

OTTAWA, ONTARIO, THE 23RD DAY OF JANUARY 1997

BEFORE: DENAULT J.

BETWEEN:

In re the *Income Tax Act*,

- and -

In re one or more assessments made by the Minister of National Revenue pursuant to one or more of the following statutes: the *Income Tax Act*, the Canada Pension Plan and the *Unemployment Insurance Act*;

AND:

TRAITEMENT D'EAU ANJOU NOTRE-DAME INC.,

Judgment debtor,

AND:

LES PRODUITS DE LA FAMILLE ANJOU INC.,

Objector.

ORDER

The Court:

FINDS that the sale concluded between the seller Traitement d'eau Anjou Notre-Dame Inc. and the purchaser Les produits de la Famille Anjou Inc. on November 18, 1993 by a contract concluded before Jean Martel is invalid as to the judgment creditor, the Minister of National Revenue;

DISMISSES the objection by Les produits de la Famille Anjou Inc.;

THE WHOLE with costs against the objector.

PIERRE DENAULT
JUDGE

Certified true translation

C. Delon, L.L.L.

OTTAWA, ONTARIO, THE 23RD DAY OF JANUARY 1997

BEFORE: DENAULT J.

BETWEEN:

In re the *Income Tax Act*,

- and -

In re one or more assessments made by the Minister of National Revenue pursuant to one or more of the following statutes: the *Income Tax Act*, the Canada Pension Plan and the *Unemployment Insurance Act*;

AND:

TRAITEMENT D'EAU ANJOU NOTRE-DAME INC.,

Judgment debtor,

AND:

ALAIN JOLY,

Objector.

Application by the objector Alain Joly asking the Court to:

-ALLOW this application to object;

-STAY any proceedings subsequent to the execution against personal property made in the case at bar in respect of all the following property:

the 1991 Hyundai Scoupe automobile serial No. KMHVE21JXMUO74756, the property of Alain Joly;

-ORDER the officiating bailiff to make an immediate report to this Court of the proceedings undertaken on the writ of execution issued herein;

-DECLARE that the execution against the said property in the case at bar is void, irregular and illegal;

-DECLARE the objector the sole owner of all the movable property seized and described above;

-GRANT the objector partial release from the said seizure in execution;

THE WHOLE with costs against the judgment plaintiff.

[Article 597 of the *Code of Civil Procedure*]

ORDER

At the hearing of this application in Montreal on December 16, 1996 the judgment creditor gave a release of the seizure.

This release is approved without costs.

PIERRE DENAULT
JUDGE

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In re the *Income Tax Act*,

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AND:

TRAITEMENT D'EAU ANJOU NOTRE-DAME INC.,

Judgment debtor,

AND:

LES PRODUITS DE LA FAMILLE ANJOU INC.,

Objector.

REASONS FOR ORDER

DENAULT J.

The applicant, Les Produits de la Famille Anjou Inc. ("PFA"), is objecting to the seizure made by the Minister of National Revenue ("MNR") on the property of Traitement d'eau Anjou Notre-Dame Inc. ("TAND"), owing the sum of \$10,753.51 pursuant to a certificate of September 6, 1994. This debt resulted from source deductions not submitted by the debtor for the period from October to December 1992 and January to November 1993.

The objector argued that the seized property belonged to it since it had purchased the property by a notarized agreement made on November 18, 1993. The Minister of National Revenue, for his part, asked the Court to dismiss this objection: he argued that the sale of the assets of Traitement d'eau Anjou Notre-Dame Inc. to Les Produits de la Famille Anjou Inc. was contrary to his rights and cannot be set up against him.

The documents filed in support of the objection indicated that on April 30, 1992 Marcel Joly, the sole shareholder of TAND,¹ assigned all his shares to Michel Gosselin for one dollar. In return Gosselin undertook to pay to PFA [TRANSLATION] ". . . the debt of \$80,000 on a demand note bearing interest at 8% per annum for a period of five years, with no provision for payment" (Exhibit R-5). The agreement further provided that Gosselin [TRANSLATION] "gave as surety all the assets, present and future, of the company Traitement d'eau Anjou Notre-Dame Inc., as well as the Anjou Notre-Dame Inc. franchise". A demand note (Exhibit R-6) was in fact signed by Gosselin on April 30, 1992 in favour of Les Produits de la Famille Anjou Inc.

On November 18, 1993 PFA bought from TAND, *inter alia*, inventory on hand, office furniture and other movable items, the seller's accounts receivable and the Anjou Notre-Dame Inc. franchise, the seller undertaking to immediately relinquish any trade name relating thereto. The seller further stated in the contract [TRANSLATION] ". . . that the property which is the subject of this sale represents all, or nearly all, the property used in a commercial activity which represents all or part of its business" (Exhibit R-7). In return the purchaser gave a full and final release [TRANSLATION] ". . . to the seller² for any amount of capital and interest owed to it pursuant to a demand note in the original amount of \$80,000 signed on April 30, 1992". A clause in the contract provided that [TRANSLATION] "this agreement does not constitute a sale of stock in trade".

The examination of Alain Joly, vice-president of PFA, casts some useful light on the implications of these transactions. He described PFA as a manufacturer of water treatment equipment distributed through franchises. In 1992, as problems arose with the distribution of products in Notre-Dame-du-Bon-Conseil, his father Marcel Joly, the president of PFA and sole shareholder of TAND, assigned his shares to a company employee, Michel Gosselin. In return Gosselin assumed a debt³ for \$80,000 which by a demand note he undertook to repay. It was clear from the examination of Alain Joly that Gosselin was not paying PFA or his rent⁴ and that in short [TRANSLATION] "he was not paying anyone" (p. 18 of the examination). The witness said that Gosselin had never signed this

¹At the relevant time Marcel Joly was also the president of Les Produits de la Famille Anjou Inc.

²It should be noted that although the full and final release was given to the seller - TAND - the demand note thus released was in fact that of Michel Gosselin.

³It was not proven that TAND had such a debt to PFA. The evidence actually was that Gosselin signed a demand note (R-6) undertaking to [TRANSLATION] "pay" \$80,000 to PFA.

⁴The building was owned by Les Immeubles AMM Inc., the shareholder in which was Marcel Joly, who intervened in the contract of November 18, 1993 to give a full and final release and remit to the seller six months' arrears of rent owed by the seller.

franchise contract with PFA and, in view of his refusal to perform his obligations, [TRANSLATION] "we did not buy his business, we just took back what was ours" (p. 24 of the examination).

In its objection, however, PFA took a different approach: it objected to the seizure of TAND's property, stating that it had purchased the property in a contract which specified that it was not a sale of stock in trade. The Minister of National Revenue argued, on the other hand, that this transaction was made contrary to his rights as a TAND creditor. Counsel for the Minister of National Revenue raised several irregularities in these transactions, including the fact that Gosselin gave the assets of his company as security by an agreement and by a demand note, which is unlawful as such, and without regard to the rules of a commercial pledge. She further argued that Gosselin gave his company's assets gratuitously as there was no proof he was indebted to PFA. Finally, she argued that if the Court concludes that the \$80,000 debt allegedly owed by Gosselin was in fact a TAND debt, the sale should be deemed to be fraudulent, null and void as to her as the Minister of National Revenue, a TAND creditor, was not paid when the goodwill was sold.

It does not appear necessary to deal with all these points.

There is a well-known rule that a debtor's property is the common pledge of his creditors, and where they claim together they share its price rateably, unless there are amongst them legal causes of preference: this is the actual wording of art. 1981 of the *Civil Code of Lower Canada* as it read at the time of the facts at issue. Additionally, in order to protect creditors of a debtor who disposes of his stock in trade to their detriment the legislature has laid down special rules in the *Civil Code*: bulk sales, found in arts. 1569(a) *et seq.* Briefly, these rules provide that in any sale of stock in trade or merchandise outside the ordinary course of the seller's business the purchaser, before paying the price, must obtain an affidavit from the seller containing the names and addresses of all the seller's creditors, amounts due or to become due and the origin of each claim, as a basis for distributing the selling price between such creditors, otherwise the sale shall be deemed to be fraudulent and null and void as regards the creditors.

The Court must determine whether in the circumstances of the case at bar the alienation constituted a bulk sale. This is a question of fact which the judge must analyse by determining whether the sale affected an important part of the merchant's business, whether it was made outside the ordinary

course of his business, whether the items form part of the stock in trade, and finally, whether the seller intended to cease operating his business, in whole or in part.⁵

In the case at bar the documents filed in support of the objection and the examination of Alain Joly, vice-president of PFA, indicated that the disposal of TAND property on November 18, 1993 constituted the latter's share of a bulk sale and that the parties' failure to observe the rules made it null and void, in particular as regards the garnisher as a TAND creditor.

There is no doubt that the sale of the TAND assets affected an important part of the merchant's business: the contract stated, first, that the property sold represented all, or nearly all, the goods used in the course of the business, and second, the objector did not show that the seller had reserved a significant number of items in order to carry on his business. Further, since the seller disposed not only of its stock in trade but its office furniture, accounts receivable and franchise, it goes without saying that the sale was made outside the ordinary course of business, and all the items formed part of the stock in trade.

Finally, the Court notes a significant contradiction as to the nature of the contract of sale of November 18, 1993 between the statements it contained and those made by the witness Alain Joly in his examination. Contrary to what Alain Joly suggested, namely that PFA simply intended to retake the property owned by it, the seller specifically stated in the contract that it was the sole owner of the property described, free of any privilege and any contract of pledge. In short, there was nothing to indicate that the purchaser PFA held any lien whatsoever over the TAND assets and could have exercised any right to retake the property. On the contrary, everything tended to show that the sale by TAND was of its stock in trade. Including a clause to the contrary in the contract will not suffice to exclude the peremptory application of the bulk sale rules.

In so far as the objector relied on a contract of sale which did not comply with the bulk sale rules, that contract cannot be set up against the garnisher. The objection therefore cannot be allowed.

PIERRE DENAULT
JUDGE

⁵*Code civil annoté*, Baudoin-Renaud, Edition Wilson & Lafleur Ltée, Vol. 2, p. 287.

OTTAWA, Ontario,
January 23, 1997.

Certified true translation

C. Delon, L.L.L.

FEDERAL COURT OF CANADA
TRIAL DIVISION

NAMES OF COUNSEL AND SOLICITORS OF RECORD

COURT FILE No.:ITA-7668-94

STYLE OF CAUSE:ITA v. Traitement d'eau Anjou Notre-Dame Inc. *et al.*

PLACE OF HEARING:Montréal, Quebec

DATE OF HEARING:December 16, 1996

REASONS FOR ORDER BY:Denault J.

DATED:January 23, 1997

APPEARANCES:

Hélène Beaumontfor Her Majesty the Queen

Michel Bélangerfor the objector

SOLICITORS OF RECORD:

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