Federal Court  Cour fédérale

Date: 20150728

Docket: T-2053-13

Citation: 2015 FC 901

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Ottawa, Ontario, July 28, 2015

PRESENT: The Honourable Madam Justice Gagné

BETWEEN:

IN THE MATTER OF THE *INCOME TAX ACT*,
and
IN THE MATTER OF ASSESSMENTS BY THE MINISTER OF NATIONAL REVENUE, UNDER THE *INCOME TAX ACT*,

AGAINST:

9183-4507 QUÉBEC INC.

Respondent/Debtor

Dockets: ITA-14340-13
ITA-11252-13

IN THE MATTER OF THE *INCOME TAX ACT*,
and
IN THE MATTER OF ASSESSMENTS BY THE MINISTER OF NATIONAL REVENUE, UNDER THE *INCOME TAX ACT*,

AGAINST:

9183-4507 QUÉBEC INC.

Debtor

and

COMPANY TRUST ROYAL

and

RBC PHILIPS HAGER AND NORTH SERVICES-CONSEILS ET PLACEMENTS INC.

and

GESTION PLACEMENTS DESJARDINS

Garnishees

and

9183-4564 QUÉBEC INC.

Third party

JUDGMENT AND REASONS

I. Overview

[1] Before me are four motions: the first three are presented under subsection 225.2(8) of the *Income Tax Act*, RSC 1985, c 1 [ITA], namely: (i) a motion brought by the tax debtor and respondent 9183-4507 Québec Inc. [4507] to set aside the *ex parte* jeopardy collection order issued against it by Justice Beaudry (dossier T-2053-13); (ii) two motions brought by the Third party 9183-4564 Québec Inc. [4564] against the garnishment of its assets and to set aside provisional garnishment orders issued by the Chief Justice on December 19, 2013, and subsequently amended (dockets ITA-11252-13 and ITA-14340-13) [provisional garnishment orders]; the fourth motion is jointly filed by 4507 and 4564 under section 51 of the *Federal*

Courts Rules, SOR/98-106, appealing a decision by Prothonotary Richard Morneau allowing the Minister of National Revenue to file an affidavit of Thérèse Gauthier, in substitution for various affidavits previously sworn by Renée Alain, who was no longer available at the time of the cross-examinations on the affidavits.

[2] The Minister, for his part, is asking this Court to make the garnishment orders of the assets of Third party 4564 final, in accordance with Rule 459 of the *Federal Courts Rules*.

[3] The assessment, which is at the heart of the factual background shared by all of these motions, results from the application, by the Canada Revenue Agency, of the General Anti-Avoidance Rule [GAAR] under section 245 of the ITA. The Agency essentially cancelled a series of transactions whereby 4507 transferred a sum of approximately $46M to its sister company 4564, thereby incurring a capital loss in that amount. At the time the garnishments were issued by the Minister, there remained liquid assets of only $7.5M out of the $46M transferred in 2007. The difference was essentially used to finance the activities of a company by the name of Groupe Omegalpha Inc., also linked to Mr. Genest, and to offer a gift of $17M to former business associates who had contributed to his financial success.

[4] For the reasons that follow, the four motions filed by 4507 and 4064 will be dismissed and a final order of garnishment will be issued.

II. Factual Background

[5] Serge Genest is a geologist and businessman who made a fortune in uranium exploration in northern Quebec. On June 22, 2007, he agreed to sell all of the shares he held in the capital of Uranor Inc. at the time to an arm's length third party, the adjusted cost base of which was $98.90, for a selling price of over $46M. However, in order to defer the payment of the capital gains tax, he had, prior to this, rolled his Uranor shares into the asset base of the respondent 4507, a holding company incorporated for that purpose, which then proceeded to sell these to a third party, thus he realized a capital gain of some $46M.

[6] A further component of the tax planning proposed to Mr. Genest by his advisors, known at the time as a "value shift", had him incorporate Third party 4564 and 9183-4531 Québec Inc. [4531], of which he is also the sole shareholder and director.

[7] Between July 23, 2007, and September 5, 2007, 4507 subscribed for 46,656,371 Class C shares of the capital stock of 4564, non-voting and non-participating, for a selling price of $46,656,371$. Later, 4564 paid to the sole holder of Class C shares a stock dividend of Class G shares at a redemption price of $46,656,372. Barely one month later, 4507 sold its Class G shares in 4564 to a trust of which Mr. Genest was one of the beneficiaries for $1, thereby creating a capital loss of $46,656,371 for itself.

[8] Following 7 others transactions whose details are not particularly relevant for the purposes of these reasons, the Class G shares of 4564, to which potential capital gains of $46,656,372 were associated, ended up in the asset base of 4531.

[9] In January 2012, at the time the Canada Revenue Agency completed its audit of the tax affairs of 4507, the latter was a shell company with a total tax liability of $14M ($11M claimed by the Agency and $3M claimed by Revenu Québec). 4564 had a cash balance of $7.5M and an accrued liability from Omegalpha of $15 – including a loan loss provision of over $4M appearing on its financial statements, while 4531 held, as sole asset, the Class G shares of 4564, with a redemption value of $46,656,372. The only one of these holding companies that was truly active was 4564. However, it obviously lacked the credit-worthiness required to buy back its Class G shares from 4531 at the agreed-upon amount of $46,656,372.

[10] The cash balance held by 4564 was used as working capital for Omegalpha, which in light of the financial crisis of 2008, the Quebec government's moratorium on uranium exploration in 2013, and a significant decrease in the price of uranium, was in a rather precarious position.

[11] In application of the GAAR, the Agency therefore refused to take into account the capital loss resulting from the disposition of the Class C shares it held in the capital of 4564 and sent the company a draft notice of reassessment. The Agency invited counsel for 4507 to submit comments, failing which it would hand over the file to the GAAR committee.

[12] In the absence of comments, the Agency issued a notice of reassessment against 4507, for the amount of $9,883,045.01.

[13] 4507 filed a notice of objection to the assessment against it.

[14] However, given that 4507 qualifies as a large corporation within the meaning of subsection 225.1 (8) of the ITA, the Agency was entitled to immediately recover half of the debt and initiated enforcement action in addition to obtaining a certificate from this Court, under section 223 of the ITA, for $5,066,245.67 (Docket ITA-11252-13).

[15] On December 12, 2013, Her Majesty the Queen of Canada, on behalf of the Minister, filed an *ex parte* motion for jeopardy collection (Docket T-2053-13) and on December 16, 2013, Justice Beaudry authorized the Minister to take forthwith the actions described in paragraphs 225.1(1)(*a*) to (*g*) of the ITA, for the entire tax liability of Debtor 4507. A second certificate was therefore issued by this Court for the sum of $5,456,732.54 (Docket ITA-14340-13).

[16] On December 17 and 18, 2013, the Minister filed two additional *ex parte* applications seeking a lifting of the corporate veil and the issuance of provisional garnishment orders for bank accounts held by 4564 with the garnishees. On December 19, 2013, Chief Justice Crampton issued the provisional garnishment orders, which were later amended.

[17] In addition, in the jeopardy collection matter, the Minister sought and obtained permission to substitute an affidavit of Thérèse Gauthier for those previously filed by Renée Alain, who was no longer available for a cross-examination on affidavit. Prothonotary Morneau declared himself to be satisfied, on the basis of a medical certificate, that Ms. Alain was not able to be cross-examined. Prothonotary Morneau allowed the serving and filing of a replacement affidavit —without ordering the striking out of the affidavits sworn by Ms. Alain – being of the view that the Debtor would have an opportunity to cross-examine Ms. Gauthier, who stated that

she had read Ms. Alain's affidavits, had discussed them with her and intended to serve and file her own affidavit wherein she would reiterate the substance of the allegations contained in Ms. Alain's affidavits.

[18] The Debtor appealed that order and waived examining Ms. Gauthier on her affidavit. She also waived cross-examination of Ms. Alain when the latter subsequently became available to be cross-examined, some two and a half months before the hearing of the motions, citing an abuse of process of the part of the Minister.

III. Issues

[19] The following issues arise in these motions:

1. Did the Minister fulfill his duty of frank and full disclosure of the material facts at the time he filed the *ex parte* jeopardy collection application?

2. Are there reasonable grounds to believe that granting the Debtor an extension of time to pay the amounts assessed would jeopardize the collection of all or any part of the tax debt?

3. Should the corporate veils of 4507 and 4567 be lifted to effect garnishment practised by the Minister against third party 4564?

4. Should the Court amend Prothonotary Morneau's order?

IV. Analysis

A. *Jeopardy collection order and garnishment orders*

a) *Frank and full disclosure*

[20] 4507 argues that the Minister failed to provide frank and full disclosure of the material facts in this case when appearing before Justice Beaudry in order to seek a jeopardy collection order against the company. The following is a list of facts that, in its' view, should have been disclosed:

- The absence of fraud or of a sham; the various transactions included in the tax and financial planning were all realistic;
- The auditor confirmed that the transactions were legally valid;
- There is no doubt as to the veracity of the entries found in the financial statements of the tax debtor and of the third party;
- The Agency saw no need to impose a penalty for gross negligence or an out-of-time reassessment;
- The Minister has known since 2008 that 4507 has neither the necessary cash or assets to pay the assessment under appeal;
- No transfer was made without adequate consideration; in particular, the transfer of $46M to 4564 was made as consideration for the issuance of Class C shares of 4564 of the same value;

- As to the transfer of the sum of $17M to a trust located in a tax haven, the auditor confirmed that she drew no unfavourable conclusion from this. She further acknowledged that she was unaware 4507 paid any dividends, or whether 4564 obtained any tax benefit following the transfer;

- During her audit, the auditor confirmed having received a good level of cooperation on the part of Mr. Genest and his counsel;

- The notice of reassessment is subject to a notice of objection and the Agency has placed the objection file on hold pending a decision of the Court of Quebec with respect to the reassessment by Revenu Québec;

- The tax authorities have known about this type of planning and financial arrangement since at least 2004.

[21] 4507 argues that the Minister's *ex parte* record could leave the mistaken impression that it was dissipating its assets while it was challenging the assessment in order to ultimately frustrate the tax authorities. She refers us to this Court's decision in *Services M.L. Marengère Inc. (Re)*, at paragraph 63, which points out that the relevant issue is whether the collection from the tax debtor would be jeopardized by a delay resulting from an objection to, or appeal from, an assessment, and not whether the collection of the amount would be jeopardized by the precarious financial situation of the tax debtor.

[22] I find that the Minister fulfilled his duty of frank and full disclosure in the circumstances of this case. The facts not disclosed by the Minister are not, in my view, material to the issuance

of a jeopardy collection order. In *Canada (Minister of National Revenue-MRN) v Rouleau*, [1995] FCJ No 1209 [*Rouleau*] at paragraph 10, the Court noted that the Crown's duty does not require disclosure of material that is irrelevant to whether or not a jeopardy order should be issued. This includes facts that are known, relevant and important to the application of the criteria for issuing such an order (*Rouleau*; *Canada (National Revenue) v Reddy*, 2008 FC 208 [*Reddy*]; *Papa (Re),* 2009 FC 49 [*Papa (Re)*]).

[23] First, the Agency does not allege that the transactions completed by Mr. Genest and his advisers were a sham. The transactions were described as they unfolded; nor does the Agency claim that the transfer of $46M from 4507 to 4564 was made without consideration or with inadequate consideration.

[24] With respect to the penalty provided for in subsection 163(2) of the ITA, it is not required to be applied as a condition for issuing a jeopardy order. It was only on November 21, 2012, during a risk assessment by the Agency's Collections Division that the financial statements of 4507 were examined. Furthermore, 4507's inability to pay is not in itself determinative given that the Agency took into account 4564's ability to pay in its risk of loss analysis and its management of the proceeds of the sale of Uranor's shares.

[25] The cooperation of Serge Genest and his representatives is not determinative in this case either, given: (i) the nature of the assessment; (ii) Serge Genest and his advisers' knowledge that the creation of a fictitious capital loss was contrary to the spirit of the ITA; (iii) the precarious financial situation of 4507, 4564 and Omegalpha; (iv) 4564's refusal to provide the Agency with

sufficient security for the payment of 4507's tax debt; and (v) the transfer of $17M to a tax haven. The latter was discovered by chance during an audit of the offices of 4507's accountants. In any event, the Agency did not take a position regarding this transfer and was not required to do so in a jeopardy collection application. What is important at this point is that this amount is no longer under 4564's control and cannot be applied to paying the tax debt.

[26] With regard to the potential capital gain of $46M for 4531, the auditor simply noted that it was unlikely given Omegalpha's precarious financial situation and, accordingly, that of 4564. This strikes me as a rather realistic assessment.

[27] Despite the notice of objection filed by 4507, half of the debt was immediately recoverable, as the company was considered to be a large corporation. In addition, I do not believe the existence of a notice of objection would have had any impact on Justice Beaudry's decision (*Fiducie Dauphin (Re)*, 2009 CF 346).

[28] With respect to the financial statements of 4507 and 4564, the Agency did not cast doubt on these. It is true that in his affidavit in support of the motion by 4507, the company's accountant cited two sums that should have been reimbursed to 4564 by Mr. Genest and Omegalpha. However, these sums are not significant enough to have had an impact on Justice Beaudry's decision and the documentary evidence adduced in support of these reimbursements is not the most conclusive. The financial statements of these companies were not audited and were simply accompanied by a note to the reader.

[29] Lastly, Justice Beaudry was entitled to take into account the facts considered by the Agency for assessment purposes (*Laquerre (Re)*, 2008 FC 459 at paras 33-36). That assessment resulted from a scheme whose sole purpose was to defer payment of, or rather cancel, taxes on the capital gain of $46M by creating an equivalent artificial capital loss. That artificial capital loss constitutes an abuse of right, and is contrary to the public order and to the spirit of the ITA (*1207192 Ontario Limited v Canada*, 2012 FCA 259 at paras 14, 16, 20 and 21; *Barrasso v The Queen*, 2014 TCC 156). Mr. Genest and his advisers were perfectly aware of the risk of assessment because at the time they were hatching their plan, they made sure certain sums were hidden until the limitation period set out in subsection 154(2) of the ITA had expired. The facts considered by the Agency in its assessment are not in dispute.

b) *Review of jeopardy collection order and lifting of corporate veils*

[30] I adopt the summary of my former colleague, Justice Gleason, of the two-stage test set out in *Reddy* and which applied to the analysis of a judge sitting in review of a jeopardy collection order (*Tassone v Canada (National Revenue)*, 2013 FF 1100, at para 16):

> (i) First, the applicant bears the initial burden of establishing that there are reasonable grounds to doubt that the collection of all or any part of the amount assessed would be jeopardised by a delay in the collection of that amount. An applicant may muster this evidence by affidavits and/or by cross-examination of affiants who signed affidavits filed by the respondent (*Reddy* at para 7); and
>
> (ii) If the applicant succeeds at the first stage, the burdens shifts to the Minister to justify the jeopardy order by demonstrating that, on a balance of probabilities, it is more likely than not that the collection of the amount would be jeopardised by delay. The reviewing Court 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" (*Reddy* at para 8).

[31] Keeping in mind the applicable standard of proof which, "while falling short of a balance of probabilities, nevertheless connotes a bona fide belief in a serious possibility based on credible evidence" (see *Canada (Minister of National Revenue) v 514659 B.C. Ltd*, 2003 FCT 148 at para 6; *Qu v Canada (Minister of Citizenship and Immigration)*, 2001 FCA 399 at para 24; *Papa (Re)*, 2009 FC 49, at para16), I am of the view that there is no need to proceed to the second stage of the analysis. With the exception of a few corrections made by the companies' accountant regarding certain reimbursements made to 4564, the new facts presented by Mr. Genest have no bearing on the issue as to whether the collection could be jeopardized by the passage of time.

[32] Given the specific context of this case, the jeopardy collection order cannot be examined independently of the garnishment orders by means of which the Court agreed to the lifting of the corporate veils of 4507 and 4564, and vice versa. In addition, most of the facts cited in support of the motion for a jeopardy order concern entities other than the tax debtor and, thereupon, the Minister notified the Court of its intention of seeking the lifting of the corporate veils of 4507 and 4564.

[33] 4507 argues that the Court should not have issued the jeopardy order against the tax debtor on the basis of information regarding one of the third party entities. The facts regarding the tax debtor have been known since 2008: it has been a shell company since that date and the passage of time is unlikely to jeopardize the collection of the Minister's debt.

[34] For its part, 4564 argues that the application of the GAAR cannot justify the lifting of its corporate veil under article 317 of the *Civil Code of Quebec*, which requires that an entity was used to create a façade of reality. It reads as follows:

> Art. 317 The juridical personality of a legal person may not be invoked against a person in good faith so as to dissemble fraud, abuse of right or contravention of a rule of public order.

[35] First, 4564 submits that a transaction may be valid and legal even it its primary purpose is to reduce a tax burden (*Stubart Investments Ltd v The Queen*, [1984] 1 SCR 536). Taxpayers are entitled to organize their affairs so as to minimize their tax burden, even if in doing so, they resort to elaborate plans that give rise to results which Parliament did not anticipate (*2529-1915 Québec Inc v Canada*, 2008 FCA 398 at paras 56 to 57). Auditor Nancy Lapierre in fact acknowledged, on cross-examination, that the various transactions in which 4507 and 4564 participated were valid, and were not a sham. Lifting the corporate veil is reserved for extreme cases (*Meredith v Canada (Attorney General)*, 2002 FCA 258 at para 12).

[36] Second, it is not enough that a company has committed fraud, abuse of right or contravention of a rule of public order. The abuse of right or violation must be [TRANSLATION] "dissembled". This term is defined as having a [TRANSLATION] "connotation of secrecy, dissimulation, underhandedness or manipulation" (*Gestion B Mercier et Associés Inc c Vaillant*, REJB 2004-53108, JE 2004-388, at para 93, citing Paul Martel). It is therefore imperative to demonstrate the intention to dissemble in order to apply the doctrine of *alter ego* and lifting the corporate veil (*Brown c Roy*, 2010 QCCS 3657; see: *Chauvin c Beaucage*, 2008 QCCA 922 at paras 73-74).

[37] First, I am of the view that one cannot ignore the fact that the 3 holding companies incorporated in 2007 were all *alter egos* of Serge Genest and shared one common purpose: defer, even cancel, the taxes payable on the capital gain of $46M accruing from the sale of the Uranor shares, and to hide this sum from the tax authorities. Mr. Genest affirms that the primary purpose was to honour the promise made to his business partner to give him 50% of the profits. It is clear that the financial arrangement described above was not necessary to meet this objective and that 4507 could very well have made the payment directly, before or after taxes. Mr. Genest further states that he and his advisers believed the arrangement to be legal. However, it appears instead from a memorandum written by his business partner's counsel that he was recommending that a sufficient amount be set aside while awaiting the expiration of the time limit provided for in subsection 154(2) of the ITA, in the event the Agency were to decide to refuse the fictitious capital loss of 4507 and tax its $46M capital gain.

[38] At any rate, it matters little whether this type of tax planning was known by the Minister at the time. What counts, for the purposes of the decision to be made here, is the manner in which the Federal Court of Appeal recently characterized this kind of planning (*Canada v Global Equity Fund Ltd*, 2012 FCA 272) :

> [67] The vacuity and artificiality of transactions may confirm their abusive nature: *Mathew v. Canada*, 2005 SCC 55, [2005] 2 S.C.R. 643 (*sub. nom. Kaulius v. The Queen*) at para. 62. The Tax Court judge found that the transactions at issue in this case were "vacuous" and "highly artificial". I agree. Like the proverbial rabbit out of the magician's hat, the loss which occurred as a result of these transactions was pulled out of thin air. These transactions are nothing more than a paper shuffle carried out with the purpose of creating an artificial business loss for the purpose of avoiding the payment of taxes otherwise owed on the profits resulting from the real-world business operations of Global.

[39] What is also of import is that there is a notice of assessment for an amount that today exceeds $11M, that 4507 is a shell company as a result of the multiple transactions made in 2007 and that 4564, its sister company and *alter ego* of its sole shareholder, conducts its affairs in such a way as to lead the Minister to believe that the collection of its debt is in jeopardy. And it does so with the very fruit of the tax debtor's capital gain.

[40] During the hearing of this case, I raised the issue of whether lifting the corporate veils among sister companies was possible, as well as whether the Minister was not attempting, in his actions, to have the transactions from 2007 declared that they cannot be set up against it, while ignoring the strict conditions set out in articles 1631 *et seq.* of the *Civil Code of Quebec* and the short time limitation set out in article 1635.

[41] The Minister's counsel referred me to the Quebec Court of Appeal's decision in *Québec (sous-ministre du Revenu) c 9087-3118 Québec Inc*, 2010 QCCA 1470, which responds to both issues. Justice Dalphond, writing for the Court, at paragraph 18, begins by citing the following passages from *La compagnie au Québec - les aspects juridiques*, in which authors Maurice Martel and Paul Martel write [emphasis omitted]:

> [TRANSLATION]
>
> 1-268 The concept of alter ego has also been used in dealing with civil liability and taxation, particularly in Anglo-Canadian law. It is used to identify the company with its shareholder, in particular, to the point of creating privity between the latter and third parties doing business with the company, or to treat two companies as a single entity, so as to impose the obligations of one on the other.
>
> …
>
> 1-274 In all of these circumstances, no reference to the "corporate veil" or to article 317 would be required. The basis of the concept

> of alter ego is sufficient. The interrelationship between the two concepts is the following: Article 317 allows for the "lifting of the corporate veil" where the company is the alter ego of its shareholder or of another company, and where it is used to commit, at the instigation or for the benefit of either, fraud, an abuse of right, or a breach of a rule of public order. In the absence of one of these three actions, the fact that a company is an alter ego does not entail failure to respect its corporate identity, or the immunity of its shareholder.

[42] Further on, with respect to my second line of questioning, he writes [emphasis added]:

> [TRANSLATION]
>
> [20] This means that 9153's objection should have been dismissed, given that the juridical personality of a legal person cannot be invoked so as to dissemble fraud on its part or on the part of those who control it (Art. 317 C.C.Q), a situation equivalent to an estoppel of its ground of objection.
>
> [21] That being the case, I am not saying that the Minister may circumvent the requirements in a Paulian action. Such a proceeding or another seeking the conviction of 9153 would have been necessary if 9153 and 9087 had not been sister companies. For example, if, in the face of imminent notices of assessment and seizure proceedings by tax authorities, Chen had sold the assets of 9087 to a third party at a cut rate in order to make a bit of money and avoid having the assets seized, the tax authorities could have considered that the sale could not be set up against it; it would then have had to have brought the action within one year of having learned of the sale (art. 1635 C.C.Q). The basis of the action would thus not have been Art. 317 C.C.Q, but rather Art. 1631 C.C.Q In addition, the action would only have allowed the seizure of the assets that had been sold (art. 1636 C.C.Q). This is not the case here, where the seized assets are not those that were sold and where the tax authorities are not seeking a declaration that the sale between two distinct entities cannot be set up against it, but rather to consider the two entities as a single entity and, as a result, the sale as a form of simulation.

[43] In the case that concerns us, 4564 and 4531 became, following the transactions in 2007, the *alter ego* of the tax debtor for the sole purpose of contravening a rule of public order and evade payment of the taxes payable on its capital gain. This Court has already determined that

non-payment of tax debts may constitute contravention of a rule of public order and that a contravention results where it is demonstrated that the *alter egos* knowingly used their separate legal personalities for the purpose of avoiding their tax obligations (*Laquerre (Re)*, 2008 FC 460 at paras 13). Even where each transaction, taken individually is valid and legal, the tax planning in this case was contrary to a rule of public order, which justifies the Court's lifting of the corporate veil so that the parties do not benefit from increasingly complex and intricate tax avoidance techniques *(Coutu c Commission des droits de la personne et des droits de la jeunesse,* [1998] JQ No 2779 at para 34; see: *Neuman v M.R.N.*, [1998] 1 SCR 770 at para 46).

[44] I am therefore of the view that 4507 has not established that there are reasonable grounds to doubt that the collection of all or any part of the amount assessed against the respondent would be jeopardized by a delay in the collection of that amount by the Minister.

[45] I am also of the view that 4564 has not demonstrated that Chief Justice Crampton erred in finding that 4564 had become the *alter ego* of the tax debtor for the sole purpose of avoiding payment by the latter of the tax payable on the capital gain of $46M, and that the lifting of its corporate veil was warranted. I will therefore issue a final order of garnishment.

B. *Prothonotary's orders*

[46] Given that this issue concerns an appeal from a discretionary order of a Prothonotary, the Court shall conduct a hearing *de novo* only where: (a) the question raised in the motion is vital to the final issue of the case; or (b) the order is clearly wrong, in the sense that the exercise of

discretion by the prothonotary was based on a wrong principle of law or a misapprehension of the facts (*Sanofi-Aventis Canada Inc v Teva Canada Limited*, 2014 FCA 65).

[47] 4507 and 4564 essentially argue that the prothonotary erred:

1. by depriving them of their fundamental right to cross-examine a person who had personal knowledge of the facts giving rise to the issuing of the protection orders;
2. by refusing to order the striking out of the affidavits of Renée Alain;
3. in finding that the evidence submitted by the Crown was sufficient to establish Ms. Renée Alain's inability to submit to an examination on affidavit;
4. in accepting the filing of a replacement affidavit by Ms. Thérèse Gauthier, which was not detailed and based on hearsay;
5. in finding that the harm suffered by the Crown, in the event the affidavits of Renée Alain were to be struck out, outweighs the prejudice suffered by the respondent and third party resulting from Renée Alain not being cross-examined.

[48] I am of the view that the prothonotary's order is not vital to the final issue of the application before me.

[49] However, I do not feel I have to pronounce an opinion on the merits of the prothonotary's decision or weigh the rights and interests, namely, the right to cross-examine an opposing party's witness and the prejudice to the Minister if Ms. Alain's affidavits are struck from the record and if the Minister is not allowed to file Ms. Gauthier's affidavit. I find this issue and the others raised in the appeal of 4507 and 4564 became moot when their counsel waived cross-

examination of Ms. Alain when she became available, 2 and a half months before the hearing of the motions. The fact that the Court docket was complete did not preclude that cross-examination or the production of notes prior to the presentation of the motions; the Minister's counsel had consented to it and declared himself to be available to proceed in such a manner. The reason given for Ms. Alain's temporary unavailability was sufficient and did not result in an abuse of process on the part of the Minister.

[50] The appeal from Prothonotary Morneau's order is therefore dismissed on this ground.

V. Conclusion

[51] For all these reasons, the four motions before me are dismissed. Given that the third party 4564 is the *alter ego* of the tax debtor, it is also ordered to pay costs, jointly and severally with the tax debtor.

JUDGMENT

THE COURT ORDERS AND ADJUDGES that:

1. 9183-4507 Québec Inc.'s motion to review the jeopardy collection order issued by Justice Beaudry on December 16, 2013, is dismissed;

2. Third party 9183-4564 Québec Inc.'s motion challenging the garnishment orders issued by Chief Justice Crampton on December 19, 2013, and subsequently amended, is dismissed;

3. The application for the issuance of a final order of garnishment in dockets ITA-14340-13 and ITA-11252-13 is allowed;

4. The motion by 9183-4507 Québec Inc. and 9183-4564 Québec Inc. to appeal from the order of Prothonotary Richard Morneau, dated July 9 2014, and amended on July 11, 2014, is dismissed;

5. Respondent 9183-4507 Québec Inc. and third party 9183-4564 Québec Inc., are ordered, jointly and severally, to pay costs on the four motions.

"Jocelyne Gagné"
Judge

Certified true translation
Sebastian Desbarats, Translator

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-2053-13
STYLE OF CAUSE:	IN THE MATTER OF THE INCOME TAX ACT, and IN THE MATTER OF ASSESSMENTS BY THE MINISTER OF NATIONAL REVENUE, UNDER THE INCOME TAX ACT, c 9183 4507 QUÉBEC INC.
AND DOCKETS:	ITA-14230-13, T-11252-13
STYLE OF CAUSE:	IN THE MATTER OF THE INCOME TAX ACT, and IN THE MATTER OF ASSESSMENTS BY THE MINISTER OF NATIONAL REVENUE, UNDER THE INCOME TAX ACT, c 9183-4507 QUÉBEC INC and COMPANY TRUST ROYAL, and RBC PHILIPS HAGER AND NORTH SERVICES-CONSEILS ET PLACEMENTS INC., and GESTION PLACEMENTS DESJARDINS, and 9183-4564 QUÉBEC INC.
PLACE OF HEARING:	MONTRÉAL, QUEBEC
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DATED:	JULY 28, 2015

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