legal principles

[16] The parties are in agreement as to the applicable legal principles; therefore there is no need to discuss them in any great detail. Pursuant to subsection 225(1) of the *Income Tax Act*, the Minister may give 30-days' notice to a person who has failed to pay an amount as required by the Act, of the Minister's intention to direct that the person's goods and chattels be seized and sold. If the person does not make payment within 30 days, the Minister may issue a certificate of the failure to pay and direct that the person's goods and chattels be seized. However, section 225.1(1) of the Act provides that the Minister cannot undertake certain collection action until 90 days after the day of the mailing of a notice of assessment, unless these restrictions are lifted by order of this Court pursuant to subsection 225.2(2). According to that subsection, a judge who is satisfied that there are reasonable grounds to believe (as opposed to mere suspicion) that the collection of all or any part of an amount assessed in respect of a taxpayer would be jeopardized by a delay shall, on such terms as he 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. The test to be applied is "not whether the collection *per se* is in jeopardy but rather whether the actual jeopardy arises from the likely delay in the collection thereof" (*Danielson v Canada (Deputy Attorney General)*, 86 DTC 6518 at p 6519 (FC)). (See also *Her Majesty the Queen v Golbeck*, 90 DTC 6575 at p 6575 (FCA) and *Canada (Minister of National Revenue) v Services M.L. Marengère*, 2000 DTC 6032 (FC)).

[17] When an authorization has been granted pursuant to s. 225.2(2), the taxpayer may apply to a judge of this Court to review the authorization: *Income Tax Act*, s. 225.2(8). In such a review application, the Minister has the ultimate burden of justifying the decision. However, the initial

burden is on the taxpayer to show that there are reasonable grounds to doubt that the test has been met (*The Queen v Satellite Earth Station Technology* (1989), 30 FTR 94 at pp 8-9 (FC), 17 ACWS (3d) 955; *Canada (Minister of National Revenue) v Duncan*, [1992] 1 FC 713, (1991), 47 FTR 220; *Canada (Minister of National Revenue) v Rouleau* (1995), 101 FTR 57 (FC), 57 ACWS (3d) 1051).

[18] The test was aptly summarized by my colleague, Justice Lemieux, as follows:

> The parties agree a jeopardy review under subsection 225.2(8) of the Act involves, at least, the application of the two-part test developed by Justice MacKay in *HMQ v. Satellite Earth Station Technology Inc.*, [1989] 2 C.T.C. 291 or, [1989] 30 F.T.R. 94. Justice MacKay characterized a jeopardy review under subsection 225.2(8) as "involving aspects of an appeal and a hearing *de novo*".
>
> > For the first part of the test, the Applicant (here Mrs. Reddy) has the initial burden to "muster evidence, whether by affidavits, by cross-examination of affiants on behalf of the Crown, or both, that there are reasonable grounds to doubt that the test required by paragraph 225.2(2) has been met".
> >
> > For the second part of the test, Justice MacKay stated "the ultimate burden on the Crown established by paragraph 225.2(2) continues when an order granted by the Court is reviewed". He added:
> >
> > > When the evidence submitted by the taxpayer applicant raises reasonable doubt as to the sufficiency of evidence originally provided by the Crown in an *ex parte* application, it is implicit in the process established by paragraph 225.2(8) that the Court considering review of the authorization once made may consider evidence originally presented on behalf of the Minister in support of the Jeopardy Order and any additional evidence by affidavit or from cross-examination of affiants, presented by either party in relation to the motion for review. The evidence must be considered in relation to the test established by

> paragraph 225.2(2) itself and by relevant cases
> …
>
> *Canada (Minister of National Revenue) v Reddy*, 2008 FC 208 at paras 6-8, 2008 DTC 6185

[19] Finally, it is obvious that an *ex parte* collection order is an extraordinary remedy. Accordingly, the CRA must exercise utmost good faith and ensure full and frank disclosure. A jeopardy order may therefore be struck if the Minister has failed to observe and respect the high standard of disclosure to the Court that is required on *ex parte* applications (see *Canada (Minister of National Revenue) v Services M.L. Marengère*, above, at para 63, and *Canada (Minister of National Revenue) v Duncan*, above, at p 9). This is an independent ground of review, which may justify the striking of a jeopardy order in and of itself (see *Canada (Minister of National Revenue) v Robarts*, 2010 FC 875 at para 6, 374 FTR 87).

3. Analysis

[20] I shall start this analysis with the submission of the Respondent that the Applicant did not make full and fair disclosure of the facts, that the jeopardy Order was made without the benefit of complete information, and based on unsubstantiated facts which were presented in an effort to taint the Respondent's character. If established, this argument would be sufficient to strike the Order.

[21] The Order was obtained without notice to the Respondent due to the Minister's representation that it:

> …has reasonable grounds to believe that the collection of all or any part of the amounts assessed in respect of the respondent would be jeopardized by a delay in the collection thereof:

> (a) the respondent is in the process of liquidating his assets and moving to the State of Florida, USA;
> (b) the respondent's only remaining largest asset, consisting of vacant land measuring approximately 73 acres and housing a large 1700 square foot garage, was recently put in the market for sale; and
> (c) the respondent has disposed and continues to dispose of his personal assets.
>
> Notice of motion, at p. 2 of the *Ex Parte* Motion Record filed June 20, 2011.

[22] Counsel for the Respondent submits that the two affidavits, on the basis of which the *ex parte* motion was brought, (one from Mrs. Shelley Strader, Collections Officer, and the other from Donna MacAleese, Auditor) are replete with inaccuracies, gaps and insinuations that could only mislead the Court as to his real intentions. I will now briefly review these allegations one by one.

[23] Firstly, Mrs. Strader asserted in her affidavit that the Minister had issued re-assessments for a total of $883,010 for "unreported income". Yet the CRA only audited Mr. Proulx's company's shareholder account and re-assessed shareholder loans as taxable benefits. Moreover, the $883,010 amount includes interest and penalties in the approximate amount of $430,000. While Mrs. Strader does not explicitly allege tax evasion or fraud, it remains that her affidavit is inaccurate in this respect and could easily have led the motion judge to infer that the Respondent is a tax evader.

[24] Counsel for the Respondent also alleges that the Minister should have disclosed to the Court that the CRA was aware of Mr. Proulx's intention to appeal the Notice of Assessment, due to the fact that both CRA affiants knew in June that Mr. Proulx intended to file a Notice of Objection, as the CRA had been so advised by his tax advisor. Indeed, both Mrs. Strader and Mrs. MacAleese have confirmed this in their cross-examination. It was therefore literally true, but misleading to

state that “as of today, no notice of objection has been filed by Mr. Proulx” (affidavit of Mrs. Shelley Strader, para 6). It may well be, as the Minister contends, that even if Mr. Proulx’s intention to appeal had been disclosed, the further delay in collecting the tax debt due to the appeal process, would only have weighed in favour of the jeopardy Order. This assessment should have been left to the judge; it was not for the Applicant to determine unilaterally, what was relevant and what was not.

[25] Mr. Proulx alleges that the Minister should have disclosed that he was in the “side line business” of buying and selling muscle cars and other exotic vehicles, instead of stating (through Mrs. Strader’s affidavit) that the Respondent owned 11 vehicles in 2008, nine of which were sold since 2009, with the most recent being sold on June 3, 2011. According to Mr. Proulx, the inference to be drawn from this affirmation is that he is liquidating his assets, when in fact the bulk of the sales took place before the end of 2008 and the proceeds went into the purchase of his house in Cumberland.

[26] As previously mentioned, Mr. Proulx provided inconsistent statements as to when the sale of the vehicles took place. As for Mr. Proulx’s assertion that the sale of the two cars on June 3, 2011 to his fiancée was for insurance purposes only, the Minister could not have known about this, as it was a verbal arrangement. Moreover, the Respondent admitted during cross-examination that this business was not registered with the CRA. I agree with the Minister, therefore, that he could not have possibly known that Mr. Proulx was in the business of buying and selling cars. The sale of muscle cars by Mr. Proulx came to the attention of the Minister when it conducted an online search as part of its investigation. Based on the search results, the Minister claimed to have conducted a

diligent search with the Ontario Ministry of Transportation as to the number of vehicles owned by Mr. Proulx since 2008 and the sale of those vehicles. This information was later provided to the court in support of its *ex parte* application. I agree with the Minister that he cannot be blamed for inaccuracies in this respect, as he relied on information from the Ministry of Transportation of Ontario, the only publicly available source. It may well be, as explained by Mr. Proulx, that the purchasers of the cars were not residents of Ontario, or treated the exotic cars as an investment and thus did not register the transfer of title with the Ministry of Transportation right away, if ever. This is no fault of the Minister.

[27] Mr. Proulx also takes issue with the media report that was filed as an exhibit, to show that Mr. Proulx's house was destroyed by fire. Paragraphs 9 and 10 of Mrs. Strader's affidavit states:

> 9. On September 14, 2010, the bungalow was destroyed by fire. According to the media report, the cause of the fire is under investigation by the Ontario Fire Marshall. Attached as Exhibit "D" is a CBC news article titled "Fire engulfs Cumberland Home: the biggest residential fire this year: fire service".
> 10. As of today, I am not aware of whether any insurance payments have been made to Mr. Proulx.

[28] I agree with Mr. Proulx that an inference can be drawn that he burned his house down and the insurer refused to pay due to an arson for profit scheme. There was no need to refer to a media report published on the day of the fire, especially since the Fire Marshall's report was completed two days after the fire and the police report, one day after the fire, both of which concluded that this fire was not suspicious in nature and that there is no evidence that it was the result of criminal action. CRA could have obtained these reports, as it sometimes does in the course of its investigations. It is true, as the Minister contends, that nowhere in the Applicant's motion materials

nor in Ms. Strader's affidavit, is an arson for profit scheme alleged. But such explicitness was not necessary for the inference to be drawn.

[29] Mr. Proulx also argues that CRA could have filed an Abstract of title for his house in Cumberland that was obtained the day before Mrs. Strader swore her affidavit, showing that two substantial mortgages on the property had been paid off after the fire. Instead, the Minister chose to file a copy of an Abstract of title obtained in April, which did not show the discharged mortgages. The Minister replied that the Abstract of title was attached as an exhibit only to show Mr. Proulx owned the property, and that the discharge of two mortgages was not relevant in a jeopardy application.

[30] Once again, I agree with Mr. Proulx that the Minister did not make full and fair disclosure to the Court. The payment of the two mortgages was indeed relevant, whoever had paid them. If it was the Respondent himself, it showed that he was not absconding with his money and was paying his debts; if it was the insurer, it tended to show that it was honouring the policy and making payments.

[31] As for the CRA not being aware of any payments made to the Respondent by the insurance company, it is not totally accurate. It appears that the CRA was aware of the insurer paying for the Respondent staying at the hotel for more than four months, hardly the act of an insurer alleging arson. With respect to the Minister's claim that he had no knowledge of the name of the insurance company and of any insurance payments made to the Respondent, I find that it is of no merit. On cross-examination, Mrs. Strader admitted that CRA made absolutely no inquiries in relation to any

such payments. CRA had the phone numbers of both Mr. Proulx and his accountant, yet chose not to call either one of them before filing its *ex parte* Motion Record for a jeopardy Order. This was clearly unacceptable.

[32] Finally, Mr. Proulx made a few other allegations that cannot be accepted. First, he claimed that the Minister should have disclosed a conversation that his accountant had with Mrs. Strader in late June, in the course of which Mr. Northcote indicated that the Respondent would not flee the country, as he had just bought a house in Gatineau with his fiancée. Mr. Proulx also argues that the Minister should have known about the yacht he purchased in Florida and should have disclosed it as part of the *ex parte* application. Finally, Mr. Proulx submits that the Minister should have done a reasonable investigation that would have included a title search in Gatineau to confirm the purchase of the house he bought with his fiancée.

[33] These claims are without merit. First, the Minister could not have possibly known about the facts disclosed by Mr. Proulx's accountant in his late June conversation with Mrs. Strader at the time of the *ex parte* application. Second, it is unreasonable to expect that the Minister would contact the Canada Border Services Agency, with whom the Respondent filed border crossing documents and paid customs duties and GST, when the Minister did not even know about the existence of the boat purchased in Florida. Third, there was no indication before the Minister that Mr. Proulx owned property in Québec; indeed, Mr. Proulx denied that he owned property in Québec during his conversation with Mrs. Strader on June 28, 2011.

[34] In spite of the remarks found in paragraphs 32 and 33, I am of the view that the Applicant failed to make a full and frank disclosure to the motion judge of all the facts relevant to the order sought. The characterization of the re-assessments as being for "unreported income", the statement that no notice of objection had been filed without further indicating that the Respondent had clearly expressed the intention to do so, the insinuation that the fire that engulfed Mr. Proulx's house in Cumberland may have been the result of arson, the failure to provide the latest Abstract of title showing that two mortgages had been discharged, and the lack of communication with Mr. Proulx or his accountant before seeking the jeopardy Order, while not motivated by malice, severely undermines the *ex parte* application that was made by the Minister on June 20, 2011. In light of the urgency with which such applications are considered, it is conceivable that these shortcomings may have misled the motion judge. In any event, it is undoubtedly fair to say that the Minister's representations were not compliant with the standard expected in an *ex parte* proceeding. The affiants and the Minister had an obligation to ensure that complete and up-to-date information was presented to the judge, and were obliged to draw to her attention all relevant facts, even those which they considered unhelpful or inconvenient. This has not been done, and for that reason alone, the jeopardy Order must be struck.

[35] Be that as it may, I am also of the view that the Respondent has provided cogent evidence that there are reasonable grounds to doubt that the collection of the amount assessed would be jeopardized by a delay. As previously mentioned, the Minister obtained the jeopardy Order based on two grounds; namely that Mr. Proulx was in the process of liquidating his assets and that he was moving to the State of Florida, U.S.A.

[36] As regards the apparent intention of the Respondent to relocate in Florida, the evidence upon which the Applicant relied is quite sketchy. In her affidavit, Mrs. Strader stated that when contacted on April 13, and May 3, 2011, Mr. Proulx's accountant told CRA officers that Mr. Proulx was out of the country until the end of May. Then, on June 14, 2011, Ms. MacAleese was informed by Mr. Northcote that Mr. Proulx was in Florida looking for work. Mrs. Strader also stated that the "For Sale" sign for the 73 acre land listed a Florida State cell phone, and that an online search showed a Florida cell phone number attached to Mr. Proulx's home contact. Significantly, nowhere in her affidavit does Mrs. Strader mention that Mr. Proulx is moving to Florida; it is no more than a heading in her affidavit, which the Applicant takes up in his written representations without referring to any particular paragraphs of the affidavit.

[37] Having carefully considered the evidence in light of their respective submissions, I am of the view that the Respondent has provided satisfactory explanations and showed that he intends to remain and live in Canada. Mr. Proulx explained that the exhibit relied upon in relation to the online search is from a reunion website, relating to a business the Respondent worked for several years previously. Moreover, the exhibit shows not only a Florida cell phone number, but also an Ottawa land line number. This explanation appears entirely credible, and has not been contradicted by the Applicant. As for the fact that the "For Sale" sign only shows the Florida cell phone number, the Respondent indicated that he spends a few months in Florida during the winter since he sold his parking business. Once the 73 acre land was listed for sale while he was vacationing in Florida, it made sense to give his cell phone number there. As for the fact that Mr. Proulx goes to Florida on a regular basis for business purposes, his explanation is entirely conceivable and plausible. As a result of the non-competition and non-solicitation agreement which he entered into on April 1, 2008 when

he sold MPI, he cannot get back into the parking business in Québec and Ontario until April 1, 2013. Indeed, he submitted that his competitor is prepared to pay him $1 million to keep him out of the Ontario region for an additional two years. Not only has this not been contradicted by the Applicant, but there is even an admission in the Applicant's written representations submitted in response to Mr. Proulx's review application, that Mr. Proulx "has demonstrated that he does not have the intention of relocating to Florida" (Applicant's Record, p 144 at para 11).

[38] Mr. Proulx has also satisfied his initial burden with respect to the claim that he is liquidating his assets, having established that there are reasonable grounds to doubt that a delay would jeopardize the collection of the amount assessed. It is true that his property in Cumberland was put on the market for sale. However, that property had been up for sale for some time, both before the fire in September 2010 and after the fire, and there is no indication that it is likely to sell quickly. Moreover, the Respondent has an outstanding claim of approximately $2 million against his insurance company in relation to the fire loss. Finally, the Respondent has bought a new home with his fiancée in Gatineau for $625,000, and he still owns several exotic cars. There is, in sum, no evidence that the Respondent has been liquidating his assets and transferring them to the United States between the March 31, 2011 assessment and the June 21, 2011 jeopardy Order. For all of the foregoing reasons, I am therefore prepared to find that the Respondent has met his initial burden of proof that there are reasonable grounds to doubt that the collection of all or any part of the amount assessed against him would be jeopardized by a delay in the collection of that amount.

[39] Finally, I also find that the Minister has not met his ultimate burden to show that the jeopardy Order was justified in the first place, even on the basis of all the evidence that is now

before the Court. Counsel for the Minister argued, just as they did before Madam Justice Mactavish, that Mr. Proulx was trying to liquidate his assets and put the money out of CRA's reach. In their response to Mr. Proulx's review application, they added, subsidiarily, that regardless of Mr. Proulx's intent with respect to his assets, the delay in collecting would jeopardize the collection of his debt to the CRA in light of the fact that his income is insufficient to meet his personal and living expenses, and that he was quickly depleting his assets as a result.

[40] As for the Applicant's first argument, the evidence is, at best, mixed. It may well be that Mr. Proulx's vacant land in Cumberland could have sold quickly, that he sought a $300,000 mortgage on that property to invest in his new business venture and was only prevented from doing so by the lien registered by the CRA as a result of the jeopardy Order, and that he sold most of his exotic cars in recent years. On the other hand, the explanations put forward by the Respondent are equally plausible. The attempted sale of real estate, in and of itself, does not warrant a jeopardy order, especially when the property had been on sale for many months and even before the house built on it burned down. Moreover, Mr. Proulx bought a new house in Québec with his fiancée, and his new venture business in Florida (into which he wanted to invest the equity of his property in Cumberland) makes perfect sense considering the restrictive covenant preventing him from working in Ontario and Québec until April 1, 2013. Mr. Proulx also explained that his U.S.-based business is incorporated in the State of Delaware but that this business is, in turn, wholly-owned by a Canadian corporation. This structure was recommended by his advisors (and this is substantiated by a letter from Deloitte & Touche); central to this recommendation is the assertion that Mr. Proulx intends to remain as a resident of Canada. It appears that the earnings being deposited in a U.S. account are then repatriated to the Canadian company's business account with the Royal Bank in

Ottawa. This is hardly the behaviour of somebody who intends to flee the country or to put his money out of reach of the CRA.

[41] There is indeed more. The Respondent's ex-wife filed an affidavit confirming that she and the Respondent share the custody of their daughter, with whom he spends a significant amount of time. She adds: "Despite all the difficulties Marco endured, I truly believe that he would never flee the country nor abandon his daughter" (Supp. Motion Record, vol 1, at p 373).

[42] There is also an affidavit from his business partner, Mr. Pompei Balestra, to the effect that he has started the parking meter business in the U.S. with Mr. Proulx, who teaches him the business as the business is growing. The affiant states that they intend to develop their parking meter rental business in the U.S., until such time as the Respondent is able to continue his parking business in Ontario and Québec, at which time they intend to develop their business in those two provinces. This is also confirmed by an affidavit of his fiancée, who states that all their friends and family live in the Ottawa-Gatineau area and that she is "certain he has no intention to liquidate his remaining assets and move to Florida on a permanent basis".

[43] All this evidence is uncontradicted, and tends to confirm Mr. Proulx's version. When viewed as a whole, I do not think there are reasonable grounds to believe that the Respondent would waste, liquidate or otherwise transfer property so as to make it unavailable to the Minister. In other words, I do not think that the Record viewed as a whole, that is both the Record that was put before Madam Justice Mactavish and the further affidavits and exhibits filed for the purposes of this review application, can support a *bona fide* belief in a serious possibility based on credible evidence (see

Canada (Minister of National Revenue) v 514659 BC Ltd, 2003 FCT 148 at para 6, 120 ACWS (3d) 907; *Gallo (Re)*, 2009 FC 49 at para 16.

[44] The Minister is correct in stating that what matters is not the intention of the taxpayer, but the effect or result of his actions in dealing with his assets (see *Canada (Minister of National Revenue) v Delaunière*, 2007 FC 636 at para 67, 160 ACWS (3d) 377). The taxpayer's deeds must be examined objectively and realistically, and the Minister does not have to prove fraud, deceit or bad motive.

[45] It is the Minister's position that Mr. Proulx's income is insufficient to meet his personal and living expenses. Mr. Proulx has not reported any income for the taxation years 2009 and 2010, and has been earning $5,000 monthly for the last couple of months from his business in Florida. Yet, it appears that Mr. Proulx's monthly mortgage payments on the house he bought in Gatineau, together with his payments on the two vehicles that he leases, alone exceed his monthly income of $5,000. The Minister also submits that when considering all of Mr. Proulx's liabilities, his net worth is less than the amount owed to CRA.

[46] The Respondent retorts that the Minister's figures do not take into account his insurance claim in the approximate amount of $2 million, the equity in the cars that he leases, and the fact that the mortgage payments on the Gatineau property have been reduced as a result of the new conventional mortgage at a lower interest rate they have been able to negotiate, following the sale by his fiancée of her house. The Respondent also adds that his income will grow exponentially because every meter lease that is added as the business grows, adds to his monthly income, and that

his fiancée is only on a one year leave of absence from the government and will be able to contribute to their joint income starting next year.

[47] While the earning capacity of the Respondent is somewhat speculative, it is not entirely baseless. The Respondent obviously knows the parking business and has been quite successful at it in the past. The non-competition agreement that he was made to sign when he sold MPI and the apparent willingness of the company to whom he sold MPI to extend this agreement for another two years, would tend to bolster Mr. Proulx's claim that his business income will likely increase. The same conclusion can be drawn from the letter of the President and CEO of Xpress Parking Solutions, a Canadian company with whom Mr. Proulx is doing business in Florida, stating that he has dealt with Mr. Proulx for 20 years, appreciates his knowledge of the Canadian market and is anxiously waiting for him to start to represent their products in Canada as soon as he has completed his non-competition obligation.

[48] Taking into account all of this evidence, I am of the view that the Minister's assessment of the Respondent's financial situation does not accurately reflect his true situation. As a result, I have not been persuaded that there are reasonable grounds to believe that the delay in collecting would jeopardize the collection of all or any part of the amount assessed.

4. Conclusion

[49] As a result of the foregoing, the motion of the Respondent shall be granted. Accordingly, the *ex parte* Order of Madam Justice Mactavish dated June 21, 2011 is set aside, and the Minister shall be ordered to forthwith withdraw from taking or pursuing collection actions with respect to the

tax debt of the Respondent, including the lien registered against the Respondent's property in Cumberland. This is without prejudice to the Minister's right to make a new application if there is a change in circumstances.

[50] Costs shall be granted to the Respondent.

ORDER

THIS COURT ORDERS that:

1. The motion made by the Respondent is allowed;

2. The Order made on June 21, 2011 is set aside;

3. The Minister shall forthwith withdraw from taking or pursuing collection actions with respect to the tax debt of the Respondent, including the lien registered against his property in Cumberland;

4. The present Order is made without prejudice to the Minister's right to make a new application if there is a change in circumstances; and

5. Costs are granted to the Respondent.

"Yves de Montigny"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1010-11
STYLE OF CAUSE:	HER MAJESTY THE QUEEN v MARCO PROULX
PLACE OF HEARING:	Ottawa, ON
DATE OF HEARING:	August 25, 2011
REASONS FOR ORDER AND ORDER:	de MONTIGNY J.
DATED:	October 28, 2011

APPEARANCES:

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