Date: 20100115

Docket: A-90-09

Citation: 2010 FCA 13

CORAM: **LÉTOURNEAU J.A.**
NOËL J.A.
TRUDEL J.A.

BETWEEN:

ANTHONY COMPARELLI

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Heard at Toronto, Ontario, on January 13, 2010.

Judgment delivered at Ottawa, Ontario, on January 15, 2010.

REASONS FOR JUDGMENT BY: LÉTOURNEAU J.A.

CONCURRED IN BY: NOËL J.A.
TRUDEL J.A.

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REASONS FOR JUDGMENT

LÉTOURNEAU J.A.

Issue on appeal

[1] This is an appeal against a decision of the Tax Court of Canada whereby Justice Valerie Miller (judge) dismissed the appellant's appeal from an assessment under the *Income Tax Act*, 1985, c. 1 (5th Supp.) (Act) for the years 1999, 2000 and 2001.

[2] The assessment was made on the basis that the appellant was liable under section 227.1 of the Act for the failure of MindTheStore.com Inc. (MTS) to remit source deductions of federal and provincial income taxes as well as employment and Canada Pension Plan premiums.

[3] Section 227.1 reads:

227.1 (1) Where a corporation has failed to deduct or withhold an amount as required by subsection 135(3) or 135.1(7) or section 153 or 215, has failed to remit such an amount or has failed to pay an amount of tax for a taxation year as required under Part VII or VIII, the directors of the corporation at the time the corporation was required to deduct, withhold, remit or pay the amount are jointly and severally, or solidarily, liable, together with the corporation, to pay that amount and any interest or penalties relating to it.	**227.1** (1) Lorsqu'une société a omis de déduire ou de retenir une somme, tel que prévu aux paragraphes 135(3) ou 135.1(7) ou aux articles 153 ou 215, ou a omis de verser cette somme ou a omis de payer un montant d'impôt en vertu de la partie VII ou VIII pour une année d'imposition, les administrateurs de la société, au moment où celle-ci était tenue de déduire, de retenir, de verser ou de payer la somme, sont solidairement responsables, avec la société, du paiement de cette somme, y compris les intérêts et les pénalités s'y rapportant.
(2) A director is not liable under subsection 227.1(1), unless	(2) Un administrateur n'encourt la responsabilité prévue au paragraphe (1) que dans l'un ou l'autre des cas suivants :
(*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 223 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 that subsection 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	*a*) un certificat précisant la somme pour laquelle la société est responsable selon ce paragraphe a été enregistré à la Cour fédérale en application de l'article 223 et il y a eu défaut d'exécution totale ou partielle à l'égard de cette somme; *b*) la société a engagé des procédures de liquidation ou de dissolution ou elle a fait l'objet d'une dissolution et l'existence de la créance à l'égard de laquelle elle encourt la responsabilité en vertu de ce paragraphe a été établie dans les six mois suivant le premier en date du jour où les procédures ont été engagées et du jour de la dissolution; *c*) la société a fait une cession ou une ordonnance de faillite a été rendue contre elle en vertu de la *Loi sur la faillite et*

of the corporation's liability referred to in that subsection has been proved within six months after the date of the assignment or bankruptcy order.	*l'insolvabilité* et l'existence de la créance à l'égard de laquelle elle encourt la responsabilité en vertu de ce paragraphe a été établie dans les six mois suivant la date de la cession ou de l'ordonnance de faillite.
(3) A director is not liable for a failure under subsection 227.1(1) where the director exercised the degree of care, diligence and skill to prevent the failure that a reasonably prudent person would have exercised in comparable circumstances.	(3) Un administrateur n'est pas responsable de l'omission visée au paragraphe (1) lorsqu'il a agi avec le degré de soin, de diligence et d'habileté pour prévenir le manquement qu'une personne raisonnablement prudente aurait exercé dans des circonstances comparables.

Analysis of the decision of the Tax Court of Canada and the submissions of the parties

[4] The judge concluded that the appellant had not exercised the requisite degree of care, diligence and skill to prevent the failure of MTS to remit the source deductions. Therefore, it could not rely upon subsection 227.1(3) to escape from his liability.

[5] In coming to this conclusion, she made the following findings:

a) the appellant was at all times an inside director;

b) he was involved in the day-to-day management of MTS;

c) in 1999, he was elected Chairman and Chief Executive Officer of MTS and became President until June 27, 2000;

d) he was intelligent and experienced in business matters;

e) he was aware of his responsibilities under the Act as a result of previous dealings with the Canada Revenue Agency pursuant to MTS's failure to remit source deductions on time;

f) he was aware of the precarious financial position of MTS as MTS had little or no income and was relying on debt financing to continue its operations;

g) the amounts the appellant advanced to MTS were directed at keeping MTS in operation and not at preventing the failure to remit the payroll source deductions;

h) for the whole of its nearly six years of existence, i.e. 1996, 1997, 1998, 1999, 2000 and 2001, MTS had been at one time or another in default of remitting source deductions; and

i) the appellant cannot blame the failure to remit on a third party.

[6] The appellant does not quarrel with these findings. In any event, they were amply supported by the evidence. I see in any of them no palpable and overriding error justifying the intervention of this Court.

[7] Counsel for the appellant submits that the judge applied the wrong test to determine whether or not the appellant had exercised the degree of care and diligence required to prevent the failure to remit. In his view, this amounts to an extricable error of law reviewable on the standard of correctness.

[8] The appellant's argument rests on his interpretation of the decision of this Court in *Worrell v. Canada*, [2001] 2 F.C. 203, also reported as *A.G. of Canada et al. v. McKinnon et al.*, 2000 DTC 6593. He submits that the judge should have reached the same conclusion in this case. In his view, her failure to apply *Worrell* is the result of her taking into account irrelevant considerations and ignoring relevant considerations.

[9] After an analysis and a comparison of the facts in the *Worrell* case with those in the present instance, the judge concluded that the *Worrell* case was clearly distinguishable. I agree with her analysis and conclusion.

[10] There are many distinguishing features. For example, the Worrell Company had been successful in business for thirty years while MTS never really got off the ground. Unlike MTS, there was no history of repeated failures to remit by *Worrell*.

[11] Chief among many, the judge found as significant and determinative the fact that almost all of *Worrell*'s debt to Revenue Canada for unremitted source deductions accrued after the bank

started to exercise control over the cheques issued by the company: see paragraph 43 of her reasons for judgment.

[12] In my respectful view, the judge properly reiterated at paragraph 42 of her reasons that the "defence in subsection 227.1(3) of the Act requires a director to exercise reasonable care, diligence and skill, **to prevent the failure to remit**" (in bold character in the original). The defence certainly does not apply where, as in this case, the actions of MTS consisted in perpetuating the failures to remit, while merely attempting to reduce the amount of new arrears, in the hope that the company would survive and eventually be financially able to pay back all the accrued arrears. As this Court said at paragraph 69 of the *Worrell* decision, "taxpayers are not required involuntarily to underwrite this risk, no matter how reasonable it may have been from a business perspective for the directors to have continued the business without doing anything to prevent future failures to remit".

[13] For these reasons, I would dismiss the appeal with costs.

"Gilles Létourneau"

J.A.

"I agree
Marc Noël J.A."

"I agree
Johanne Trudel J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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