

Date: 20090325

Docket: ITA-4872-03

Citation: 2009 FC 315

[ENGLISH TRANSLATION]

Montréal, Quebec, March 25, 2009

PRESENT: Richard Morneau, Esq., Prothonotary

In the matter of the *Income Tax Act*,

-and-

In the matter of an assessment or assessments by the Minister of National Revenue under one or more of the following acts: the *Income Tax Act*, the *Canada Pension Plan* and the *Employment Insurance Act*,

AGAINST:

CHRISTIAN AVARD

410 Rue Comte
Lasalle, Quebec
H8R 3C8

REASONS FOR ORDER AND ORDER

[1] This is a motion by the judgment creditor (hereinafter the Crown) primarily under Rule 449 of the *Federal Courts Rules* (the Rules) to have various interim garnishment orders (in the singular, IGO) issued by this Court in 2008 against a number of pharmacists converted into final garnishment orders (in the singular, FGO).

[2] This dispute only indirectly and unfortunately involves these pharmacists, who use the services of a pharmaceutical drug delivery company. The actual legal dispute is between the Crown, on the one hand, and, on the other, the judgment debtor (Mr. Avar) and the third party (Mr. Rochon), who are acting collectively.

[3] In view of the legal proceedings to date, the crux of the problem consists of determining whether Mr. Rochon and Mr. Avar have succeeded in presenting the Court with preponderant evidence that shows, contrary to what the Court found in the IGO as a result of the supporting evidence that the Crown submitted, that Mr. Rochon, rather than Mr. Avar, is the true owner of the A.R. Livre-Rapide delivery company.

[4] In other words, that Mr. Rochon cannot be seen as Mr. Avar's nominee for the purposes of a contract negotiated between himself and Mr. Avar on November 8, 2003, through which Mr. Avar apparently sold this pharmaceutical drug delivery company to Mr. Rochon. All things considered, to prove that this sale was not simply a sham intended to allow Mr. Avar to maintain control, for all intents and purposes, of the delivery company and to collect the vast majority of the company's earnings.

Essential background

[5] On May 29, 2003, this Court issued an order authorizing an immediate execution against Mr. Avar in docket T-879-03 of this Court. The Crown submitted into evidence in that case that

Mr. Avar had used the services of eight (8) nominees to hide his delivery company's earnings or rental income.

[6] Mr. Avar did not dispute that order, nor did he dispute the various garnishment actions subsequently taken in that case, essentially along the same lines as the present actions.

[7] Up until June 1, 2003, Mr. Avar had operated his pharmaceutical drug delivery company, then known as "La Farma-Ssie."

[8] However, on June 1, 2003, Mr. Avar feigned the sale of his delivery company to his son, Yanick Avar, under a new corporate name, then known as "Délivrapide."

[9] As a result of this situation, on July 10, 2003, the Court issued IGOs that were converted to FGOs on September 26, 2003.

[10] On August 2, 2003, Mr. Avar sold to Alain Rochon the right to service eight (8) pharmacies that were clients retaining Mr. Avar's delivery services. That is when Mr. Rochon registered the company under the corporate name "A.R. Livre-Rapide."

[11] As the Court understands it, on October 30, 2003, the Crown made an agreement with Mr. Avar and Mr. Rochon to settle the situation involving all the garnishments in effect or foreseeable in the very near future (the October 30, 2003 agreement).

[12] As of November 2003, Mr. Avaré reportedly still had many clients to whom he had been providing his services for at least a year in some cases. On October 30, 2003, when he signed the agreement with the Canada Revenue Agency, Mr. Avaré failed to mention this fact.

[13] On November 8, 2003, Mr. Avaré and Mr. Rochon made the agreement that is central to the current dispute and that involved Mr. Avaré selling all of his remaining clients to Mr. Rochon, namely delivery services to twelve (12) pharmacies that were added one after the other over the years (the November 8, 2003 clientele sale).

[14] Between 2005 and 2007, Mr. Avaré deposited the amount of \$275,839.95 into the account of his wife, Renée Couture, in the form of cheques issued by all the pharmacies as payment for the company's delivery services.

<u>YEAR</u>	<u>AMOUNT</u>
2005	\$129,176.55
2006	\$101,234.86
2007 (March 2007 to September 2007)	\$45,428.54

Analysis

[15] Contrary to Mr. Rochon's claim, I do not find that the nature of the October 30, 2003 agreement, to which the Crown was a party, is such that it prevents the Crown from proposing its

theory, first, in its evidence for obtaining the IGO, then later, in a supplementary affidavit that it filed further to a scheduling order established by this Court.

[16] In this respect, I can conclude only that this transaction, namely the October 30, 2003 agreement, must be *res judicata* with respect to the Crown when it comes to the true nature of the company's sale on August 2, 2003. It seems to me that on October 30, 2003, we must find that the Crown, through the agreement made on that date, sought mainly, if not only, to definitively settle the outcome of the various IGOs and FGOs obtained as of that date or to be obtained shortly thereafter (namely November 4, 2003). Moreover, the following passage taken from the FGO dated November 4, 2003, supports this argument:

[TRANSLATION] WHEREAS the Crown, the debtor and the third party made an agreement on October 30, 2003 ("the October 30 agreement") to comprehensively settle this case and the Crown's other motions against the garnishee pharmacies;

[17] Moreover, we must in any event accept that Mr. Rochon breached his obligations regarding the disclosure of the total number of pharmacies served and therefore that the October 30, 2003 agreement allows the Crown to continue to argue in collection procedures that Mr. Rochon was acting as a nominee for Mr. Avaré.

[18] This being established, we come to the clientele sale on November 8, 2003. The contract showing this sale was produced by Mr. Rochon as an exhibit in his affidavit dated January 22, 2009.

[19] This sale — for the price of \$375,000.00 — was seemingly intended to allow Mr. Rochon to serve twelve (12) other pharmacist clients in addition to the eight (8) clients who were part of the sale on August 2, 2003.

[20] After having carefully considered all of the evidence and arguments brought to the Court's attention by the parties in their motion records and pleadings during the hearing, I cannot conclude that Mr. Rochon has provided valid evidence or arguments that constitute the contrary evidence sought by the IGO.

[21] With respect specifically to the burden of proof in this dispute, it must be noted that the Court determined the following as part of the IGO on the basis of the Crown's evidence available at that time:

[TRANSLATION]... it would appear at least *prima facie* and subject to the provision of evidence to the contrary that the judgment debtor is the true owner of the A.R. Livre-Rapide delivery company and that, as a result, all amounts owed by the garnishee to A.R. Livre-Rapide are in fact owed to the judgment debtor Christian Avaré; [Emphasis added.]

[22] It is thus erroneous to think that this burden of proof rests entirely on the Crown's shoulders or that the Crown's burden is greater or more strict than the balance of probabilities. In my view, any contrary reasoning results from a misinterpretation of the Rules and the text of the IGO itself.

[23] As for the Rules, subrule 449(1)(b) stipulates that the Court may issue an IGO that requires the third party (here, we understand that it is Mr. Rochon who showed cause in this regard) to appear to justify why the Court should not move ahead with the garnishment.

[24] Rule 449(1) reads as follows:

449. (1) Subject to rules 452 and 456, on the *ex parte* motion of a judgment creditor, the Court may order

(a) that

(i) a debt owing or accruing from a person in Canada to a judgment debtor, or

(ii) a debt owing or accruing from a person outside Canada to a judgment debtor, where the debt is one for which the person might be sued in Canada by the judgment debtor,

be attached to answer the judgment debt; and

(b) that the person attend, at a specified time and place, to show cause why the person should not pay to the judgment creditor the debt or any lesser amount sufficient to satisfy the judgment.

449. (1) Sous réserve des règles 452 et 456, la Cour peut, sur requête *ex parte* du créancier judiciaire, ordonner :

a) que toutes les créances suivantes du débiteur judiciaire dont un tiers lui est redevable soient saisies-arrêtées pour le paiement de la dette constatée par le jugement :

(i) les créances échues ou à échoir dont est redevable un tiers se trouvant au Canada,

(ii) les créances échues ou à échoir dont est redevable un tiers ne se trouvant pas au Canada et à l'égard desquelles le débiteur judiciaire pourrait intenter une poursuite au Canada;

b) que le tiers se présente, aux date, heure et lieu précisés, pour faire valoir les raisons pour lesquelles il ne devrait pas payer au créancier judiciaire la dette dont il est redevable au débiteur judiciaire ou la partie de celle-ci requise pour l'exécution du jugement.

[Je souligne.]

[25] It is in this spirit that the IGO, at pages 2 and 3, contains the following two (2) excerpts:

[TRANSLATION]... it would appear at least *prima facie* and subject to the provision of evidence to the contrary that the judgment debtor is the true owner of the A.R. Livre-Rapide delivery company and that, as a result, all amounts owed by the garnishee to A.R. Livre-Rapide are in fact owed to the judgment debtor Christian Avard; [page 2]

IT IS ALSO ORDERED that Alain Rochon be added as a third party to this case and that he appear before this Court at the time and place specified above for showing cause, to present his reasons why this Court should not issue a final garnishment order. [page 3]

[Emphasis added.].

[26] Thus, in my opinion, this is more a sharing of the burden in a FGO, namely for the Crown to complement or support its *prima facie* evidence seen in the IGO, and, for Mr. Rochon, to contest the evidence brought by the Crown.

[27] As mentioned earlier, I do not think that Mr. Rochon has successfully contested the evidence brought by the Crown. On the contrary, I think that the Crown, through the evidence filed in this case to date, has established on a balance of probabilities serious, precise and concordant presumptions supporting that Mr. Avard is still the owner of the delivery company now known as A.R. Livre-Rapide and that he is using Mr. Rochon to evade his tax obligations and to continue operating his delivery company.

[28] Among other things, the Court finds in this regard that the November 8, 2003 clientele sale was concluded for a substantial amount. This impression remains despite the explanations that Mr. Rochon tried to give regarding the price of this sale in comparison to the price of the sale on August 2, 2003.

[29] The most striking point, however, is that the entire sum was payable to Mr. Avard in a very phased manner through his direct receipt of cheques issued regularly by the pharmacists for delivery services rendered. Here, the Court notes that the absence of any payment during and as part of the conclusion of the November 8, 2003 clientele sale is an element that, with respect to the August 2, 2003 sale, seems to have also gained the attention of Justice Boisvert of the Court of Quebec when he ruled on the sentencing of Mr. Avard in 2006 for filing false tax returns, among other things. In paragraph [14] of his reasons, Boisvert J. stated the following:

[TRANSLATION] Then,... [Mr. Avard] purported to sell his delivery company to an employee, Alain Rochon, although no payment was made.

[30] Furthermore, the nature of this November 8, 2003 clientele sale is such that it favours Mr. Avard, with the result being that Mr. Rochon did not gain ownership of the clientele sold until the end of December 2007.

[31] Thus, as previously mentioned, between 2005 and 2007, the payment method for the sale price enabled Mr. Avard to deposit into the account of his wife, Renée Couture, cheques totalling \$275,839.95 issued by all of the pharmacies as payment for the company's delivery services.

[32] It is also important to note that Mr. Rochon admitted in an out-of-court examination on affidavit that he knew nothing about the company he was purchasing and that it was, in fact, Mr. Avaré who controlled the company.

[33] Additionally, it is far from certain that the pharmacists had truly been advised of this November 8, 2003 clientele sale because neither Mr. Avaré nor Mr. Rochon could ultimately find the letters purportedly sent to the pharmacies following the sale.

[34] The Court is strongly led to believe that this sale was not mentioned outside the circle formed by Mr. Avaré, his entourage and Mr. Rochon since, besides the absence of proof of letters to the pharmacies, in January 2005, more than thirteen (13) months after the alleged sale, many pharmacies were still making their cheques payable to Délivrapide.

[35] Indeed, all the evidence submitted by the Crown demonstrates on a balance of probabilities that the November 8, 2003 clientele sale was not real and that Mr. Avaré had, at all relevant times, maintained control of the A.R. Livre-Rapide delivery company.

[36] A reading of the transcripts of Mr. Rochon's and Mr. Avaré's examinations on affidavit clearly shows that Mr. Rochon had always let Mr. Avaré prepare and administer all aspects of the company despite the purported November 8, 2003 clientele sale.

[37] Consequently, I find that the Crown has discharged its burden of proof and that the Court is justified in essentially converting the IGOs issued in 2008 to FGOs, the whole with costs. The Court

hereby requests that the Crown's attorney send the drafts of the final garnishment orders required with respect to the various pharmacies concerned.

[38] Any other argument raised by Mr. Rochon that is not directly addressed here is dismissed for reasons that the Crown asserts in paragraphs 6 *et seq.* of its rebuttal representations filed on February 27, 2009.

ORDER

THE COURT essentially converts the IGOs issued in 2008 to FGOs, the whole with costs. The Court hereby requests that the Crown's attorney send it, within twenty (20) days of this order, the drafts of the final garnishment orders required with respect to the various pharmacies concerned.

“Richard Morneau”

Prothonotary

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: ITA-4872-03

STYLE OF CAUSE: INCOME TAX ACT
against:
CHRISTIAN AVARD

PLACE OF HEARING: Montréal, Québec

DATE OF HEARING: March 19, 2009

REASONS FOR ORDER: PROTHONOTARY MORNEAU

DATED: March 25, 2009

APPEARANCES:

Louis Sébastien FOR THE JUDGMENT CREDITOR

Benoit Aubertin FOR THE THIRD PARTY
ALAIN ROCHON

SOLICITORS OF RECORD:

John H. Sims, Q.C. FOR THE JUDGMENT CREDITOR
Deputy Attorney General of Canada
Montréal, Québec

De Chantal, D'Amour, Fortier, LLP FOR THE THIRD PARTY
Longueuil, Quebec ALAIN ROCHON