

Date: 20060824

Docket: GST-2070-05

Citation: 2006 FC 1019

[ENGLISH TRANSLATION]

Montréal, Quebec, August 24, 2006

PRESENT: Richard Morneau, Esq., Prothonotary

In the matter of the *Excise Tax Act*

and

**In the matter of an assessment or assessments
by the Deputy Minister of Revenue of Quebec
under the *Excise Tax Act***

AGAINST:

RÉAL BOUDREAU

Debtor

and

HILAIRE BOUDREAU

Adverse Claimant

REASONS FOR ORDER AND ORDER

[1] In the case at hand, the Court is dealing with a written motion from the adverse claimant under Rules 369 and 371 of the *Federal Courts Rules* (the Rules) for the adverse claimant to be

authorized to give oral testimony on the real property objection filed against the seizure conducted by the judgment creditor on March 7, 2006.

[2] Rule 371 stipulates:

371. On motion, the Court may, in special circumstances, authorize a witness to testify in court in relation to an issue of fact raised on a motion.

371. Dans des circonstances particulières, la Cour peut, sur requête, autoriser un témoin à témoigner à l'audience quant à une question de fait soulevée dans une requête.

(Emphasis added.)

[3] Case law in support of this rule is such that this authorization can only be granted under exceptional circumstances.

[4] The burden of demonstrating the existence of these circumstances is on the moving party.

[5] In *Cyanamid Canada Inc. v. The Minister of National Health and Welfare* (1992), 52

F.T.R. 22 (F.C.T.D.), the Associate Chief Justice of this Court, as he then was, made the

following comments, which apply *mutatis mutandis* to the rule under study:

It is clear that motions are to be conducted on the basis of documentary evidence and that it is exceptional to depart from this practice. Rule 319 of the *Federal Court Rules* provides that allegations of fact upon which a motion is based shall be by way of affidavit although, by leave of the Court and for special reason, a witness may be called to testify in open Court in relation to an issue of fact raised by an application. In *Glaxo Canada Inc. v. Canada (Minister of National Health and Welfare) and Apotex Inc. et al. No. 4* (1987), 11 F.T.R. 132, Glaxo's application under rule 319(4)

for leave to call a witness to give viva voce evidence in relation to certain issues of fact raised in the application was dismissed. Rouleau, J., commented (at p. 133):

Under Rule 319 all the facts on which a motion is based must be supported by affidavit evidence. It is only “by leave of the court” and “for special reason” that a witness can be called to testify in relation to an issue. There were no cases presented to me by counsel for the plaintiff nor am I aware of any case law which identifies the test as to what constitutes “special reason”. In my opinion, this is a question to be decided on the facts of a particular case with the onus being on the applicant to prove the existence of “special reason” to the satisfaction of the court. What is clear from the jurisprudence is that leave will be granted by the court only in exceptional circumstances.

[6] I re-read the affidavit by counsel for the adverse claimant that was filed in support of the review, and I am not at all satisfied in this case that there are particular reasons that would allow the adverse claimant to circumvent the general hearing process of a motion on the basis of affidavits.

[7] Here, I consider that the affidavit evidence for each party will be sufficient, and that particular circumstances under Rule 371 have not been demonstrated. Consequently, the adverse claimant’s motion is dismissed without costs.

[8] However, the adverse claimant is authorized to serve and file a new detailed affidavit in support of his objection within ten (10) days of this order.

[9] The judgment creditor must serve and file her motion record within the next thirty (30) days.

[10] Any examination of the affidavits, if necessary, must be done within the next twenty (20) days.

[11] Thereafter, said objection must be brought by the adverse claimant within a rather short timeframe to a general list of motions in Montréal, unless counsel for the parties in question are of the opinion, by mutual agreement, that the expected duration will exceed two hours. If this is the case, a short joint and concise letter must be sent to this Court's registry in Montréal to request a special hearing date.

ORDER

THE COURT ORDERS that the adverse claimant's motion under Rule 371 is dismissed,
without costs.

“Richard Morneau”

Prothonotary

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: GST-2070-05

STYLE OF CAUSE: In the matter of the *Excise Tax Act*,
- and -
In the matter of an assessment or assessments by the Deputy
Minister of Revenue of Quebec, representing Her Majesty
the Queen in Right of Canada under the *Excise Tax Act*
AGAINST

RÉAL BOUDREAU
and
HILAIRE BOUDREAU

**WRITTEN MOTION REVIEWED AT MONTRÉAL WITHOUT APPEARANCE OF
THE PARTIES**

REASONS FOR ORDER BY: PROTHONOTARY MORNEAU

DATED: August 24, 2006

WRITTEN SUBMISSIONS BY:

Pierre Bouchard

FOR THE JUDGMENT CREDITOR:

Alexandre Montambault

FOR THE ADVERSE CLAIMANT

SOLICITORS OF RECORD:

Veillette, Larivière
Montréal, Quebec

FOR THE JUDGMENT CREDITOR:

Alexandre Montambault
Montréal, Quebec

FOR THE ADVERSE CLAIMANT

