Federal Court of Appeal | Cour d'appel fédérale

CANADA

Date: 20100415

Docket: A-100-09

Citation: 2010 FCA 102

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

BETWEEN:

PIERRE BORDUAS

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Hearing held at Montréal, Quebec, on April 13, 2010.

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

REASONS FOR JUDGMENT BY: LÉTOURNEAU J.A.

CONCURRED IN BY: PELLETIER J.A.
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REASONS FOR JUDGMENT

LÉTOURNEAU J.A.

Issue

[1] This is an appeal of a decision by the Tax Court of Canada in which Madam Justice Lamarre (the judge) dismissed the appeal of an assessment under section 323 of Part IX of the *Excise Tax Act*, R.S.C. 1985, c. E-15, as amended (the Act). In so doing, she held the appellant

personally liable for the tax that the corporation, of which he was the director, failed to remit to the Government of Quebec.

[2] He challenges this finding on the ground that he should have benefitted from the exemption described in subsection 323(3) of the Act. Under this subsection, a director can, in short, avoid liability by demonstrating that he or she has exercised the degree of diligence that a reasonably prudent person would have exercised in comparable circumstances to prevent the failure by the corporation to remit the tax.

[3] Section 323, reproduced below, governs the liability of the directors of a corporation owing an amount of net tax. It makes them jointly liable for the payment of this tax, as well as any interest and penalties, if the corporation fails to remit the amount in question:

Liability of directors	Responsabilité des administrateurs
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.	**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.
Limitations	Restrictions
(2) A director of a corporation is not liable under subsection (1) unless	(2) L'administrateur n'encourt de responsabilité selon le paragraphe (1)

que si :

(*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;

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*) 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

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*) 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 corporation's liability referred to in subsection (1) has been proved within six months after the date of the assignment or bankruptcy order.

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 la somme pour laquelle elle est responsable a été établie dans les six mois suivant la cession ou l'ordonnance.

Diligence

(3) A director of a corporation is not liable for a failure under subsection (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.

Diligence

(3) L'administrateur n'encourt pas de responsabilité s'il a agi avec autant de soin, de diligence et de compétence pour prévenir le manquement visé au paragraphe (1) que ne l'aurait fait une personne raisonnablement prudente dans les mêmes circonstances.

Assessment

(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

Cotisation

(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

modifications as the circumstances require.

adaptations de circonstance, dès que le ministre envoie l'avis de cotisation applicable.

Time limit

(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.

Prescription

(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.

Amount recoverable

(6) Where execution referred to in paragraph (2)(*a*) has issued, the amount recoverable from a director is the amount remaining unsatisfied after execution.

Montant recouvrable

(6) Dans le cas du défaut d'exécution visé à l'alinéa (2)a), la somme à recouvrer d'un administrateur est celle qui demeure impayée après l'exécution.

Preference

(7) Where a director of a corporation pays an amount in respect of a corporation's liability referred to in subsection (1) that is proved in liquidation, dissolution or bankruptcy proceedings, the director is entitled to any preference that Her Majesty in right of Canada would have been entitled to had the amount not been so paid and, where a certificate that relates to the amount has been registered, the director is entitled to an assignment of the certificate to the extent of the director's payment, which assignment the Minister is empowered to make.

Privilège

(7) L'administrateur qui verse une somme, au titre de la responsabilité d'une personne morale, qui est établie lors de procédures de liquidation, de dissolution ou de faillite a droit au privilège auquel Sa Majesté du chef du Canada aurait eu droit si cette somme n'avait pas été versée. En cas d'enregistrement d'un certificat relatif à cette somme, le ministre est autorisé à céder le certificat à l'administrateur jusqu'à concurrence de son versement.

Contribution

(8) A director who satisfies a claim under this section is entitled to contribution from the other directors who were liable for the claim.

Répétition

(8) L'administrateur qui a satisfait à la réclamation peut répéter les parts des administrateurs tenus responsables de la réclamation.

Decision of the Tax Court of Canada

[4] At the end of the hearing, in reasons delivered orally, the judge rejected the appellant's arguments that he was an outside director and that he had, in the circumstances, exercised the diligence required to benefit from the exemption in subsection 323(3).

Analysis of the judge's decision and grounds of appeal

Was the appellant an inside director?

[5] It is generally recognized that it is much more difficult for an inside director, who is involved in the day-to-day management of the corporation and who influences the conduct of its business affairs, to establish the defence of due diligence than it is for an outside director, participating sporadically, who may rely on the inside directors to pay any debts owing to the government: see *Soper v. Canada*, [1998] 1 F.C. 124 (F.C.A.); *Cadrin v. R.*, 99 D.T.C. 5079 (F.C.A.). As an outside director, the appellant would only be liable if he knew or should have known that the corporation was having difficulty remitting its taxes; hence his interest in being characterized as such.

[6] In my view, it was open to the trial judge to find, based on the evidence, that the appellant was an inside director, given his day-to-day availability and involvement in the corporation's affairs and the degree of control and influence he exercised: see the testimony of the appellant himself and

Rachel Guay, one of the persons who had held the position of comptroller, Appeal Book, Vol. 2, at pages 198 to 201, 224, 225, 258, 259, 266, 274, 279 and 282.

[7] Substituting our own understanding of the evidence on this point for that of the judge would be a cavalier assumption of a power that is not ours to exercise, as we have neither seen nor heard the witnesses: *R. v. Van der Peet*, [1996] 2 S.C.R. 507, at paragraph 81.

The defence of due diligence

[8] The appellant submits that the judge committed three errors of law, as well as palpable and overriding errors, in weighing the evidence related to the defence of due diligence set out in subsection 323(3).

Imposing a duty not provided for in the Act to assess the appellant's conduct

[9] The appellant argues that for the defence of due diligence, the judge required the appellant to establish that he was not in a position to detect the omission, namely, the corporation's failure to remit the tax. In so doing, she altered the test, which is limited to exercising diligence to prevent the failure.

[10] With respect, the appellant's claim does not accurately reflect the Tax Court of Canada proceedings or the reasons for judgment. It was the appellant himself who raised before the judge the defence that he was not in a position to detect the failure. She was simply responding to the

appellant's argument on this point. It is clear from reading her reasons that she applied the correct test. At page 5, she writes the following regarding the appellant:

> [TRANSLATION]
>
> He has not demonstrated, on a balance of probabilities, that he was unable to prevent the failure; in other words, he had the authority to verify the remittances when confronted with facts, as described above, that could lead him to believe that such failures existed.
>
> [Emphasis added.]

[11] The facts to which the judge refers are the corporation's financial difficulties, the appellant's involvement in its management, the repeated omissions, and even the failure to pay the amounts due upon the late filing of the reports required by the Act.

[12] The appellant, as sole director of the corporation, could not have been unaware of its financial difficulties, given that it had never been profitable since its acquisition in December 2000, had poor cash flow and was incurring substantial losses: see the appellant's letter dated June 17, 2003, to the ministère du Revenu du Québec, Appeal Book, Vol. 1, at page 143. Added to this are the reservations expressed by the lending bank, which was concerned that a substantial portion of the line of credit had been used, and which, when that line of credit was renewed in March 2002, demanded that the corporation at issue be sold: *ibid.* He was aware of these difficulties and refused to have a representative of the accounting firm Samson Bélair and others appointed to represent the bank regarding the business and to review its management and finances. It was not until the bank began exerting pressure (refusing to honour personal cheques in the appellant's name, issuing a notice of intent to exercise a security interest) that the appellant acquiesced. The bank's

representative began auditing the financial statements and required that all future cheques be approved by him before being issued.

[13] When a corporation is in financial difficulty, the above is a very strong indication that that payments are being made preferentially to some debtors at the expense of others. Experience generally shows that, at such times, directors tend to allocate available resources to pay providers of goods and services that keep the corporation operating from day to day, in the hope that it will become profitable again or at least stay afloat until it is sold.

[14] When companies are struggling, the government is not always high on the list of prior or preferred creditors. Unfortunately, experience also shows that, more often than not, preferential payments, rather than breathing new life into the corporation, do little more than prolong the agony and put off the inevitable, as was the case here, with the consequences now being faced by the appellant.

[15] When a discussing a corporation's precarious financial situation, it is not necessarily legal heresy to refer, as did the appellant himself as a defence and the judge in response to this, to an ability or inability to detect, in order to prevent, a possible, or even probable, failure to remit taxes owing.

[16] In his testimony, the appellant emphasized the importance for a director of delegating his administrative duties to facilitate the sound management of a corporation and keep it running efficiently. He described the general structures put in place for these purposes.

[17] But such a delegation of duties is not an abdication and does not exonerate the delegator from liability. The appellant, who was aware of the corporation's financial difficulties, has provided no evidence of any concrete steps he might have taken to ensure that the legal duties imposed by the Act were respected.

[18] This was the judge's finding. I can find no error therein.

Did the judge err in law in holding the appellant to a higher standard of care than that required by the Act and the case law?

[19] Again, the appellant is essentially arguing that, as a director, he was required to delegate certain administrative tasks and was entitled to rely on his delegates to perform the tasks honestly and correctly. He cites *Soper v. Canada*, [1998] 1 F.C. 124, paragraph 27; *Polsinelli v. The Queen*, 2004 TCC 186, paragraphs 18 and 19; *Smith v. Her Majesty the Queen*, 2001 FCA 84; *Mariani v. Her Majesty the Queen*, 2002 G.T.C. 266.

[20] I do not disagree with this statement of principle. But in each of these cases, the scope of the statement is limited by adding that it applies "unless there is a reason for suspicion" (*Soper* and *Mariani*), unless the corporation is in financial difficulty (*Smith*) or unless the directors were not given "any indication that anything was wrong" (*Polsinelli*).

[21] In this case, to use the terms of the preceding paragraph, something was wrong, as the corporation was in constant financial difficulty, and there was reason for suspicion. This was the

judge's finding, according to her reasons for judgment. There was sufficient evidence, in my view, to allow her to reach such a conclusion.

Did the judge err in law by transforming the appellant's *prima facie* burden of proof into a burden of persuasion?

[22] This claim from the appellant's Memorandum of Fact and Law has two aspects. On one hand, he submits that the judge imposed on him a burden of persuasion rather than a mere initial burden to demolish, but no more, the assumptions on which the Minister had based his assessment. On the other hand, he submits that she erred in drawing a negative inference from the fact that the appellant did not call as witnesses the corporation's comptrollers, who were responsible for verifying the GST returns and, where applicable, signing the remittance cheques.

[23] In support of the first claim, the appellant cites the Supreme Court of Canada's decision in *Hickman Motors Ltd. v. The Queen*, [1997] 2 S.C.R. 336, in particular the following excerpt from paragraphs 92 and 93:

> **92** . . . The Minister, in making assessments, proceeds on assumptions (*Bayridge Estates Ltd. v. M.N.R.*, 59 D.T.C. 1098 (Ex. Ct.), at p. 1101) and the initial onus is on the taxpayer to "demolish" the Minister's assumptions in the assessment (*Johnston v. Minister of National Revenue*, [1948] S.C.R. 486; *Kennedy v. M.N.R.*, 73 D.T.C. 5359 (F.C.A.), at p. 5361). The initial burden is only to "demolish" the exact assumptions made by the Minister but no more: *First Fund Genesis Corp. v. The Queen*, 90 D.T.C. 6337 (F.C.T.D.), at p. 6340.
>
> **93** This initial onus of "demolishing" the Minister's exact assumptions is met where the appellant makes out at least a prima facie case: *Kamin v. M.N.R.*, 93 D.T.C. 62 (T.C.C.); *Goodwin v. M.N.R.*, 82 D.T.C. 1679 (T.R.B.). . . .

[24] It would not be out of place to recall, as did the Supreme Court further above in paragraph 92, that "[i]t is trite law that in taxation the standard of proof is the civil balance of probabilities . . . and that within balance of probabilities, there can be varying degrees of proof required in order to discharge the onus, depending on the subject matter . . . ." [Emphasis added.]

[25] At the hearing, in response to a question from the bench, counsel for the appellant referred to the following passage of the decision, cited above, which gave rise to the argument based on *Hickman*. I repeat it here for ease of reference:

> [TRANSLATION]
>
> He has not demonstrated, on a balance of probabilities, that he was unable to prevent the failure; in other words, he had the authority to verify the remittances when confronted with facts, as described above, that could lead him to believe that such failures existed.
>
> [Emphasis added.]

[26] As the exchanges between the parties' counsel and the members of the panel made clear, this excerpt is related not to the assumptions on which the Minister based the assessment, but rather to the defence available to the appellant under subsection 323(3) of the Act. This assumes both a burden to produce evidence of due diligence (an evidentiary burden) and a burden to persuade the judge on a balance of probabilities (a legal burden).

[27] Counsel for the appellant, who was experienced, acknowledged that the judge had not erred in this respect.

[28] There remains the allegation that the judge drew a negative inference from the absence of comptrollers as witnesses. Note that the appellant claims to have been unaware of the failures to remit the payments and, accordingly, that he was not in a position to detect the failure to meet the legal obligation to make the payments.

[29] Neither the appellant nor the respondent chose to call the comptrollers as witnesses. The appellant took the risk of establishing on the sole basis of his testimony his ignorance of the failures and his inability to detect them. The judge did not believe him, given his daily contact with the comptrollers. She simply noted that in the absence of the comptrollers, it would be [TRANSLATION] "more difficult [for the appellant] to persuade the Court that he was not in a position to detect the failure" or that he [TRANSLATION] "was unaware of the failure": see the reasons for the decision at pages 2 and 3. As the judge explained, the risk [TRANSLATION] "did not play out in his favour": *ibid*, at page 2.

Conclusion

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

[31] That said, I cannot ignore the fact that both parties filed their books of authorities the morning of the hearing, in contravention of Rule 348 of the *Federal Courts Rules*.

[32] While it is rare for both parties to be at fault this way, the same cannot be said, unfortunately, for single parties. All too often for the members of our Court, who diligently prepare

for hearings to make them as productive as possible, one of the parties is late in filing its book of authorities. If we refuse to accept it, we are only punishing ourselves.

[33] I believe the time has come for the Rules Committee to review Rule 348 to increase its effectiveness and promote compliance. We could link the book of authorities to the memorandum of fact and law by requiring that both be filed simultaneously. Or, to promote the filing of a joint book of authorities, the rule could provide that no application for a hearing under Rule 347 may be submitted, or hearing date set, before the book of authorities has been filed. Any party that files late would penalize itself rather than the Court and would have to explain to the client why the hearing is delayed; in the case of undue delay, the party would potentially be subject to a notice of status review.

[34] A quick review of the rules of practice of other jurisdictions would no doubt yield further alternatives. But one thing is certain: the *status quo* must be replaced.

"Gilles Létourneau"
J.A.

"I agree.
J.D. Denis Pelletier J.A."

"I agree.
Johanne Trudel J.A."

Certified true translation
Francie Gow, BCL, LLB

FEDERAL COURT OF APPEAL

SOLICITORS OF RECORD

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