



Date: 20110707

Docket: ITA-8283-05

Citation: 2011 FC 800

Vancouver, British Columbia, July 7, 2011

**PRESENT: Roger R. Lafrenière, Esquire
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, Canada Pension Plan,
Employment Insurance Act, the Alberta Income Tax Act,*
against:**

**ALLEN ZIEFFLE
POST OFFICE BOX 93
ALLIANCE, ALBERTA
T0B 0A0**

REASONS FOR ORDER AND ORDER

[1] Rule 437(1) of the *Federal Courts Rules (FCR)* provides that a writ of execution is valid for six years after its date of issuance. By motion brought *ex parte* and in writing, the Applicant, Her Majesty the Queen (Crown), seeks an order pursuant to Rule 437(2) extending the validity of the writ of seizure and sale issued in this proceeding for a further period of six years, with costs against the Judgment Debtor, Allen Zieffle.

[2] This motion involves an interpretation of Rule 437(2) which reads:

<p>(2) Extension of validity of writ - On motion, where a writ has not been wholly executed, the Court may, before the writ would otherwise expire, order that the validity of the writ, including a writ the validity of which has previously been extended, be extended for a further period of six years.</p>	<p>(2) Prolongation de la validité - Si un bref n'a été exécuté qu'en partie, la Cour peut, sur requête, rendre, avant l'expiration du bref, une ordonnance renouvelant celui-ci pour une période de six ans à la fois.</p>
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[3] It has been the general practice of the federal Crown to bring applications to renew writs in proceedings under the *Income Tax Act (ITA)*, the *Goods and Services Act (GSA)* and the *Excise Tax Act (ETA)* on an *ex parte* basis. Such applications have routinely been granted by this Court over the years. However, on May 28, 2010, on one occasion, the Court declined to entertain an *ex parte* application for the renewal of a writ in Court File No. ITA-8528-97. A direction was issued that the motion for extension of the writ be served on the respondent.

[4] In order to obtain judicial guidance and prevent future uncertainty, the Crown seeks directions as to whether applications for extension of the validity of a writ pursuant to Rule 437(2) may continue to be brought by the Attorney General on an *ex parte* basis.

Facts

[5] The relevant facts on this motion can be summarized as follows. Canada Revenue Agency (CRA) filed a Certificate on July 22, 2005 under section 223 of the *ITA* certifying that the Judgment Debtor was liable to CRA for unpaid income tax in the amount of \$71,792.45, plus prescribed

interest from July 6, 2005 to the date of payment. A Writ of Seizure and Sale was issued on July 22, 2005 (Writ) directing the Sheriff of the Province of Alberta or any civil enforcement agency licensed pursuant to section 9 of the Alberta *Civil Enforcement Act (CIA)* to seize property of the Judgment Debtor which is subject to levy within the Province of Alberta.

[6] CRA subsequently registered the Writ at the Alberta Land Titles Office against the real property jointly owned by the Judgment Debtor and his spouse. The Judgment Debtor made an assignment in bankruptcy in December 2006; however, he remains an undischarged bankrupt.

[7] Since the issuance of the Writ, other collection activity was taken by CRA, including the issuance of Requirements to Pay. A balance of \$62,067.68 remains owing on the tax debt as of June 21, 2011 and the Writ will expire on July 22, 2011. The Crown accordingly moves for an extension of the validity of the Writ.

Analysis

[8] The express requirements of Rule 437(2), namely the existence of an unexpired writ, not wholly executed, are satisfied in this case. The procedural issue to be determined is whether Rule 437(2) requires that a motion for extension of the validity of a writ must be served on the Judgment Debtor before it can be extended.

[9] Rule 437(2) provides that an extension of the validity of a writ may be obtained “on motion”. The Crown submits that Rule 437(2) is silent as to whether an application can be made “*ex parte*” and that neither the *Federal Courts Act* nor the *FCR* explicitly require an application to

be made on notice to the judgment debtor. However, the general provisions governing motions in Part 7 of the *FCR*, including the service requirements contained in Rules 363, 364, 367 and 370, impliedly stipulate that notice should be given to any person who may be affected by an interlocutory proceeding.

[10] In addition, Rule 436, which immediately precedes Rule 437(2), specifically provides that a motion for leave to issue a writ of execution under subsection 434(1) or Rule 435 may be made *ex parte*. Applying the implied exclusion rule of statutory construction (at one time expressed by the Latin maxim *expressio unius est exclusio alterius*), the express inclusion of wording granting leave to proceed without notice in Rule 436 would exclude such dispensation for motions brought pursuant to Rule 437(2).

[11] However, as stated by Farwell LJ, *Re Lowe v Darling & Son* [1906] 2 KB 772 at p 785: “...the [implied exclusion rule] ought not to be applied, when its application, having regard to the subject-matter to which it is to be applied, leads to inconsistency or injustice.”

[12] Rule 437(2) is contained in Part 12 of the *FCR*, which governs the enforcement of judgments and orders. The renewal of a writ is part of a continuum of an enforcement process which is usually engaged without notice to the judgment debtor. Rule 433(1) provides that a person entitled to execution may obtain a writ of execution by filing a requisition for its issuance, subject only to Rule 434 and 435 and the completion of any conditions set out in the judgment. As stated earlier, Rule 436 provides that a motion for leave to issue a writ of execution under subsection 434(1) or Rule 435 may be made *ex parte*. It appears incongruous that an application for

leave to issue a new writ to replace an expired writ may be made on *ex parte* basis while an application to renew an unexpired writ is required to be on notice.

[13] In *R v Aubé (Lanteigne)* [1981] 2 FC 702 (*Aubé*), Mr. Justice Mahoney considered an *ex parte* application in writing of the Crown to renew a writ of seizure pursuant to former Rule 2006 of the *Federal Court Rules*, C.R.C., c. 663, which provided as follows:

Rule 2006. (1) For the purpose of execution, a writ of execution is valid in the first instance for five years beginning with the date of issue.

Règle 2006. (1) Aux fins de l'exécution, un bref est valide à l'origine pendant cinq ans à compter de la date à laquelle il a été décerné.

(2) Where a writ has not been wholly executed the Court may by order extend the validity of the writ from time to time for a period of five years at any one time beginning with the day on which the order is made, if an application for extension is made to the Court before the writ would otherwise expire.

(2) Lorsqu'un bref n'a pas été intégralement exécuté, la Cour pourra, par ordonnance, en prolonger la période de validité par renouvellements valables dans chaque cas pour cinq ans à compter de la date de l'ordonnance, si demande en est faite à la Cour avant que le bref ne devienne normalement périmé.

[14] Mr. Justice Mahoney held that such an application was not subject to the requirement of former Rule 331A, that one month's notice be given to every other party of a party's intention to proceed if a year or more has passed since the last proceeding in a matter. He concluded that the express provision that an application under former Rule 2006(2) could be made up to five years less a day after the issuance of the writ should be given effect over the general provision of former Rule 331A and therefore granted the application.

[15] In *Wolf v Canada*, [1991] 2 CTC 41, 48 FTR 5 (TD), Mr. Justice Teitelbaum questioned what an opposant could possibly say at a renewal hearing. Relying on the Court's reasoning in *Aubé*, he concluded that the writ renewal in the particular case before him was properly done *ex parte*, without notice to Mrs. Wolf, a party claiming interest in goods seized under the writ. In his view, there was no prejudice to the opposant by not being given notice of the renewal.

[16] Beyond the matter of expediency and cost-efficiency, there are compelling reasons to allow applications pursuant to Rule 437(2) to be considered on an *ex parte* basis.

[17] First, the renewal of a writ is a procedural step that maintains a judgment creditor's interest in and priority to the tax debtor's assets. There is a low threshold to be met by an applicant to obtain relief under Rule 437(2). In the vast majority of cases, the only evidence necessary is that a writ has not been wholly executed and has not expired.

[18] Second, in seeking relief by way of an *ex parte* motion, the moving party must act in the utmost good faith, and make full and frank disclosure so as not to mislead the Court: *Canada (Minister of National Revenue) v Services ML Marengère Inc.* (1999), 2000 DTC (6032).

[19] Third, before the Crown can execute its writs, notice must be given to the taxpayer. Within Alberta, the *CIA* mandates that a Notice of Intention to sell real property be at least 180 days before the property can be listed for sale, and a Notice of Seizure of personal property must be served on either the taxpayer, an adult person in the taxpayer's household, or the person in possession of the personal property. The *CIA* also provides a 15-day period following the seizure of personal property

for the debtor to file an objection to the seizure. The seizure and sale of the personal property cannot proceed without either the voluntary withdrawal of the objection by the taxpayer or the order of this Court vacating the objection and directing the civil enforcement agency to proceed with the sale. Subsections 223(9) of the *ITA* and 316(8) of the *ETA* also provide additional safeguards of the taxpayer's rights, as the Minister's written consent is necessary before any of the taxpayer's property is sold, disposed of, or advertised for sale.

[20] Fourth, a judgment debtor is not left without any recourse to challenge a writ extended pursuant to Rule 437(2). Rule 399(1) permits the Court to set aside or vary an *ex parte* order if a party against whom the order is made discloses a *prima facie* case why the order should not have been made.

[21] It remains that the Court cannot issue general directions dispensing with service of all motions brought pursuant to Rule 437(2). Only an amendment to the *FCR* could effect such a sweeping change. However, the Crown is at liberty to move for leave to proceed *ex parte* if it is simply a matter of continuing the *status quo* for security with respect to an unsatisfied debt. Ultimately, the Court retains the discretion to require that any motion, even those specifically allowed to be brought *ex parte* under the *FCR*, be served on a party potentially affected by the relief sought by a moving party.

[22] The steps taken by the Crown to seek leave to extend the validity of the Writ were reasonable and necessary to enforce a judgment certified by this Court. In the circumstances, the Crown is entitled to costs of the motion, hereby fixed in the standard amount of \$100.00 for such applications.

ORDER

THIS COURT ORDERS that:

1. The Crown is granted leave to bring this motion on an *ex parte* basis.

2. The Writ of Seizure and Sale issued on July 22, 2005, and directed to the Sheriff of the Province of Alberta or any civil enforcement agency licensed pursuant to Section 9 of the *Civil Enforcement Act* of the Province of Alberta, is hereby renewed for a period of six years from the date of this Order.

2. Costs of this motion, hereby fixed in the amount of \$100.00, shall be paid by the Judgment Debtor, Allen Zieffle.

“Roger R. Lafrenière”

Prothonotary

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: ITA-8283-05

STYLE OF CAUSE: ITA v ALLEN ZIEFFLE

**MOTIONS IN WRITING CONSIDERED AT VANCOUVER, BRITISH COLUMBIA,
PURSUANT TO RULE 369**

REASONS FOR ORDER AND ORDER: LAFRENIÈRE P.

DATED: July 7, 2011

WRITTEN REPRESENTATIONS BY:

George F. Bódy

FOR THE APPLICANT

N/A

FOR THE RESPONDENT

SOLICITORS OF RECORD:

Myles J. Kirvan
Deputy Attorney General of Canada

FOR THE APPLICANT

N/A

FOR THE RESPONDENT