

Federal Court



Cour fédérale

Date: 20231030

Docket: ITA-2367-23

[ENGLISH TRANSLATION]

Ottawa, Ontario, October 30, 2023

PRESENT: Associate Judge Benoit M. Duchesne

IN THE MATTER OF the *Income Tax Act*,

AND

IN THE MATTER OF one or more assessments by the Minister of National Revenue under the *Income Tax Act*;

AGAINST:

**CARFLEX DISTRIBUTION INC.
L3-13361 Du Curé-Labelle Boulevard
Mirabel, Quebec J7J 1H1**

Judgment Debtor

AND

**YVAN DRAPEAU
Whose last known address is 23 Cléroux Street
Saint-Lin–Laurentides, Quebec J5M 2B6**

AND

**9488-0846 QUÉBEC INC.
504 Saint-Louis Street
Joliette, Quebec J6E 2Z2**

AND

**BUREAU DE LA PUBLICITÉ FONCIÈRE
5700 4e Avenue West, Suite E-308
Québec, Quebec G1H 6R1**

Third Parties

ORDER

[1] This is a written motion brought by the Attorney General of Canada (the AGC) under rule 369 of the *Federal Courts Rules* (the Rules) for an order authorizing the service and filing of a supplementary affidavit by Patrick Savage and accompanying exhibits, to provide the Court with information, documents and the results of additional research that Patrick Savage conducted starting on April 15, 2023, concerning judgment debtor Carflex Distribution Inc. (Carflex) and third parties Yvan Drapeau (Drapeau), Entreprise Carflex, which is a sole proprietorship registered under the surname “Drapeau”, 9488-0846 Québec inc. (9488), and 9462-7759 Québec inc. (9462), as well as a decision rendered by the Superior Court of Québec on May 19, 2023.

[2] The motion is part of an *ex parte* motion for the lifting of the corporate veil, declarations of unenforceability and an interim charging order under rules 4, 136, 358, 395 and 458 of the Rules, and articles 317 and 1631 *et seq.* of the *Civil Code of Québec*.

[3] The third party 9488-0846 Québec inc. opposes the motion. It believes that the motion should not be granted but that, if it is granted, the Court should strike out in whole or in part certain portions of the proposed supplemental affidavit and certain supporting exhibits.

[4] For the reasons that follow, the AGC’s motion will be dismissed without prejudice because there is no evidence relevant to the motion and because the AGC failed to follow the proper procedure, thereby applying a legal test that does not apply to the motion. The AGC did not discuss the applicable test in his motion.

I. Background to motion

[5] This proceeding was commenced by a certificate referred to in section 223 of the *Income Tax Act* (the ITA) and is part of a broader series of proceedings to enforce an order of a federal board, commission or other tribunal, in this case, an order for a tax debt referred to in section 233 of the ITA.

[6] Under subsection 223(3) of the ITA, producing to this Court a certificate made under subsection 223(2) of the ITA gives the certificate the same effect, and all proceedings may be taken thereon, as if it were a judgment obtained in this Court against the debtor for a debt in the amount certified plus interest thereon to the date of payment and, for the purpose of any such proceedings, the certificate shall be deemed to be a judgment against the debtor for a debt due to His Majesty, enforceable in the amount certified plus interest thereon to the day of payment.

[7] As part of enforcing his certificate, the AGC brought an *ex parte* motion under rule 458. Rule 458 is in Part 12 of the Rules, on the enforcement of orders.

II. Rules applicable to motions

[8] An *ex parte* motion under rule 458 is a motion within the meaning of the Rules.

[9] Accordingly, it must have the form of a motion under the Rules, it is governed by the rules that apply to motions, and it is initiated in the same way as any other motion under the Rules, namely, in accordance with Part 7 of the Rules. Rule 358, the first rule in Part 7, reads, “This Part applies to motions other than motions for leave to appeal under Part 6”, and applies to all motions under the Rules except those that are excluded.

[10] Motions under Part 7 of the Rules must comply with the applicable rules. The following is a summary of some of the basic rules that apply to motions under Part 7 of the Rules:

- (a) Under rule 359, a motion is initiated by a notice of motion, in Form 359, setting out the relief sought, namely, an order or outcome.
- (b) A motion is supported by affidavit evidence as provided for in rule 363. A party to a motion sets out in an affidavit any facts to be relied on by that party in the motion that do not appear on the Court file and any documentary evidence in exhibits in accordance with rules 80 and 81.
- (c) The notice of motion and supporting affidavits are placed together in a motion record under rule 364, although they may be served separately under rule 367.
- (d) The contents of a motion record referred to in rule 364 are not restricted to the notice of motion and supporting affidavits, but may include any transcript of an examination or cross-examination on which a party intends to rely at the hearing, and any other material filed with the Registry and added to the Court file that is necessary for the purposes of the motion as set out in paragraphs 364(2)(d) and (f), with the understanding that it is neither the Court's nor the Registry's duty or function to retrieve documents from the Court file to supplement a party's motion record (*Ewert v Assistant Commissioner Policy and Programs*, 2022 CanLII 117825 (FC), at paras 3, 4).

- (e) Under paragraph 364(2)(e), the motion record also contains the moving party's written representations.
- (f) The motion record is served on the opposing parties before the hearing date and filed with the Registry along with proof of service.

[11] The basic rules that apply to a respondent's motion record are mainly in rule 365 and are essentially the same as the rules that apply to a motion record.

[12] The process of preparing and filing material required for the hearing of a motion under the Rules involves (a) the preparation, service and filing of a motion record that includes affidavit evidence to support the conclusions sought in the notice of motion and written representations setting out the moving party's legal and factual arguments; (b) the preparation, service and filing of a respondent's motion record that includes affidavit evidence to counter or supplement the evidence for the motion and written representations that set out the respondent's legal and factual arguments; and (c) if the application is to be decided on the basis of written representations, the moving party's written representations in reply under subrule 369(3).

[13] In cases where evidence for the purposes of the motion is given by affidavit, the Rules provide for possible cross-examination on affidavits under rules 87 to 100, and transcripts of all cross-examinations on affidavits that take place must be filed with the Registry before the hearing of the motion, in accordance with rule 368.

[14] What can be seen from this brief overview of the rules applicable to motions is that Part 7 is silent on how a party to a motion is to serve and file supplementary or additional affidavits

after it has served and filed its motion record or respondent's motion record. How, then, is supplementary or additional evidence to be served and filed after a motion record or respondent's motion record has been served in accordance with Part 7?

[15] Motion records and respondent's motion records are considered to be "documents" within the meaning of the Rules because they are documents that must be filed with the Registry under the Rules (*Hughes v Canada (Human Rights Commission)*, 2020 FC 1096 (CanLII) at paras 38–48, and the case law cited therein; Rules, rr 23, 65, 364, 365, among others). As "documents" under the Rules, motion records and respondent's motion records may be amended like any other "document" pursuant to rule 75, which deals with the amendment of any document that must be filed with the Registry on such terms, set by the Court in its leave to amend, as will protect the rights of all parties.

[16] It follows, therefore, that a party wishing to introduce supplementary or additional evidence on a motion after it has served its motion record or respondent's motion record, as the case may be, must obtain leave of the Court on motion under rule 75 to amend its motion record by adding the new affidavit.

[17] A motion for leave to amend a motion record or respondent's motion record may be made informally on consent or without objection on the basis of discussions between the parties or, if it is objected to, by formal motion. The applicable test would then be the test that normally applies to motions to amend under rule 75, which is essentially that the amendment should be allowed at any stage of the proceeding if it assists the court in determining the real questions in controversy between the parties, provided that it would not result in an injustice to the other

party that is not compensable in costs and that it would serve the interests of justice (*Canada v Pomeroy Acquireco Ltd*, 2021 FCA 187 (CanLII) at para 4, among others).

III. Rule 312, its application to Part 7 motions

[18] The AGC has presented an argument in line with its basic assertion that the Rules do not specifically provide a mechanism for authorizing the production of a supplemental affidavit as part of a motion record, as in this case. According to the AGC, the Court should follow the approach in *Amgen Canada Inc v Apotex Inc*, 2016 FCA 121 at para 7 (*Amgen*) and apply rules 3, 4 and 55 to allow for reply evidence to be filed. *Amgen* does not apply to this motion.

[19] In *Amgen*, the Federal Court of Appeal had before it a very specific issue in an appeal. The issue was whether and how a party could introduce a reply affidavit with its representations in reply under subrule 369(3), to provide evidence in reply to the respondent's evidence in a mootness motion. As Justice Stratas rightly points out at paragraph 12 of *Amgen*, quoting Wigmore, there is good reason to restrict the admission of evidence on reply, since allowing a wide range of evidence could be unfair to the respondent who had supposed the case in chief would be the entire case to meet. In *Amgen*, the Court's solution was to allow the new affidavit on conditions because the reply evidence concerned an issue that the respondent had raised in its motion record but that the moving party had not raised in its original motion record. Because the reply evidence appeared to be relevant, the Court allowed it subject to conditions that protected procedural fairness for the respondent. The motion before me contemplates presenting evidence not in reply but rather by affidavit supplementary to the affidavit already served and filed.

[20] The Court notes that rule 312 is found in Part 5 of the Rules. Rule 312 considered in context provides for leave to file and serve affidavits supplementary or additional to affidavits served under rules 306 and 307 in connection with an application described in rule 300 and governed by Part 5 of the Rules. An application under Part 5 of the Rules and a motion under Part 7 are separate procedural vehicles. The motion before this Court is not part of an application under rule 300 or Part 5 of the Rules. Given that Part 7 and rule 75 are applicable and provide a specific solution for documents filed as part of a motion, there is no reason to rely on rule 312 or *Amgen* to decide the motion before me.

IV. Evidence presented for this motion

[21] The AGC's motion must be dismissed, regardless of the applicable rule on the merits of the motion, because the AGC failed to submit evidence relevant to the applicable test for service of a supplemental affidavit.

[22] The AGC's motion record contains Mr. Savage's supplemental affidavit. Mr. Savage's affidavit sets out information and the results of additional research he has conducted since the service of his initial affidavit of April 14, 2023, regarding Carflex, Drapeau, Entreprise Carflex, which is a sole proprietorship registered under the surname "Drapeau", 9488-0846 Québec inc. (9488) and the companies of which Mr. Drapeau was or is a shareholder or director.

[23] Mr. Savage's affidavit contains no evidence as to the necessity of his affidavit, its relevance, or whether the AGC could have obtained the evidence he presented before the date of his first affidavit. All these elements must be proven by an affidavit because they are questions of fact or of mixed fact and law. The affidavit here is silent on these issues.

[24] No affidavit has been filed dealing with the considerations for leave to amend documents under rule 75.

[25] Given the insufficient evidence on issues critical to the motion before me, it is obvious that the motion must be dismissed.

V. Role of written representations

[26] The Court notes that the AGC's written representations present arguments and evidence that address the jurisprudential factors for leave to serve an additional affidavit under rule 312. The evidence, however, is not in the evidence before me.

[27] As reflected in Part 7, evidence on a motion is presented by affidavit, documentary evidence, transcript or by a document that is already in the Registry. Written representations are representations, or arguments, and are not a substitute for the evidence required for the purposes of a motion. I recall and reiterate the words of Justice Roger of the Ontario Superior Court of Justice, formerly a prothonotary, at paragraph 57 of *Lamoureux v Lamoureux*, 2014 ONSC 1735 (CanLII), with respect to the role of a memorandum or written representations on a motion:

[TRANSLATION]

I find the whole thing quite contradictory and I do not accept that a party can contradict itself in its memorandum, which is not in evidence, except perhaps to make an admission on consent or an admission against its interests or otherwise in a context where this is brought to the attention of the judge or prothonotary hearing the case. A memorandum is not an affidavit, and a party should not deviate in its memorandum from the facts in evidence unless it does so very clearly, in a way that explains the contradiction without providing new evidence.

[28] Written representations unsupported by properly presented evidence will not be persuasive.

VI. Conclusions

[29] For these reasons, the AGC's motion is dismissed, but without prejudice to his bringing a new motion for an order granting him leave to amend his motion record under rule 75. Given the contents of Mr. Savage's affidavit of June 21, 2023, and that the facts set out therein at least appear to be clearly relevant to the execution on judgment, it would also be advisable for the parties to discuss the situation and perhaps proceed by way of an informal motion on consent with or without conditions or time limits in accordance with the Court's *Consolidated General Practice Guidelines*.

[30] In light of the foregoing, any future motion by the AGC for leave of the Court to serve and file with the Registry a motion record amended by including a supplemental affidavit from Mr. Savage or others should be sent to me for adjudication.

THIS COURT ORDERS as follows:

1. The AGC's motion is dismissed without prejudice.
2. Any future motion by the AGC for leave of the Court to serve and file with the Registry a motion record amended with respect to his motion under rule 458 through the inclusion of a supplementary affidavit by Mr. Savage or other people must be sent to me for determination.

3. Without costs.

“Benoit M. Duchesne”

Associate Judge

Certified true translation
Vincent Mar