

BETWEEN:

EDWARD P. LA BUICK,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

(Delivered orally from the Bench at Toronto, Ontario on May 18, 2007)

Margeson J.

[1] The appeal is with respect to an assessment made against the Corporation under the *Income Tax Act* (“*Act*”) and the claim now made against the Appellant as a director of the Corporation during the relevant period of time under the provisions of section 227.1 of the *Act*.

[2] In general terms, this is a claim against a director of a corporation for failure of the Corporation to remit amounts owing to the Minister. The Court is satisfied that there is no evidence before it which would indicate that the amount which the Minister is claiming in this action which is \$794,897.84 was not incurred; there is no evidence that this amount is not the correct amount. There is no evidence before me which would question the accuracy of this calculation.

[3] Indeed, the auditor was here, at least the person who raised the assessment, that is J. Barry Schafer. As the senior programs officer, he raised the assessment against the Corporation. He is familiar with the claim present before the Court and he said that the amount that is alleged to be owing is the amount that is owing by the Corporation.

[4] The evidence is clear that the Minister has acted in accordance with the statute. He raised an assessment against the Corporation. At that time, the Corporation was 1375400 Ontario Limited.

[5] If there was a defence to the claim then it should have been made at that time. Once the judgment is obtained and the Minister then proceeds to register that judgment with the Federal Court, and then to take action by issuing an execution order to attach any amounts of money, goods or assets that the Corporation had and then applies them towards the existing debt, the matter is at an end (save the appeal process). After that, the Minister is free to proceed under subsection 227.1(4) against a director, under the *Act*.

[6] I am satisfied that the Minister has acted properly under the circumstances and proceeded in accordance with the statute. I am satisfied that the amount that is alleged to be owing during the relevant period of time was indeed owing. The debt was incurred during the period of time that the Appellant here was a director of this Corporation.

[7] The Appellant says, in essence, in his evidence, that no one knew what the amount was and that it should have been claimed back. In other words, an allegation that there should have been credits applied toward the account which would have been sufficient to pay off the debt. However, the evidence before the Court is that at the time, the \$80,000 which was received from another Court proceeding was applied towards the GST debt, and there were still monies owing on the GST debt.

[8] There was no evidence before me to confirm the Appellant's position that there was an amount of money that should have been left available to the Corporation to pay off the debt. If there was, again, that is not the issue before me. The issue before me is not the GST; the issue before me is the income tax debt and the failure of the Corporation to make the deductions under the *Act* and the *Canada Pension Plan* that it should have made.

[9] The Appellant did not attempt to raise the issue of reasonableness. The defence that is available to a director in situations like this is that the director acted and exercised a degree of care, diligence and skill that a reasonably prudent person would have exercised in comparable circumstances to prevent the failure of the corporation to remit to the Receiver General of Canada federal income tax, interest and penalties as set out in the Reply.

[10] I am satisfied that there is no evidence before me whatsoever that would allow me to apply that defence, to find that the director acted reasonably and prudently as a reasonable director would. Under the circumstances, indeed, he does not even make that claim. He is basically saying that no one knew what the amount was that could have been recovered; there was enough money there to pay all debts.

[11] Further, he argues that if he had been allowed to obtain the company records and to take appropriate action he would have been able to bring in enough funds to pay all the debts off and we would not be here today. That was his position.

[12] He also questions the fact that the Minister waited approximately a year to take the action that he did. But the Minister's action is not before me today. One would hope that the Minister acted as reasonably quickly as he could in this particular case. I do not know. The Appellant does not think he did but the Minister did proceed shortly thereafter anyway, within a year, to take action against the Corporation.

[13] There was an action in the Superior Court, apparently, by the Appellant to try to remain in control of the company. A judge who had jurisdiction in the matter saw fit to allow the new directors to take over. Consequently, and for the Appellant, unfortunately, at the end of the day the new directors did not do anything which was sufficient to put the company back on sound financial footings or to pay the debt that was already in existence.

[14] That does not help the Appellant in this particular case. The Appellant himself made it clear that during the period of time that he was in office as a director the debt that is before me today was incurred.

[15] I am satisfied that the debt is the correct amount based on the evidence before me. I am satisfied that the Appellant was a director.

[16] Again, I have already indicated it is too late for the Appellant to question the accuracy of the judgment against the Corporation. That should have been done before. There is certainly no evidence before me today which would suggest that the amount was wrong anyway, and I am satisfied that the amount was correct.

[17] The Appellant has not satisfied the burden on him of showing that he acted with a degree of care, diligence and skill to prevent the failure by the Corporation to remit the tax owing as a reasonably prudent director would have done under similar circumstances.

[18] I know it is a huge burden for this man, but when a person becomes a director of a corporation, the act places upon that director a very, very substantial responsibility which has to be dealt with very seriously. I am sure that in this particular case the Appellant was not like a lot of people who come before me who do not know anything whatsoever about corporation governance; he did. As a matter of fact, he

had legal counsel and he was aware of the debt that was owing to the Corporation and apparently he was dealing with the Minister on it.

[19] At the end of the day, the Appellant has failed to meet the burden of establishing that he acted reasonably. The Court, unfortunately, will have to dismiss the appeal and confirm the Minister's assessment.

[20] Under the circumstances, the Respondent is entitled to costs in this matter. Those costs will be taxed by the Minister.

Signed at New Glasgow, Nova Scotia, this 2nd day of August 2007.

“T. E. Margeson”

Margeson J.