

Federal Court



Cour fédérale

Date: 20110405

Docket: ITA-14795-09

Citation: 2011 FC 413

Ottawa, Ontario, April 5, 2011

PRESENT: The Honourable Mr. Justice Mandamin

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*:

BETWEEN:

HER MAJESTY THE QUEEN  
as represented by the  
MINISTER OF NATIONAL REVENUE

Judgment  
Creditor

and

MARCEL MALACHOWSKI (also known as  
MARCEL OWEN JOSEPH MALACHOWSKI,  
MARCEL OWEN MALACHOWSKI, MARCEL  
WUNSCK, MR. WENLOCK, MEMO  
WENLOCK, MEMO AND MARCEL  
WENLOCK)

Judgment  
Debtor

**REASONS FOR ORDER AND ORDER**

[1] The Moving Party, Ms. Suzanne Fishwick, has brought a motion under s.462 and s.399 of the *Federal Court Rules* SOR198-106 (the *Rules*) to discharge the interim charging order made on December 18, 2009.

[2] The Judgment Debtor, Mr. Marcel Malachowski, was indebted to the amount of \$803,931.95 plus interest under the *Income Tax Act* 1985 c.1 (5<sup>th</sup> Supp.) (the *ITA*) to the Judgment Creditor, the Minister of National Revenue (the Minister) for the taxation years 2004 to 2008. This debt was confirmed by a certificate registered in Federal Court on December 11, 2009 which has the force of judgment pursuant to section 223 of the *ITA*.

[3] The Minister determined that Mr. Malachowski had a beneficial interest in two adjoining parcels of real property at Nun's Point situated at 19650 County Road 2, Summerstown, Ontario (collectively referred to as Nun's Point) and applied, *ex parte*, for an interim charging order for the purpose of securing the payment of the income tax debt owed to the Minister.

[4] In the *ex parte* motion, the Minister lead evidence relating to its concern that, without the interim charging order, it would not be able to collect from Mr. Malachowski because:

- i his interest in Nun's Point appears to be his only asset;
- ii he was not likely to return to Canada since:
  - a. he is now incarcerated in the United States for a lengthy period;
  - b. his common law spouse has returned to the United States; and
- iii Nun's Point was up for sale.

[5] In result, on December 18, 2009 Justice Richard J. Mosley granted the interim charging order on Nun's Point and ordered the matter to be further considered by the Court on April 15, 2010. The subsequent court hearing would determine whether the interim charging order should be made absolute.

[6] Justice Mosley's Order provided:

IT IS ORDERED that unless sufficient reasons to the contrary are show on April 15, 2010 at 9:30, when this matter will be further considered by the Court at Ottawa, Mr. Malachowski's interest in the real property shall, and it is ordered that in the meantime it does, stand charged with the payment of \$803,931 including any interest due on the Certificate with the costs of this motion.

and applied to Nun's Point, the property legally described as:

PT LT 4 CON 1 FRONT CHARLOTTENBURGH AS IN AR95007; S/T AR 95007;  
SOUTH GLENGARRY  
(PIN 67131-0098)

and

PT LT 4 CON 1 FRONT CHARLOTTENBURGH AS IN AR98003; T/W AR 95003;  
SOUTH GLENGARRY  
(PIN 67131-0084)

[7] Ms. Fishwick (the Moving Party) claims that Nun's Point belongs to her and that Mr. Malachowski was merely a tenant residing on the property. She brought this motion to have the December 18, 2008 interim charging order set aside.

[8] On July 19, 2010, Prothonotary Mireille Tabib gave an oral direction that the hearing on whether to make the charging order absolute would be fixed after the hearing of Ms. Fishwick's motion to have the interim charging order set aside.

[9] The motion was heard by me on August 30, 2010. I have concluded that her motion to have the interim charging order set aside on the basis that Mr. Malachowski does not have a beneficial interest in Nun's Point does not succeed. Accordingly, the motion is dismissed. My reasons are set out in the following.

### **Background**

[10] Ms. Fishwick and her common law spouse Mr. Patrick Donihee purchased an eleven acre waterfront property known as Nun's Point on July 25, 1994 from the Religious Hospitallers of St. Joseph of Cornwall. On August 31, 1994, the two purchased the adjacent forty-three acres of land. Ms. Fishwick and Mr. Donihee lived at Nun's Point from 1994 to 2005.

[11] In January 2005, Ms. Fishwick and Mr. Donihee listed Nun's Point for sale but did not receive any serious offers. In October 2005, Mr. Malachowski arrived, unannounced, expressing interest in Nun's Point. Neither Ms. Fishwick nor Mr. Donihee had ever met or spoken to him previously. Mr. Malachowski told them he had seen Nun's Point many times from his boat on the water. He told them he was a part owner of a cigarette factory on the nearby Indian Reserve. He said he was interested in buying Nun's Point but could not afford to make the purchase at that time. He said he was interested in renting with an option to buy the property in the future.

[12] Ms. Fishwick and Mr. Donihee entered into an oral agreement with Mr. Malachowski on a monthly rental of Nun's Point with an option to purchase. The purchase price for Nun's Point would be \$1,000,000. Mr. Malachowski could rent the property up to a maximum of 5 years and if he did not purchase the property by then, they could list Nun's Point for sale. The agreed rent

would be \$1,200 per month, the cost of utilities and property taxes, and maintenance of the property. He could move in as of November 1, 2005.

[13] Between November 2005 and April 2006, Beau Malachowski, Mr. Malachowski's younger brother, and a friend lived at Nun's Point. Ms. Fishwick and Mr. Donihee say they were uncomfortable with only having the two young people on the property and had both Beau Malachowski and his friend sign a lease agreement for \$3,000 per month.

[14] Mr. Malachowski arrived back on the scene in May 2006. He reassured Ms. Fishwick and Mr. Donihee of his intentions and they continued with the original agreement of rent at \$1,200 per month plus expenses with an option to purchase. He eventually took up residence at Nun's Point and was joined in the summer of 2007 by Ms. Selena Hopper, his girlfriend from the United States of America (U.S.) and her young daughter.

[15] Ms. Fishwick and Mr. Donihee say they made clear to Mr. Malachowski that any improvements made to Nun's Point would be fixtures to the property and must remain at the end of the lease. He would not be refunded the cost of the improvements if he did not purchase Nun's Point.

[16] In addition to the oral agreement concerning Nun's Point, Ms. Fishwick and Mr. Donihee had several other business dealings with Mr. Malachowski. According to them it was always because he asked them for a favour. Their further involvement with real estate dealings by Mr. Malachowski were:

- i) in 2007, Mr. Malachowski purchased the Viau farm; on the last day of closing, he asked Ms. Fishwick and Mr. Donihee to lend him \$50,000. They did and Mr. Malachowski reimbursed them with a series of cheques from his company, Wenlock Inc. Three cheques were returned insufficient funds and Ms. Fishwick asked Mr. Malachowski for a replacement cheque of \$20,000 which she certified before depositing; and
- ii) in 2008 Mr. Malachowski arranged for the purchase of land known as Pilon's Point; he asked if they could lend to him \$143,000. Ms. Fishwick said she knew the \$143,000 would be refunded quickly as otherwise they would have a charge against the property. Mr. Malachowski repaid \$79,529.96 from a mortgage secured on the Pilon property and provided a further \$81,990.74 by a cheque from his sister.

[17] Ms. Fishwick acknowledges that Mr. Donihee had purchased a trailer and obtained licence plates using money provided by Mr. Malachowski. She said Mr. Donihee turned over the trailer and licence plates to Mr. Malachowski.

[18] Ms. Fishwick and Mr. Donihee also assumed a power of attorney for Mr. Malachowski in July 2007. Ms. Fishwick says she assumed this power of attorney at his request and exercised it in the summer of 2009 when Mr. Malachowski's mortgage payments on the Viau farm were in arrears. She assisted with listing the Viau farm for sale, personally paid to have the power to the farm reinstated and recovered the power bill payment from the sale proceeds.

[19] Ms. Fishwick and Mr. Donihee say they have never accepted money from Mr. Malachowski, his brother or Ms. Hopper, other than the rent payments and the reimbursements from the above business dealings. However, she did become involved in two other financial transactions after Mr. Malachowski's arrest in the United States.

[20] Ms. Fishwick states that she and Mr. Donihee learned of Mr. Malachowski's arrest in late November 2008. Ms. Hopper told Ms. Fishwick that she sought to engage a U.S. lawyer to help Mr. Malachowski. Ms. Hooper had collected money from friends to pay the lawyer but did not have a Canadian Bank account. She asked if Ms. Fishwick could send a wire transfer to cover the lawyer's retainer. On November 21, 2008 Ms. Fishwick transferred \$58,629 CDN to Mr. Malachowski's U.S. lawyer. Ms. Fishwick says she was repaid by Ms. Hopper in cash.

[21] Ms. Fishwick also says Ms. Hooper later asked for a loan to assist with Mr. Malachowski's bail hearing. On December 18, 2008 Ms. Fishwick wired \$24,380 CDN to the U.S. lawyer. Mr. Malachowski did not succeed in securing release and the U.S. lawyer sent back \$30,000 USD. No explanation is given for the return of an increased amount.

[22] Ms. Fishwick states that she and Mr. Donihee let Ms. Hooper stay rent free at Nun's Point from December 2008 to early August 2009 because the young lady was pregnant. Ms. Hooper moved back to the United States after the child was born. Ms. Fishwick says she agreed Mr. Malachowski's furniture could remain in the house at Nun's Point after Ms. Hooper's departure.

[23] Nun's Point remained unoccupied and Ms. Fishwick re-listed the property for sale after August 2009. She eventually accepted an offer for Nun's Point of \$1,100,000 from a purchaser in the spring of 2010.

[24] The Minister advises Mr. Malachowski is currently serving a lengthy sentence of imprisonment in the United States for possession of machine guns and silencers.

[25] The Minister presented evidence about the results of an RCMP search of Nun's Point conducted while Mr. Malachowski resided there. During the April 2006 search at Nun's Point a ledger was found in a safe in the barn on the property. The ledger, titled "NUNSPPOINT PROPERTY", recorded a purchase price of \$1,000,000 and payments against that amount totalling \$222,234 made during the period October 19 2005 to February 22, 2006. This ledger does not indicate who made the payments or to whom these payments were made.

[26] The Minister also led evidence that Mr. Malachowski expended at least \$65,000 in improvements to Nun's Point. He had custom built kitchen cabinets installed in the residence on the first parcel of land and a further \$30,000 in landscaping in the second parcel at Nun's Point.

### **New Developments**

[27] As stated above, Justice Mosley granted an interim charging order on December 18, 2009. Approximately one year later, on December 2, 2010, Prothonotary Tabib issued a further Order as follows:

1. The Interim Charging Order issued on December 18, 2009, registered on title against the lands known as Part Lot 4, Concession 1



Front Charlottenburgh as in AR95007; S/T AR95007, South Glengarry, bearing PIN no. 67131-0098 (LT), and which Charging Order was registered on December 23, 2009 as Instrument No. GL787, is hereby discharged.

2. The Interim Charging Order issued on December 18, 2009, registered on title against the lands known as Part Lot 4, Concession 1 Front Charlottenburgh as in AR98003; T/W AR98003, South Glengarry, bearing PIN no. 67131-0084 (LT), and which Charging Order was registered on December 23, 2009 as Instrument No. GL787, is hereby discharged.

3. The full proceeds of sale of the lands above shall be transferred in trust to Mr. Paul D'Angelo, Counsel for Ms. Fishwick, for the purposes of the following distribution:

- \$843,875.06 to be kept in Mr. Paul D'Angelo's law firm's trust account pending a final and binding decision in file ITA-14795-09; and
- the remainder to Ms. Suzanne Fishwick.

[28] This Order reflects the subsequent sale of Nun's Point. The issue no longer relates to whether or not the interim charging order should be made absolute but rather whether the proceeds of the sale, \$843,875.06 as of December 2, 2010, was caught, in entirety, in part, or at all, by the interim charging order.

[29] Since the Moving Party contends the interim charging order should not have been granted in the first instance, putting at issue the evidence of the Minister's *ex parte* motion and since she brought this motion in advance of a hearing on whether or not the interim charging order should be made absolute, it seems to me that the Prothonotary's oral direction aligns with the issues I have to deal with.

[30] Accordingly, I will address the challenges advanced by the Moving Party to the interim charging order and leave for later the question to what degree the proceeds of the property sale were caught by the interim charging order.

## Legislation

[31] The *Income Tax Act*, (1985, c. 1 (5th Supp.)) (*ITA*) provides:

223. (2) An amount payable by a person (in this section referred to as a “debtor”) that has not been paid or any part of an amount payable by the debtor that has not been paid may be certified by the Minister as an amount payable by the debtor.

(3) On production to the Federal Court, a certificate made under subsection 223(2) in respect of a debtor shall be registered in the Court and when so registered has the same effect, and all proceedings may be taken thereon, as if the certificate were a judgment obtained in the Court against the debtor for a debt in the amount certified plus interest thereon to the day of payment as provided by the statute or statutes referred to in subsection 223(1) under which the amount is payable and, for the purpose of any such proceedings, the certificate shall be deemed to be a judgment of the Court against the debtor for a debt due to Her Majesty, enforceable in

223. (2) Le ministre peut, par certificat, attester qu’un montant ou une partie de montant payable par une personne — appelée « débiteur » au présent article — mais qui est impayé est un montant payable par elle.

(3) Sur production à la Cour fédérale, un certificat fait en application du paragraphe (2) à l’égard d’un débiteur est enregistré à cette cour. Il a alors le même effet que s’il s’agissait d’un jugement rendu par cette cour contre le débiteur pour une dette du montant attesté dans le certificat, augmenté des intérêts courus jusqu’à la date du paiement comme le prévoit les lois visées au paragraphe (1) en application desquelles le montant est payable, et toutes les procédures peuvent être engagées à la faveur du certificat comme s’il s’agissait d’un tel jugement. Dans le cadre de ces procédures, le certificat est réputé être un jugement exécutoire rendu par

the amount certified plus interest thereon to the day of payment as provided by that statute or statutes.

cette cour contre le débiteur pour une dette envers Sa Majesté du montant attesté dans le certificat, augmenté des intérêts courus jusqu'à la date du paiement comme le prévoit ces lois.

225.2 (2) Notwithstanding section 225.1, where, on ex parte application by the Minister, a judge is satisfied that there are reasonable grounds to believe that the collection of all or any part of an amount assessed in respect of a taxpayer would be jeopardized by a delay in the collection of that amount, the judge shall, on such terms as the judge considers reasonable in the circumstances, authorize the Minister to take forthwith any of the actions described in paragraphs 225.1(1)(a) to 225.1(1)(g) with respect to the amount.

225.2 (2) Malgré l'article 225.1, sur requête ex parte du ministre, le juge saisi autorise le ministre à prendre immédiatement des mesures visées aux alinéas 225.1(1)a) à g) à l'égard du montant d'une cotisation établie relativement à un contribuable, aux conditions qu'il estime raisonnables dans les circonstances, s'il est convaincu qu'il existe des motifs raisonnables de croire que l'octroi à ce contribuable d'un délai pour payer le montant compromettrait le recouvrement de tout ou partie de ce montant.

(emphasis added)

[32] The *Federal Court Rules*, SOR/98-106 provides:

399. (1) On motion, the Court may set aside or vary an order that was made

(a) ex parte; or

(b) in the absence of a party who failed to appear by accident or mistake or by reason of insufficient notice of the proceeding,

if the party against whom the

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) toute ordonnance rendue sur requête ex parte;

order is made discloses a prima facie case why the order should not have been made.

458. (1) On the ex parte motion of a judgment creditor, the Court may, for the purpose of enforcing an order for the payment of an ascertained sum of money,

(a) make an order imposing an interim charge for securing payment of that sum and any interest thereon

(i) on real property or immoveables, or on an interest in real property or

immoveables, of a judgment debtor, in Form 458A, or

(ii) on any interest to which the judgment debtor is beneficially entitled in any

shares, bonds or other securities specified in the order, in Form 458B; and

(b) order the judgment debtor to show cause, at a specified time and place, why the charge should not be made absolute.

Service of show cause order

(2) Unless the Court directs otherwise, an order made under subsection (1) shall be served on the judgment debtor and, where the order relates to property referred to in subparagraph (1)(a)(ii), on the corporation, government or other person or entity by whom the securities were issued, at least seven days before the time appointed for

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.

458. (1) Aux fins de l'exécution d'une ordonnance exigeant le paiement d'une somme déterminée, la Cour peut, sur requête ex parte du créancier judiciaire, rendre une ordonnance :

a) constituant une charge à titre provisoire en vue de garantir le paiement de la somme et des intérêts y afférents :

(i) soit sur un immeuble, un bien réel ou un droit immobilier du débiteur judiciaire, laquelle ordonnance est établie selon la formule 458A,

(ii) soit sur tout droit que le débiteur judiciaire possède sur des actions, des obligations ou autres valeurs mobilières précisées dans l'ordonnance, laquelle est établie selon la formule 458B;

b) précisant les date, heure et lieu de l'audience à laquelle le débiteur judiciaire peut faire valoir les raisons pour lesquelles la charge ne devrait pas être maintenue.

Signification de l'ordonnance

(2) Sauf directives contraires de la Cour, l'ordonnance rendue en vertu du paragraphe (1) est signifiée au débiteur judiciaire et, si elle porte sur les biens visés au sous-alinéa

the hearing.

(1)a)(ii), à la personne morale, au gouvernement ou à toute autre personne ou entité qui a émis les valeurs mobilières, au moins sept jours avant la date fixée pour l'audience.

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.

(emphasis added)

## Issues

[33] The Moving Party requests an order discharging the interim charging order on the following grounds:

1. Suzanne Fishwick is the legal owner of the property described in the charging order;
2. Mr. Malachowski, the Judgment Debtor, has no interest in the property;
3. It was unreasonable for the Minister to pursue the charging order when her representatives knew, in light of the evidence known to them, that the Judgment Debtor had no interest in the property;
4. Rule 462.

[34] In my view, the proper issues in this proceeding are:

1. Who bears the onus in a motion to set aside an interim charging order made under Rule 458?
2. Does Rule 458 of the *Rules* apply to beneficial interests in real property?
3. Did Mr. Malachowski have a beneficial interest in Nun's Point?

## **Analysis**

### *Preliminary Matters*

[35] Two preliminary matters arise in this motion.

[36] The first is an application by the Moving Party to have the affidavit evidence appended the last wills and testaments of both Ms. Fishwick and Mr. Donihee accepted. Their wills make no mention of Mr. Malachowski. This evidence had not been previously provided and was not subject to cross-examination on affidavit. The Minister takes no position on this application. Given that the Minister has led similar evidence to the effect that the Moving Party and Mr. Donihee treated Mr. Malachowski "like a son" as well as evidence of their involvement as executors of Mr. Malachowski's will, I will admit this evidence.

[37] Second, a letter was sent to the Federal Court by Mr. Malachowski, in which he makes a number of statements. Understandably, Mr. Malachowski has not attended because of his incarceration. However, the evidence discloses he has had resources to draw on. He has been served with the interim charging order and has not taken steps to be represented in these

proceedings as a party. Moreover, Mr. Malachowski's statements in the letter have not been presented by way of affidavit or statutory declaration, a step that would be feasible even if he is now in more constrained financial circumstances. Accepting the letter as is would be unfair to the parties adverse in interest. I do not admit Mr. Malachowski's letter either as a submission or as evidence and I will not have any further regard to Mr. Malachowski's letter.

*Burden of Proof with respect to the Motion*

[38] The Moving Party submits that the ultimate burden is on the Minister to demonstrate on a balance of probabilities that the interim charging order should be made absolute and disputes the interim charging order should have even been granted in the first place.

[39] The Moving Party has emphasized that the Minister had a duty to be completely candid with the Court in bringing the *ex parte* application for an interim charging order. She submits that the Minister failed to discharge this duty by not first obtaining evidence from the Moving Party about her ownership of Nun's Point or by not disclosing to the Court that she held the legal title to the property.

[40] Although Rule 399 provides that an *ex parte* motion shall be set aside if the party against whom the order is made discloses a *prima facie* case why the order should not have been made, I consider Rule 399 not to apply since the interim charging order was made under Rule 458. In this case Rules 458 to 465 govern.

[41] Rules 458 to 465 of the *Rules* establish a procedure for obtaining a charging order. Where a charge is imposed on the land of the judgment debtor on the *ex parte* motion of the judgment creditor, the property owner is entitled to object to the charging order granted. In particular, Rule 462 provides:

462. The Court may, on the motion of a judgement debtor or any 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.

(emphasis added)

[42] The Moving Party submits that the Federal Court has confirmed during an analysis of Rule 2400, the predecessor to Rule 458, that such an application must recognize the rights of both the judgement debtor and the third party owner of the land at issue: *R v Couillard Enterprises Inc*, [1978] F.C. 181. She states that the Court must consider the basis of a third party's objection prior to making an interim order absolute.

[43] The Moving Party makes an analogy to the 'jeopardy collection' rules under the *ITA*. The general rule set out in subsection 225.1(1) of the *ITA* is that the Minister is ordinarily restricted from collecting from a taxpayer until 90 days after the Notice of Assessment was mailed but under section 225.2, where a court is satisfied that there are reasonable grounds to believe the collection of all or part of the amount assessed would be jeopardized by a delay in collection, the court shall authorize the Minister to proceed to collect prior to the expiry of the 90 days.

[44] The Moving Party submits that the Court may set aside an order if it finds the motion record in support of the *ex parte* authorization contained shortcomings. She refers to Justice



Lemieux`s decision in *Re Gravel*, 2005 FC 1252 (*Re Gravel*) at para 7 where he quoted and relied on the principles applicable to “jeopardy collection” that had been previously summarized in *Canada (Minister of National Revenue) v Services M.L. Marengère Inc*, [2000] 176 F.T.R. 1 (*MNR v Marengère Inc*):

In terms of burden, an applicant under subsection 225.2(8) has the initial burden to show that there are reasonable grounds to doubt that the test required by subsection 225.2(2) has been met, that is the collection of all or any part of the amounts assessed would be jeopardized by the delay in collection. However, the ultimate burden is on the Crown to justify the jeopardy collection order granted on an *ex parte* basis. However, the mere suspicion or concern that delay may jeopardize collection is not sufficient *per se*.

...

An *ex parte* collection order is an extraordinary remedy. Revenue Canada must exercise utmost good faith and insure full and frank disclosure.

[45] The Moving Party also relies on *Minister of National Revenue v Landru*, [1993] 1 CTC 93 (SKQB) (*Landru*) as the authority for the proposition that there must be compelling evidence beyond mere suspicion or conjecture that would be likely to jeopardize the collection of the amount assessed.

[46] The Minister`s position is that the onus is on the Moving Party bringing this particular motion.

[47] The difficulty with the Moving Party`s analogy to the “jeopardy provision” in the *ITA* is twofold.

[48] First, subsection 225.2(2) sets out a statutory pre-condition that there be reasonable grounds that the collection of the assets would be jeopardized by a delay in collection pending any appeal of the assessment. Rules 458 to 465 of the *Federal Court Rules* do not contain an analogous precondition that the collection of the assets be jeopardized by delay.

[49] Second, in *Re Gravel*, counsel for the Minister acknowledged shortcomings in the motion record filed on that *ex parte* application about the alleged jeopardy. No such admission is made here.

[50] Also in *Landru*, the taxpayer filed an affidavit attesting to having adequate income to meet his obligations and expressing a *bona fide* intention to pay the tax debt. Here, there is no declaration by Mr. Malachowski about having income or any intention to pay the outstanding tax debt.

[51] Accordingly neither the statutory provisions nor the evidence in the motion record are in accord with the section 225.1 jeopardy analogy proposed by the Moving Party.

[52] In result, I do not agree that the Moving Party's burden to set aside the interim charging order is merely to show that there are reasonable grounds to doubt the validity of the Order. The Moving Party's burden to set aside the interim charging order in advance of any consideration on whether or not to make the Order absolute is the same as with any motion, that is, on the balance of probabilities.

*Equitable interest in land*

[53] The Minister submits there is evidence to support its position that Mr. Malachowski had a beneficial interest in Nun's Point:

- i) the ledger found during the RCMP 2006 raid of the Nun's Point records a \$1,000,000 purchase price for the property as well as payments totalling \$222,234 between October 19, 2005 and February 22, 2006;
- ii) at the time of the RCMP search, Ms. Hooper, Mr. Malachowski's common law spouse, described Ms. Fishwick and Mr. Donihee as the former owners of Nun's Point;
- iii) while at the Nun's Point, Mr. Malachowski ordered and had installed in the residence custom built cabinets worth more than \$30,000, and
- iv) Mr. Malachowski also ordered extensive landscaping at a cost of at least \$35,000.

[54] The Moving Party submits that the primary onus is on the Minister to prove Mr. Malachowski has a legal interest in Nun's Point. She argues that for an interest in real property to exist or be proven, there must be a document in writing. She cites the *Statute of Frauds* R.S.O. 1990, c. S.19, as am. S.O. 1994, c. 27, s. 55:

1. (1) *Every estate or interest of freehold and every uncertain interest of, in, to or out of any messuages, lands, tenements or hereditaments shall be made or created by a writing signed by the parties making or creating the same, or their agents thereunto lawfully authorized in writing, and, if not so made or created, has the force and effect of an estate at will only, and shall not be deemed or taken to have any other or greater force or effect.*

2. Subject to section 9 of the *Conveyancing and Law of Property Act*, no lease, estate or interest, either of freehold or term of years, or any uncertain interest of, in, to or out of any messuages, lands,

tenements or hereditaments shall be *assigned, granted or surrendered unless it be by deed or note in writing signed by the party so assigning, granting, or surrendering* the same, or the party's agent thereunto lawfully authorized by writing or by act or operation of law.

....

4. *No action shall be brought to charge any executor or administrator upon any special promise to answer damages out of the executor's or administrator's own estate, or to charge any person upon any special promise to answer for the debt, default or miscarriage of any other person, or to charge any person upon any contract or sale of lands, tenements or hereditaments, or any interest in or concerning them, unless the agreement upon which the action is brought, or some memorandum or note thereof is in writing and signed by the party to be charged therewith* or some person thereunto lawfully authorized by the party.

1994, c. 27, s. 55

...

9. Subject to section 10, *all declarations or creations of trusts or confidences of any lands, tenements or hereditaments shall be manifested and proved by a writing signed by the party who is by law enabled to declare such trust, or by his or her last will in writing, or else they are void and of no effect.*

(emphasis by Moving Party)

[55] The Moving Party submits that the onus is on the Minister to prove that Mr. Malachowski has a legal interest in Nun's Point, and can only do so if the evidence satisfies the requirements under the *Statute of Frauds*. She submits that there is no evidence to prove that Nun's Point was sold or transferred to Mr. Malachowski and, in the alternative; the Moving Party submits that she has satisfied the onus to prove she is the legal owner of the Nun's Point.

[56] The Moving Party cites *R v Mullins*, [1985] 2 CTC 128 (FCTD) where the Federal Court held that a co-owner of the land has the right to object to a charging order and was successful in setting aside such a charge.

[57] These submissions skirt the real issue. The proper question, in my view, is firstly whether there can be an equitable interest in land and secondly, whether Rule 458 can attach to such an equitable interest.

[58] The *Statute of Frauds* itself recognizes an equitable interest in land. Subsection 1(1) of that Act states that every interest in lands shall be made in writing but “*if not so made or created, has the force and effect of an estate at will only*”. Consequently, there may an equitable interest in lands even if not in writing but the legislation gives it limited application.

[59] Moreover, the doctrine of part performance may take an oral agreement for the purchase of land outside the operation of the *Statute of Frauds*.

[60] In *Erie Sand and Gravel Limited v Seres' Farms Limited et al.*, (2009) 97 O.R. (3d) 241, the Ontario Court of Appeal considered a situation where Erie Sand and Gravel Limited (Erie) wanted to buy a parcel of land from Seres' Farms Limited (Seres' Farms). Erie was aware of a right of first refusal held by a third party, Tri-B Acres Inc. (Tri-B). Erie and Seres' Farm met to discuss the purchase. During the meetings, Seres' Farms insisted on a written offer that it could present to Tri-B. Erie made it clear that it would only provide a written offer when all terms of the sale and purchase were finalized. Erie understood their oral arrangement to be that unless Tri-

B matched its offer, it would acquire the land. Erie then made an offer in writing along with a cheque for the full price. Seres' Farms presented this written offer to Tri-B. Tri-B responded by offering to match the selling price but with a partial deposit rather than the full purchase payment. Seres' Farms then sold the land to Tri-B.

[61] The Ontario Court of Appeal held that the purpose of section 4 of the *Statute of Frauds* is to prevent fraudulent dealings in land based on perjured evidence. However, it added that equity created the doctrine of part performance to prevent the *Statute of Frauds* from being used as a variant of unconscionable dealings. Since Tri-B did not match the Erie offer, namely the Erie's delivery of the full purchase price along with its offer, Seres' Farms was not entitled to accept the Tri-B offer. The partial performance by Erie in delivering a written offer along with the cheque for payment in full took the agreement outside the operation of section 4 of the *Statute of Frauds*.

[62] I conclude that an equitable interest in land can exist when partial performance takes an oral agreement outside the scope of the *Statute of Frauds*.

#### *Rule 458 and Equitable Interests in Land*

[63] In *Re Laquerre*, 2008 FC 460 (*Laquerre*), Justice Martineau considered a challenge to having an interim charging order made absolute. In the course of ruling the charging order absolute, he considered the effect of a charging order on immovable property, stating:

“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.

[64] In *Canada (Minister of National Revenue) v McDonald*, 2010 FC 340 (*MNR v MacDonald*), the respondent sought to have an interim charging order against his interest in an estate discharged claiming that he did not have an interest in the property under Rule 458(1)(a). The property in question was his entitlement to land as provided in his father's will. The respondent admitted having "an indirect, contingent, beneficial interest" but argued that Rule 458 did not encompass this kind of an interest.

[65] Justice Russell found Justice Martineau's words in *Laquerre* were equally applicable to an interest in real property. Justice Russell stated:

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 [D]ictionary 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 7th edition at page 816.

14 Moreover, in *Williams v. Papworth*, [1900] A.C. 563 (New South Wales P.C.), 69 LJPC (as cited in *Rystephaniuk v. Prosken* (1951), 59 Man. R. 142 (Man. K.B.) 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.

[66] Justice Russell then held the interim charging order in that case should be made absolute.

[67] I would add to the above analysis consideration of the following emphasized words in

Rule 458:

458. (1) On the ex parte motion of a judgment creditor, the Court may, for the purpose of enforcing an order for the payment of an ascertained sum of money,

(a) make an order imposing an interim charge for securing payment of that sum and any interest thereon

(i) on real property or immoveables, or on an interest in real property or immoveables, of a judgment debtor, in Form 458A,



(emphasis added)

... and

(b) order the judgment debtor to show cause, at a specified time and place, why the charge should not be made absolute.

[68] Rule 458 not only provides for an interim charge on the real property or immoveables of a judgment debtor but also “on an interest in real property or immoveables”. All words in a statute must not be ignored, but rather attributed a meaning and interpretation that would not render it pointless or redundant, otherwise it is mere surplusage: Ruth Sullivan, *Driedger on the Construction of Statutes*, 3rd ed. (Toronto: Butterworths, 1994) at 88; *R v Proulx*, 2000 SCC 5 at para 28; *Morguard Properties Ltd v Winnipeg*, [1983] 2 SCR 493.

[69] The latter phrase “on an interest in real property” would be redundant given the earlier phrase “on real property” if only legal interests in real property were contemplated. In my view, the addition of these words demonstrates a clear intention by the legislator that the interim charging order could also apply to equitable interests in real property.

[70] I conclude that Rule 458 of the *Rules* does include equitable interests in real property.

*Does Mr. Malachowski have an Equitable Interest in Nun’s Point?*

[71] The Moving Party insists there is no evidence that Mr. Malachowski purchased Nun’s Point or made any payments towards purchase. Where there is no evidence of any consideration for the alleged oral agreement, the Moving Party contends the claim for an interest in property should be dismissed: *Palkowski et al v Ivancic*, 2008 ONCA 419.

[72] Contrary to the Moving Party's submission, there is evidence that points to partial performance by Mr. Malachowski for the purchase of Nun's point pursuant to the oral agreement.

[73] First, the Moving Party does not dispute that there was an oral agreement to rent with an option to buy Nun's Point.

[74] Next, there is no issue that Mr. Malachowski moved to Nun's Point and took up residence. He had effective control of the property since there is no evidence the other tenants, his younger brother and friend and his common law spouse and her daughter, were there other than on his approval.

[75] There is the ledger found at Nun's Point during the period Mr. Malachowski resided there showing two payments towards the agreed purchase price for Nun's Point. This ledger was found in a safe in the barn, which is an unusual place to keep a safe, but it matches Mr. Malachowski's practice of concealing his financial activities. The Moving Party denies ownership of the safe and no other competing explanation exists for the safe's presence. Since the property was under Mr. Malachowski's control, I make the inference that the safe, and therefore the ledger, were his.

[76] There is also the evidence of Mr. Malachowski's investment of some \$65,000 in improvements to Nun's Point, the kitchen cabinets and the landscaping. Both sets of expenditure clearly relate to improvements on real property. Given the Moving Party's evidence that she

cautioned that improvements would be regarded as fixtures, Mr. Malachowski's conduct is consistent with a person who sees the land as his or becoming his property.

[77] Returning to the matter of the ledger, the purchase price for "NUNSPPOINT PROPERTY" listed on the ledger, \$1,000,000, is the same as the purchase price in the oral agreement that the Moving Party admits to having with Mr. Malachowski. I draw the inference that the ledger records payments he made to the Moving Party pursuant to the oral agreement for the sale and purchase of Nun's Point.

[78] The evidence satisfies me that Mr. Malachowski was engaged in partial performance of the oral agreement with the Moving Party such that he had an equitable interest in Nun's Point. The partial performance is such that his interest would fall outside of the scope of the *Statute of Frauds*. This type of beneficial interest is indeed contemplated by Rule 258 of the *Federal Court Rules*.

*The Applicant's Burden on the Motion*

[79] I now turn to whether the Moving Party has met her burden to show that the interim order should be discharged.

[80] The Moving Party submits the Minister's evidence amounts to mere suspicion that Mr. Malachowski gained a beneficial interest in Nun's Point. She has led evidence to show she holds the legal title to Nun's Point.

[81] I note that the Moving Party and Mr. Donihee twice lent Mr. Malachowski significant amounts of money for bridge financing of his land deals without securing the loans in any written form. The Moving Party also advanced money to pay for Mr. Malachowski's U.S. lawyer and his subsequent bail application which she says was either raised or repaid by Mr. Malachowski's common law spouse, all in cash and undocumented.

[82] I find that these financial arrangements are consistent with Mr. Malachowski's purchase of Nun's Point from the Moving Party under terms of an oral agreement. All these transactions are based on oral agreements not documented by written agreements. I have already concluded that Mr. Malachowski was engaged in partial performance of the oral agreement to purchase Nun's Point. The Moving Party has not proven otherwise.

[83] Finally, to address one last point, the Moving Party lead evidence to support her contention that she and her spouse do not have any relationship with Mr. Malachowski other than landlord and tenant. She has submitted evidence that to show that she and Mr. Donihee have sufficient income to maintain their expenses and life style without any payments from Mr. Malachowski for the Nun's Point.

[84] The Minister questions Ms. Fishwick's claim that Mr. Malachowski merely rented Nun's Point. Much of the Minister's evidence was directed at showing that Ms. Fishwick and Mr. Donihee did not have the income or funds to make the expenditures they did without money that only could be explained by cash payments from Mr. Malachowski. Much of Ms. Fishwick's

evidence was directed to proving she and Mr. Donihee had income and funds to make the expenditures they did during this period.

[85] I find that the evidence provided to support the Moving Party's assertions of having significant cash resources of their own to draw upon is no better than the Minister's evidence that they dispute. The evidence tendered by the Moving Party does not negate the Minister's evidence.

[86] I conclude that the Moving Party has not satisfied the burden of proof she must meet to support setting aside the interim charging order in advance of a hearing to determine whether the Order should be made absolute.

### **Conclusion**

[87] The motion to set aside the interim charging order by the Moving Party is dismissed and costs of this motion are in favour of the Responding Party.

[88] The evidence before me does not show that Mr. Malachowski completed partial performance for Nun's Point such that he would have been entitled to claim transfer of title in accordance with the terms of the oral agreement between him and the Moving Party. The interim charging order, on its wording, only applied to "Mr. Malachowski's interest in the real property". The question of what his interest, if any, was caught by the making of the interim charging order remains to be determined.

**ORDER**

**THIS COURT ORDERS AND ADJUDGES that:**

1. The motion to set aside the interim charging order is dismissed.
2. Costs of the motion are in favour of the Responding Party.
3. A show cause motion on making the interim charging order absolute or on determining the degree to which the proceeds of the property sale were caught by the interim charging order be set down for hearing at a date to be determined by the Case Management Prothonotary.

“Leonard S. Mandamin”

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Judge

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

**DOCKET:** ITA-14795-09

**STYLE OF CAUSE:** HER MAJESTY THE QUEEN as represented by the  
Minister of National Revenue and MARCEL  
MALACHOWSKI (also known as MARCEL OWEN  
JOSEPH MALACHOWSKI, MARCEL OWEN  
MALACHOWSKI, MARCEL WUNSCK, MR.  
WENLCOK, MEMO WENLOCK, MEMO AND  
MARCEL WENLOCK)

**PLACE OF HEARING:** OTTAWA, ONTARIO

**DATE OF HEARING:** AUGUST 30, 2010

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

**DATED:** APRIL 5, 2011

**APPEARANCES:**

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