

Docket: 2008-390(GST)I

BETWEEN:

GARAGE A. D. INC.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

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Motion heard on April 16, 2008 at Montréal, Quebec

Before: The Honourable Justice Lucie Lamarre

Appearances:

Counsel for the Appellant:	Jacques Matte
Counsel for the Respondent:	Richard Généreux

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**ORDER**

Upon motion by the Respondent for a judgment by the Court dismissing the appeal from the assessment, notice of which is dated March 14, 2006 and numbered 5125260, on the ground that the Appellant does not have the capacity to sue or be sued because of its bankruptcy;

And upon application by counsel for the Appellant to adjourn the said motion to dismiss the appeal so he can request the trustee in bankruptcy to authorize Francine Alhot, who owns 50 percent of the Appellant's shares, to represent the Appellant in the Tax Court of Canada in objecting to the assessment the Appellant wants to appeal;

The Court allows the application of counsel for the Appellant, and the hearing of this motion is postponed for 60 days so Ms. Alhot can take the necessary steps with the trustee and the bankruptcy court to assert her rights for the purpose of determining whether the appeal to this Court should be continued by the trustee or, on an exceptional basis, by Ms. Alhot herself despite the trustee's initial decision not to appeal the assessment.

Signed at Ottawa, Canada, this 29th day of April 2008.

"Lucie Lamarre"

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Lamarre J.

Translation certified true  
on this 27th day of June 2008.

Brian McCordick, Translator

Citation: 2008TCC246  
Date: 20080429  
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### **REASONS FOR ORDER**

Lamarre J.

[1] The Respondent moves to dismiss the appeal on the ground that the Appellant does not have the capacity to sue or be sued.

[2] The Appellant declared bankruptcy on November 29, 2007. On February 1, 2008, it appealed an assessment that had been made on March 14, 2006 and confirmed on November 21, 2007. The assessment concerns GST and QST on drug trafficking.

[3] The Respondent submits that the Appellant is no longer capable of suing or being sued because it is bankrupt. The evidence shows that the Minister of National Revenue and the Quebec Minister of Revenue are the main creditors in the bankruptcy, with a total claim of about \$8 million. There is also another creditor, the Royal Bank, which has a claim for \$98,000. At the meeting of creditors, counsel for the Appellant brought up the possibility that the assessments for a total of about \$8 million were unfounded. The trustee in bankruptcy postponed the meeting of creditors several times based on the arguments made by counsel for the Appellant. The trustee himself had never intended to challenge the assessments. The last

meeting of creditors was attended only by André Allard, the trustee in bankruptcy, and Junior St-Urbain, a representative of the Quebec Minister of Revenue.

[4] The trustee asked Mr. St-Urbain to act as an inspector in the bankruptcy. He explained that it is always preferable to have an inspector because this avoids many court proceedings.

[5] The trustee never asked the inspector for authorization to appeal the assessments. If he had, the inspector, Mr. St-Urbain, would have had to disqualify himself, since he would have been in a conflict of interest given that he was representing the interests of the Quebec Minister of Revenue, who had made the assessments.

[6] Counsel for the Appellant acknowledges that, since the Appellant is bankrupt, it does not have the capacity to sue or be sued. However, he asks that the motion to dismiss the appeal be adjourned so that he can request the trustee in bankruptcy to authorize Francine Alhot, who owns 50 percent of the Appellant's shares, to represent the Appellant in the Tax Court of Canada and the Court of Quebec in objecting to the assessments. If the trustee denies permission to do so, he will make a motion before the bankruptcy court. According to counsel, he is representing the interests not only of the Appellant but also of Ms. Alhot. The other shareholder is Ms. Alhot's spouse, who is in prison for drug trafficking. Counsel for the Appellant relies on articles 165 and 166 of the Quebec *Code of Civil Procedure* and wants to seek an order remedying the ground upon which the motion to dismiss is based and authorizing Ms. Alhot to represent the Appellant in this Court.

[7] Counsel for the Respondent objects to this delay, saying that Ms. Alhot is not personally a creditor in the bankruptcy and has no right to assert. He refers to sections 2, 2.1, 30(1)(d) and (e), 37, 71, 116, 117, 118 and 120 of the *Bankruptcy and Insolvency Act* ("*Bankruptcy Act*") and argues that only the trustee has the right to sue for the bankrupt. He also cites the following decisions: 4028490 *Canada Inc. v. Canada*, [2005] T.C.J. No. 95 (QL), a decision by Justice Paul Bédard of this Court signed on February 23, 2005; and *Transport Car-Fre ltée v. Fiset*, [2000] J.Q. No. 4586 (QL), a decision of the Court of Quebec, district of Iberville, signed on November 1, 2000, No. 755-22-001896-9.

[8] The legislative provisions cited above read as follows:

Articles 165 and 166 of the Quebec *Code of Civil Procedure*

**165.** The defendant may ask for the dismissal of the action if:

- (1) There is *lis pendens* or *res judicata*;
- (2) One of the parties is incapable or has not the necessary capacity;
- (3) The plaintiff has clearly no interest in the suit;
- (4) The suit is unfounded in law, even if the facts alleged are true.

**166.** When it is possible to remedy the ground upon which the exception is based, the plaintiff may ask that he be granted a time to do so and that judgment be rendered upon the exception only upon the expiry of such time.

If the ground remains, the suit is dismissed; if it has been remedied, the exception is maintained for costs only.

*Bankruptcy Act*

**2.** In this Act,

"creditor" means a person having a claim, unsecured, preferred by virtue of priority under section 136 or secured, provable as a claim under this Act;

**2.1** For the purposes of this Act, the bankruptcy or putting into bankruptcy of a person occurs at the time or date of

- (a) the granting of a bankruptcy order against the person;
- (b) the filing of an assignment by or in respect of the person; or
- (c) the event that causes an assignment by the person to be deemed.

**30(1)** The trustee may, with the permission of the inspectors, do all or any of the following things:

...

(d) bring, institute or defend any action or other legal proceeding relating to the property of the bankrupt;

(e) employ a barrister or solicitor or, in the Province of Quebec, an advocate, or employ any other representative, to take any proceedings or do any business that may be sanctioned by the inspectors;

**37.** Where the bankrupt or any of the creditors or any other person is aggrieved by any act or decision of the trustee, he may apply to the court and the court may confirm, reverse or modify the act or decision complained of and make such order in the premises as it thinks just.

**71.** On a bankruptcy order being made or an assignment being filed with an official receiver, a bankrupt ceases to have any capacity to dispose of or otherwise deal with their property, which shall, subject to this Act and to the rights of secured creditors, immediately pass to and vest in the trustee named in the bankruptcy order or assignment, and in any case of change of trustee the property shall pass from trustee to trustee without any assignment or transfer.

**116.**

Appointment

(1) At the first or a subsequent meeting of creditors, the creditors shall appoint one or more, but not exceeding five, inspectors of the estate of the bankrupt.

Persons not eligible

(2) No person is eligible to be appointed or to act as an inspector who is a party to any contested action or proceedings by or against the estate of the bankrupt.

Powers

(3) The powers of the inspectors may be exercised by a majority of them.

Filling vacancy

(4) The creditors or inspectors at any meeting may fill any vacancy on the board of inspectors.

Revocation and replacement

(5) The creditors may at any meeting and the court may on the application of the trustee or any creditor revoke the appointment of any inspector and appoint another in his stead.

**117.**

Meetings

(1) The trustee may call a meeting of inspectors when he deems it advisable and he shall do so when requested in writing by a majority of the inspectors.

Participation by telephone, etc.

(1.1) An inspector may, if all the other inspectors consent, participate in a meeting of inspectors by means of such telephone or other communication facilities as permit all persons participating in the meeting to communicate with each other, and an inspector participating in such a meeting by such means is deemed for the purpose of this Act to be present at that meeting.

Trustee votes in case of tie

(2) In the event of an equal division of opinion at a meeting of inspectors, the opinion of any absent inspector shall be sought in order to resolve the difference, and in the case of a difference that cannot be so resolved, it shall be resolved by the trustee, unless it concerns his personal conduct or interest in which case it shall be resolved by the creditors or the court.

**118.** Where there are no inspectors of the estate of the bankrupt or where the inspectors fail to exercise the powers conferred on them, the trustee shall call a meeting of the creditors for the purpose of appointing inspectors or substituting other inspectors, taking such action or giving such directions as may be necessary.

**120.**

Inspector may not acquire property

(1) No inspector is, directly or indirectly, capable of purchasing or acquiring for himself or for another any of the property of the estate for which he is an inspector, except with the prior approval of the court.

Formal defects

(2) No defect or irregularity in the appointment of an inspector vitiates any act done by him in good faith.

Duty of inspectors

(3) The inspectors shall from time to time verify the bank balance of the estate, examine the trustee's accounts and inquire into the adequacy of the security filed by the trustee and, subject to subsection (4), shall approve the trustee's final statement of receipts and disbursements, dividend sheet and disposition of unrealized property.

Approval of trustee's final statement by inspectors

(4) Before approving the final statement of receipts and disbursements of the trustee, the inspectors shall satisfy themselves that all the property has been accounted for and that the administration of the estate has been completed as far as can reasonably be done and shall determine whether or not the disbursements and expenses incurred are proper and have been duly authorized, and the fees and remuneration just and reasonable in the circumstances.

Inspectors' expenses and fees

(5) Each inspector

(a) may be repaid actual and necessary travel expenses incurred in relation to the performance of the inspector's duties; and

(b) may be paid such fees per meeting as are prescribed.

Special services

(6) An inspector duly authorized by the creditors or by the other inspectors to perform special services for the estate may be allowed a special fee for those services, subject to approval of the court, which may vary that fee as it deems proper having regard to the nature of the services rendered in relation to the obligations of the inspector to the estate to act in good faith for the general interests of the administration of the estate.

[9] Moreover, paragraph 128(1)(a) of the *Income Tax Act* ("ITA") provides as follows:

**128(1) Where corporation bankrupt** – Where a corporation has become a bankrupt, the following rules are applicable:

(a) the trustee in bankruptcy shall be deemed to be the agent of the bankrupt for all purposes of this Act;

[10] According to paragraph 128(1)(a) of the *ITA*, the trustee in bankruptcy shall be deemed to be the agent of the bankrupt.

[11] Under section 71 of the *Bankruptcy Act*, a bankrupt no longer has any capacity to dispose of or otherwise deal with the bankrupt's property, which vests in the trustee.

[12] According to paragraphs 30(1)(d) and (e) of the *Bankruptcy Act*, the trustee may, with the permission of the inspector, bring, institute or defend any action or other legal proceeding relating to the property of the bankrupt and employ a barrister or solicitor or, in the Province of Quebec, an advocate, or employ any other representative, to take any proceedings.

[13] Thus, the basic principle where a taxpayer declares bankruptcy is that the trustee decides whether or not to object to the assessment. Here, the trustee clearly indicated that he did not intend to challenge the assessment.

[14] However, section 37 of the *Bankruptcy Act* states that, where the bankrupt or any of the creditors or any other person is aggrieved by any decision of the trustee, that person may apply to the court and the court may confirm, reverse or modify the act or decision complained of and make such order in the premises as it thinks just.

[15] Here, the main creditors are the Minister of National Revenue and the Quebec Minister of Revenue, who have a total claim of about \$8 million. The other creditor, the Royal Bank, did not attend the meeting of creditors. Ms. Althot believes that the assessments made by the Quebec Minister of Revenue are unfounded. If this is the case and the trustee does not intend to challenge the assessments, she may be able to argue before the bankruptcy court that she feels aggrieved.

[16] In *Transamerica Commercial Finance Corp., Canada v. Computercorp Systems Inc.* (Alta. C.A.), [1993] A.J. No. 447 (QL), [1993] 7 W.W.R. 495, the issue was whether a shareholder of a bankrupt corporation could sue in lieu of the trustee if the trustee refused to do so. The Alberta Court of Appeal stated the following at pages 496-497:

The difficulty is that the proposed plaintiff is an undischarged bankrupt. Despite the fact that the proposed claim is for several million dollars, the trustee in bankruptcy, after consultation with the inspectors, refused to prosecute it. The simple and sole reason was that, although the bankrupt owes millions, it has almost no assets, and in any event not enough to secure to the trustee its potential litigation costs.

The Lloyds are directors and shareholders of the bankrupt. They are of the view that Transamerica, who precipitated the bankruptcy and put in the receiver when



it called a huge debt owed to it, was in breach of its obligations to the bankrupt. If successful in the suit, the Lloyds say the bankrupt will win from Transamerica enough to pay all its debts as well as his lost investment in the company, if not more. They are sufficiently confident of the outcome that he will undertake personally to underwrite the cost of the suit at no risk to other claimants. He asked in return only that his claim as a shareholder be given priority over the claims of creditors. The learned chambers judge accepted this offer, and granted leave to "bring an action in the name of Computercorp Systems Inc.". The judge also ordered that "all costs of this lawsuit will be borne entirely" by the Lloyds, and not the proposed plaintiff, and that any fruits of the litigation, after payment of costs, "shall go ... to satisfy the claims of..." the Lloyds.

Transamerica appeals. It argues firstly that a judge in bankruptcy has no power to make an order permitting a third party the carriage of a suit in the name of the bankrupt. As the principal creditor in the bankruptcy, it also protests what it says is an illegal re-ordering of the priorities established by the *Bankruptcy Act*, R.S.C. 1985, c. B-3.

We shall first deal with the power to make the order. It is unusual. This is not a case where, at discharge, the trustee re-assigns a cause of action. Nor is it a case where the shareholder attempts, during bankruptcy, a derivative action. Nor is this a case where a bankrupt, during the bankruptcy, attempts itself to sue. Cases dealing with those situations have no application. Nor is it quite the same as a case where, under s.38, the bankruptcy judge grants leave to a creditor to sue when the trustee will not. The Lloyds are not creditors.

The learned chambers judge found the power to make the order in s.37 of the Act. It provides:

Where the bankrupt or any of the creditors or any other person is aggrieved by any act or decision of the trustee, he may apply to the court and the court may confirm, reverse or modify the act or decision complained of and make such order in the premises as it thinks just.

We have not been persuaded to put any unnecessary limit on the powers of a Court under s.37. That wide residual power permits a bankruptcy judge to do justice in special cases. We reject the argument that he lacked the statutory authority to make the order under review.

[17] Thus, in my opinion, it would be possible for Ms. Althot to apply to the bankruptcy court for an order modifying the trustee's decision not to object to the assessments. Of course, it would be up to the bankruptcy court to decide whether or not to allow such an application.

[18] I cannot determine what the trustee's duties are, but I consider it important to give Ms. Althot an opportunity to assert her rights before the bankruptcy court. That court will decide whether her application is well-founded. If she wins before the bankruptcy court, the Notice of Appeal in this Court will no longer necessarily have to be struck out as the Respondent argues.

[19] I note that a trustee's refusal to take action is reviewable under section 37 of the *Bankruptcy Act* (see Lloyd W. Houlden, Geoffrey B. Morawetz and Janis P. Sarra, *The 2008 Annotated Bankruptcy and Insolvency Act* (Toronto: Thomson Carswell, 2008), at p. 98, citing *Holley v. Gifford Smith Ltd.* (1986), 54 O.R. (2d) 225, [1986] O.J. No. 165 (QL) (Ont. C.A.), and other decisions on this subject).

[20] Moreover, although the *Bankruptcy Act* is structured in such a way as to allow the trustee to administer the property of the bankrupt without unreasonable interference, the trustee's decisions may be challenged in certain cases where the necessary proof exists. In *Nesterenko (syndic) v. Banque royale du Canada*, [1998] J.Q. No. 53 (QL), the following was stated:

42 Moreover, the scheme of the Bankruptcy Act is so framed as to allow the trustee to administer an estate under the supervision of the inspectors without undue interference. Where inspectors are acting within the amount of their authority the Court should not interfere lightly save for sound and cogent reasons. This principle has been aptly stated by the courts in *Re Groves-Raffin Construction Ltd.* (No. 2), (1978) 28 C.B.R. (n.5.) 105 (B.C.S.C.) where Macfarlane J. states at Page 112:

In considering the conduct of a trustee it is well to keep in mind that the scheme of the Act is to allow the trustee to administer the estate under the supervision of the inspectors without interference unless there has been an excess of power, fraud, a lack of bona fides, or unless the actions of the trustee and the inspectors are unreasonable from the standpoint of the good of the estate.

[21] For these reasons, the motion to dismiss the appeal should be adjourned so Ms. Althot can take the necessary steps with the trustee and the bankruptcy court to assert her rights. Counsel for the Appellant referred to a time period of 30 days for this purpose. To be on the safe side, I am adjourning the motion for 60 days. This motion to dismiss the appeal will be set down for hearing again by me when that time period is over so that the issue of whether the Notice of Appeal must be struck out can be determined once and for all.

Signed at Montréal, Quebec, this 29th day of April 2008.

"Lucie Lamarre"

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Lamarre J.

Translation certified true  
on this 27th day of June 2008.

Brian McCordick, Translator

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COURT FILE NO.: 2008-390(GST)I  
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PLACE OF HEARING: Montréal, Quebec  
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REASONS FOR ORDER BY: The Honourable Justice Lucie Lamarre  
DATE OF ORDER: April 29, 2008

APPEARANCES:

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