

CANADA / JUDGMENT

Weinberg, Re

2006 FC 689

COURT

Federal Court

DECIDED

2 June 2006

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Weinberg, Re Court (s) Database Federal Court Decisions Date 2006-06-02 Neutral citation 2006 FC 689 File numbers ITA-869-06 Decision Content Date: 20060602 Docket: ITA-869-06 Citation: 2006 FC 689 Ottawa, Ontario, June 02, 2006 PRESENT: The Honourable Mr. Justice Harrington BETWEEN: 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 Income Tax Act, Canada Pension Plan, Employment Insurance Act, Against: RONALD WEINBERG Judgment Debtor and: TRANSAMERICA LIFE CANADA Garnishee REASONS FOR ORDER AND ORDER

- [1] This is a case of two creditors, two clients, two courts, and too little money. Her Majesty in Right of Canada has an income tax judgment in this Court against Mr. Weinberg. Another group of creditors, whom I shall call Cinar, has an action pending against him in the Superior Court of Quebec. Having reason to believe that a third party, Transamerica Life Canada, is indebted to Mr. Weinberg in the form of a registered retirement savings plan, Her Majesty obtained a garnishment order requiring it to declare such sums, if any, it owed, and not to dispossess itself thereof until further order. Upon Transamerica making a positive declaration, Her Majesty moved for an order directing that it pay her.
- [2] Cinar moved to intervene in order to claim an interest in Mr. Weinberg's assets. Mr. Weinberg then jumped into the fray in order to seek directions. So far he has been content to point out that Cinar's solicitors in this action, and in the Superior Court of Quebec action, are one and the same, and that his motion in the latter court for an order to have them removed as solicitors of record because of an alleged conflict of interest is currently pending. Unless the Federal Court proceedings were stayed until that matter was resolved, he would have no option but to make a similar motion to have the solicitors disqualified in this case.
- [3] All three motions were heard at the same time by Prothonotary Morneau. Noting that the seizure by garnishment in the hands of Transamerica remains in place, and considering that the Superior Court of Quebec is the more appropriate forum to rule on whether Cinar's solicitors are in a conflict of interest because of their prior relationship with Mr. Weinberg, and after exhorting the parties to act with diligence in resolving that issue, he adjourned all three motions sine die. Her Majesty has appealed.

ISSUES

Did the Prothonotary exercise his discretion appropriately? If not, in which manner should the Court exercise its jurisdiction *de novo*?

BACKGROUND

- [4] In January of this year, Her Majesty registered a certificate pursuant to Section 223 of the Income Tax Act declaring that Mr. Weinberg was indebted in the amount of \$220,027.51 with interest compounded daily at the rate prescribed under the Act from 23 January 2006 to the day of payment. That certificate has the same force and effect as a judgment.
- [5] In accordance with the garnishment proceedings section of the Federal Courts Rules, Rule 449 and following, Her Majesty obtained a show cause order against Transamerica Life Canada requiring it to appear and declare what sums, if any, it owed Mr. Weinberg, and not to dispose of same without Court order. On March 29, a vice-president of the company swore that in October 2000 Mr. Weinberg opened a registered retirement savings plan with it, pursuant to which he named his wife, Micheline Charest, as beneficiary. The initial deposit was \$347,823.73. As of March 14, 2006 the value of the policy was \$232,002.93. However, as of the date of the declaration the value was \$234,159.50. It is common knowledge that Micheline Charest has died.
- [6] Transamerica as garnishee had the option of paying the money into Court pursuant to Rule 450. It did not do so, and so Her Majesty moved under Rule 451 for an Order for Payment. Under that rule, the Court may make an order for payment to the judgment creditor, or payment into Court.
- [7] At this point, Cinar Corporation, Cinar Productions (2004) Inc., Cinar Animation Inc. and Lassie Productions II (2004) Inc. moved for leave to intervene and for directions. The basis of their intervention is that they have an action pending against Mr. Weinberg, the Estate of Micheline Charest, and others for an amount in excess of \$94 million dollars. In those proceedings, they obtained an interlocutory injunction, commonly known as a *mareva* injunction, which is still in force, enjoining Mr. Weinberg from incumbering or disposing of any of his assets, which assets presumably include the registered retirement savings plan Her Majesty has garnished. At some point it may well have to be decided what effect the *mareva* injunction has on these garnishment proceedings. Be that as it may, it was quite proper for Cinar to seek leave to intervene to bring its claim against Mr. Weinberg to the attention of the Court, as the garnishment provisions of the Rules allow the Court to make rulings with respect to competing creditors.
- [8] Cinar's motion provoked Mr. Weinberg to bring on his own motion for directions. He alleged that Cinar's solicitors, both in these proceedings and in the Superior Court proceedings, Davies Ward Phillips & Vineberg, are in conflict of interest. He has a motion pending in the Superior Court to have them disqualified as solicitors of record because they are in conflict of interest and are in position to use information they had acquired from one client for the

benefit of another, and might be called as witnesses at trial. He sought a stay of proceedings in this Court until that issue was resolved. Failing that, he would have to bring on a motion in this Court to have the solicitors disqualified. DISCUSSION

[9] Adjournments and stays of proceedings and the lifting thereof, are discretionary. Sections 50(1) and (3) of the Federal Courts Act provide:

50. (1) The Federal Court of Appeal or the Federal Court may, in its discretion, stay proceedings in any cause or matter (a) on the ground that the claim is being proceeded with in another court or jurisdiction; or (b) where for any other reason it is in the interest of justice that the proceedings be stayed. [...]

(3) A court that orders a stay under this section may subsequently, in its discretion, lift the stay.

50. (1) La Cour d'appel fédérale et la Cour fédérale ont le pouvoir discrétionnaire de suspendre les procédures dans toute affaire :

a) au motif que la demande est en instance devant un autre tribunal;

b) lorsque, pour quelque autre raison, l'intérêt de la justice l'exige. [...]

(3) Le tribunal qui a ordonné la suspension peut, à son appréciation, ultérieurement la lever.

[10] A judge may review a discretionary order of a prothonotary de novo if the questions raised are vital to the final issue in the case, or if the order is clearly wrong in the sense that the exercise of discretion was based on a wrong principle or upon a misapprehension of the facts (*Merck & Co. v. Apotex Inc.*, [2004] 2 F.C.R. 459, *Z.I. Pompey Industrie v. ECU-Line N.V.*, [2003] 1 S.C.R. 450, and *Canada v. Aqua-Gem Investments Ltd.*, [1993] 2 F.C. 425.

[11] At the close of argument, I said I would dismiss Her Majesty's appeal, but that the order would only take effect once signed, with accompanying reasons.

[12] Although technically speaking the motions were adjourned sine die, the parties accept that the effect thereof was a stay of proceedings. Her Majesty submits she will suffer irreparable harm if she is not paid now. Her debt continues to mount with interest compounded daily while the RRSP may be a wasting asset. If she is not paid now, Cinar may obtain a judgment, or Mr. Weinberg may become insolvent, accompanied or not by a formal bankruptcy. She may have to share the RRSP with others. Given that Cinar's legal representation was being challenged in the Superior Court of Quebec, it could have moved to intervene in this Court through other solicitors. Cinar's claim to the money should be determined now.

[13] Cinar was entitled to move to intervene. The general rule is that it may select the solicitors of its choice. However, if, as alleged, those solicitors obtained confidential information from Mr. Weinberg which might be used against him, or if they prove to have been disloyal, they may be disqualified (*MacDonald Estate v. Martin*, [1990] 3 S.C.R. 1235, *R. v. Neil*, [2002] 3 S.C.R. 631. It was right and proper for Mr. Weinberg to inform this Court that he had filed a motion to disqualify the solicitors in the Superior Court of Quebec, and if necessary would

have to do the same in this Court.

- [14] The Prothonotary's decision did not decide a vital point, and his discretion was not exercised on a wrong principle. Indeed if it were to exercise my discretion *de novo*, I would have done what he had done, except I might have actually granted a stay, rather than adjourn the motions *sine die*. The Crown's privilege to be paid in preference to other creditors has been, in the context of this case, taken away by Parliament. If there are insufficient funds, creditors are normally paid *pro rata*. Her Majesty wishes to pursue an advantage, which some may consider unfair, because she can in effect obtain a judgment under the Income Tax Act by simply certifying a debt and registering it with the Court, while Cinar has to prove its debt to the satisfaction of the Superior Court of Quebec.
- [15] If the Prothonotary had not done what he did, the only other reasonable option would be under Rule 451 to order the garnishee to cash out the RRSP, and pay the proceeds into Court, and then hear a motion on the disqualification of Cinar's solicitors, a matter already before the Superior Court of Quebec. The Prothonotary was right in considering that that Court was the more appropriate forum to determine the issue. In comity, and in cooperation with that Court, the prothonotary did the right thing.
- [16] Rule 379 permits the sale of a wasting asset, not that there is any evidence at this point that the RRSP is a wasting asset. If the RRSP were to be sold, given Cinar's claim, the most Her Majesty could hope for would be that the proceeds thereof would be deposited into the Federal Court. At least the Federal Court pays interest on deposits while the Superior Court of Quebec pays no interest and in fact levies an administration charge. The rate paid by the Court is, as Her Majesty certainly knows, far less than what she claims on debts accruing under the Income Tax Act! It is noteworthy that she has not asked for payment out against an undertaking to repay with interest calculated at the same rate as a court deposit should she ultimately be ordered to share the proceeds of the RRSP with Cinar or others.
- [17] An interesting analogy can be drawn from the recent decision of Mr. Justice Evans in the Court of Appeal in *Apotex Inc. v. Merck & Co. Inc. et al* 2006 FCA 198. Although one normally thinks of a stay of execution of a judgment in terms of the judgment debtor putting up security pending an appeal, there are circumstances where the successful plaintiff may put up security. Merck obtained a permanent injunction against further infringement by Apotex of a patent. Apotex appealed and sought a stay of the judgment arguing that it had a serious case in appeal and that if the trial judgment were not stayed it would suffer irreparable harm. The matter was resolved by Merck undertaking to compensate Apotex should Apotex succeed in appeal. I cannot resist adding that one of the theories relating to the rate of interest awarded on a judgment debt, if not prescribed by Statute, is that the creditor lost the use of funds and may have had to borrow. Her Majesty is able to borrow at an interest rate far less than the rate she claims against Mr. Weinberg.

- [18] A motion which has been adjourned sine die may be reactivated if circumstances warrant, just as a stay of proceedings may be lifted. If, for instance, the legal representation issue is not dealt with diligently or, if it becomes evident that the RRSP should be cashed out and the proceeds deposited into Court, Her Majesty, just like the other parties, may revive the matter.
- [19] For these reasons, the motion in appeal of the order of Prothonotary Morneau is dismissed, with costs in favour of Mr. Weinberg. Although Cinar and Transamerica were both present, as they did not participate in the appeal they shall not be awarded costs. ORDER THIS COURT ORDERS that: the appeal of the order of Prothonotary Morneau dated 28 April 2006 is dismissed with costs. "Sean Harrington" Judge FEDERAL COURT NAME OF COUNSEL AND SOLICITORS OF RECORD DOCKET: ITA-869-06 STYLE OF CAUSE: 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 Income Tax Act, Canada Pension Plan, Employment Insurance Act, Against: RONALD WEINBERG and: TRANSAMERICA LIFE CANADA PLACE OF HEARING: Montreal, Quebec DATE OF HEARING: May 29, 2006 REASONS FOR ORDER AND ORDER: HARRINGTON J. DATED: June 2, 2006 APPEARANCES: Mr. Daniel Beauchamp FOR THE JUDGMENT CREDITOR Ms. Magali Fournier FOR THE JUDGMENT DEBTOR Ms. Marie-Claude Michon FOR THE GARNISHEE Mr. Stéphane Eljarrat FOR CINAR CORPORATION ET AL SOLICITORS OF RECORD: John H. Sims, Q.C. Deputy Attorney General of Canada FOR THE JUDGMENT CREDITOR Fournier Avocats Inc. Barristers & Solicitors Montreal, Quebec FOR THE JUDGMENT DEBTOR Donati Maisonneuve LLP Barristers & Solicitors Montreal, Quebec FOR THE GARNISHEE Davies Ward Phillips & Vineberg LLP Barristers & Solicitors Montreal, Quebec FOR CINAR CORPORATION ET AL

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