

Federal Court



Cour fédérale

Date: 20100329

Docket: ITA-5671-08

Citation: 2010 FC 340

Toronto, Ontario, March 29, 2010

**PRESENT:** The Honourable Mr. Justice Russell

**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: Don McDonald  
1515 – 1 Lombard Place  
Winnipeg, Manitoba  
R3B 0X3**

**REASONS FOR ORDER AND ORDER**

[1] At the show cause hearing for this matter under Rule 459 the judgment debtor, Mr. Don McDonald, seeks to have the interim order discharged on the grounds that he does not have an interest under Rule 458(1)(a) that can be charged.

[2] Essentially, Mr. McDonald argues that he has an indirect, contingent, beneficial interest in the gift of real property contained in his father's will and there is no authority that permits such an interest to be charged under Rule 458(1)(a).

[3] He says that if the Court were to hold that such an interest is captured by Rule 458(1)(a), this would go beyond the plain and ordinary usage of the words and would amount to "judicial legislation." This could not have been the intent of Parliament or the Rules Committee. He also says that, in the context of the orderly administration of estates, such an interpretation would lead to chaos.

[4] In other words, Mr. McDonald says that Rule 458(1) does not encompass the charging of a beneficial, contingent interest such as the interest of a beneficiary of real property under a will. He says that much more explicit language would be required to permit such an extraordinary charge, particularly in light of the effects that such an interpretation would potentially have on settled estate administration jurisprudence.

[5] The interest in question in this case – Mr. McDonald's interest in the real estate that falls to be distributed under his father's will to Mr. McDonald and his sisters – arises for consideration under Rule 458(1)(a)(i) as "an interest in real property."

[6] Rule 458(1)(a) places no limitation on the nature or extent of the judgment debtors "interest in real property or immoveables." As Justice Martineau pointed out in *Canada (Minister of National*

*Revenue- M.N.R.) v. Laguerre*, 2008 FC 460, [2008] F.C.J. No. 578 at paragraph 3, the registration of a certificate of the Minister is “equivalent to a judgment of this Court” which means that the Minister “may immediately register an interim charge against any immovable (*sic*) belonging to the judgment debtor mentioned in the certificate in question.” Justice Martineau’s words are equally applicable to “any” interest in real property.

[7] Justice Martineau also makes several points at paragraph 5 of his reasons in *Laguerre* that, in my view, are also applicable to the case before me:

5. Rule 459(1) reads, “At a show cause hearing referred to in paragraph 458(1)(b), the Court shall make the interim charge absolute, in Form 459, or discharge it. In this case, then, the Court has two options: to make the charge absolute or to discharge it. I note that rules 458 and 459 do not require a judgment creditor to seize the immovable immediately (although he could); the goal is rather to charge it with the equivalent of a judicial hypothec to ensure the protection of his rights: *R. v. Mullin*, [1985] 2 C.T.C. 128. More specifically, the purpose and effect of these rules is the creation of a charge on the debtor’s immovable pursuant to a judgment, affecting the said immovable when that judgment is enforced: *Re Beaudry*, [1979] 2 FC 138. Given that we are simply dealing with a judgment execution measure and that under rule 462, the Court may, on a motion by the judgment debtor or any other person having a right in the property charged with an interim or absolute charge, discharge or vary the charging order on such terms as it considers just with respect to costs, I do not find it premature to issue a charging order absolute in this case.

[8] Mr. McDonald does not deny that, under his father’s will, he has an “interest in real property.” He characterizes this interest as “indirect/contingent, beneficial,” but it is still an interest in real property.

[9] As Justice Martineau pointed out in *Laguerre*, Rule 462 allows a discharge or variance on motion of the judgment debtor or any other person with an interest in property subject to an interim or absolute charge under rule 458 or 459, at any time, on such terms as to costs as the Court considers just. In my view, there is sufficient flexibility within the rules to deal with the charge in question should it be necessary to do so as part of the estate administration process. There is really no evidence before me that the charge in question will lead to problems or “chaos” in the administration of the estate. I regard Mr. McDonald’s concerns in this regard as speculative and unlikely, given the Court’s ability to discharge or vary with suitable terms as to costs.

[10] As regards the scope of “an interest in real property” under 458(1), there is simply nothing in the governing legislation or the Rules to suggest that such an interest should be limited in some way. Mr. McDonald argues that there is nothing to suggest that the wording was intended to encompass the interest he has in the land under his father’s estate. In my view, however, it is Mr. McDonald who is seeking to limit the plain and obvious meaning of “an interest in real property or immoveables” and there is nothing in the scheme of the governing legislation, the Rules, or the jurisprudence to suggest that such a limitation should apply. An interest in land is an interest in land, even if it is a beneficial and contingent interest in land. To embark upon a process of trying to carve out certain interests in land that should not be subject to Rule 458 would, in my view, be extremely difficult and would result in the kind of confusion for which I can see no justification in principle or authority.

[11] Jowitt's dictionary of English Law, 2<sup>nd</sup> ed. (1977) p. 995 (as cited in Words & Phrases, volume 4 at page 1178), establishes that a person has an interest in something when "he has rights, advantages, duties, liabilities, losses or the like, connected with it, whether present or future, ascertained or potential..."

[12] Based on such an expansive definition, I believe that there is little question that the property interests in the land currently maintained by the Respondent would fall within the scope of Rule 458.

[13] Black's Law Dictionary also contains an expansive interpretation of the term "interest." Black's considers an interest to be "a legal share in something; all or part of a legal or equitable claim to or right in property." Black's 7<sup>th</sup> edition at page 816.

[14] Moreover, in *Williams v. Papworth*, [1900] A.C. 563, 69 LJPC (as cited in *Rystephaniuk v. Proskan*, 59 Man R. 142 and *Words and Phrases*, above,) Lord Macnagten said with regard to the term interest in land,

It could not, of course, be disputed that the expression "interest in land," unless there was something to restrict the meaning, must include equitable as well as legal interests.

[15] Based on the expansive definition of the word "interest" and the phrase "interest in land," it is my view that the Respondent's interest is encompassed in Rule 458. Furthermore, contrary to the Respondent's argument, there is nothing in the wording of Rule 458 that restricts the meaning of

“an interest in real property.” As such, on an interpretive basis, it appears that the Respondent’s interest is included in Rule 458.

[16] Because the estate has yet to be distributed, the Respondent has a concern that it could be premature to require the Respondent to pay tax on an asset he has yet to acquire. I think that such a concern, although potentially valid, does not arise on these facts.

[17] In this case, it appears the Respondent is attempting to delay distributing the property in question to the beneficiaries, himself included, so that he can avoid paying his share of taxes on the property. As stated by the Applicant, his “failure to convey the legal interest of this real property to the devisees is ostensibly keeping his one quarter beneficial interest in this asset outside the reach of the tax collector.” Hence, on these facts, I see no reason not to allow Rule 458(1)(a) to take effect in accordance with the interpretation set out above. As Justice Martineau pointed out in *Laguerre*, given that we are dealing with a judgment execution measure, there is enough flexibility to deal with anomalies and injustices if and when they arise. They do not arise here.

[18] Consequently, I believe that the interim change in this case should be made absolute in accordance with Rule 459.

**CHARGING ORDER ABSOLUTE**

**UPON MOTION** made returnable on January 18, 2010 by Order of Justice Pinard, dated November 30, 2009;

**AND UPON** reading the material filed on behalf of the Attorney General of Canada in its application for an *ex parte* interim charging order and on hearing the submissions of counsel for Don McDonald and counsel for the Attorney General of Canada, and upon reading further written submissions filed by both counsel;

**IT IS ORDERED THAT:**

1. The interest of Don McDonald in the assets specified in the real property described as:
  - a. PCL 34570 SEC DKF; PT LOCATION 460P UNSURVEYED TERRITORY PT OF GALT ISLAND, LAKE OF THE WOODS, PT 9, 10, 11, 12, 13 23R5964 and PT 3 and 4 KR341 S/T PT 10 and 13, 23R5964 AS IN LT30027; S/T LT222465; DISTRICT OF KENORA; and
  - b. PDL 35264 SEC DKF; PT LOCATION 460P UNSURVEYED TERRITORY BEING PT OF GALT ISLAND, LAKE OF THE WOODS, PT 8, 23R5964; DISTRICT OF KENORA.

stand charged with the payment of \$2,546,249.27, the amount due from Don McDonald to Her Majesty the Queen in Right of Canada as represented by the Minister of National Revenue pursuant to a certificate registered in this Honourable Court on or about May 8, 2008, said certificate having the force of a judgment pursuant to subsection 223(3) of the *Income Tax Act*, together with any applicable interest, compounded daily, at the rate prescribed under the *Income Tax Act* and the costs of this motion, which are to be added to the judgment debt.

“James Russell”

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Judge



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

**DOCKET:** ITA-5671-08

**STYLE OF CAUSE:** IN THE MATTER OF the *Income Tax Act*;  
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*Income Tax Act, Canada Pension Plan, Employment  
Insurance Act*

against: Don McDonald  
1515 – 1 Lombard Place  
Winnipeg, Manitoba  
R3B 0X3

**PLACE OF HEARING:** Winnipeg, Manitoba

**DATE OF HEARING:** January 18, 2010

**REASONS FOR ORDER  
AND ORDER:** RUSSELL J.

**DATED:** March 29, 2010

**APPEARANCES:**

Denyse T. Coté FOR THE APPLICANT

Jeff D. Pniowsky FOR THE RESPONDENT

**SOLICITORS OF RECORD:**

John H. Sims, Q.C. FOR THE APPLICANT  
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