LEGAL BUSINESS REPORT | ALPERT LAW FIRM
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DEFENDING JEOPARDY ASSESSMENTS

This issue of the Legal Business Report provides current information on jeopardy assessments under the Income Tax Act (Canada) and possible challenges to such assessments. Alpert Law Firm is experienced in providing legal services to its clients in tax dispute resolution, tax litigation, tax and estate planning matters, corporate-commercial transactions and estate administration.

A. INTRODUCTION

The Minister has a variety of collection powers pursuant to the provisions of section 222 to 228 inclusive of the *Income Tax Act* (the "Act"). Subsection 225.1(1) of the Act provides that the Minister cannot exercise most of these collection powers against a taxpayer until the day after 90 days from the date a Notice of Assessment is mailed. Furthermore, if a Notice of Objection or Notice of Appeal has been filed by a taxpayer, the Minister is not able to undertake any collection actions on the tax debt assessed in the Notice of Assessment until the appeal is resolved.

Due to the restrictions placed on the Minister in section 225.1 of the Act, it may be several months or years until the taxpayer is forced to pay amounts which are owing as a result of a tax assessment. In certain circumstances, where a taxpayer is likely to flee the country, this delay could greatly decrease the likelihood of the Minister collecting tax debts.

Section 225.2 of the Act provides an exception to the general rule expressed in section 225.1 of the Act. Subsection 225.2(2) of the Act allows the Minister to bring an *ex parte* application before a judge in the Federal Court of Canada or a Provincial Superior Court to obtain authorization to collect an assessed amount where there are reasonable grounds to believe that the collection of all or part of an assessed amount would be jeopardized by a delay in collection (the "Jeopardy Order").

B. CONSIDERATIONS IN GRANTING A JEOPARDY ORDER

The Minister has the onus to prove that the ability of the taxpayer to pay the amount assessed will decrease if there is a delay in collection. In other words, it is not a question of whether or not collection at the current time is in jeopardy, but, rather, whether the collection of the tax assessed will be in jeopardy due to the collection

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restrictions under section 225.1 of the Act. It is important to note that the inability of a taxpayer to pay the tax at the time of assessment is not, by itself, conclusive.

In determining whether or not to authorize a Jeopardy Order, a judge must be satisfied it is more likely than not that collection of assessed amounts would be jeopardized by a delay in collection. This is an objective test to determine whether there are reasonable grounds for believing that the taxpayer will waste, liquidate, or otherwise transfer property so as to make it unavailable for collection by the Minister.

Factors that may justify a decision to grant a Jeopardy Order include, but are not limited to, situations where the taxpayer has:

(a) acted fraudulently or has been involved in illegal activities;

(b) engaged in the liquidation or transfer of his or her assets so as to put the assets out of the Minister's reach;

(c) engaged in unorthodox behaviour that raises a reasonable apprehension that funds may no longer be available to satisfy the tax debt (ie. keeping large amounts of cash in one's residence or safety deposit box, investing in significantly risky ventures);

(d) engaged in tax evasion tactics, such as the failure to report income to the Canada Revenue Agency accurately;

(e) a significant amount of debt in comparison with his or her income; or

(f) assets that could potentially decline in value, deteriorate, or perish over the ordinary course of time.

One of the above-mentioned factors, by itself, may not be determinative. The Court will evaluate the evidence as a whole in order to arrive at a reasonable conclusion regarding the ability of a taxpayer to satisfy his debts over time.

Pursuant to the provisions of subsection 225.2(2) of the Act, the Minister is entitled to bring an application on an *ex parte* basis to a Federal Court judge to obtain a Jeopardy Order. This permits the Minister to bring an application for a Jeopardy Order, and receive such an order, without first notifying the taxpayer. Pursuant to subsection 225.2(3) of the Act, a judge may authorize a Jeopardy Order in respect of an assessed amount even prior to the issuance of a Notice of Assessment to the taxpayer. This may

occur if the judge is satisfied that the receipt of the Notice of Assessment would likely further jeopardize the collection of that amount.

Pursuant to subsection 252.2(5) of the Act, once a Jeopardy Order is obtained by the Minister, it must be served on the taxpayer within 72 hours unless the order specifies service at another time. A judge will usually extend this time period if the Minister reasonably requires more than 72 hours to arrange for a seizure of the taxpayer's assets. In the event that the Jeopardy Order is obtained prior to a Notice of Assessment being sent to the taxpayer, the Notice of Assessment is required to be served together with the Jeopardy Order.

C. JUDICIAL REVIEW OF A JEOPARDY ORDER

Under subsection 225.2(8) of the Act, a taxpayer may file an application for judicial review to set aside the Jeopardy Order upon giving at least six clear days' notice to the Deputy Attorney General of Canada. Unlike the *ex parte* application initially tendered by the Minister, the judge hearing the application for review has the benefit of considering representations submitted by the taxpayer as well.

The ultimate burden of justifying the grant of the Jeopardy Order falls on the Minister when the order is reviewed under subsection 225.2(8) of the Act. However, the initial onus will be on the taxpayer to present evidence that shows there are reasonable grounds to doubt that the requirements in subsection 225.2(2) of the Act have been met. If a taxpayer can show that the evidence submitted by the Minister on the *ex parte* application was incomplete, and that additional evidence would support the proposition that a delay would not jeopardize the collection of the assessed amounts, then the taxpayer will succeed in having the Jeopardy Order rescinded.

To determine whether or not the Jeopardy Order will be upheld, the Court will conduct the same analysis as is required under subsection 225.2(2) of the Act. The judge will consider the evidence from both parties to decide whether there are reasonable grounds to believe that the collection of all or part of the assessed amount will be jeopardized by a delay in their collection. Pursuant to subsection 225.2(11) of the Act, the judge who is hearing the application for review has the authority to confirm, set aside, or vary the Jeopardy Order initially granted.

When applying *ex parte* to the Court for a Jeopardy Order against a taxpayer, the Minister must act in good faith. This entails making frank and full disclosure with respect to all allegations that are made pertaining to the taxpayer in question. If the taxpayer is

able to show, on judicial review, that the Minister made false statements or deliberately misled the judge during the application for a Jeopardy Order, the order will be set aside. Similarly, if the Minister neglected to make full disclosure of the facts during its application for a Jeopardy Order, and further evidence demonstrates that a delay would not jeopardize the collection of the tax debt, the order will also be rescinded.

Pursuant to subsection 225.2(9) of the Act, an application by the taxpayer for judicial review made under subsection 225.2(8) must be filed within thirty days from the date on which the Jeopardy Order was served on the taxpayer. The judge has the discretion to allow an application to be filed after the 30 day time period if the judge is satisfied that the application was made by the taxpayer as soon as practicable.

Pursuant to subsection 225.2(13) of the Act, there is no right of appeal from a decision made under subsection 225.2(11). In other words, neither the taxpayer nor the Minister may appeal a decision that has already been judicially reviewed under subsection 225.2(8) and 225.2(11) of the Act.

D. RECENT CASE LAW

1. *Re Arif,* 2011 D.T.C. 5145

In this recent Federal Court of Canada case, the Minister brought a *ex parte* application seeking authorization to take actions forthwith to collect amounts owed as tax debts by a husband and wife (collectively, the "taxpayers"). The taxpayers were jointly and severally liable for the husband's tax debt because the husband transferred the family home to the wife without consideration when he had a tax debt of $109,123.92 pursuant to a Notice of Reassessment against the husband.

During the CRA audit, the husband stated that he had kept significant amounts of cash for his brother, claiming that it was to prevent his brother from gambling away the money and to allow him to pay the supplies for his tavern business. On April 26, 2011, during a search of the husband's home, the police officers found 40 grams of cocaine and $5,600 in cash. At that time, the husband was charged with drug trafficking and possession of drugs for the purpose of trafficking. In addition, at the time of the trial, the family residence had been up for sale for nearly 5 months during which time the asking price had even been reduced by $10,000. In addition, barely one month prior to the trial, the taxpayers sold immovable property that they owned until then.

The Federal Court found that without income, the fact that the husband was preparing to sell the family residence would make collection on his tax debt that much more difficult. If the residence was sold, it was unlikely that the taxpayers would seek to purchase a new residence immediately before knowing the outcome of the criminal charges against the husband, since he faced possible imprisonment in the near future and the wife had no source of income. The family residence seemed to be the taxpayers' last known asset that could cover their tax debts. Thus, once the assets were liquidated by the taxpayers, the proceeds could potentially reduce in value over time.

The Federal Court granted the Minister's motion and authorized the Jeopardy Order. In its reasons, the Federal Court held that the following factors justified the issuance of the Jeopardy Order against both of the taxpayers: (i) the husband was involved in cocaine trafficking and faced a long prison sentence if convicted, during which he would be deprived of income and have difficulty in settling his tax debts; (ii) each of the taxpayers had proceeded to liquidate or transfer his or her assets; (iii) the husband had attempted to evade his tax liabilities, as demonstrated by the gross under-reporting of his income in previous years; and (iv) the amount of the taxpayers' tax debt was significant in relation to their incomes and assets.

The Federal Court held that these factors were more than sufficient grounds to justify issuing the Jeopardy Order sought. The Court concluded that the delays regarding collection would seriously jeopardize the debt to the Minister and would very likely enable the taxpayers to liquidate their remaining assets, including the family residence that had been up for sale for a quite a few months, and transfer them out of the Minister's reach.

2. ***MNR v. Sung Youn Park*, 2011 DTC 5043**

In this Federal Court of Canada case, the Minister brought an *ex parte* application under subsection 225.2(2) of the Act for the issuance of a Jeopardy Order against the taxpayer. At the time that the taxpayer's former husband instructed the taxpayer's son to transfer a property (the "Subject Property") to the taxpayer for nominal consideration, the market value of the Subject Property was over $1,100,000 and the taxpayer's son already owed the Canada Revenue Agency a significant amount of unpaid taxes.

Consequently, the taxpayer was assessed for around $1,400,000 under the transferor-transferee joint tax liability provisions of section 160 of the Act. The taxpayer filed a Notice of Objection to that assessment and, when the Subject Property was sold for over $2,000,000, no portion of the tax assessed was paid. Besides the Subject

Property, the only other exigible asset that the taxpayer held in Canada was the 15% of shares of a corporation from which she had been receiving dividends from 2006 to 2009 in amounts that varied from $30,000 to $60,000. In addition, her annual income as a nurse only made up a fraction of the tax debt that she owed to the Canada Revenue Agency.

Past circumstances also suggested that there was not a high likelihood that the taxpayer would willingly provide the Minister with sufficient funds to satisfy her unpaid taxes. When the taxpayer previously sold a rental property, she failed to pay the taxes owing in respect of the sale. The taxpayer's financial assets were also deeply intertwined with her former husband and her son, both of whom had strong offshore connections and owed the Canada Revenue Agency substantial amounts of tax. The taxpayer's former husband, who lived in South Korea, seemed to control the family's finances and, historically, most of the family's assets were eventually transferred to him. Furthermore, the Minister faced great difficulties in making direct contact with the taxpayer or with any of her immediate family members.

The Federal Court granted the Minister's application as there was compelling evidence submitted by the Minister as to a high likelihood of the dissipation or movement of the taxpayer's assets out of the jurisdiction. The unorthodox behaviour of the taxpayer raised a reasonable apprehension that there would be difficulty in retracing these funds or in recovering them if a normal delay in collection were allowed. In order to prevent jeopardizing the collection of assessed amounts owed to the Minister, the Court held that an *ex parte* Jeopardy Order be issued against the taxpayer pursuant to subsection 225.2(2) of the Act.

3. ***MNR v. Steele,* [1996] 2 CTC 279**

In this Saskatchewan Court of Queen's Bench case, the Minister successfully brought an *ex parte* application under subsection 225.2(2) of the Act to take immediate action to collect amounts owed as tax debts by the taxpayer. At that time, the taxpayer was found to be disposing of assets to a non-arm's length corporation, and to her husband.

The Saskatchewan Court of Queen's Bench held that the collection of tax by the Minister was not jeopardized by a delay in collection because all of the dispositions of property were being made to non-arm's length individuals. In particular the taxpayer had disposed of assets to a corporation of which she was the sole shareholder, and a vehicle to her husband. The non-arm's length nature of all of the transferees of the taxpayer's property meant that the Minister was still capable of collecting the tax debt by

applying section 160 of the Act, which provides for vicarious liability for non-arm's length individuals who receive property below fair market value from tax debtors. Because the Minister was still capable of collecting the funds that the taxpayer had disposed of, the Court held that the Minister had not proven it was more likely than not that the funds would be jeopardized by a delay in collection.

4. *MNR v. Denise Cormier-Imbeault*, 2009 DTC 5165

In this Federal Court of Canada case, the Minister brought an *ex parte* application under subsection 225.2(2) of the Act seeking authorization to take immediate actions to collect amounts owed as tax debts by the taxpayer. At that time, the taxpayer was found to owe the CRA a tax debt of over $406,000 and her only assets known to the CRA having a realizable value were: (i) a balance of around $581,000 in a joint bank account that allowed unlimited access by both the taxpayer and her husband; and (ii) an undivided half interest in a property assessed at $54,400.

The Federal Court found that the collection of tax by the Minister would be jeopardized by a delay in collection as (i) many withdrawals were made from the joint bank account in the past; and (ii) the taxpayer's husband did not seem trustworthy, especially since he previously had pleaded guilty to tax evasion, transferred half of his undivided ownership of a property to his wife upon learning that the CRA was in a position to undertake collection measures on his assets and had engaged in efforts to hide the existence of the joint bank account from the CRA. Consequently, the Court granted the Minister's application for an *ex parte* Jeopardy Order pursuant to subsection 225.2(2) of the Act, and authorized the Minister to take forthwith any or all of the actions described in paragraphs 225.1(1)(a) to (g) of the Act in order to collect payment of the amounts owed by the taxpayer.

5. *MNR v. Tehrani*, 2011 FC 1232

In this Federal Court of Canada case, the taxpayer brought an application under subsection 225.2(8) of the Act to review and set aside the *ex parte* Jeopardy Order issued by the Federal Court. The taxpayer had an outstanding balance of approximately $1,400,000 from previous tax assessments and it was alleged that he also failed to report income of approximately $3,100,000. He had accumulated around $1,200,000 in credit card debt and had appropriated over $1,500,000 from corporations of which he was a shareholder.

In addition, the taxpayer was involved in corporations that had not met their fiscal obligations, as they had either neglected to file tax returns or had failed to pay the

amounts in their tax assessments. Three months after the receipt of the notices of assessments, the taxpayer granted hypothecs on two of his properties to his mother, which effectively eliminated all of the equity remaining on his most valuable assets.

Furthermore, the taxpayer made many misrepresentations, including the false statements he gave to financial institutions regarding his income, as well as the inaccurate information he provided to the CRA regarding some of his assets. In addition, he refused to co-operate with the CRA when asked to provide a complete list of his assets. The taxpayer had also been involved in the liquidation of his assets and the withdrawal of significant amounts from his investment and bank accounts for his own personal benefit.

In his application for judicial review, the taxpayer claimed that the Minister had not met the burden of proving there were reasonable grounds to believe that the taxpayer would waste, liquidate or otherwise transfer his assets so as to become less able to pay the assessed amount. The taxpayer argued that the Minister's allegations of his failure to disclose income were being contested and should not form part of the analysis under subsection 225.2(8) of the Act. He also claimed that the hypothecs granted to his mother guaranteed repayment of loans that had existed for some time. With regards to the allegation of misrepresentation, the taxpayer argued that the information that he omitted to relay to the Canada Revenue Agency was either not relevant because it was of minimal value, or were events that happened without his knowledge. He further argued that some of the withdrawals from his bank accounts were made prior to the issuance of the tax assessment, and others were one-time withdrawals that were partly reinvested in his RRSP.

The Federal Court held that the taxpayer failed to prove that the Jeopardy Order issued against him did not meet the requirements set out in subsection 225.2(2) of the Act. The Court found that the hypothecs that the taxpayer granted to his mother, the misrepresentations he made and his refusal to co-operate with the CRA provided reasonable grounds for believing that the collection of all or part of the assessed amount will be jeopardized by a delay in their collection. As such, the Court dismissed the taxpayer's application for judicial review and upheld the order for immediate collection.

6. ***MNR v. Ander Rouleau*, 95 DTC 5597**

In this Federal Court case, the taxpayer was reassessed in respect of his 1989-1991 and 1992-1993 taxation years in two separate notices of assessment, which were based on net worth statements developed in part on the basis of information gathered

during two search warrants. During the execution of the search warrants, the Minister discovered that the taxpayer had: (i) $25,000 in cash at his apartment; (ii) $92,000 in cash in safety deposit boxes; and (iii) $96,000 in cash in a cold storage depot locker maintained by the Applicant. The Minister then obtained a *ex parte* Jeopardy Order in respect of the Notices of Reassessment from the Federal Court pursuant to subsection 225.2(2) of the Act. The taxpayer filed an application in the Federal Court to review the Jeopardy Order obtained by the Minister, seeking to have it set aside.

The taxpayer argued that the discoveries from the execution of the Search Warrants did not provide reasonable grounds to believe that collection of all or any part of the assessed amounts would be jeopardized by a delay in collection. The taxpayer also claimed that the Minister did not make full and frank disclosure by failing to put before the judge the net worth statements that formed the basis of the Notices of Reassessment.

The Federal Court affirmed its decision to issue the Jeopardy Order and dismissed the taxpayer's application. The Court held that the taxpayer failed to discharge the initial burden of showing that there were reasonable grounds to doubt that the requirements in subsection 225.2(2) of the Act have been met. The Court found that (i) the nature of the reassessments against the taxpayer indicated a range of income quite out of scale with the incomes previously reported by the taxpayer; and (ii) the way in which the taxpayer held his assets: (a) disclosed an unorthodox course of conduct; and (b) disclosed practices that would have made it easy for the taxpayer to spirit away substantial assets if he had been so inclined so that there conceivably could have been difficulty in tracing the assets and in recovering them.

7. ***MNR v. Theriault-Sabourin,* 2003 DTC 5151**

In this Federal Court of Canada case, the taxpayer was liable to the CRA in the amount of $353,170 as a result of Section 160 assessments under the Act issued by the CRA in respect of non-arm's length transfers received by the taxpayer from her husband. The taxpayer's husband was the sole shareholder and director of a corporation involved in bookkeeping, tax preparation and tax planning for individuals, family trusts and corporations. The business was run as a sole proprietorship until 1997 when its assets and clientele were transferred to the corporation. The taxpayer's husband and the corporation were reassessed under the *Excise Tax Act* resulting in a total owing of approximately $135,000. The taxpayer's husband was then personally reassessed under the *Income Tax Act* resulting in an income tax liability of approximately $670,000. During 2002, the taxpayer's husband was also forced into bankruptcy by his creditors, and was then investigated for tax evasion under the Act.

During the relevant years, the CRA alleged that the taxpayer's husband made several non-arm's length transfers to the taxpayer, including the transfer of the interest in their principal residence in January, 1997 (the "First Property"). The taxpayer subsequently sold the First Property and acquired a new property at a construction cost of $637,000 (the "Second Property"). During October, 2002, the taxpayer entered into: (i) an agreement to sell the Second Property for the sum of $550,000; and (ii) an agreement of purchase and sale for the purchase of a new home (the "Third Property") for $305,000. Three days after the Minister issued a section 160 assessment to the taxpayer, the Minister obtained an *ex parte* Jeopardy Order against the taxpayer.

The taxpayer filed an application in the Federal Court to review the Jeopardy Order obtained by the Minister, seeking to have it set aside. As a consequence of the Jeopardy Order, there was a writ of execution in favour of the CRA registered on the Second Property. The solicitor for the purchaser of the Second Property insisted that the writ of execution be lifted prior to closing. The taxpayer argued that the writ of execution should simply be transferred from the Second Property to the Third Property to allow the sale to go through, but the Minister took the position that the recovery of the tax debt would be diminished as a result of the associated costs with the sale of one property and the purchase of another.

The taxpayer also argued that the Minister failed to establish reasonable grounds for the Jeopardy Order at the *ex parte* hearing or alternatively, that the taxpayer's evidence cast doubt on the Minister's claim of reasonable grounds. The taxpayer argued that the burden was on the Minister to establish evidence of the taxpayer's waste, liquidation or transfer of assets so as to make funds unavailable to the Minister and that the behavior or conduct of the taxpayer's husband was irrelevant. The taxpayer argued that this was a forward looking exercise and that future frustration of collection is the essential element and that, unlike her spouse, she was solvent and had sufficient assets to pay.

The Federal Court of Canada dismissed the taxpayer's appeal and upheld the Jeopardy Order. The Federal Court of Canada agreed with the taxpayer that the essential question related to the future; however, it held that the future was impossible to predict and that it was reasonable to look at past conduct when assessing the positions of the parties as to what is more likely than not to happen to the Minister's debt. The Federal Court found that it was reasonable to conclude that the taxpayer had knowledge of her husband's impropriety regarding his business and also found that the taxpayer played an important role in her husband's scheme to defraud the tax authorities. On the totality of the evidence, the Federal Court was not persuaded that

the Jeopardy Order should be set aside or varied. The Federal Court also upheld the writ of execution on the Second Property.

8. ***R v. Marco Proulx*, 2011 DTC 5170**

In this Federal Court of Canada case, the taxpayer sought to set aside a Jeopardy Order issued against him pursuant to subsection 225.2(2) of the Act. In order to obtain the Jeopardy Order, the Minister submitted that collection of all or any part of the assessed amount would be jeopardized by a delay in collection. The Minister persuaded the motion judge to grant the Jeopardy Order by leaving the impression that the taxpayer: (i) was evading tax; (ii) was liquidating and transferring his assets to put them beyond the reach of the Minister; and (iii) had an intention to move to Florida.

The taxpayer appealed the decision, claiming that the Minister did not exercise good faith and failed to observe the high standard of full and frank disclosure required in an *ex parte* application for a Jeopardy Order. The taxpayer argued that the Minister not only failed to disclose relevant facts to the judge, but also made insinuations that misled the judge into believing that the taxpayer would be unable or unwilling to pay the assessed amounts if a normal delay in collection was allowed.

The Court held that the Minister's assessment of the taxpayer's financial situation did not accurately reflect the true state of the taxpayer's affairs. It was found that the Minister misled the judge on the *ex parte* application by: (i) stating that no Notice of Objection had been filed even though it was known that the taxpayer had an intention to object to the assessments, (ii) insinuating that the taxpayer caused the fire that destroyed his home when the fire and police report both concluded that the fire was not suspicious, (iii) failing to provide the latest Abstract of title showing that the taxpayer had discharged two of his mortgages, and (iv) erroneously characterizing the entirety of the taxpayer's re-assessments as being for "unreported income".

The Minister had not fulfilled the duty to provide all relevant facts to the judge. The Court found that the taxpayer had provided cogent evidence that he intended to remain in Canada and that he was not engaged in liquidating or transferring his assets in an attempt to remove them from the CRA's reach. Since the Minister did not meet the ultimate burden to show that the Jeopardy Order was justified, the court granted the taxpayer's application and set aside the Jeopardy Order.

9. *MNR v. Atchison*, 89 DTC 5088

In this Supreme Court of British Columbia case, the taxpayer brought an application to set aside the *ex parte* Jeopardy Order issued pursuant to subsection 225.2(2) of the Act. The taxpayer was reassessed for the years 1981 to 1986 in the total amount of approximately $400,000. In obtaining the Jeopardy Order, the Minister argued that: (i) the taxpayer was in the process of divesting himself of assets and converting them into cash; and (ii) the collection of income tax from the taxpayer was in "jeopardy" for the purposes of subsection 225.2(2) of the Act as it was his belief that the taxpayer appeared very likely to flee the country or conceal, divest, or dissipate assets, rather than pay income tax.

In arguing to set aside the Jeopardy Order, the taxpayer denied the factual allegations made by the Minister and explained that the divestiture of certain assets was a result of court orders obtained in the context of a matrimonial action between the taxpayer and his wife. The taxpayer also cited *Danielson v. MNR* 86 DTC 6518 for the proposition that the essence of subsection 225.2(1) of the Act is the matter of collection jeopardy by reason of a delay in collection normally attributable to the appeal process.

The Supreme Court of British Columbia allowed the application and set aside the Jeopardy Order. The Court held that the wording of subsection 225.2(1) of the Act indicated that the onus lies with the CRA to show that a delay in collection will jeopardize the collection process. The Court concluded that, based on the evidence, the Minister was not justified in seeking a Jeopardy Order against the taxpayer for the following reasons: (i) the Minister did not present any evidence with respect to a delay in the proceeding caused by the taxpayer; (ii) the delay in the proceedings was caused by the CRA as it led the taxpayer to believing that further assessments were forthcoming in its discussions with the solicitor for the taxpayer; and (iii) the Court rejected the Minister's allegation that the taxpayer was planning on leaving the country or dissipating his assets. Finally, the Court concluded that the Minister did not obtain the Jeopardy Order in good faith as it did not make full disclosure of relevant information to the Court with respect to the allegations. As such, the Court granted the taxpayer's application to have the Jeopardy Order set aside.

10. *MNR v. Mary Rudyk*, 96 DTC 6192

In the Federal Court-Trial Division, the Minister was granted an *ex parte* Jeopardy Order which authorized him to take any of the collective actions described in subsection 225.1(1)(a) to (g) of the Act. Following the grant of the Jeopardy Order, the Minister and the taxpayer proceeded to engage in settlement negotiations. However,

settlement talks broke down more than 30 days after the Jeopardy Order had been served.

The taxpayer sought to bring an application to appeal the *ex parte* Jeopardy Order, despite the fact that the order had been served more than 30 days prior. The Court granted the taxpayer's application because it would be counter-productive to efforts to settle in good faith if the 30-day appeal period were to run during negotiations. Furthermore, the taxpayer should not be foreclosed from applying for judicial review of the Jeopardy Order simply because she missed the deadline while contesting the accuracy of her tax assessments.

11. *Re Naber*, 2003 SKQB 563

In this Saskatchewan Court of Queen's Bench case, the Minister obtained an *ex parte* jeopardy order under subsection 225.2(2) of the Act to take immediate action to collect amounts owed as tax debts by the taxpayer. The taxpayer had operated a farming business through a corporation, and owed CRA $1,024,000 as a result of repeated tax evasion. The taxpayer brought an application for review of this order under s.225.2(8) of the Income Tax Act.

The Saskatchewan Court of Queen's Bench held that the taxpayer had brought a preponderance of evidence to show that collection of tax by the Minister was not jeopardized by a delay in collection. Crucially, the Court determined that the nature of the taxpayer's conduct involving repeated tax evasion that gave rise to the reassessments could not be held against him with regards to a review of a jeopardy assessment. The Court also held that the personal hardship and inconvenience of a jeopardy order to the taxpayer was also not a relevant consideration.

12. *R v. Fiducie Dauphin*, 2009 FCA 257

In this Federal Court decision, the taxpayers' application to appeal a Jeopardy Order issued against them was dismissed pursuant to subsection 225.2(8) and 225.2(11) of the Act. The taxpayers were not able to show that collection of the assessed amount would not be jeopardized by a delay in collection because: (i) the management of the taxpayer's affairs was somewhat unorthodox; and (ii) the taxpayer made significant loans without security or with very low interest rates. Thus, the Court upheld the Jeopardy Order issued.

The taxpayers then applied to the Federal Court of Appeal for a further judicial review of the Federal Court's decision. The Federal Court of Appeal held that, pursuant

to subsection 225.2(13) of the Act, there is no right of appeal from a decision made under subsection 225.2(11) of the Act. The Court found it inappropriate for the taxpayers to seek to indirectly achieve a result that subsection 225.2(13) of the Act directly prevents taxpayers from doing.

13. ***R v. Tony Papa*, 2009 FCA 112**

In this Federal Court decision, the taxpayer's application to appeal a Jeopardy Order was dismissed pursuant to subsection 225.2(8) and 225.2(11) of the Act. The evidence submitted by the taxpayer was highly technical, not material to the Jeopardy Order, and did not convince the Court that there were reasonable grounds to doubt the validity of the Jeopardy Order.

The taxpayer then appealed the decision to the Federal Court of Appeal, arguing that the decision to uphold the Jeopardy Order was based not only on subsections 225.2(8) and 225.2(11) of the Act, but also on Rule 399 of the *Federal Courts Rules*. As such, the taxpayer submitted that the Jeopardy Order was not subject to the statutory prohibition in subsection 225.2(13) of the Act.

The Federal Court of Appeal dismissed the taxpayer's application for judicial review of the Federal Court's decision. The Court held that Jeopardy Orders that have been judicially reviewed under subsection 225.2(8) and 225.2(11) of the Act cannot be appealed. The fact that Rule 399 of the *Federal Courts Rules* was relied on in coming to a decision does not transform the order into one rendered pursuant to Rule 399 of the *Federal Court Rules*.

14. ***MNR v. S&D International Inc*., 2009 ABQB 536**

In this Alberta Court of Queen's Bench decision, the taxpayer corporation owed $19 million in taxes to the CRA as a result of a reassessment. The Minister obtained an ex parte jeopardy order pursuant to s.225.2(2) of the Income Tax Act, preventing the sale of any of the businesses assets. The taxpayer corporation applied to have the jeopardy order reviewed.

The Alberta Court of Queen's Bench held that the order was justified, given the taxpayer corporation's demonstrated history of improper expenditures, and so upheld the jeopardy order. However , the Court of Queen's Bench also varied the order, allowing most of the taxpayer's land to be sold so long as 65% of the sale proceeds were remitted to the CRA at closing. This alteration allowed the taxpayer corporation to sell

assets and remain in business, without jeopardizing the ability of the CRA to collect on the outstanding tax debt.

15. *MNR v. Grenon (Trust of)*, 2015 FC 1050

In this Federal Court decision, the Minister obtained an ex parte jeopardy order against the taxpayer trust, pursuant to section 225.2(2) of the Income Tax Act, upon learning of a number of large transfers made by the trust into an offshore account. The taxpayer applied for review of that decision.

The Federal Court set aside the jeopardy order, holding that the Minister had not made out that it was more likely than not that the funds would be wasted if there was a delay in collection. The Court found this as a result of two determinations of fact: i) the transactions that the Minister objected to had actually taken place before the taxpayer was notified of reassessment proceedings, and ii) the taxpayer trust and the individual who controlled the trust both had serious financial incentives in keeping the funds within the reach of the Minister. Based upon this evidence, the Court held that the Minister had not satisfied the requirements to impose a jeopardy order on the taxpayer.

E. CHOICE OF VENUE

1. *MNR v. Abu-Taha*, 2001 FCT 76

In this Federal Court decision, an individual accused of several drug trafficking offences (which were already being dealt with in the Superior Court of Ontario) had his assets seized by the RCMP. He applied to the Superior Court of Ontario to have some of the seized funds returned to him to pay for living expenses. The Minister of National Revenue made a separate application to the Federal Court to prevent this return of funds, on the grounds that the funds could be diminished if returned to the taxpayer for living expenses, decreasing the chances of successful collection by CRA. This preliminary matter dealt with which court would have jurisdiction to determine the issues relating to the jeopardy order.

The Federal Court held that the Superior Court of Ontario was the proper forum to decide the jeopardy motion. The federal Court determined that it would unduly fetter the Superior Court of Ontario's discretion in hearing the individual's motion, if the funds were already encumbered by a separate decision made by the Federal Court. The Federal Court reiterated that a jeopardy order could be made at either the Federal Court

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or at the Provincial Superior Court level, and that, where possible, all of the relevant determinations in a given case should be determined by the same level of court.

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