

Citation: 2009TCC280

2007-3019(GST)G

2007-3020(GST)G

2007-3027(GST)G

BETWEEN:

FRANÇOIS RICHARD, MICHEL RICHARD AND ÈVE RICHARD,

APPELLANTS,

AND

HER MAJESTY THE QUEEN,

RESPONDENT.

[OFFICIAL ENGLISH TRANSLATION]

**CERTIFICATION OF TRANSCRIPT OF
REASONS FOR ORDER**

Let the attached copy of the original version of the Reasons for Order delivered from the Bench in Montréal, Quebec, on March 12, 2009, with some minor corrections, which I identified and initialled, be filed.

For clarity, I also attach hereto an edited copy of the Reasons.

"Lucie Lamarre"

Lamarre J.

Signed at Montréal, Quebec, this 28th day of May 2009.

Translation certified true
on this 30th day of September 2009
Margarita Gorbounova, Translator

TAX COURT OF CANADA

RE: EXCISE TAX ACT

2007-3019(GST)G

2007-3020(GST)G

2007-3027(GST)G

BETWEEN:

**FRANÇOIS RICHARD
MICHEL RICHARD
ÈVE RICHARD**
Appellants

-and-

HER MAJESTY THE QUEEN
Respondent

[OFFICIAL ENGLISH TRANSLATION]

Held before the Honourable Justice **LUCIE LAMARRE**, Tax Court of Canada, in the offices of the Courts Administration Service, Montréal, Quebec, on **March 12, 2009**.

REASONS FOR JUDGMENT

APPEARANCES:

**FRANÇOIS POULIN
KATHY KUPRACZ**
Counsel for the appellants.

MARTINE BERGERON
Counsel for the respondent.

Registrar/technician: Claude Lefebvre

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GST-5268

per: **JEAN LAROSE**

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2 START OF REASONS FOR JUDGMENT: 3:25 p.m.

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The appeals pertain to the assessments issued against the appellants as directors of J.B. Lefebvre inc. (JBL) for failing to make GST payments pursuant to the *Excise Tax Act* (ETA) in the amount of \$39,323.49, or \$45,284.40 once penalty and interest are added, for the period from January 1, 2004, to January 31, 2004. The assessments were issued under section 323 of the ETA.

The appellants are relying on the due diligence defence in subsection 323(3) of the ETA to escape their joint obligation together with the corporation to pay the amount due to the Minister of Revenue of Quebec (the Minister).

To succeed, the appellants must show that they had exercised the degree of care, diligence and skill required to prevent JBL's failure to remit the net tax amount due to the Minister.

The net tax in the amount of \$39,323.49 for the period from January 1, 2004, to January 31, 2004, had to be paid by JBL by March 1, 2004, at the latest.

1 Ève Richard, President of JBL's Board
2 of Directors, explained that the corporation had existed
3 since 1912. It was founded by her grandfather. It
4 operates a retail business selling shoes.

5 The company grew over the years. The
6 founder's daughter, Iseult Richard, took it over in 1959.
7 Ève Richard, Iseult's daughter, joined the company in
8 1981 and became president in 1994, when her mother
9 retired from its day-to-day management. Ève Richard has a
10 master's degree in business administration (MBA) and is
11 primarily responsible for managing the business's
12 finances.

13 Pierre Morin, another director of the
14 corporation, joined in 1986 and was in charge of
15 negotiating leases for all stores.

16 François Richard, Iseult's son and
17 Ève's brother, is a lawyer by training and joined the
18 company in 1991. He was responsible for purchasing and
19 inventory management.

20 Michel Richard, also Iseult's son and
21 Ève's brother and also a lawyer, was another of the
22 company's directors. He works for the Laurentian Bank,
23 and although informed about the company's finances, he
24 did not work for the company per se.

1 It is apparent from Ève, François and
2 Michel Richard's testimony that the corporation peaked in
3 2000 with annual sales of around \$30 million.

4 Business slowed down starting in
5 September 2001. The year ending on January 31, 2002,
6 showed a net loss of \$150,000. That loss became \$455,000
7 at January 31, 2003. Ève Richard explained that the
8 development costs had increased and sales had dropped.

9 In fall 2002, watching its financial
10 situation deteriorate, the company called on Saine
11 Marketing to develop a strategic plan and a remarketing
12 strategy. Saine Marketing advised it to lower its
13 merchandise sale prices, to increase employee salaries in
14 order to recruit more specialized staff, to increase
15 advertising costs and to speed up inventory turnover in
16 order to be more competitive. That plan did not work.

17 Sales dropped, and non-recurring costs
18 such as consulting fees, severance pay and shutdown costs
19 upon closures of some of the stores resulted in the drop
20 of the gross profit margin.

21 The Board of Directors met once a
22 year. The members of the Board of Directors also sat on a
23 management committee, which met at least four times a
24 year.

25 The company, which took pride in
26 always paying its suppliers, remitting its deductions at

1 source and taxes to the government as well as making its
2 lease payments, had more financial difficulties in the
3 fall of 2003. Despite everything, it still paid its
4 taxes.

5 At January 31, 2004, seeing the
6 balance sheet for 2003 reach an all-time low with a net
7 loss of around \$1.6 million before tax, the members of
8 the Board of Directors and the management committee held
9 a special meeting on Saturday, February 14, 2004, in
10 order to review the situation.

11 At that time, the decision was made
12 with the help of financial advisors, accountants and
13 external auditors to apply the *Companies' Creditors*
14 *Arrangement Act* (CCAA) to the company. From what I
15 understand, it was planned to have the application heard
16 in court as quickly as possible.

17 Ève Richard stated that, during that
18 meeting, the representatives from Richter, the auditors,
19 experts in retail and insolvency, had told her that, from
20 that time on, ordinary creditors, including the
21 government for taxes, should not be paid because they
22 were filing an application under the CCAA.

23 François Richard said that the GST was
24 discussed at the meeting of February 14. He had asked
25 then about the status of those payments. He was told
26 that, up to that day, everything was in order. As to

1 future payments, he understood that that all payments to
2 suppliers and to the government were subject to the CCAA.
3 He was particularly conscious of his responsibility as
4 the company's tax liability director.

5 Michel Richard also said that he was
6 present at the meeting and that he had understood that
7 the company would file an application under the CCAA.

8 Everyone trusted Richter, which
9 presided over the meeting of February 14, 2004.

10 Michel Richard knew Raymond Massy from
11 Richter through his work at the Laurentian Bank and
12 trusted him completely.

13 Counsel for the respondent called as
14 witness François Guillaume Couillard, an objections
15 officer at the Ministère du Revenu du Québec. He said
16 that he had not been informed of the meeting of
17 February 14, 2004, at the objection stage. He said that
18 no one had told him that Richter had advised the
19 appellants not to pay any ordinary creditors, including
20 the government for taxes, before the application under
21 the CCAA was filed in court.

22 He received a letter from counsel for
23 the appellants. The letter is dated February 22, 2005,
24 and was filed as Exhibit I-2. It states at paragraphs 12
25 and 13 that, at the start of 2004, the appellants
26 consulted professionals specializing in insolvency to

1 request that they prepare a creditors arrangement
2 proposal pursuant to the CCAA.

3 He added at paragraph 14 that those
4 consultations took place in January and February 2004 and
5 that it was planned that the corporation would be placed
6 under the protection of the CCAA in February 2004.

7 According to the letter, there were
8 delays on the part of the professional services in
9 preparing the necessary documentation, which resulted in
10 the record being filed in court only on March 4, 2004,
11 and the court order being issued on March 5, 2004.

12 In the letter, he also stated at
13 paragraph 15 that, given the deficiencies in working
14 capital, the company was unable to pay the tax by
15 March 1, 2004, but added the following in parentheses:

16 [TRANSLATION]

17 In reality, were it not for the
18 delays caused by the
19 professionals, J.B. Lefebvre
20 limitée would already have been
21 under the protection of the
22 *Companies' Creditors Arrangement*
23 *Act* at that time.

24 In my view, the letter confirms the
25 appellants' testimony that they had been advised by
26 Richter to not pay ordinary creditors including the

1 government for taxes after the meeting of
2 February 14, 2004.

3 In fact, I believe that the letter
4 indicates that Richter had the appellants believe that
5 the application would be made in February 2004. The GST
6 being due on March 1, 2004, the appellants were told that
7 they no longer had the right to remit it.

8 Although that advice was probably
9 given from the perspective that the application would be
10 filed in February, the appellants cannot now be blamed
11 for believing that they should not make any payments to
12 the government following the meeting of
13 February 14, 2004.

14 The company had never failed to remit
15 its taxes; only the tax for January 2004 is at issue
16 because it was the only tax due by March 1, 2004.

17 The appellants' version that they had
18 understood Richter's statements to mean that they should
19 not make any payments following the meeting seems even
20 more plausible to me since François Richard had mentioned
21 that he was very aware of his responsibility as the
22 company's tax liability director. If he had understood
23 that the company was not protected from remitting taxes
24 for January 2004, he would have probably made sure that
25 that debt was paid as he had done in the past.

1 However, counsel for the respondent
2 mentioned in her argument that the company had made rent
3 payments and payments to the bank, but did not pay its
4 taxes. I did not see that in the evidence. I understood
5 that the company had paid the salaries in January and
6 that, after the meeting of February 14, it had been told
7 not to pay any ordinary creditors. The evidence did not
8 deal with who was paid after February 14, 2004.

9 In addition, the fact that no one from
10 Richter testified does not undermine the appellants'
11 credibility, in my opinion. What is important is to
12 verify their understanding of the situation and what they
13 had done to prevent the failure.

14 While all the appellants are
15 professionals, none of them had expertise in insolvency.
16 They cannot be blamed for trusting experts; the standard
17 is reasonableness and not perfection. Based on their
18 testimony, they had understood that they should be very
19 careful not to favour one creditor over another under
20 threat of personal liability. Following the meeting, Ève
21 Richard took the time to return to the office to ensure
22 that the advice she had just received was followed,
23 including the advice not to remit the tax. She also
24 contacted a law firm, which had not advised her
25 otherwise.

1 In my view, the appellants have shown,
2 on the balance of probabilities, that they had exercised
3 the degree of care, diligence and skill required to
4 prevent JBL's failure to remit the tax for January 2004,
5 and that it had exercised the care required in the
6 circumstances.

7 The appeals are allowed with costs.

8 END OF REASONS FOR JUDGMENT

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12 Translation certified true

13 on this 30th day of September 2009

14 Margarita Gorbounova, Translator

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REASONS
FOR JUDGMENT