

Federal Court



Cour fédérale

**Date: 20110502**

**Docket: ITA-13825-10**

**Citation: 2011 FC 508**

**[UNREVISED CERTIFIED ENGLISH TRANSLATION]**

**Montréal, Quebec, May 2, 2011**

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

**IN THE MATTER OF THE *INCOME TAX ACT*,**

**and**

**IN THE MATTER OF AN ASSESSMENT OR ASSESSMENTS  
BY THE MINISTER OF NATIONAL REVENUE UNDER ONE  
OR MORE OF: THE *INCOME TAX ACT*, THE *CANADA  
PENSION PLAN*, THE *EMPLOYMENT INSURANCE ACT*,**

**AGAINST:**

**TONY BAROUD  
201 GOLF ROAD, APT. 302  
VERDUN, QUEBEC H3E 1Z4**

**Judgment debtor**

**and**

**CHARLES TOUPIN  
355 DRAPEAU STREET  
SUITE 212  
LAVAL, QUEBEC H7L 2B8**

**and**

**FRANCINE LEWIS  
5 PLACE DU COMMERCE**

**SUITE 250  
VERDUN, QUEBEC H3E 1M8**

**and**

**RICHARD LUPIEN  
3 PLACE DU COMMERCE  
SUITE 500  
MONTRÉAL, QUEBEC H3E 1H7**

**Garnishees**

**and**

**9210-5089 QUÉBEC INC.  
7192 CHOUINARD STREET  
MONTRÉAL, QUEBEC H8N 2Z5**

**and**

**FATIMA ABDELMOUTALIB  
7192 CHOUINARD STREET  
MONTRÉAL, QUEBEC H8N 2Z5**

**Third parties**

**REASONS FOR ORDER AND ORDER**

[1] **CONSIDERING** the interim garnishment order issued by this Court on February 10, 2011, and the subsequent challenge brought by the third parties against the garnishment proceedings in this case (the third parties' challenge);

[2] **CONSIDERING** the various written submissions of the judgment creditor (Her Majesty) and the third parties challenging the latter were read and analyzed, in accordance with the orders of this Court dated February 25 and April 14, 2011, setting a timetable for doing so;

[3] **CONSIDERING** the parties' counsel were heard on April 29, 2011;

[4] **CONSIDERING** the Court is ultimately satisfied that the facts enabling an understanding of this discussion are accurately described at paragraphs 1 to 8 of the written submissions of Her Majesty filed on March 18, 2011 (Her Majesty's submissions of March 18, 2011), reproduced below:

[TRANSLATION]

1. The third parties have brought an action against the judgment debtor for damages, among other things. In these proceedings, they obtained from the Superior Court a writ of seizure before judgment on August 19, 2010, on the ground that the recovery of their debt had been jeopardized by Mr. Baroud's actions.
2. On August 25, 2010, three (3) immovables were garnished before judgment:
  - (a) The immovable located at 201 Golf Road, Apt. 214, Verdun (201-214);
  - (b) The immovable located at 201 Golf Road, Apt. 1007, Verdun (201-1007);
  - (c) The immovable located at 201 Pointe Sud Road, Apt. 510, Verdun (201-510).
3. The judgment debtor challenged these garnishments before judgment before the Superior Court and it seems that no decision has been rendered on this issue yet.
4. While this challenge was still pending, the judgment debtor and his spouse wanted to sell their immovables. The garnishments before judgment prevented that.
5. The third parties and the judgment debtor therefore entered into two escrow agreements, one dated October 20, 2010, for the immovables 201-214 and 201-1007, the other dated December 14, 2010, for immovable 201-510.
6. The contents of the two agreements are practically identical. The third parties agreed to the sale of the immovables and the judgment debtor agreed that the selling price owing to him

would be placed in escrow with the officiating notaries, the garnishees:

- (a) to be given to the judgment debtor if the garnishment before judgment was set aside or if the action was dismissed;
  - (b) to be given to the third parties if they obtained a favourable decision by the arbitration tribunal established further to their civil litigation against the judgment debtor.
7. Having obtained authorization under section 225.2 of the *Income Tax Act* (ITA), Her Majesty filed a certificate with the Federal Court under section 223 of the ITA, demonstrating that the judgment debtor owed her the sum of \$855,446.25.
8. In enforcing this judgment, Her Majesty obtained an interim garnishment order and now asks the Court to order the garnishees to pay her all proceeds from the sale of the immovables owing to the judgment debtor.

[5] **CONSIDERING** the Court is satisfied that the issues are as follows:

- A) What is the impact of the escrow agreements?
- B) Must the garnishment before judgment have precedence over the garnishment after judgment?
- C) Are the garnishee notaries “liable” to the judgment debtor for the amounts held in trust?

[6] **CONSIDERING** with regard to issue A), which involves in this context examining the nature of a garnishment before judgment, the Court is of the view that, contrary to the third parties’ claims, the escrow agreements (the agreements) cannot be considered to have transferred

outside the judgment debtor's patrimony and in favour of the garnishees (the notaries) any amount that could be owing to the judgment debtor following the sale of the immovables in question;

[7] **CONSIDERING** the Court is of the view, as submitted by Her Majesty at paragraph 18 of her submissions of March 18, 2011, that [TRANSLATION] "a garnishment before judgment is a conservatory measure that protects an eventual right to any claim. It does not confer any rights of ownership on the seizing party, nor does it take away the debtor's right of ownership in his or her property."

*Provi-Grain (1986) Inc. (bankruptcy of)*, [1994] R.J.Q. 1804

(C.A.)

[8] **CONSIDERING** the Court is of the view that the only objective of the third parties and the judgment debtor in making the agreements was to prevent the judgment debtor from disposing of the amounts in the time it would take to settle the dispute in the Superior Court one way or another. The only role of the garnishee notaries in the interim is to act as trustees of the amounts that may be owing to the judgment debtor. The Court does not find that the agreements in this case created a trust or a patrimony by appropriation that would exclude the amounts owing to the judgment debtor from his patrimony;

[9] **CONSIDERING**, accordingly, the Court is of the view in response to issue A) that the agreements and the garnishment before judgment do not prevent the garnishment proceedings in this case and the granting of a garnishment order absolute in favour of Her Majesty;

[10] **CONSIDERING**, with regard to issue B), the Court is satisfied that a garnishment after judgment such as these garnishment proceedings has precedence over a garnishment before judgment;

[11] **CONSIDERING**, with regard to issue C), the Court is of the view that it must answer in the affirmative for the following reasons.

[12] **WHILE** it is plausible to argue that if the judgment debtor or the third parties themselves wanted to claim from the garnishees the amounts held by them under the agreements, the said garnishees could then claim to not be liable in the judgment debtor's favour. In fact, as the third parties point out at paragraph 20 of their written submissions filed on April 6, 2011, the following argument could therefore be made:

[TRANSLATION]

20. In fact, the amounts could as easily be paid to the third parties as to the judgment debtor or be shared by both under the terms of a judgment;

[13] However, the agreements in this sense have effect only between the parties who entered into them. As for Her Majesty, it must be noted that she is to be considered here as a creditor with an enforceable judgment that she is enforcing through a garnishment after judgment and that the agreements cannot then block the garnishment after judgment she is making. The wording of subparagraph 449(1)(a)(i) of the *Federal Courts Rules*—the applicable rule here and not section 224 of the *Income Tax Act*—is clearly of such a nature as to allow this garnishment here;

[14] **THUS, FOR THE FOREGOING REASONS,** the Court dismisses the challenge of the third parties and orders that Her Majesty is entitled to seek a final order of garnishment stating that the garnishee notaries are liable to the judgment debtor and ordering them to pay these amounts to Her Majesty. With costs against the third parties.

[15] Therefore, and in a separate order, the Court issues a final order of garnishment on this date.

**“Richard Morneau”**

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Prothonotary

Certified true translation  
Catherine Jones, Translator