Date: 20081014

Dockets: A-40-08
A-41-08

Citation: 2008 FCA 304

CORAM: **DÉCARY J.A.**
BLAIS J.A.
RYER J.A.

Docket A-40-08

BETWEEN:

HER MAJESTY THE QUEEN

Appellant

and

AMARJIT AUJLA

Respondent

Docket A-41-08

BETWEEN:

HER MAJESTY THE QUEEN

Appellant

and

HARJINDER AUJLA

Respondent

Heard at Vancouver, British Columbia, on September 18, 2008.

Judgment delivered at Ottawa, Ontario, on October 14, 2008.

REASONS FOR JUDGMENT BY:	RYER J.A.
CONCURRED IN BY:	DÉCARY J.A.
DISSENTING REASONS BY:	BLAIS J.A.

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REASONS FOR JUDGMENT

RYER J.A.

[1] Two appeals (A-40-08 and A-41-08) were taken from a decision of Bowie J. (the "Tax Court Judge") of the Tax Court of Canada (2007TCC764), dated December 21, 2007, allowing the

appeals of Amarjit and Harjinder Aujla, which were heard on common evidence, against assessments issued to them, pursuant to subsection 323(1) of the *Excise Tax Act*, R.S.C. 1895, c. E-15 (the "ETA"), for the outstanding liability for goods and services tax ("GST"), interest and penalties of Aujla Construction Ltd. (the "Company") at the time that it was struck from the register of companies under the *Company Act*, R.S.B.C. 1996, c. 62 (the "BCCA"), for failure to file annual reports.

[2] If a corporation fails to remit or pay certain amounts that are specified in subsection 323(1) of the ETA, that provision imposes a liability on the directors of the corporation, at the time of such failure, to pay the amounts (including interest on and penalties relating to those amounts) that should have been remitted or paid by the corporation. Subsection 323(4) of the ETA permits the Minister to assess the directors for the amount of the liability that has been imposed upon them under subsection 323(1) of the ETA. Subsection 323(5) of the ETA stipulates that an assessment pursuant to subsection 323(4) of the ETA cannot be made against a person more than two years after that person last ceased to be a director of the corporation.

[3] The issue in this appeal is whether the limitation period in subsection 323(5) of the ETA prevents the Minister from assessing the Aujla brothers for $162,331.92, pursuant to subsection 323(1) of the ETA, in respect of the failure of the Company to remit GST and related interest and penalties of a like or greater amount for reporting periods that ended prior to its dissolution, as provided for in section 257 of the BCCA, as a consequence of its failure to file annual reports.

RELEVANT STATUTORY PROVISIONS

[4] The relevant provision of the ETA is section 323. The relevant provisions of the BCCA are sections 1, 257, 262 and 263. These provisions are reproduced in Appendix A.

BACKGROUND

[5] The appeal in the Tax Court of Canada proceeded on an agreed statement of facts that is reproduced in the reasons of the Tax Court Judge. While the facts are non-contentious, it is useful to consider them briefly.

[6] The Minister assessed the Company for GST, interest and penalties in the amount of $197,995.75 on March 20, 1998. Approximately one year after the date of that assessment, the Company was dissolved on March 5, 1999, for failure to file annual reports, in accordance with section 257 of the BCCA.

[7] In an attempt to collect the amount owing, on February 20, 2003, the Minister applied to have the Company restored to the register, pursuant to subsection 262(1) of the BCCA.

[8] On February 20, 2003, approximately five years after the assessment against the Company, the British Columbia Supreme Court issued an order (the “Court Order”) that restored the Company to the register of companies under the BCCA for a two year period. The record contains no explanation for the Minister’s approximately five year delay in pursuing the collection of the amount owing by the Company.

[9] The Court Order reads as follows:

> THIS COURT ORDERS that Aujla Construction Ltd. is restored to the Register of Companies for a period of not more than two (2) years, commencing on the date of the filing of a certified copy of this Order with the Registrar of Companies, for the purpose of enabling the Minister of National Revenue to facilitate the assessment and collection of the Goods and Services Tax debt owing by Aujla Construction Ltd. to the Receiver General for Canada.
>
> THIS COURT FURTHER ORDERS that Aujla Construction Ltd. shall be deemed to have continued in existence as if its name had never been struck off the register and dissolved, without prejudice to the rights of any parties which may have been acquired prior to the date on which Aujla Construction Ltd. is restored to the Register of Companies.

[10] The Court Order led to the issuance of a Certificate of Restoration by the British Columbia Registrar of Companies, on March 6, 2003, that restored the Company to the register of companies under the BCCA for a two year period.

[11] After the restoration of the Company, the Minister commenced collection actions against the Aujla brothers by Third Party Notices of Assessment, dated September 4, 2003, on the basis of subsection 323(1) of the ETA, contending that they were vicariously liable for the amount that was assessed against the Company because they were directors of the Company at the time that the liability arose. That provision reads as follows:

323(1) If a corporation fails to remit an amount of net tax as required under subsection 228(2) or (2.3) or to pay an amount as required under section 230.1 that was paid to, or was applied to the liability of, the corporation as a net tax refund, the directors of the corporation at the time the corporation was required to	323(1) Les administrateurs d'une personne morale au moment où elle était tenue de verser, comme l'exigent les paragraphes 228(2) ou (2.3), un montant de taxe nette ou, comme l'exige l'article 230.1, un montant au titre d'un remboursement de taxe nette qui lui a été payé ou qui a été déduit d'une somme

remit or pay, as the case may be, the amount are jointly and severally, or solidarily, liable, together with the corporation, to pay the amount and any interest on, or penalties relating to, the amount.	dont elle est redevable, sont, en cas de défaut par la personne morale, solidairement tenus, avec cette dernière, de payer le montant ainsi que les intérêts et pénalités afférents.

[12] The Aujla brothers objected to these assessments on the basis that they had ceased to be directors of the Company as of the date of its dissolution on March , 1999, and the two year limitation period in subsection 323(5), which ended on March 4, 2001, precluded the assessments. That provision reads as follows:

323(5) An assessment under subsection (4) of any amount payable by a person who is a director of a corporation shall not be made more than two years after the person last ceased to be a director of the corporation.	323(5) L'établissement d'une telle cotisation pour un montant payable par un administrateur se prescrit par deux ans après qu'il a cessé pour la dernière fois d'être administrateur.

[13] The Minister justified the assessments on two bases. First, because the Company was dissolved as a consequence of its failure to file annual reports, and because they never formally resigned, the Aujla brothers never ceased to be directors. Secondly, because the Court Order had the effect of retroactively restoring the Company as if there had been no dissolution, the Court Order similarly must have retroactively reconstituted the directorship of the Aujla brothers. In either case, the Minister concluded that the two year limitation in subsection 323(5) was not engaged. As a result, the assessments were confirmed and the Aujla brothers appealed against them to the Tax Court of Canada.

THE DECISION OF THE TAX COURT OF CANADA

[14] The Tax Court Judge held that the Aujla brothers ceased to be directors of the Company when the dissolution occurred on March 5, 1999, because a dissolved company cannot have directors.

[15] The Tax Court Judge then considered the effect of the Court Order and concluded that it did not have the effect of retroactively reinstating the directorships of the Aujla brothers, as the Crown contended.

[16] The Tax Court Judge referred to subsections 262(1) and (2) and section 263 of the BCCA, which read as follows:

> **Restoration to register**
>
> 262 (1) If a company has been dissolved, or the registration of an extraprovincial company has been cancelled under this Act or any former *Companies Act*, the court may, if it is satisfied that it is just that the company or extraprovincial company be restored to the register, not more than 10 years after the date of the dissolution or cancellation, on application by the liquidator, a member, a creditor of the company or extraprovincial company, or any other interested person, make an order, subject to the conditions and on the terms the court considers appropriate, restoring the company or extraprovincial company to the register.
>
> (2) If a company or an extraprovincial company is restored to the register under subsection (1), the company is deemed to have continued in existence, or the registration of the extraprovincial company is deemed not to have been cancelled, and proceedings may be taken as might have been taken if the company had not been dissolved, or the registration of the extraprovincial company had not been cancelled.

> **Power of court**
>
> 263 In an order made under section 262, the court may give directions and make provisions it considers appropriate for placing the company or extraprovincial company and every other person in the same position, as nearly as may be, as if the company had not been dissolved or the registration of the extraprovincial company cancelled, but, unless the court otherwise orders, the order is without prejudice to the rights of parties acquired before the date on which the company or extraprovincial company is restored to the register.

At paragraphs 13 and 14 of his reasons, the Tax Court Judge stated:

> 13 Subsection 262(1) permits the court to make an order restoring the company to the register "on the terms the court considers appropriate ...". "Section 263 empowers the court "to give directions and make provisions it considers appropriate for placing the company ... **and every other person** in the same position, as nearly as may be, as if the company had not been dissolved ..." [emphasis in original].
>
> 14 The effect of the order and the restoration of the company to the register, by the terms of subsection 262(2), is that the company is deemed to have continued in existence, and proceedings that might have been taken had there been no dissolution may be taken thereafter. Notably, the order of the court made no provision, as it might have done, to place the directors in the same position as if the company had not been dissolved. The words of the order add nothing to the effects that flow automatically by reason of the words of the *Act* from the simple fact of restoration.

[17] The Tax Court Judge observed that it did not appear that the Crown advised the British Columbia Supreme Court that the order that it was requesting would be used to assess the Aujla brothers, as a consequence of their having been directors at the time when the tax liability of the Company arose, as they were apparently not given notice of the application to restore the Company.

[18] The Tax Court Judge further commented upon subsection 262(1) and section 263 of the BCCA, stating in paragraph 16 of his reasons:

> 16 As important as the words of the statute and the order are, the words omitted from them are equally important. I am asked, in effect, to conclude that by necessary implication the deeming provision in subsection 262(2) not only deems the company to have been in existence when in fact it was not, but also deems the directors to have been directors when in fact they were not. There is, for good reason, a presumption against expanding by interpretation the scope of retrospective legislation: see *Driedger on the Construction of Statutes*, 3rd Ed., pp. 511-17 and the authorities there cited. In the present case, there is an additional reason not to extend the deeming provision beyond the company to the directors. The British Columbia legislature, by enacting section 263, has given to the court hearing the restoration application the discretionary power to decide whether "other persons" are to be retrospectively affected by the restoration order, or are to have the benefit of the "without prejudice" clause in that section. The absence of a provision in the order placing the directors in the position for which the respondent contends, and the inclusion of the without prejudice provision in it, both are indicative of an intent that the directors are not to be, in effect, deemed to have been directors throughout the period during which the company was struck off [emphasis added].

[19] Taking into consideration the fact that the British Columbia Supreme Court declined to exercise its discretion to include any “other persons” in the Court Order, as well as the principle supporting a narrow construction of retroactive legislation, the Tax Court Judge concluded that the Court Order did not, by implication, provide that the Aujla brothers were retroactively reconstituted as directors. As a result, he allowed the appeal.

ISSUES

[20] In the appeal, the Crown reiterated the arguments it made in the Tax Court of Canada in support of its contention that the limitation period in subsection 323(5) of the ETA was inapplicable in relation to the assessments that were issued to the Aujla brothers. First, the Crown contended that the Aujla brothers never ceased to be directors of the Company because they had not resigned from their positions as directors and the dissolution of the Company was the consequence of its having been struck off pursuant to section 257 of the BCCA. In the alternative, the Crown argued that if the

Aujla brothers ceased to be directors of the Company by virtue of its dissolution, the Court Order, which restored the Company to the register and deemed it to have continued in existence, had the effect of reconstituting the directorships of the Aujla brothers as if the dissolution of the Company had never occurred and they had never ceased to be directors.

[21] The Crown added a third argument. It asserted that by finding that the Aujla brothers were not retroactively reconstituted as directors, the Tax Court Judge implicitly found that they were prospectively reconstituted as directors for the two year period that commenced on the date of the Court Order. It follows, according to the Crown, that the September 4, 2003 assessments against the Aujla brothers could not be resisted on the basis of the limitation period in subsection 323(5) of the ETA because, at the time of those assessments, the Aujla brothers actually held the office of directors of the Company, having been reconstituted as directors as of the date of the Court Order. In that regard, the Crown asserts that it is immaterial that the directorships of the Aujla brothers had been interrupted between March 5, 1999, the day of the dissolution of the Company, and March 6, 2003, the day of its restoration.

[22] The Aujla brothers disagree with the Crown's contentions and add one of their own. They argue that even if the Court Order had the effect of reconstituting their directorships as of the date of the restoration of the Company, the "without prejudice" language in subsection 263 of the BCCA and the Court Order must be interpreted so as to preserve their right to assert the two year limitation period in subsection 323(5) of the ETA as a basis upon which to resist the assessments that were made against them.

ANALYSIS

Provincial Commercial Law Applies

[23] Both parties contend that the application of section 323 of the ETA is to be undertaken in light of the applicable provincial corporate law provisions, citing the decision of this Court in *Kalef v. R.*, [1996] 2 C.T.C. 1 (F.C.A.). In that decision, McDonald J.A. agreed with the reasoning of MacKay J. in *Perri (J.F.) v. M.N.R.*, [1995] 2 C.T.C. 196 (F.C.) to the effect that the principles that apply to the question of whether a directorship has been terminated are to be determined under the applicable provincial law and that the answer to that question may vary from province to province. Specifically, at page 5, McDonald J.A. stated:

> I agree with the reasoning of MacKay J. While it may be open to Parliament to expressly deviate from the principles of corporate law for the purposes of the *Income Tax Act*, I do not think such an intention should be imputed.

[24] In my view, the provisions of the ETA do not provide any guidance with respect to whether the Aujla brothers ceased to be directors of the Company as a consequence of its dissolution on March 5, 1999, or if their directorships terminated on the dissolution, whether the Court Order had the effect of reconstituting those directorships, either retroactively or prospectively. These matters should be approached from the perspective of the applicable commercial law – in this case, the law of British Columbia.

[25] As recognized by the Courts in *Perri* and *Kalef*, the underlying commercial law may vary from province to province and, accordingly, its application may produce potentially different fiscal consequences in different provinces. For this reason, I am of the view that jurisprudence which

interprets commercial law of jurisdictions other than British Columbia law is of limited relevance. Moreover, in the circumstances of this case, it is the BCCA – not successor or predecessor legislation – that must be considered. To that extent, caution must be exercised even when British Columbia legislation and jurisprudence are being considered.

Did the Aujla Brothers Ever Cease to be Directors of the Company?

[26] The Crown's proposition that the Aujla brothers did not cease to be directors when the Company was dissolved on March 5, 1999, because the dissolution occurred involuntarily, pursuant to subsection 257(3) of the BCCA, cannot be accepted. No authority for that proposition was shown. Indeed, the authorities presented to this Court pointed in the opposite direction. See *R. v. Gill* (1989), 40 B.C.L.R. (2d) 360 at 367 (B.C.Co.Ct.); also see *Shaw v. Hyde*, [1921] 61 D.L.R. 666 at 670 (B.C.Co.Ct.).

Did the Court Order Retroactively Reconstitute the Directorships of the Aujla Brothers?

[27] The Crown's next argument is that even if the dissolution of the Company caused the directorships of the Aujla brothers to cease on March 5, 1999, the Court Order had the effect of retroactively reconstituting those directorships such that, as a matter of law, those directorships never ceased. Consequently, according to the Crown, the two year limitation period in subsection 323(5) of the ETA never commenced and was, therefore, no bar to the assessments of the Aujla brothers on September 4, 2003, because they were directors of the Company on that date.

[28] The Aujla brothers contend that the alleged retroactive reconstitution of their directorships is unfair as it deprives them of the benefit of the limitation period that is provided for in subsection 323(5) of the ETA. They point out that the assessments were made against them approximately five years after the assessment was made against the Company and that the Minister has "slept on his rights". They cite the decision of the Supreme Court of Canada in *Markevich v. Canada*, [2003] 1 S.C.R. 94 and, in particular, paragraphs 19 and 20 of the decision of Major J., which read as follows:

> The appellant's submission that the rationales for limitation periods militate against their application to tax collection cannot be correct. As noted above, limitation provisions are based upon what have been described as the certainty, evidentiary, and diligence rationales: see *M. (K.)*, *supra*, at p. 29. The certainty rationale recognizes that, with the passage of time, an individual "should be secure in his reasonable expectation that he will not be held to account for ancient obligations": *M. (K.)*, *supra*, at p. 29. The evidentiary rationale recognizes the desire to preclude claims where the evidence used to support that claim has grown stale. The diligence rational encourages claimants "to act diligently and not 'sleep on their rights'": *M. (K.)*, *supra*, at p. 30.
>
> Each of the rationales submitted as applicable to there being no limitation periods affecting collection are in fact just the opposite and are directly applicable to the Minister's collection of tax debts. If the Minister makes no effort to collect a tax debt for an extended period, at a certain point a taxpayer may reasonably come to expect that he or she will not be called to account for the liability, and may conduct his or her affairs in reliance on that expectation. As well, a limitation period encourages the Minister to act diligently in pursuing the collection of tax debts. In light of the significant effect that collection of tax debts has upon the financial security of Canadian citizens, it is contrary to the public interest for the department to sleep on its rights to enforce collection. It is evident that the rationales which justify the existence of limitation periods apply to the collection of tax debts.

[29] In my view, the contention of the Aujla brothers is not without merit, considering that the Crown has offered no explanation for its delay in attempting to collect the amounts owed by the Company and that the Crown apparently did not give notice to the Aujla brothers of the application

to restore the Company, when it was clear to the Crown that the Aujla brothers could be affected by the restoration. However, I am of the view that these contentions are more relevant to the question of whether the ability of the Aujla brothers to rely on the limitation period in subsection 323(5) of the ETA is a substantive right that is to be maintained by virtue of the "without prejudice" language in section 263 of the BCCA and the Court Order.

[30] Thus, the question, at this point, is whether the Court Order had the effect of retroactively reconstituting the directorships of the Aujla brothers. In my view, this question turns on the interpretation of subsection 262(2) and section 263 of the BCCA. Those provisions bear repeating.

> 262 (2) If a company or an extraprovincial company is restored to the register under subsection (1), the company is deemed to have continued in existence, or the registration of the extraprovincial company is deemed not to have been cancelled, and proceedings may be taken as might have been taken if the company had been dissolved, or the registration of the extraprovincial company had not been cancelled.
>
> 263 In an order made under section 262, the court may give directions and make provisions it considers appropriate for placing the company or extraprovincial company and every other person in the same position, as nearly as may be, as if the company had not been dissolved or the registration of the extraprovincial company cancelled, but, unless the court otherwise orders, the order is without prejudice to the rights of parties acquired before the date on which the company or extraprovincial company is restored to the register.

[31] The Tax Court Judge concluded that the deeming provision in subsection 262(2) of the BCCA did not result in the retroactive reconstitution of the directorships of the Aujla brothers. He found that the power to bring about that result existed in section 263 of the BCCA but that the British Columbia Supreme Court did not exercise that power in making the Court Order, since that

order contained no reference to any such reconstitution and it was unacceptable to find such a reconstitution by implication.

[32] The Tax Court Judge observed that the Crown's contention that the directorship of the Aujla brothers should be regarded as having been implicitly reconstituted is inconsistent with the fact that they were given no notice of the Crown's application to restore the Company. He further supported his conclusion by reference to the general presumption against expanding, by interpretation, the scope of retroactive legislation, citing Ruth Sullivan, *Driedger on the Construction of Statutes*, 3rd ed. (Toronto: Butterworths, 1994) at 511-517.

[33] In my view, the Tax Court Judge was correct in his conclusion that the retroactive reconstitution of the Aujla brothers could only have arisen out of express language to that effect in the Court Order.

[34] In addition to the reasons that were put forward by the Tax Court Judge, I find support for his conclusion in the decision of the British Columbia Court of Appeal in *Natural Nectar Prod. Can. Ltd. v. Theodor*, [1990] 5 W.W.R. 590. In that case, the British Columbia Court of Appeal interpreted subsection 286(2) and section 287 of the *Company Act*, R.S.B.C. 1979, c. 59 (the "Former BCCA"). Subsection 286(2) of the Former BCCA is substantially similar to subsection 262(2) of the BCCA and section 287 of the Former BCCA is identical to section 263 of the BCCA.

[35] The central issue in that case was whether the deeming provision in subsection 286(2) of the Former BCCA had the effect of retroactively restoring the corporate existence of the company in question, as was contended by the respondent. Since this is a decision of the highest court in British Columbia that bears directly upon the issue that is before this Court in the present appeal, it is worthwhile to reproduce the relevant portion of the decision. In particular, at pages 594 and 595, Hinkson J.A. stated:

> In the present case, the order made restoring the company to the Register of Companies on 27th February 1989 provided:
>
> > THIS COURT ORDERS that Natural Nectar Products Canada Ltd. be and the same is hereby restored to the Registrar of Companies commencing on the date of the filing of a certified copy of this Order with the Registrar of Companies and that the said company shall be deemed to have continued in existence, without prejudice, however, to the rights of any parties which may have been acquired prior to the date on which the Company is restored to the Register.
>
> In drawing the form of order counsel for the respondent inserted the words after, "... continued in existence" the words "as if its name had never been struck off" but the judge did not include those words in the order made by him. In my opinion, it was open to him to do so if he considered it appropriate in the circumstances. He would then have been exercising a power conferred by s. 287. But he did not do so.
>
> Counsel for the respondent relied upon the deeming provision in s. 286 and contended that legislation containing deeming clauses has been determined to have retrospective effect in the following cases: *A.G.B.C. v. Royal Bank of Can.*, [1937] S.C.R. 459, [1937] 3 D.L.R. 393; *Culchoe Nu Lodge (1980) Ltd. v. Cando Contr. Ltd.* (1986), 73 A.R. 342 (M.C.); *Montreal Trust Co. v. Boy Scouts of Can. (Edmonton Region) Foundation*, [1978] 5 W.W.R. 123, 3 E.T.R. 1, 88 D.L.R. (3d) 99 (B.C.S.C.); *Home Mtge. Ltd. v. Robertson*, [1988] 4 W.W.R. 260, 68 Sask. R. 274 (Q.B.); and *Zangelo Invt. Ltd. v. Glasford State Inc.* (1987), 59 O.R. (2d) 510, 38 D.L.R. (4th) 395; affirmed 63 O.R. (2d) 510, 49 D.L.R. (4th) 320 (C.A.).
>
> Each of those cases dealt with statutory sections which differ from the present provisions of ss. 286 and 287 of the Company Act.

> In my opinion, the deeming provision in s. 286 was inserted in the section to overcome the problems that would otherwise arise when a company was struck from the register and subsequently restored to the register. As Jenkins, L.J. observed in the *Tymans* case at p. 622:
>
> > Otherwise obvious difficulties as to incorporation, membership, share capital, and so forth would arise, and if the resuscitated company was brought into being as a legal entity distinct from the dissolved one, claims by and against the resuscitated company in respect of the pre-dissolution dealings of the dissolved company would not be maintainable.
>
> The purpose in inserting the deeming provision was to avoid those problems and to avoid any suggestion that the company had not been revived by being restored to the register.
>
> Upon the basis of that reasoning, however, I do not conclude that s. 286 should be given retrospective operation. Rather, such an effect can be given to the order restoring the company to the register if the court gives appropriate directions under s. 287 for placing the company "in the same position, as nearly as may be, as if the company had not been dissolved . . .”
>
> In my opinion, that would have been the effect of the order restoring the company to the register if the words "as if its name had never been struck off" had been contained in the order.
>
> Construing the order as it was entered, in my opinion, it does not have the effect of placing the company in the same position, as nearly as may be, as if the company had not been dissolved.
>
> [Emphasis added.]

[36] In my view, this passage makes it clear that the deeming provision in subsection 286(2) of the Former BCCA, and therefore subsection 262(2) of the BCCA, does not have the effect of retroactively reconstituting the corporate existence of a company that has been restored. Instead, that result can only be brought about by the inclusion in the order of express language to that effect, in accordance with the exercise of the power contained in section 287 of the Former BCCA, or

subsequently, section 263 of the BCCA. Thus, a restoration order that does not contain the requisite language will have the effect of restoring the company in question on a prospective and not a retroactive basis.

[37] In applying the rationale in *Natural Nectar* to the issue at hand, it is my view that section 263 of the BCCA empowers the British Columbia Supreme Court to order the retroactive reconstitution of directorships that were in place at the time of the dissolution of the company in question, since each person who was then a director would fall within the meaning of the phrase "other person" in section 263 of the BCCA. However, I am also of the view that since explicit language in a restoration order is necessary to bring about a retroactive restoration of a company, exercising a power granted under section 263 of the BCCA (as was the conclusion of the Court in *Natural Nectar*), it must follow that the retroactive reconstitution of the directorships that existed at the date of the dissolution of the company in question equally requires the inclusion of explicit language to that effect in the restoration order, in the exercise of the power granted under that statutory provision.

[38] In the circumstances under consideration, the Court Order deemed the Company to have continued in existence "as if its name had never been struck off". In my view, this language evidences the specific exercise of the power granted to the British Columbia Supreme Court under section 263 of the BCCA to retroactively restore the corporate existence of the Company. However, the Court Order contains no mention whatsoever of the reconstitution of the directorships of the Aujla brothers, retroactively or otherwise, as it surely could have. Accordingly, I am of the view that

the Court Order had no such effect and the Aujla brothers were not reconstituted as directors of the Company by virtue of the Court Order.

[39] I wish to reiterate that this conclusion is based upon the particular provisions of the BCCA that were in force at the time of the assessments against the Aujla brothers, as such provisions have been interpreted in the relevant jurisprudence. It is clear that British Columbia corporate law has evolved over time. See *A.-G. B.C. v. Royal Bk. et al*., [1937] 3 D.L.R. 393 (S.C.C.), in which the Court considered the restoration of a company that had been struck off the register pursuant to the *Companies Act*, R.S.B.C., 1924, c. 38. Under the applicable provisions of that legislation, the restoration had retroactive effect that did not depend upon the exercise of judicial discretion. This is in marked contrast to the corresponding provisions of the Former BCCA, as interpreted in *Natural Nectar*, and the BCCA that are under consideration in this appeal. Thus, it may be observed that even within the same province, the relevant corporate legislation may change over time, with the result that the fiscal consequences of similar transactions or events may differ depending upon the specific provisions of such corporate legislation at the time that such transactions or events take place.

[40] I would add that the retroactively reconstituted existence of the Company without the retroactive reconstitution of the directorships that were in place at the time of its dissolution, might appear to be problematic in that without directors the Company would seemingly be unable to function. In the circumstances under consideration, this potential concern does not arise since the record does not contain any indication that the Company undertook or desired to undertake any

activities after the date of its dissolution on March 5, 1999. If the shareholders of the Company had considered it to be useful for the Company to have undertaken any activity after its restoration, they could have passed a resolution under which directors could have been elected. I would hasten to add that this is not a case in which any person who held the office of director prior to the dissolution of a company, pursuant to subsection 257(3) of the BCCA, continued to act as if the directorship of that person had persisted in spite of such dissolution. In those circumstances, I would observe that the definition of director in section 1 of the BCCA includes "every person, by whatever name designated, who performs functions of a director". Thus, if such a company were retroactively reconstituted and a person who was a director immediately before the dissolution continued to perform functions of a director of that company in the period after the dissolution, that person's actions might well be sufficient to bring that person within the definition of director in section 1 of the BCCA. In the circumstances of this case, these considerations are academic since there is no indication that the Aujla brothers undertook any actions after March 5, 1999, that could bring them within the definition of director in section 1 of the BCCA or that any action by or on behalf of the Company occurred or was contemplated.

Did the Court Order Prospectively Reconstitute the Directorships of the Aujla Brothers?

[41] With respect to the Crown's final argument that the Tax Court Judge implicitly found that the Aujla brothers were reconstituted as directors of the Company as of the date of the Court Order, in my view, the Tax Court Judge made no such finding. Accordingly, that argument cannot be accepted.

Conclusion

[42] In summary, I conclude that the Aujla brothers ceased to be directors of the Company on March 5, 1999, the date of its dissolution, and were not reconstituted as directors by the Court Order (retroactively or otherwise). As such, it follows that they are entitled to resist the assessments made against them on September 4, 2003, since those assessments were made after the limitation period provided for in subsection 323(5) of the ETA, which expired in March of 2001. It also follows that it is unnecessary for me to consider the effect of the "without prejudice" language in section 263 of the BCCA and the Court Order.

DISPOSITION

[43] For the foregoing reasons, I would dismiss the appeals with one set of costs. I would also direct that a copy of these reasons should be placed in each of Court files A-40-08 and A-41-08.

"C. Michael Ryer"
J.A.

"I agree.
Robert Décary J.A."

BLAIS J.A. (Dissenting Reasons)

INTRODUCTION

[44] This is an appeal from 2007TCC764, a judgment rendered by Justice Bowie of the Tax Court of Canada dated December 21, 2007.

[45] Generally at issue is whether Amarjit Aujla and Harjinder Aujla (Aujla brothers) can be held personally liable, as directors of the recently restored Aujla Construction Ltd. (the Company), for taxes in the amount of $197,995.75 owed under the *Excise Tax Act.*

[46] Specifically at issue is whether the Aujla brothers can be imputed with personal obligations as directors despite the absence of any mention of the Aujla brothers in the February 2003 order issued by the British Columbia Supreme Court (the Court Order) that restored the Company.

[47] I will rely on the facts as presented by the Tax Court judge and my colleague in lieu of reproducing them here.

[48] I have had the benefit of reading the reasons prepared by my colleague and respectfully disagree.

ANALYSIS

[49] The determination of any obligations potentially owed by the Aujla brothers is premised on the Court Order, the federal *Excise Tax Act*, and the *Company Act* of British Columbia.

[50] The Court Order reads as follows:

> THIS COURT ORDERS that the Company is restored to the Register of Companies for a period of not more than two (2) years, commencing on the date of the filing of a certified copy of this Order with the Registrar of Companies, for the purpose of enabling the Minister of National Revenue to facilitate the assessment and collection of the Goods and Services Tax debt owing by the Company to the Receiver General of Canada.
>
> THIS COURT FURTHER ORDERS that the Company shall be deemed to have continued in existence as if its name had never been struck off the register and dissolved, without prejudice to the rights of any parties which may have been acquired prior to the date on which the Company is restored to the Register of Companies.

[51] The power to restore a company through a court order is found in provisions 262 and 263 of the British Columbia *Company Act*, R.S.B.C. 1996 c. 62:

> 262 (1) If a company has been dissolved, or the registration of an extraprovincial company has been cancelled under this Act or any former Companies Act, the court may, if it is satisfied that it is just that the company or extraprovincial company be restored to the register, not more than 10 years after the date of the dissolution or cancellation, on application by the liquidator, a member, a creditor of the company or extraprovincial company, or any other interested person, make an order, subject to the conditions and on the terms the court considers appropriate, restoring the company or extraprovincial company to the register.
>
> (2) If a company or an extraprovincial company is restored to the register under subsection (1), the company is deemed to have continued in existence, or the registration of the extraprovincial company is deemed not to have been cancelled, and proceedings may be taken as might have been taken if the company had not been dissolved, or the registration of the extraprovincial company had not been cancelled.
>
> (3) The court may make an order under subsection (1) restoring a company or an extraprovincial company to the register for a limited period, and, after the expiration of that

> period, the company must promptly be struck off the register, or, in the case of an extraprovincial company, its registration cancelled, by the registrar. […]

and

> 263 In an order made under section 262, the court may give directions and make provisions it considers appropriate for placing the company or extraprovincial company and every other person in the same position, as nearly as may be, as if the company had not been dissolved or the registration of the extraprovincial company cancelled, but, unless the court otherwise orders, the order is without prejudice to the rights of parties acquired before the date on which the company or extraprovincial company is restored to the register. (emphasis added)

[52] The limitation period relevant to these facts is contained in the *Excise Tax Act*, R.S.C. 1985, c. E-15 at subsections 323(4) and (5). It reads:

323. (4) The Minister may assess any person for any amount payable by the person under this section and, where the Minister sends a notice of assessment, sections 296 to 311 apply, with such modifications as the circumstances require.	323. (4) Le ministre peut établir une cotisation pour un montant payable par une personne aux termes du présent article. Les articles 296 à 311 s'appliquent, compte tenu des adaptations de circonstance, dès que le ministre envoie l'avis de cotisation applicable.
(5) An assessment under subsection (4) of any amount payable by a person who is a director of a corporation shall not be made more than two years after the person last ceased to be a director of the corporation. (emphasis added)	(5) L'établissement d'une telle cotisation pour un montant payable par un administrateur se prescrit par deux ans après qu'il a cessé pour la dernière fois d'être administrateur.

[53] When contemplating the Aujla brothers' potential liability, the greatest hurdle is the limitation period. Since it sets the limitation period at two years "after the person last ceased to be a director", the Aujla brothers must be found to either a) have continued to be directors during the

period when the Company was struck off the register or b) be reinstated as directors when the Company was restored such that they have not yet "last ceased" to be directors.

[54] Any other consideration regarding the timing of the Minister's five-year delay in pursuing the collection of the amount owing by the Company is not relevant to these proceedings. According to section 262 of the *Company Act*, the Master had the discretion to restore the Company to the register subject to the condition that the restoration was just and that the restoration take place within 10 years of the Company's dissolution. By the fact that the restoration order was issued, it is clear that the Master found the order just. That order has not been appealed. Therefore any consideration of the Minister's delay or suggestion that the Minister slept on its rights is inappropriate to these proceedings.

Did the Aujla brothers continue as directors despite the dissolution?

[55] If the Aujla brothers continued as directors despite the Company's dissolution, then they would never have "ceased" to be directors and the limitation period in section 323(5) of the *Excise Tax Act* would not have been triggered.

[56] The parties agree that applicable provincial legislation governs whether an individual has ceased to be a director. In the case of the Aujla brothers, the Crown contends that according to the British Columbia *Company Act*, directors only cease to hold office in accordance with section 130 or when a company is voluntarily dissolved.

[57] Clearly, the directorship of the Aujla brothers was not affected by section 130 of the British Columbia *Company Act*. Section 130 reads:

> 130 (1) A director ceases to hold office when his or her term expires in accordance with the articles or when he or she
>
> (a) dies or resigns,
> (b) is removed in accordance with subsection (3),
> (c) is not qualified under section 114, or
> (d) is removed in accordance with the memorandum or articles.
>
> (2) Every resignation of a director becomes effective at the time a written resignation is delivered to the registered office of the company or at the time specified in the resignation, whichever is later.
>
> (3) A company may, despite any provision in the memorandum or articles, remove a director before the expiration of the director's term of office by special resolution, and, by ordinary resolution, may appoint another person in his or her stead.

[58] Relying on *R v. Gill (B.C. Co. Ct.)*, [1989] B.C.J. No. 2225, 40 B.C.L.R. (2D) 360 (*Gill*), the Crown attempted to argue that a director ceases to hold offices when a company dissolves, but only when such a dissolution is voluntary. In fact, the decision in *Gill* only indicates that, "a dissolved corporation is a dead corporation and with it died its officers and directors."

[59] There is no case law supporting the contention that when a corporation dissolves involuntarily its directors do not cease to be directors. Thus, before the issuance of the Court Order restoring the Company, the Company had ceased to exist and the Aujla brothers' legal status as directors was in limbo.

Did the liability of the Aujla brothers survive the dissolution?

[60] The Company was struck off the register in accordance with paragraph 257(1)(a) and subsections 257(3) and (4) of the British Columbia *Company Act*:

> 257 (1) If
>
> (a) a company or an extraprovincial company has for 2 years failed to file with the registrar the annual report or any other return, notice or document required by this Act to be filed by it,
> […]
>
> the registrar must mail to the company or extraprovincial company a registered letter notifying it of its failure or of the registrar's belief, and of the registrar's powers under subsection (3).
>
> […]
>
> 257 (3) If, within one month after the registrar mails the letter referred to in subsection (1) or (2), the registrar does not receive a response that
>
> (a) indicates that the failure has been or is being remedied, or is otherwise satisfactory to the registrar, or
> (b) notifies the registrar that the extraprovincial company continues to carry on business in British Columbia,
>
> the registrar may publish in the Gazette a notice that, at any time after the expiration of one month after the date of publication of the notice, unless cause is shown to the contrary, the company will be struck off the register and dissolved, or, in the case of an extraprovincial company, its registration will be cancelled.
>
> (4) At any time after one month after the date of publication of the notice referred to in subsection (3), the registrar, unless good cause to the contrary is shown to him or her, may strike the company off the register and, on being struck off, the company is dissolved, or, in the case of an extraprovincial company, cancel its registration.

[61] The Crown argues that the liability of directors continues in the case of a company administratively dissolved under section 257. The Crown bases this argument on section 260 of the *Company Act*:

> 260 The liability of every director, officer, liquidator and member of a company that is struck off the register, or of an extraprovincial company that has had its registration cancelled, under section 256, 257, 259 or 319 continues and may be enforced as if the company had not been struck off the register, or the registration of the extraprovincial company had not been cancelled.

[62] Thus, it would appear that the liability of the Aujla brothers continued despite the fact that the Company was struck off the register. This is supported by *Canadian Sports Specialist Inc. v. Phillipon* (1990), 66 D.L.R. (4th) 188, and *Whittier Wood Products v. Vernon-Jarvis*, [2003] B.C.J. No. 675 (*Whittier*) which stand for the premise that:

> … a director who ha[s] breached fiduciary duties [is] personally responsible for those actions during the time the company was struck from the register.

[63] In *Whittier*, a company was struck from the register under section 257 of the *Company Act* for failing to file annual reports for two years. Despite the dissolution of the company, the director continued to operate the business by ordering and receiving goods but refused to pay for them. Provincial Court Justice Yee found the director liable under section 260 of the British Columbia *Company Act* for failure to meet the fiduciary duty imposed on him as a director. While Justice Yee imposed liability in part because the director continued to act as if the company had not been dissolved, it is worth noting that the language of section 260 does not require that directors continue to behave as directors of a dissolved company in order to be found liable.

[64] In the circumstances of this case, the Aujla brothers were also imputed with a fiduciary duty. Through the Company, they had collected taxes that were intended to be remitted to the government. The Aujla brothers held this sum as fiduciaries. Their failure to remit the taxes to the government was a breach of their duty as fiduciaries.

[65] Therefore, section 260 can be used to argue that the liability of the Aujla brothers for negligent actions prior to the dissolution of the Company can be maintained. However, existing case law has not supported the contention that section 260 somehow permits the Court to find that the directors did not cease to be directors after the administrative dissolution of the Company. The relevant difference is that even if the liability for negligence continued to exist, the Aujla brothers must be found not to have ceased to hold their office as directors for the limitation period in the *Excise Tax Act* not to apply. Since section 260 does not support the Crown's conclusion that the Aujla brothers continued to be directors after the dissolution of the Company, the legal status of the Aujla brothers as directors remains in limbo.

[66] Conversely, for the Aujla brothers to take advantage of the limitation period under section 323 of the *Excise Tax Act*, it was necessary for them to show that they were not directors according to the law in British Columbia. In the absence of proof that the Aujla brothers ceased to be directors, their liability survived according to section 260 of the *Company Act*. Since the Aujla brothers did not cease to hold their office as directors according to section 130 of the *Company Act* and are not affected by any existing Common Law relieving them of their office as directors, their liability is governed and maintained under section 260 of the *Company Act.*

Were the Aujla Brothers reinstated as directors by the Court Order?

[67] The Tax Court judge concluded that the Court Order did not have the effect of reinstating the Aujla brothers to their position as directors of the Company when the Company was restored to the Register.

[68] The Crown contends that the decision in *Natural Nectar Products Canada Ltd. v. Theodor (B.C.C.A)*, [1990] B.C.J. No. 1342 (*Natural Nectar*) supports the conclusion that when a company has been restored to the register using the words "as if its name had never been struck off", the company is placed "in the same position, as nearly as may be, as if the company had not been dissolved" and that therefore its directors are also reinstated.

[69] In his reasons with respect to this case, my colleague also examines *Natural Nectar* but comes to a different conclusion. My colleague argues that just as the order must include "as if its name had never been struck off" to have a retrospective effect according to *Natural Nectar*, the order must also include explicit language stipulating that the directors are reinstated to have the effect of returning them to their office as directors.

[70] This conclusion creates vast conceptual difficulty. If a company is restored without assuming either that the directorship of the last known directors of that company continues, or that the directors existing at the time of the dissolution are reinstated, then the company is nothing but a name on a register. Without assets or directors, there is nothing to pursue and no one to defend the

action presumably motivating the restoration order. In short, claims against the company will not be maintainable.

[71] The difficulty created is similar to those enunciated by Jenkins L.J. in *Tymans, Ltd. v. Craven*, [1952] 1 All E.R. 613. Jenkins L.J. indicated that:

> … obvious difficulties as to incorporation, membership, share capital, and so forth would arise and if the resuscitated company was brought into being a legal entity distinct from the dissolved one, claims by and against the resuscitated company in respect of the pre-dissolution dealings of the dissolved company would not be maintainable. (emphasis added)

[72] In *Natural Nectar,* Justice Hinkson quoted the concerns of Jenkins L.J. highlighting these types of difficulties as the reason that the retroactive deeming provision was permitted according to the *Company Act* section 263 and should be inserted as a clause in any court order that intends to have the effect of retroactively restoring a company to the register. Justice Hinkson concluded:

> Upon the basis of that reasoning, however, I do not conclude that s. 286 [now section 262] should be given retrospective operation. Rather, such an effect can be given to the order restoring the company to the register if the court gives appropriate directions under s. 287 for placing the company "in the same position, as nearly as may be, as if the company had not been dissolved."
>
> In my opinion, that would have been the effect of the order restoring the company to the Register if the words, "as if its name had never been struck off" had been contained in the order.

[73] While a retroactive deeming provision was used in the Court Order at issue through the clause "the Company shall be deemed to have continued in existence as if its name had never been struck off the register," my colleague contends that this is insufficient to restore the directors, and

that an additional deeming clause dealing exclusively with the directors should also have been included to have such an effect.

[74] The result of that reasoning is that an additional clause must be included to reverse the presumption that the directorships of the Aujla brothers ceased upon dissolution, despite the clear indication by the existing retroactive provision that the dissolution did not occur since the Company "continued in existence as if its name [was] never struck off the register." The leap in this logic is that the dissolution is presumed to have triggered the cessation of the Aujla brothers' office as directors, but the retroactive annulment of the dissolution is now said to be insufficient to undo the cessation of the Aujla brothers' office as directors.

[75] The ultimate result in the restoration of the Company to the register without directors also goes against section 108 of the British Columbia *Company Act.* This section indicates that a company "must have at least one director." Based on section 108, the Aujla brothers must be presumed to be reinstated with the restoration of the Company as no other directors have ever been associated with the Company. Thus, while no express mention of the restoration of the directors was made in the Court Order, it must none-the-less have the effect of restoring the Aujla brothers since they never ceased to hold office under any provisions of the British Columbia *Company Act*, the dissolution which is said to have ended their office as directors is deemed never to have occurred, and a company cannot exist without directors.

[76] The effect of this determination is in line with the reasoning of Justice O'Connor of the Tax Court of Canada in *Glass v. Canada*, [1997] T.C.J. No. 1020 at paragraph 16, where he states:

> The effect of the restoration order was that the company was deemed to continue in existence. Moreover by virtue of section 284 [now 260] of the B.C. Act the liability of a director continued. Consequently, the Appellant is not entitled to take advantage of the limitation period provided …

[77] The interpretation that directors are reinstated upon the restoration of the Company to the register is also supported by the decision in *Cadorette c. Canada*, [2008] CCI 416, [2008] A.C.I. No. 316 where Justice Favreau of the Tax Court of Canada determined that:

> …l'appelant doit être considéré comme n'ayant jamais perdu son statut d'administrateur entre le moment où l'immatriculation de la société a été radiée d'office et le moment où le registraire des entreprises a révoqué la radiation de l'immatriculation de la société.

However, this jurisprudence is of limited persuasiveness since it deals with the status of directors under corporate law in the province of Quebec and all parties to this appeal agree that the law applicable to the determination of the status of the Aujla brothers as directors is governed solely by the *Company Act* in the province of British Columbia.

Does the "without prejudice" clause in section 263 apply to the directors?

[78] The "without prejudice" language found in section 263 requires that the Court Order not affect "the rights of parties acquired before the date on which the company or extraprovincial company is restored to the register." However, since the Aujla brothers never ceased to be directors of the Company they never acquired any rights and the Court Order does not have the effect of prejudicially affecting those rights.

[79] In addition, this provision is intended to apply to third parties who have acquired rights since the dissolution. This is confirmed in *Re: Montreal Trust Company and Boys Scouts of Canada Foundation et al.*, 88 D.L.R. (3d) 99 at paragraph 18 where Justice Ruttan concluded:

> Here I find that s. 189 of the Statute and the order made thereunder established a conclusive rather than a rebuttable presumption that the company continued in existence, so that not only rights which previously existed but rights which were acquired during the period of hiatus could retroactively become and belong part of the property of the corporation.
>
> This "conclusive" presumption does not conflict with the protection of third parties as referred to in s. 189 [now section 262] of the Act, i.e.
>
> > "without prejudice to the rights of parties acquired prior to the date on which the company is restored to the register."
>
> The rights referred to are those which third parties have acquired in dealing with the company during the period between the dissolution and restoration.

[80] Whereas section 263 refers to “rights of parties” generally, section 260 clearly stipulates that the liability of “every director, officer, liquidator and member of a company that is struck off the register” survives. In view of this specific provision, the general “without prejudice to the rights of parties” language is interpreted to apply to persons other than those listed in section 260.

Public policy argument with respect to the limitation period

[81] There exists a public policy argument in favour of not reinstating the Aujla brothers as directors since they likely no longer viewed themselves as directors of the Company and thus ordered their personal affairs for many years believing they would not be held liable.

[82] However, the Aujla brothers should not be rewarded for their negligence. As directors of the Company, the Aujla brothers collected money in the form of taxes to be remitted to the government. The Company was later dissolved through an administrative act of the Registrar because of the Aujla brothers' failure to file annual reports. The administrative striking of the Company from the register and subsequent involuntary dissolution of the Company is a penalty imposed due to the Aujla brothers' negligence.

[83] The Aujla brothers would not have been entitled to apply for the voluntary dissolution of the Company without complying with section 268 of the British Columbia *Company Act*. Section 268 requires the directors of a company to affirm that the company will be able to pay its debts soon after dissolution. It reads:

> **268** (1) If it is proposed to wind up a company voluntarily, the majority of the directors, before calling the general meeting at which the resolution for the winding up of the company is to be proposed, must make an affidavit that they have made a full inquiry into the affairs of the company and that they are of the opinion that the company will be able to pay its debts in full within the period, not exceeding 12 months from the commencement of the winding up, specified in the affidavit.
>
> (2) An affidavit referred to in subsection (1) must
>
> (a) be made within 5 weeks immediately preceding the date the members pass the resolution for the voluntary winding up of the company, and
>
> (b) contain a statement of the assets and liabilities of the company as at the latest practicable date.
>
> (3) A copy of the affidavit must be
>
> (a) filed with the registrar before the meeting, and
>
> (b) presented to the meeting at which the resolution for the voluntary winding up of the company is to be proposed.
>
> (4) Every director of a company who makes an affidavit under this section without having reasonable grounds for the opinion that the company will be able to pay its debts in full within the period specified in the affidavit commits an offence.

> (5) If a company is wound up in accordance with a resolution passed within 5 weeks after the making of the affidavit, but its debts are not paid or provided for in full within the period stated in the affidavit, it is presumed, until the contrary is shown, that the declarant did not have reasonable grounds for the declarant's opinion.
>
> (6) This section does not apply to a winding up commenced before October 1, 1973.

[84] Should the directors fail under their obligation as directors or under section 268, the Court may make provisions under section 290:

> **290** If a company is being wound up, the court may
> […]
>
> (i) on application by any of the persons mentioned in section 271(1), examine into the conduct of any person who has taken part in the formation or promotion of the company or any person that is a past or present director, officer, receiver, receiver manager, liquidator or member of the company if it appears that the person has misapplied, or retained, or become liable or accountable for, any money, or property, or breach of trust, in relation to the company, and compel the person to repay or to restore the money, or property, or any part of it, with interest at the rate the court considers appropriate, or to contribute the sum to the assets of the company by way of compensation in respect of the misapplication, retainer or breach of trust as the court considers appropriate, and this provision applies even if the conduct complained of is conduct for which the person may be liable to prosecution.
>
> […]

[85] The Aujla brothers did not voluntarily dissolve their company. The Company was involuntarily dissolved because of the Aujla brothers' failure to file annual reports. The Company also failed to remit taxes owed to the government. To find that the Aujla brothers are no longer responsible for the liabilities they evaded by allowing their Company to be struck from the register would allow the Aujla brothers to profit from their negligence as directors when responsible

directors who properly wind up their companies are not permitted to do so according to section 268 and following of the *Company Act*.

[86] Before the dissolution of the Company the Aujla brothers could have resigned as directors. The registrar was obliged, under section 257(1) to send the directors of the Company a letter indicating their failure to file annual reports. One month after the mailing of the letter the Registrar was obligated under section 257(3) to publish a notice of its intent to strike the Company off the register in the Gazette. One month after the publication of the notice, the Registrar was able to strike the Company off the register. At no time during these delays did the Aujla brothers resign from the Company. Their failure to do so results in their ban from benefiting from the two year limitation period set out in section 323 of the *Excise Tax Act.*

CONCLUSION

[87] The Aujla brothers failed to properly wind up their company, and never resigned as directors. The Company was struck off and subsequently restored to the register and "deemed to have continued in existence as if its name had never been struck off the register and dissolved." Therefore, the Aujla brothers continue in their position as directors of the Company and their liability continues as provided in sections 260 of the British Columbia *Company Act* and 323(1) of the *Excise Tax Act.*

[88] I would allow the appeal with one set of costs.

[89] I would also direct that a copy of these reasons should be placed in each of Court files A-40-08 and A-41-08.

"Pierre Blais"

J.A.

APPENDIX "A"

Relevant Statutory Provisions

Section 323 of the *Excise Tax Act*

323.(1) If a corporation fails to remit an amount of net tax as required under subsection 228(2) or (2.3) or to pay an amount as required under section 230.1 that was paid to, or was applied to the liability of, the corporation as a net tax refund, the directors of the corporation at the time the corporation was required to remit or pay, as the case may be, the amount are jointly and severally, or solidarily, liable, together with the corporation, to pay the amount and any interest on, or penalties relating to, the amount.

(2) A director of a corporation is not liable under subsection (1) unless

(*a*) a certificate for the amount of the corporation's liability referred to in that subsection has been registered in the Federal Court under section 316 and execution for that amount has been returned unsatisfied in whole or in part;

(*b*) the corporation has commenced liquidation or dissolution proceedings or has been dissolved and a claim for the amount of the corporation's liability referred to in subsection (1) has been proved within six months after the earlier of the date of commencement of the proceedings and the date of dissolution; or

(c) the corporation has made an assignment or a bankruptcy order has been made against it under the *Bankruptcy and Insolvency Act* and a claim for the amount of the

323.(1) Les administrateurs d'une personne morale au moment où elle était tenue de verser, comme l'exigent les paragraphes 228(2) ou (2.3), un montant de taxe nette ou, comme l'exige l'article 230.1, un montant au titre d'un remboursement de taxe nette qui lui a été payé ou qui a été déduit d'une somme dont elle est redevable, sont, en cas de défaut par la personne morale, solidairement tenus, avec cette dernière, de payer le montant ainsi que les intérêts et pénalités afférents.

(2) L'administrateur n'encourt de responsabilité selon le paragraphe (1) que si :

a) un certificat précisant la somme pour laquelle la personne morale est responsable a été enregistré à la Cour fédérale en application de l'article 316 et il y a eu défaut d'exécution totale ou partielle à l'égard de cette somme;

b) la personne morale a entrepris des procédures de liquidation ou de dissolution, ou elle a fait l'objet d'une dissolution, et une réclamation de la somme pour laquelle elle est responsable a été établie dans les six mois suivant le premier en date du début des procédures et de la dissolution;

c) la personne morale a fait une cession, ou une ordonnance de faillite a été rendue contre elle en application de la *Loi sur la faillite et l'insolvabilité*, et une réclamation de

corporation's liability referred to in subsection (1) has been proved within six months after the date of the assignment or bankruptcy order.	la somme pour laquelle elle est responsable a été établie dans les six mois suivant la cession ou l'ordonnance.
. . .	[…]
(4) The Minister may assess any person for any amount payable by the person under this section and, where the Minister sends a notice of assessment, sections 296 to 311 apply, with such modifications as the circumstances require.	(4) Le ministre peut établir une cotisation pour un montant payable par une personne aux termes du présent article. Les articles 296 à 311 s'appliquent, compte tenu des adaptations de circonstance, dès que le ministre envoie l'avis de cotisation applicable.
(5) An assessment under subsection (4) of any amount payable by a person who is a director of a corporation shall not be made more than two years after the person last ceased to be a director of the corporation.	(5) L'établissement d'une telle cotisation pour un montant payable par un administrateur se prescrit par deux ans après qu'il a cessé pour la dernière fois d'être administrateur.

BCCA PROVISIONS:

Section 1

Definitions and interpretation

1(1) In this Act:

"**director**" includes every person, by whatever name designated, who performs functions of a director;

Section 257

Registrar may strike off company

257 (1) If

(a) a company or an extraprovincial company has for 2 years failed to file with the registrar the annual report or any other return, notice or document required by this Act to be filed by it,

(b) the registrar has reasonable cause to believe that an extraprovincial company has ceased to carry on business in British Columbia,

(c) a company or an extraprovincial company has failed to pay, within 10 days after default in payment of the fine, any fine imposed on it under this Act,

(d) a company or an extraprovincial company has failed to comply with an order of the registrar under section 18,

(e) a reporting company dos not comply with section 139, or

(f) a company or an extraprovincial company has failed to comply with a requirement under section 338(3)(b) within 60 days after the date of the mailing to the company or extraprovincial company of a registered letter referred to in section 338(4),

the registrar must mail to the company or extraprovincial company a registered letter notifying it of its failure or of the registrar's belief, and of the registrar's power under subsection (3).

(2) If a company or an extraprovincial company is being wound up, and

(a) the registrar has reasonable cause to believe that no liquidator is acting, or that the company is fully wound up, or
(b) the returns required to be made by the liquidator have not been made for a period of 3 consecutive months,

the registrar must mail to the company a registered letter inquiring whether a liquidator is acting, or the company is fully wound up, or notifying the company of the failure to file returns, or of the registrar's belief and of the registrar's powers under subsection (3).

(3) If, within one month after the registrar mails the letters referred to in subsection (1) or (2), the registrar does not receive a response that

(a) indicates that the failure has been or is being remedied, or is otherwise satisfactory to the registrar, or

(b) notifies the registrar that the extraprovincial company continues to carry on business in British Columbia,

the registrar may publish in the Gazette a notice that, at any time after the expiration of one month after the date of publication of the notice, unless cause is shown to the contrary, the company will be struck off the register and dissolved, or, in the case of an extraprovincial company, its registration will be cancelled.

(4) At any time after one month after the date of publication of the notice referred to in subsection (3), the registrar, unless good cause to the contrary is shown to him or her, may strike the company off the register and, on being struck off, the company is dissolved, or, in the case of an extraprovincial company, cancel its registration.

(5) A letter mailed under this section may be addressed to the company at its registered office, or in the case of an extraprovincial company, at its head office in British Columbia.

Section 262

Restoration to register

262 (1) If a company has been dissolved, or the registration of an extraprovincial company has been cancelled under this Act or any former *Companies Act*, the court may, if it is satisfied that it is just that the company or extraprovincial company be restored to the register, not more than 10 years after the date of the dissolution or cancellation, on application by the liquidator, a member, a creditor of the company or extraprovincial company, or any other interested person, make an order, subject to the conditions and on the terms the court considers appropriate, restoring the company or extraprovincial company to the register.

(2) If a company or an extraprovincial company is restored to the register under subsection (1), the company is deemed to have continued in existence, or the registration of the extraprovincial company is deemed not to have been cancelled, and proceedings may be taken as might have been taken if the company had been dissolved, or the registration of the extraprovincial company had not been cancelled.

(3) The court may make an order under subsection (1) restoring a company or an extraprovincial company to the register for a limited period, and, after the expiration of that period, the company must promptly be struck off the

register, or, in the case of an extraprovincial company, its registration cancelled, by the registrar.

(4) The court must not make an order under this section

(a) in all cases,

(i) unless notice of the application under subsection (1) and a copy of any document filed in support of it has been sent to the registrar and the registrar has consented, and

(ii) until one week after the application has been published notice of the application under subsection (1) in one issue of the Gazette and has mailed notice of that application to the last address shown as the registered office of the company or head office in British Columbia of the extraprovincial company,

(b) in the case of a company or extraprovincial company that had, at the time of cancellation of registration or dissolution, the power of capacity to operate as a club, without the consent of the minister, and

(c) in the case of a company or extraprovincial company that was, at the time of cancellation of registration or dissolution, a reporting company under this Act or the *Securities Act*, without the consent of the British Columbia Securities Commission.

Section 263

Power of court

263 In an order made under section 262, the court may give directions and make provisions it considers appropriate for placing the company or extraprovincial company and every other person in the same position, as nearly as may be, as if the company had not been dissolved or the registration of the extraprovincial company cancelled, but, unless the court otherwise orders, the order is without prejudice to the rights of parties acquired before the date on which the company or extraprovincial company is restored to the register.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKETS:	A-40-08 and A-41-08

(APPEALS FROM A JUDGMENT OF BOWIE J. OF THE TAX COURT OF CANADA (2007TCC764) DATED DECEMBER 21, 2007)

STYLES OF CAUSE:	Her Majesty the Queen v. Amarjit Aujla Her Majesty the Queen v. Harjinder Aujla
PLACE OF HEARING:	Vancouver, British Columbia
DATE OF HEARING:	September 18, 2008
REASONS FOR JUDGMENT BY:	Ryer, J.A.
CONCURRED IN BY:	Décary J.A.
DISSENTING REASONS BY:	Blais J.A.
DATED:	October 14, 2008

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