Federal Court of Appeal | Cour d'appel fédérale

Date: 20160219

Docket: A-229-15

Citation: 2016 FCA 62

CORAM: **NADON J.A.**
TRUDEL J.A.
SCOTT J.A.

BETWEEN:

GAÉTAN LAQUERRE

Appellant

and

HER MAJESTY THE QUEEN

Respondent

and

9011-1345 QUÉBEC INC.

Mis-en-cause

Hearing held at Québec, Quebec, on December 17, 2015.

Judgment delivered at Ottawa, Ontario, on February 19, 2016.

REASONS FOR JUDGMENT BY: NADON J.A.

CONCURRED IN BY: TRUDEL J.A.
SCOTT J.A.

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REASONS FOR JUDGMENT

NADON J.A.

I. Introduction

[1] This is an appeal of an Order (2015 FC 440) made by Mr. Justice Harrington of the Federal Court (the Judge) on April 10, 2015, dismissing the motion filed by the mis-en-cause Société 9011-1345 Québec Inc. (Société 9011) and Gaétan Laquerre (the appellant) under Rule 462 of the

Federal Courts Rules, SOR/98-106 to quash an absolute charging order on an immovable owned by Société 9011.

[2] For the reasons that follow, I conclude that the appeal should be dismissed.

II. The facts

A. The parties

[3] Mario Laquerre, the appellant's brother, invested in the real estate industry in his own name, as well as through trusts and companies that he controls. Over time, Mario Laquerre, his trusts and companies (the tax debtors) have collectively accumulated a significant amount of tax debt owed to the Minister of National Revenue (the Minister).

[4] Société 9011 was created on November 4, 1994, and has been active in the real estate development industry since then. This company owns a commercial rental property located at 1095 de la Canardière in Québec City (the property) and owes no money to the Minister.

[5] In an affidavit signed on November 25, 2014, the appellant professed to be the president of Société 9011, to own 52% of said company's shares and that his brother, Mario Laquerre, owned the rest of the shares.

B. The imposition of a charge on the property

[6] On an *ex parte* motion dated October 3, 2007, from the Crown (the respondent), as a judgment creditor seeking an interim order to, *inter alia*, charge five properties held by

Société 9067-6388 Québec Inc. (Société 9067) and the property held by Société 9011 on the grounds that [TRANSLATION] "several companies connected to [Mario Laquerre] were started in order to allow some of them and himself to avoid paying taxes," Madam Justice Gauthier, then a Federal Court judge, rendered an interim order on October 11, 2007 under Rule 458 to impose a charge on said properties for the purpose of enforcing an order for the payment of a sum of money owed by the tax debtors. On page 3 of her order, Gauthier J. stated the following:

> [TRANSLATION] **WHEREAS** at least *prima facie* and unless the contrary is shown, the corporate veil should be lifted and the holdings of 9067-6388 Québec Inc. and of 9011-1345 Québec Inc. should be considered part of the holdings of the following judgment debtors: Mario Laquerre, 9122-9831 Québec Inc., 9075-3153 Québec Inc., 9015-7769 Québec Inc. and 9029-0065 Québec Inc. An interim charging order should therefore be made until it is conceded that an absolute order be made in this respect only for purposes of allowing the applicant to take steps to collect the taxes owed by these judgment debtors [my emphasis].

[7] On April 9, 2008, on a motion filed by the respondent for an absolute charging order on properties owned by Société 9067 and on the property owned by Société 9011, Mr. Justice Martineau of the Federal Court rendered an order (2008 FC 460) imposing an absolute charge on said properties under Rule 459. It is to be noted that Société 9011, the mis-en-cause in this proceeding, and represented by its legal counsel, opposed the piercing of its corporate veil and the imposition of an absolute charge on its property.

[8] Despite Société 9011's opposition, Martineau J. found that this company was Mario Laquerre's *alter ego* and that he used the separate juridical personalities of his companies, including Société 9011, in order to avoid paying taxes. In view of the evidence before him, including a counter-letter dated December 29, 1994 between the appellant and his brother, Mario Laquerre, which states that Mario Laquerre remained the absolute owner of Société 9011, Martineau J. ruled

that Société 9011's corporate veil should have been pierced in view of the criteria propounded by the case law and the doctrine pertaining to article 317 of the *Civil Code of Québec*, CQLR c. C-1991 (CCQ). The Judge said that he was of the opinion that non-payment of a tax debt may constitute a contravention of public order. Société 9011 did not appeal from Martineau J.'s order.

C. Facts on which is based the present motion

[9] A fire that broke out on March 23, 2014 caused the appellant to perform work on the property, which is still owned by Société 9011. According to the appellant, the company insuring the property would not cover his expenses or continue to cover the property because of the charge held by the respondent. It appears that this event prompted the appellant and Société 9011 to commence this proceeding before the Federal Court in order to have the charge on the property stricken out.

[10] On August 6, 2014, the appellant bought back the mortgage on the property from the Caisse de Gentilly-Lévrard-Rivière du Chêne, which registered it in 2005, thereby becoming a mortgagee having priority over the respondent, which registered its charge on the property in 2008.

D. Motion giving rise to the appeal

[11] On or around November 25, 2014, Société 9011 and the appellant filed a motion under Rule 462, asking the Federal Court to render an order setting aside in part Martineau J.'s order imposing an absolute charge on the property. In other words, Société 9011 and the appellant requested the cancellation of the legal hypothec on the property pronounced by Martineau J.'s decision. More specifically, Société 9011 argued that the conditions warranting the piercing of its

corporate veil [TRANSLATION] "were not and are still not met." In support of this motion, Société 9011 and the appellant filed the appellant's affidavit, wherein, *inter alia*, he states the following:

1. That he was in no way part of the proceedings instituted by the respondent against his brother, Mario Laquerre, and his trusts and companies;

2. That Société 9011, unlike the companies owned and/or controlled by his brother, owed no money to the respondent;

3. That Société 9011 had not been used to hide a fraudulent act and that there was no confusion between his brother's and Société 9011's property;

4. That he held 52% of the shares in Société 9011 and that he was its CEO, adding that he had always been involved personally in Société 9011 and that he had always acted as its representative.

5. With respect to the counter-letter dated December 29, 1994 between him and his brother, Mario Laquerre, that [TRANSLATION] "… I do not deny having signed that counter-letter, I am saying that I do not remember signing it." (Appeal Book, Vol. 1, Tab 2, page 38, at paragraph 21);

6. That he was not a party to the respondent's recovery proceedings and that [TRANSLATION] "I wrongly believed that these proceedings would have no impact on me or on 9011-1345 Québec Inc. because it was just a mis-en-cause" (*ibidem* at paragraph 47);

7. That he was in no way interested in how the proceedings before Martineau J. would play out.

III. Federal Court Order

[12] The motion filed by Société 9011 and by the appellant was heard by the Judge on March 26, 2015. On April 10, 2015, the Judge dismissed the motion.

[13] To begin with, the Judge noted that the motion before him had been filed almost seven years after Martineau J.'s decision and that it was based on three grounds: 1) Martineau J. had erred by ruling that Société 9011's corporate veil had to be pierced, 2) Martineau J. would have ruled

otherwise had Société 9011 and the appellant submitted evidence, which they did not, and 3) the appellant, as principal shareholder in Société 9011, should have been personally served, which he was not. In addition, the Judge noted that Société 9011 and the appellant cited new circumstances that warranted the filing of their motion: the facts stated in paragraphs [9] and [10] above.

[14] The Judge dismissed the motion for the following reasons: With regard to the appellant, the Judge said he was of the opinion that a corporation had a legal personality separate from that of its shareholders. They had an interest in the corporation, but not in its assets. Consequently, the Judge concluded that the appellant, as a shareholder in Société 9011, had no standing in this case because it was Société 9011 that owned the property. With regard to the appellant's standing as a mortgagee, the Judge stated the following in paragraph 15 of his reasons:

> [TRANSLATION] He may have standing as a mortgagee, but absolutely nothing allows a mortgagee to maintain that a legal hypothec registered after his should have been paid.

[15] As for Société 9011, the Judge stated that it could have used Rule 462 to have Martineau J.'s order set aside in certain special circumstances (e.g., if the tax debtors had successfully disputed their assessments or it was proven that the respondent held more securities than necessary). Because there were no such circumstances in this case, the Judge found that he was bound by Martineau J.'s absolute charging order, under the *res judicata* doctrine. In addition, the Judge stated that Société 9011 should have appealed from Martineau J.'s decision or filed a motion to reconsider under Rule 397.

[16] The Judge stated that nothing prevented the appellant, as CEO of or principal shareholder in Société 9011, from filing an affidavit in the proceedings before Martineau J. The appellant was well aware of those proceedings, but he simply did not think that it was worth his while to appear. The Judge added that there was no obligation on the respondent's part to serve the appellant with the motion that led to Martineau J.'s decision because the appellant was only a shareholder in Société 9011.

[17] Lastly, the Judge said he was of the opinion that Martineau J.'s decision stood under the doctrine of *res judicata*. In paragraph 20 of his reasons, citing *Rostamian v. Canada (Minister of Employment and Immigration)*, 129 N.R. 394 [1991], F.C.J. No. 525 (QL), the Judge stated that "[t]here is an important public interest to be served in the finality of judgments."

IV. Appellant's submissions

[18] The appellant raises five issues:

A. *Audi alteram partem*;

B. The Judge's refusal to reconsider the piercing of the corporate veil;

C. Interpretation of Rule 462;

D. Occurrence of unreasonable seizure, and

E. The unconstitutionality of rules 458 and 462.

A. Audi alteram partem

[19] The appellant submits that the decision appealed from violates the principles of fundamental justice because it was the Judge's opinion that Martineau J.'s order was *res judicata* as for him whereas he was not a party in that case. The Judge wrongly refused to examine his argument that the

corporate veil could not be pierced without the appellant, who saw his rights affected because he was not a party in the proceedings. The appellant said that the Judge's actions are contrary to the doctrine propounded by the Supreme Court in *Bowen v. City of Montreal*, [1979] 1 S.C.R. 511, [1978] CanLII 114, and by the Quebec Court of Appeal in *Cousineau v. Stephenson*, [2001] J.Q. No. 461, [2001] CanLII 14356.

[20] Although in his opinion, the conditions for piercing the corporate veil were not met, the appellant further argued that his connection with his brother, Mario Laquerre, resulted in the creation of a partnership under article 2186 of the CCQ. It was therefore not possible to change with a hypothec his share in the assets without his consent, under article 2211 of the CCQ.

[21] In addition, the appellant submits that, under subsection 2(*e*) of the *Canadian Bill of Rights*, S.C. 1960, c. 44; section 7 of the *Charter of Human Rights and Freedoms*, CQLR c. C-12 (the Charter); section 23 of the Charter and Rule 4 in the *Federal Courts Rules*, SOR/98-106, and under section 5 of the Quebec *Code of Civil Procedure*, CQLR c. C-25, he has a right to a hearing under the *audi alteram partem* rule. In summary, the Judge erroneously decided that the appellant should have taken part in proceedings at which he was not summoned to appear.

B. The Judge's refusal to reconsider the piercing of the corporate veil

[22] The appellant further stated that the Judge erred by refusing to address his argument that the necessary conditions for piercing the corporate veil were not met. To begin with, piercing the corporate veil is unheard of when a company has several shareholders; for if it were pierced, the

alter ego concept would not apply. Where there are several shareholders, it must be proven that there was collusion among them; that has never been proven in this case.

C. Interpretation of Rule 462

[23] The appellant states, *inter alia*, that the Judge erred by concluding that he had no standing under Rule 462. The appellant maintains [TRANSLATION] "that he is clearly a person with an interest in and a right to the property charged by the order because he bought back the mortgage from the Caisse populaire and the law sets out no time criteria regarding holding a right" (appellant's memorandum at paragraph 62). In *Minister of National Revenue v. McDonald*, 2010 FC 340, [2010] F.C.J. No. 1047, the concept of "real property" must be broadly interpreted (appellant's memorandum at paragraph 63).

[24] In addition, the Judge failed to consider the appellant's true legal interest as a majority shareholder in Société 9011. Martineau J.'s order pierced the corporate veil with respect to all shareholders, not just Mario Laquerre. The Judge was therefore wrong to conclude that Société 9011's separate juridical personality ensured that the appellant had no standing.

[25] The appellant also argues that the Judge wrongfully limited the scope of Rule 462. This rule is flexible enough to give the appellant standing at any time. The appellant could not appeal from Martineau J.'s order because he was not a party in the case at the time.

D. Occurrence of unreasonable seizure

[26] Should our Court answer in the negative questions A, B, and C, the appellant submits that the order under appeal constituted unreasonable seizure and contravened section 8 of the Charter.

[27] The appellant submits that the test of section 8, [TRANSLATION] ". . . which consists in assessing, in all cases, whether an individual's right not to be inconvenienced by the Government should be superseded by that of the Government to interfere in citizens' private lives for the public good," was satisfied (appellant's memorandum at paragraph 90).

[28] From the time that Martineau J. pierced the corporate veil, the property was considered part of the Laquerre brothers' holdings. The appellant should therefore have been deemed to be the direct owner of 52% of the property. As such, he had an expectation of privacy with regard to the property. The seizure was illegal because the law does not authorize the imposition of a charge on a property that is owned by a third party.

E. The unconstitutionality of rules 458 and 462

[29] Should this Court answer questions A, B and C in the negative, the appellant was of the opinion that rules 458 and 462 are unconstitutional because they violate the rule against unreasonable seizures found in section 8 of the Charter.

V. Issues

[30] In my opinion, the appeal raises the following two questions:

1) Did the appellant have the necessary standing to act under Rule 462?

2) Was the imposition of a charge on the property unconstitutional?

VI. Standard of Review

[31] The appellant makes no submissions in his memorandum regarding the applicable standard of review. For its part, the respondent submits that the correct standard of review applies to the issue regarding Rule 462 and the deadlines for filing an appeal because these are questions of law. The issue of standing should, as a question of mixed fact and law, fall under the standard of palpable and overriding error. The respondent also submits that no standard of review applies to the constitutional issues raised for the first time in this appeal.

[32] In my opinion, the applicable standard of review is that propounded by the Supreme Court in *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235. Consequently, the Judge's rulings on questions of fact are reviewable on a correctness standard. Findings of fact are subject to the palpable and overriding error standard. Questions of mixed fact and law are also subject to the palpable and overriding error standard, absent an isolated error in law, in which case the standard of correctness applies.

VII. Analysis

(a) Did the appellant have the necessary standing under Rule 462?

[33] In my opinion, the appellant did not have the necessary standing under Rule 462, which reads as follows:

Federal Courts Rules **SOR/98-106**	*Règles des Cours fédérales* **DORS/98-106**
Discharge or variance of charging order	**Annulation ou modification de l'ordonnance**
462 The Court may, on the motion of a 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, discharge or vary the charging order on such terms as to costs as it considers just.	**462** La Cour peut, sur requête du débiteur judiciaire ou de toute autre personne ayant un droit sur les biens grevés par une charge provisoire ou définitive, annuler ou modifier l'ordonnance constituant la charge, aux conditions qu'elle estime équitables quant aux dépens.
[my emphasis]	[mon soulignement]

[34] The appellant claims to have a right in the property and, accordingly, has standing under Rule 462 in two different ways: as a mortgagee and as owner of 52% of the property.

[35] The Judge's decision regarding the appellant's standing as a mortgagee is from paragraph 15 of his reasons, where he states:

> [TRANSLATION] [15] He may have standing as a mortgagee, but absolutely nothing allows a mortgagee to maintain that a legal hypothec registered after his should have been paid.

[36] Indeed, a mortgagee's rights are not affected by mortgages registered after their own securities (articles 2645, 2646, 2647 and 2945 of the CCQ stated hereafter):

***Civil code of Quebec*, C.Q.L.R. c. C-1991**	***Code civil du Québec*, R.L.R.Q. c. C-1991**
2644. The property of a debtor is charged with the performance of his obligations and is the common pledge of his creditors.	**2644.** Les biens du débiteur sont affectés à l'exécution de ses obligations et constituent le gage commun de ses créanciers.
(…)	[…]
2646. Creditors may institute judicial proceedings to cause the property of their debtor to be seized and sold. If the creditors rank equally, the price is distributed proportionately to their claims, unless some of them have a legal cause of preference.	**2646.** Les créanciers peuvent agir en justice pour faire saisir et vendre les biens de leur débiteur. En cas de concours entre les créanciers, la distribution du prix se fait en proportion de leur créance, à moins qu'il n'y ait entre eux des causes légitimes de préférence.
2647. The legal causes of preference are prior claims and hypothecs.	**2647.** Les causes légitimes de préférence sont les priorités et les hypothèques.
(…)	[…]
2945. Unless otherwise provided by law, rights rank according to the date, hour and minute entered on the memorial of presentation or, if the application concerning them is presented for registration in the land register, entered in the book of presentation, provided that the entries have been made in the appropriate registers. Where publication by delivery is authorized by law, rights rank according to the time at which the property or title is delivered to the creditor.	**2945.** À moins que la loi n'en dispose autrement, les droits prennent rang suivant la date, l'heure et la minute inscrites sur le bordereau de présentation ou, si la réquisition qui les concerne est présentée au registre foncier, dans le livre de présentation, pourvu que les inscriptions soient faites sur les registres appropriés. Lorsque la loi autorise ce mode de publicité, les droits prennent rang suivant le moment de la remise du bien ou du titre au créancier.
[my emphasis]	[mon soulignement]

[37] Although it is indisputable that the appellant has a right in the property as a mortgagee, this right alone, in my opinion, is not sufficient to grant him the required standing to file a motion under Rule 462 to have discharged a charge that in no way affects said mortgage.

[38] As the Judge states in paragraph 16 of his reasons, in addition to Martineau J.'s order, only two decisions have been rendered under Rule 462: *Canada v. Malachowski*, 2011 FC 413, [2011] F.C.J. No. 529 and *Income Tax Act (Re)*, 2010 FC 340, [2010] F.C.J. No. 1047. This very limited case law is of no help in this case for determining the right to the property that is required for standing under Rule 462.

[39] It seems to me that the rationale behind Rule 462 is to create a procedural mechanism allowing people affected by a charging order to ask the Court to discharge or vary it in the appropriate circumstances. In this case, the security held by the appellant on the property is in no way affected by the charging order. Indeed, the appellant wants to benefit from wearing two hats as mortgagee and as shareholder in Société 9011, which owns the building, to offset the possibility of Société 9011 not being able to fight the charging order.

[40] For that reason, I am of the opinion that the appellant does not have standing as a mortgagee.

[41] The appellant also submits that he has standing as a shareholder in Société 9011 and owner of the building and that the company's corporate veil was pierced, thereby making his property part of the holdings of the company's shareholders again. The Judge rejected this argument, invoking a company's separate legal personality.

[42] In my opinion, the Judge's finding is irrefutable in that the appellant, as a shareholder in Société 9011, has no property rights in the building. This property right clearly belongs to Société

9011. The appellant is not a "person with a right in the collateral" within the meaning of Rule 462. Consequently, I cannot find that the Judge erred.

[43] In dismissing the motion before him, the Judge said that he was also of the opinion that Rule 462 did not apply in this case. In paragraph 17 of his reasons, the Judge stated the following:

> [TRANSLATION] Without going into too much detail, Rule 462 could have applied if the respondents had successfully disputed their tax assessments or even if they had paid the balance owing. In such a case, a motion on consent would likely be filed to have the legal hypothec discharged. Rule 462 could also apply if it were proven that Her Majesty had more securities than necessary. Under a procedure similar to marshalling in common law, quashing the charge on 9011's assets may have been enough; the company is not a judgment debtor.

[44] Similarly, there are Martineau J.'s comments in his decision of April 9, 2008, where he stated in paragraph 18 of his reasons:

> [TRANSLATION] It may also be useful to reiterate that Rule 462 provides that respondents may (through a motion) ask the Court to discharge or vary the absolute charging order if the Tax Court of Canada allows their appeal and does not uphold the validity of the reassessments issued by the Minister on August 31, 2006 and on April 25, 2007.

[45] I fully concur with the respondent's submission that the purpose of Rule 462 is not to confer a right to appeal or reconsideration, but to allow the order to be discharged or varied, for example, for cause of total or partial extinguishing of the tax debt. In other words, I am of the opinion that Rule 462 does not have the same meaning or scope as Rule 399, which allows any interested party to request that an order be discharged or varied in certain circumstances. Rule 399 reads as follows:

Setting aside or variance.	**Annulation sur preuve *prima facie***
399(1) On motion, the Court may set aside or vary an order that was made	**399(1)** La Cour peut, sur requête, annuler ou modifier l'une des ordonnances suivantes, si la partie contre laquelle elle a été rendue présente une preuve *prima facie* démontrant pourquoi elle n'aurait pas dû être rendue :
(*a*) ex parte; or	*a*) toute ordonnance rendue sur requête ex parte;
(*b*) in the absence of a party who failed to appear by accident or mistake or by reason of insufficient notice of the proceeding,	*b*) toute ordonnance rendue en l'absence d'une partie qui n'a pas comparu par suite d'un événement fortuit ou d'une erreur ou à cause d'un avis insuffisant de l'instance.
if the party against whom the order is made discloses a *prima facie* case why the order should not have been made	
(2) On motion, the Court may set aside or vary an order	**(2)** La Cour peut, sur requête, annuler ou modifier une ordonnance dans l'un ou l'autre des cas suivants :
(*a*) by reason of a matter that arose or was discovered subsequent to the making of the order; or	*a*) des faits nouveaux sont survenus ou ont été découverts après que l'ordonnance a été rendue;
(*b*) where the order was obtained by fraud.	*b*) l'ordonnance a été obtenue par fraude.
(3) Unless the Court orders otherwise, the setting aside or variance of an order under subsection (1) or (2) does not affect the validity or character of anything done or not done before the order was set aside or varied.	**(3)** Sauf ordonnance contraire de la Cour, l'annulation ou la modification d'une ordonnance en vertu des paragraphes (1) ou (2) ne porte pas atteinte à la validité ou à la nature des actes ou omissions antérieurs à cette annulation ou modification.

[46] In this case, it seems undeniable to me that what the appellant is seeking is precisely what Rule 399 allows him to do, if the circumstances stated in the rule are met, of course. For the purposes of the appeal only, I will consider the appellant's motion as if it were filed under Rule 399.

I also conclude that the criteria in Rule 399 are not met and, consequently, the appellant cannot succeed.

[47] In my opinion, the cornerstone of the appellant's submissions is that he holds 52% of the shares in Société 9011, of which he is the CEO. Consequently, he said that he had a right to be personally served with the motion that led to Martineau J.'s decision. The appellant stated that there is the rub. Since he was not a party in the proceedings that are the subject of Martineau J.'s order, he did not submit any evidence or written or oral representations regarding the piercing of Société 9011's corporate veil. The appellant argues that Société 9011's corporate veil could not be pierced without his involvement in the proceedings. Therefore, since he was not a party in the case, he could not appeal from Martineau J.'s decision.

[48] The appellant's argument falls squarely under Rule 399(1)(*b*), which allows the Court to discharge or vary any order "that was made in the absence of a party who failed to appear by accident or mistake or by reason of insufficient notice of the proceeding." As for Rule 399(2), it seems to me that it does not apply in this proceeding because the appellant in no way submits that Martineau J.'s order was obtained through fraud or new facts that arose or were discovered following said order. I hasten to add that the facts related to paragraph [9] of my reasons do not constitute new facts within the meaning of Rule 399(2).

[49] Let us now examine the appellant's arguments in the light of his affidavit and of the case before us. With respect to the appellant, the scenario that he submits in support of his arguments is, in my opinion, not credible. Here is my explanation.

[50] To begin with, it must be noted that the evidence before Martineau J. was different from that which is currently before us. The evidence submitted before Martineau J. by the respondents (Mario Laquerre, his trusts and his companies, including mis-en-cause Société 9067 and Société 9011) was that only Mario Laquerre held shares in Société 9011. The December 29, 1994 counter-letter corroborated that evidence. The only affidavit filed by the respondents was that of Mario Laquerre dated January 11, 2008. In paragraphs 55 to 60 of his affidavit, Mario Laquerre states as followings:

> 55. [TRANSLATION] Société 9011-1345 Québec Inc. was created on November 4, 1994, as identified in a copy of the statement of information on a corporation submitted as exhibit R-16 in support of my affidavit.
>
> 56. [TRANSLATION] Société 9011-1345 Québec Inc. has its head office at 1392 4th Avenue in the city of Québec, province of Quebec, as identified in a copy of the statement of information on a corporation submitted as exhibit 16 in support of my affidavit.
>
> 57. [TRANSLATION] Société 9011-1345 Québec Inc. carries out its activities in the field of real estate investment.
>
> 58. [TRANSLATION] The sole real estate asset held by Société 9011-1345 Québec Inc. is:
>
> a. A property located at 1095 de la Canardière Road in the city of Québec, province of Quebec.
>
> 59. [TRANSLATION] I am the sole director of Société 9011-1345 Québec Inc.
>
> 60. [TRANSLATION] I am the sole director of Société 9011-1345 Québec Inc.
>
> (Supplementary Appeal Book, Tab 1, at page 10).

[51] In addition, on January 11, 2008, the legal counsel representing Mario Laquerre, his trusts and his companies, as well as the mis-en-cause Société 9067 and Société 9011, filed their written representations. In paragraphs 55 to 60 of these representations, counsel described Société 9011 as follows:

> 55. [TRANSLATION] Société 9011 1345 Québec Inc. was created on November 4, 1994, as identified in a copy of the statement of information on a corporation submitted as **exhibit 16** in support of Mario Laquerre's affidavit.
>
> 56. [TRANSLATION] Société 9011 1345 Québec Inc. has its head office at 1392 4th Avenue in the city of Québec, province of Quebec, as identified in a copy of the statement of information on a corporation submitted as exhibit 16 in support of Mario Laquerre's affidavit.
>
> 57. [TRANSLATION] Société 9011 1345 Québec Inc. carries out its activities in the field of real estate investment.
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> 58. [TRANSLATION] The sole real estate asset held by Société 9011 1345 Québec Inc. is:
>
> a. A property located at 1095 de la Canardière Road in the city of Québec, province of Quebec.
>
> 59. [TRANSLATION] Respondent Mario Laquerre is the sole director of Société 9011 1345 Québec Inc.
>
> 60. [TRANSLATION] Respondent Mario Laquerre is the sole shareholder in Société 9011 1345 Québec Inc.
>
> (Supplementary Appeal Book, Tab 2, pages 33 and 34) [my emphasis].

[52] Because it is clear that paragraphs 55 to 60 of counsel's written representations only reflect the same paragraphs in Mario Laquerre's affidavit, it seems probable that paragraph 60 of Mario Laquerre's affidavit is erroneous. In my opinion, it should read [TRANSLATION] "I am the sole shareholder in Société 9011-1345 Québec Inc."

[53] It should be noted that counsel's written representations make no reference to the appellant as a shareholder in or president of Société 9011. On the contrary, its entire argument is focused on Mario Laquerre's role with respect to all the companies named in the proceedings, including Société 9011.

[54] As I stated in paragraph [8] of my reasons, despite Société 9011's opposition, Martineau J. concluded that it was appropriate, in the circumstances, to pierce the company's corporate veil and to impose an absolute charging order on the property.

[55] In addition, before the Judge and before us, the appellant submitted that he was president of Société 9011 and holder of 52% of its shares when the respondent's motion was served to Société 9011 in the fall of 2007 and when Martineau J. rendered his order on April 9, 2008.

[56] In addition, in paragraphs 21 to 28 of his affidavit, the appellant discussed the December 29, 1994 counter-letter, which was before Martineau J. when he made his order. The appellant stated as follows :

> 21: [TRANSLATION] On or around October 9, 2014, through the Canada Revenue Agency's response to the motion to vary and discharge the charging order, I read the counter letter between Mario Laquerre and myself dated December 29, 1994, submitted as exhibit R-18 in support hereof, and although I have no recollection of signing it, I could very well have done so.
>
> 22. [TRANSLATION] This counter letter dated December 29, 1994, was prepared by Mario Laquerre as part of his divorce.
>
> 23. [TRANSLATION] The counter letter states that shares were sold on November 4, 1994, but no shares had yet been issued by Société 9011 1345 Québec Inc., as appears in the issued and paid share capital accounts filed in support hereof as exhibit R 19 and which prove that 50 shares from treasury issued in my name bear the date of January 1, 1995.
>
> 24. [TRANSLATION] Also on January 1, 1995, a shareholder agreement was entered into between Mario Laquerre and myself; it sets out that Mario Laquerre is holder of 50% of the common shares in 9011 1345 Québec Inc. (50 class A common shares) and that I am holder of the same percentage of class A common shares, as stated in the agreement submitted in support hereof as exhibit R 20.

> 25. [TRANSLATION] On February 3, 1996, Mario Laquerre transferred 50 class A shares to Fiducie ML, in which he is the sole shareholder, as stated in the issued and paid share capital accounts (exhibit R 19).
>
> 26. [TRANSLATION] On December 31, 2005, Fiducie ML transferred two class A shares to my share capital account, meaning that I became majority shareholder in the company (52%) while Fiducie ML was 48% shareholder, as stated in the issued and paid share capital accounts (exhibit R 19).
>
> 27. [TRANSLATION] Therefore, if such a counter letter (R 18) was really signed by me, it was offset by later acts stated above, and I have always believed that I was shareholder and full owner of the shares that I held.
>
> (Appeal Book, Vol. 1, Tab 2, pages 38 and 39).

[57] To begin with, the appellant does not seem to deny having signed the counter-letter. Instead, he states in paragraph 21 of his affidavit that he does not remember having signed the letter. After having noted that the counter-letter had been prepared by his brother, Mario Laquerre, in his divorce, he tried to prove, as stated in paragraph 27 of his affidavit, that if he signed the counter-letter, it was rendered obsolete by the events enunciated in paragraphs 23 and 26 of his affidavit. With all due respect, the appellant's explanations are in no way credible.

[58] I reiterate that after the respondent's motion was filed, Société 9011 retained counsel's services to oppose said motion and that this counsel appeared at the hearing before Martineau J. Despite these facts, which are not in dispute, the appellant states in his affidavit:

i. That he was not a party in these proceedings;

ii. That he thought that the respondent's recovery proceedings [TRANSLATION] "would have no impact on me or on 9011-1345 Québec Inc. because it was just a mis-en-cause" (Appeal Book, Vol. 1, Tab 2 at paragraph 47).

[59] It is difficult, if not impossible, to reconcile this statement from the appellant with the events that occurred in 2007 and 2008. Société 9011 received a copy of the order made by Gauthier J. on October 11, 2007, which imposed an interim charge on the property. Société 9011 was also served with the respondent's motion to obtain an absolute charging order on the property. Société 9011 also appeared at these proceedings and defended itself through its counsel. How can the appellant say that he was of the opinion that these proceedings did not concern him or Société 9011?

[60] I would even go so far as to say that if it is true that the appellant was the CEO of Société 9011 and held 52% of the shares in it, his sworn statement makes no sense. How is it possible for the CEO of a company, and holder of 52% of its shares, not to react when he is served with a motion from the Crown to pierce this company's corporate veil—a company that owed no tax debt to the Crown—in order to impose an absolute charge on its sole asset (the property)?

[61] In addition, the appellant provides no explanation in his affidavit with respect to counsel whose services were retained to defend the interests of Société 9011 during the proceedings before Martineau J. The fact that counsel represented Société 9011 and took part in the proceedings before Martineau J. is not denied. One would expect the appellant, who describes himself as CEO of Société 9011 and its majority shareholder, to provide an explanation regarding the role that counsel played in 2007 and 2008. Surprisingly, the appellant knows absolutely nothing about it. He seems to be content with the explanation that he gave in his affidavit, namely that he was under the impression that the proceedings initiated by the respondent—proceedings that sought the imposition of an absolute charge on the property—in no way concerned him or Société 9011.

[62] Based on the evidence of record, it seems, without being certain, that Mario Laquerre was in charge of operations regarding defending Société 9011 before Martineau J. In addition, the appellant made no allegations of fraud or negligence toward his brother, Mario Laquerre, with regard to defending Société 9011. He said nothing about this.

[63] I am of the opinion that the evidence tends to support the respondent's version of the events (i.e., in fact, Mario Laquerre was the only shareholder in Société 9011). That explains why the appellant was in no way concerned about the respondent's motion that led to Martineau J.'s order. As I stated in paragraphs [59] and [60] of my reasons, the appellant's conduct cannot be reconciled with his submission that he is CEO of, and majority shareholder in, Société 9011. This submission is, having regard to the evidence, does not make sense.

[64] Consequently, given that the appellant is not a shareholder in Société 9011, his arguments fail. In other words, he cannot involve Rule 462 or Rule 399(1)(*b*).

[65] Although the appellant did indeed hold 52% of the shares in Société 9011, I also conclude that he cannot succeed. In *TMR Energy Ltd. v. State Property Fund of Ukraine*, 2005 FCA 28, [2005] 3 F.C.R. 111, at paragraphs 31 and 32, our Court stated that a motion under Rule 399 must be brought within a reasonable time after the circumstances on which the motion is based became known (see also Mr. Justice Lemieux's decision in *Entreprise A.B. Rimouski Inc. v. Canada*, 2005 FC 115, [2005] F.C.J. No. 197, at paragraphs 16 to 18).

[66] In my opinion, for the reasons I have just stated, there can be no doubt that in the fall of 2007, Société 9011 and the appellant were fully aware of the respondent's motion for an absolute charging order on the property. By assuming that filing this motion was not sufficient to make the appellant realize that his interests and those of Société 9011 could be affected if the order sought by the respondent were rendered, it is undeniable that sending, through the Federal Court, a copy of the order made by Martineau J. to Société 9011 could not render the company or its CEO and majority shareholder indifferent to the effect of the order.

[67] In my opinion, upon receipt of the copy of Martineau J.'s order, the appellant should have acted if he wanted to invoke on Rule 399. Because the appellant let seven years pass before initiating proceedings, I can only conclude that he did not act within a reasonable time. The appellant's explanations that he thought the proceedings filed by the respondent could have no impact on him or on Société 9011 are not sound. They are also not credible. In my opinion, this is clearly, at the very least, a situation of deliberate blindness.

[68] There is another factor that leads me to find that the appellant cannot succeed. Because "the rules of procedure should be the servant of substantive rights and not the master" (*Reekie v. Messervey*, [1990] 1 S.C.R. 219 at page 222), I conclude that the appellant cannot invoke the fact that he was not absence of personally served in this proceeding before Martineau J. to argue that he was not bound by the findings of this order, which today is *res judicata*. In *Fiducie Dauphin (Re)* 2010 FC 1144, [2010] D.T.C. 5194 (*Fiducie Dauphin*), Mr. Justice de Montigny, then a Federal Court judge, retroactively validated an irregular service on the grounds that the person involved had

not suffered any harm, was familiar with the proceedings and that form should not prevail over substance. In paragraph 40 of his reasons, de Montigny J. stated as follows:

> [TRANSLATION] One should not lose sight of the goal that underlies the rules on service. It must be reiterated that the purpose of these rules is to prevent a party from not being prepared to defend its interests because it may not have been informed, or would not have been in a timely fashion, of the proceedings filed against it. Rule 147 of the Federal Courts Rules also reflects this principle insofar as it authorizes the Court to validate an irregular service if it is satisfied that the document came to the notice of the person to be served [my emphasis].

[69] In paragraph 41 of his reasons, de Montigny J. added that [TRANSLATION] "this rule reflects within a broader principle: form must not prevail over substance. This principle is mainly expressed in rules 53, 55 and 56."

[70] In addition to de Montigny J.'s words, there are those of Mr. Justice O'Keefe, who, in the context of the proceedings filed against the controlling mind of a corporation, concluded that this action constituted an action against the corporation itself. In subsections 51 and 52 of his reasons in *Rolls Royce v. Fitzwilliam*, 2002 FCT 598 (CanLII), he stated the following:

> [51] Rule 147 allows the Court to consider the documents to be validly served if it is satisfied that the document came to the notice of the person to be served. Mr. Fitzwilliam admitted that he received a copy of the material, and that he is the controlling mind of the corporations, and that he seeks to represent the defendant corporations in this proceeding.
>
> [52] I am satisfied that Mr. Fitzwilliam is the controlling mind of the defendant corporations and that service on Mr. Fitzwilliam under these circumstances is sufficient to constitute service on the defendant corporations.

[71] In this case, the proceedings that led to Martineau J.'s decision were indeed served on Société 9011, of which the appellant claims to be CEO and majority shareholder. I also note that

counsel was retained by Société 9011 and that counsel opposed the collection measures used by the respondent; these measures included the piercing of Société 9011's corporate veil. In these circumstances, it is difficult, as I stated earlier, to reconcile the information in the appellant's affidavit with the events that occurred in 2007 and 2008. As de Montigny J. stated in paragraph 40 of his reasons in *Fiducie Dauphin*, the purpose of service is to allow an interested party in due course to be apprized or proceedings that may affect him. In my opinion, the appellant knew or should have known in the fall of 2007 what the Crown's proceedings were about. Consequently, I conclude that the fact that he was not personally does not support his argument that he had a right to request that Martineau J.'s order be discharged or varied.

(b) Was the imposition of a charge on the property unconstitutional?

[72] Briefly, the appellant submits that the charge on the property, in accordance with Martineau J's order, constituted unreasonable seizure because it allowed the Crown to seize an asset that belongs to him, in part, and he had no opportunity to be heard or even summoned. In my opinion, given the conclusions I have reached, it is not necessary to address the appellant's constitutional arguments. It should also be noted that the appellant did not raise his constitutional arguments before the Judge; he raised them for the first time before us. The appellant gave no explanation why, under the circumstances, we should exercise our discretionary authority in his favour and hear his constitutional arguments (*Guindon v. Canada*, 2015 SCC 41).

VIII. Conclusion

[73] For these reasons, I would dismiss the appeal with costs.

"M. Nadon"

J.A.

"I concur.
Johanne Trudel J.A."

"I concur.
"A.F. Scott, J.A."

Certified true translation
François Brunet, Revisor

FEDERAL COURT OF APPEAL

SOLICITORS OF RECORD

DOCKET:	A-229-15
STYLE OF CAUSE:	GAÉTAN LAQUERRE v. HER MAJESTY THE QUEEN AND 9011-1345 QUÉBEC INC.
PLACE OF HEARING:	QUÉBEC, QUEBEC
DATE OF HEARING:	DECEMBER 17, 2015
REASONS FOR JUDGMENT:	NADON J.A.
CONCURRED IN BY:	TRUDEL J.A. SCOTT J.A.
DATED:	FEBRUARY 19, 2016

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