

**Date: 20070619**

**Docket: T-1926-06**

**Citation: 2007 FC 656**

[ENGLISH TRANSLATION]

**Montréal, Quebec, June 19, 2007**

**PRESENT: Richard Morneau, Esq., Prothonotary**

**BETWEEN:**

**THE MINISTER OF NATIONAL REVENUE**

**Applicant**

**and**

**LA COOPERATIVE DE SERVICES DES  
TRAVAILLEURS AUTONOMES DE  
L'OUTAOUAIS also known as  
COOP HARMONIE PLUS**

**Respondent**

**REASONS FOR ORDER AND ORDER**

[1] The Court is faced with two (2) motions. One is by the applicant, and it is aimed at establishing a timeline for bringing this case into order, which is tending to drag. This motion is not truly being challenged.

[2] The other motion is by the respondent (hereinafter Coop Harmonie Plus) under Rule 371 of the *Federal Courts Rules* (the Rules) for leave to have two witnesses heard during the hearing for its application to have the Court's decision dated November 6, 2006, reviewed, which gave leave to the Minister of National Revenue (the applicant) to have a request for information and document delivery aimed at the designated individuals not mentioned by name served on Coop Harmonie Plus.

[3] We will first deal with the latter motion under Rule 371.

### **Background**

[4] The Court's leave on November 6, 2006, was granted under subsection 231.2(3) of the *Income Tax Act* ("ITA"). To obtain this leave, the applicant demonstrated two elements: that the persons in question could be identified and that the applicant required their names to audit a duty or obligation set out in the ITA, namely, to our understanding, that the investments of persons in the Coop Harmonie Plus met the conditions set out in the ITA to qualify as an RRSP deduction.

[5] Afterwards, Coop Harmonie Plus filed an application challenging the order dated November 6, 2006, and proceed with the examination on affidavit of the two auditors who signed the affidavits in support of the *ex parte* application, Ms. Josée Girard and Mr. Jacques Lacroix. The same steps were taken in docket T-1933-06.

[6] Coop Harmonie Plus finally filed the motion under review recently.

## Analysis

### 1 Motion by Coop Harmonie Plus under Rule 371

[7] Rule 371 reads as follows:

**371.** On motion, the Court may, in special circumstances, authorize a witness to testify in court in relation to an issue of fact raised on a motion.

**371.** Dans des circonstances particulières, la Cour peut, sur requête, autoriser un témoin à témoigner à l'audience quant à une question de fait soulevée dans une requête.

(Emphasis added)

[8] In *Cyanamid Canada Inc. v. The Minister of National Health and Welfare* (1992), 52 F.T.R. 22 (F.C. Trial Division), the Associate Chief Justice of this Court, as he then was, stressed the following statements that apply *mutatis mutandis* to the rule under review:

It is clear that motions are to be conducted on the basis of documentary evidence and that it is exceptional to depart from this practice. Rule 319 of the *Federal Court Rules* provides that allegations of fact upon which a motion is based shall be by way of affidavit although, by leave of the Court and for special reason, a witness may be called to testify in open Court in relation to an issue of fact raised by an application. In *Glaxo Canada Inc. v. Canada (Minister of National Health and Welfare) and Apotex Inc. et al. No. 4* (1987), 11 F.T.R. 132, Glaxo's application under rule 319(4) for leave to call a witness to give viva voce evidence in relation to certain issues of fact raised in the application was dismissed. Rouleau, J., commented (at p. 133):

Under Rule 319 all the facts on which a motion is based must be supported by affidavit evidence. It is

only ‘by leave of the court’ and ‘for special reason’ that a witness can be called to testify in relation to an issue. There were no cases presented to me by counsel for the plaintiff nor am I aware of any case law which identifies the test as to what constitutes ‘special reason’. In my opinion, this is a question to be decided on the facts of a particular case with the onus being on the applicant to prove the existence of ‘special reason’ to the satisfaction of the court. What is clear from the jurisprudence is that leave will be granted by the court only in exceptional circumstances.

[9] The burden of demonstrating the existence of those circumstances falls to the respondent, Coop Harmonie Plus.

[10] In its notice of motion and written submission — and not in an affidavit, so therefore not in the evidence — Coop Harmonie Plus argues that the applicant is pursuing some sort of nationwide investigation through this docket, and not a simple audit of the people in question at Coop Harmonie Plus.

[11] During its written submissions at its motion hearing, counsel for Coop Harmonie Plus argued that the applicant was reproducing here on merit the situation denounced by the Supreme Court of Canada in *James Richardson & Sons v. M.N.R.*, [1984] 1 S.C.R. 614, i.e. a general investigation (fishing expedition) into a category of people.

[12] According to the allegations by Coop Harmonie Plus, witnesses who come from or worked for the applicant (Mr. Vita and Mr. Gagnon) would confirm everything. However, the affidavit provided by Coop Harmonie Plus is very brief, and does not raise at all the detailed proposition

argued by Coop Harmonie Plus in its written and oral allegations. Furthermore, the applicant acted in 2006 pursuant to the parameters under subsection 231.2(3) of the ITA, which, as demonstrated by counsel for the applicant, underwent two legislative changes since *Richardson* in 1984.

[13] Moreover, Coop Harmonie Plus did not provide as evidence any elements showing that it took steps to contact the two witnesses sought, Mr. Vita and Mr. Gagnon, and that these two witnesses refuse to provide affidavits. In Mr. Vita's case, it appears that he is no longer employed by the applicant. He is therefore not under the applicant's control. As for Mr. Gagnon, the evidence reveals very little about him.

[14] As a result, this motion by the respondent, Coop Harmonie Plus, will be dismissed with costs, because it is my view that the respondent did not meet its burden of proof in its motion.

## **2 Applicant's motion for a timeline**

[15] As for this motion, the parties will govern themselves in accordance with the timeline in the order below. This motion is therefore allowed, with costs in the cause.

**ORDER**

1. The motion by the respondent, Coop Harmonie Plus, is dismissed, with a set of costs for both dockets (i.e. this docket and docket T-1933-06).
  
2. The applicant's motion to establish a timeline is allowed as follows, with costs in the cause. Thus, the parties must govern themselves according to the following timeline:
  - a) By July 18, 2007, the respondent, Coop Harmonie Plus, shall serve and file an additional motion record under Rule 364 that contains, if applicable, written representations in addition to those already filed, and the excerpts from the transcripts of the testimonies on affidavit that it intends to use;
  
  - b) By August 3, 2007, the applicant, the Minister of National Revenue, shall serve and file a motion record in response to the respondent's motion record and the additional motion record, if applicable;
  
  - c) After the later of the dates above, the Court shall set the motion review hearing for the order at a special session of the Federal Court in Montréal, for a duration of no longer than one (1) day for dockets T-1926-06 and T-1933-06. Counsel for the applicant shall send the judicial administrator a letter for that purpose.

- d) This order applies *mutatis mutandis* to docket T-1933-06.

**“Richard Morneau”**

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Prothonotary

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** T-1926-06

**STYLE OF CAUSE:** THE MINISTER OF NATIONAL REVENUE  
Applicant  
LA COOPERATIVE DE SERVICES DES  
TRAVAILLEURS AUTONOMES DE  
L'OUTAOUAIS also known as  
COOP HARMONIE PLUS  
Respondent

**PLACE OF HEARING:** Montréal, Quebec

**DATE OF HEARING:** June 18, 2007

**REASONS FOR ORDER:** PROTHONOTARY MORNEAU

**DATED:** June 19, 2007

**APPEARANCES:**

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