Docket: 2003-3159(GST)G

BETWEEN:

JEAN-ROBERT LACROIX,
representing CANADEVIM LTÉE
under subsection 38(1) of the
Bankruptcy and Insolvency Act,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

Appeal heard on January 12 and 13, 2010, at Ottawa, Ontario.

Before: The Honourable Justice Lucie Lamarre

Appearances:

Counsel for the Appellant:	Chantal Donaldson
Counsel for the Respondent:	Benoît Denis

JUDGMENT

The appeal from the assessment made by the Minister of Revenue of Quebec ("the Minister") under the *Excise Tax Act* (ETA), bearing the number H2002060 and dated August 23, 2002, in respect of the period from May 1, 1998, to October 31, 2001, is allowed, and the assessment is referred back to the Minister for reconsideration and reassessment on the basis that Canadevim Ltée was not required to collect GST of $73,027.60 with respect to the amount of $1.2 million shown in the notice of legal hypothec that Canadevim registered in July 1998. In addition, the penalty and interest assessed under section 280 of the ETA are cancelled.

With respect to the $16,622.52 in input tax credits disallowed by the Minister, the assessment shall remain unchanged.

The Appellant is entitled to costs under Tariff B of the *Tax Court of Canada Rules (General Procedure)* (Rules), except the costs related to the Respondent's successful pre-trial motion to bar Mr. Roberge from testifying as an expert witness in this appeal (see order of January 12, 2010). The Respondent is entitled to costs on that motion under Tariff B of the Rules.

Signed at Ottawa, Canada, this 18th day of March 2010.

"Lucie Lamarre"

Lamarre J.

Translation certified true
on this 31st day of May 2010.

Erich Klein, Revisor

Citation: 2010 TCC 160
Date: 20100318
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JEAN-ROBERT LACROIX,
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REASONS FOR JUDGMENT

Lamarre J.

[1] Canadevim Ltée ("Canadevim") has appealed an assessment made by the Minister of Revenue of Quebec ("the Minister"). The assessment bears the number H2002060, is dated August 23, 2002, and pertains to the period from May 1, 1998 to October 31, 2001. The amount of the assessment is $92,023.16, plus interest and penalties, for a total of $135,570.69. It appears that Canadevim went bankrupt on January 24, 2003, and that Jean-Robert Lacroix, one of the directors, was granted authorization to continue the appeal before this Court (see the judgment of Justice Martin Bédard of the Quebec Superior Court, Exhibit A-10).

[2] At subparagraphs 26(i), (j), (k) and (l) of her Reply to the Notice of Appeal, the Respondent states that the assessment is based on the amount of a hypothecary claim entered by Canadevim on a notice of legal hypothec that Canadevim registered on July 10, 1998, with respect to $1.2 million worth of work performed by it to build a golf course on land that was then owned by Harry Adams, Harry Adams and Debra Adams in their capacity as trustees of the Shirley Goodwin Trust (hereinafter "the Adams family"), Yoland La Casse and Yoland La Casse in Trust, doing business

under the name of Projet Les Vieux Moulins, in Aylmer, Quebec (see the notice of legal hypothec, Exhibit A-4).

[3] According to the Minister's calculation, if the amount of the hypothecary claim was $1.2 million, Canadevim should have collected $73,027.60 in goods and services tax (GST). In addition, the Respondent disallowed $16,662.52 in input tax credits (ITCs) claimed by Canadevim. These are the two amounts in issue before me.

Facts

[4] The only person who testified for the Appellant was Yoland Lacasse. Jean-Robert Lacroix was not present. Harry Adams died on July 28, 2000. I understand from Mr. Lacasse's testimony that Mr. Lacasse was, during the period in issue, the person primarily responsible for financing two-thirds of the golf course project, while Harry Adams was primarily responsible for financing the other third. Mr. Lacroix, through Canadevim, was the golf course construction contractor.

[5] In 1989, Yoland Lacasse bought a 200-acre parcel of land in trust for three companies, one of which was Canadevim, in which he held shares. Mr. Lacasse personally borrowed $300,000 from the bank to purchase the land. Another parcel, of 100 acres, belonged to Mr. Adams. In October 1996, the town of Aylmer approved a residential and commercial development project that included the building of a golf course on the parcels of land belonging to Yoland Lacasse in Trust and to Mr. Adams.

[6] According to Mr. Lacasse, there was an initial oral agreement that a company would be formed that would eventually hold and operate the golf course. Under that agreement, Mr. Adams would hold 33.3% of the shares and Yoland Lacasse in Trust would hold the other 66.6%. The plan was to sell the parcels of land to the new company for a nominal amount in exchange for shares of that company. That company was never actually formed, however.

[7] In August 1996, architectural plans (Exhibit A-2) were finalized for the golf course. In the winter of 1996, Yoland Lacasse in Trust gave Canadevim the mandate to start building the course. Tree clearing began right away. In the spring of 1997, Canadevim bought the heavy equipment and began subcontracting. Work on the cleaning up and irrigation of the land commenced. In the fall of 1997, the greens and tees were seeded and the fairways were prepared.

[8] According to Mr. Lacasse, Harry Adams agreed to Canadevim's doing the work. Mr. Lacasse said that Mr. Adams paid his share of the architectural fees and urban planning costs, and that he was on the site once or twice a week. However, in the fall of 1997, Mr. Adams learned that he had an untreatable form of cancer, prompting him to want to withdraw from the project and sell his land. No major work was done on the golf course after November 1997. In the spring of 1998, the grass was cut to preserve the work that had already been done.

[9] On April 17, 1998, Harry Adams made a gift of his land, including part of the golf course, to Debra Adams and Harry Adams as trustees of Shirley Goodwin, Harry Adams' spouse (see Exhibit A-3). Mr. Lacasse now realized that Mr. Adams had completely lost interest in the project. Fearing that the land would be resold by the Adams family, thereby jeopardizing the entire investment that he had made (both personally and through Canadevim), Mr. Lacasse had the idea of registering a notice of legal hypothec on the golf course. That notice was filed on July 10, 1998 (Exhibit A-4). Mr. Lacasse had a discussion with Mr. Lacroix and summarily estimated that the cost of the work done to that point was $1.2 million. According to his testimony, the work was roughly 55% complete on that date. The sand traps and certain lakes in the plan (Exhibit A-2) were not done; the irrigation system was about 75-80% complete, and the fairways were still covered with rocks. However, as a former notary, Mr. Lacasse said that registering a notice of legal hypothec would enable Canadevim to protect its claim against a future purchaser of the Adams family land. Canadevim subsequently commenced proceedings against the Adams family in order to compel it to come to an agreement aimed at obtaining the financing necessary to finish the work.

[10] During this period — that is, in the fall of 1998 — Mr. Lacasse, Mr. Lacroix and two other shareholders formed Le Club de Golf Les Vieux Moulins Inc. (hereinafter "CGLVM") to obtain financing so that the golf course could be finished and the project could become profitable. Despite everything, the golf club opened in June 1999 in order to begin earning income. The irrigation system had been completed in part, and the minimum work necessary in order to open had been done. Thus, the sand traps had been filled, the necessary flags and signage had been installed, and the equipment to maintain the course was purchased, as were clubs and balls (for roughly $200,000 in equipment purchases). There was no clubhouse, the work on the lakes was extended until 2001, and the practice area was also completed in 2001. According to Mr. Lacasse, the basins still need to be done in order to have complete irrigation. Four lakes remain to be done at a cost of roughly $750,000.

[11] In January 2001, the Adams family settled out of court with Canadevim (Exhibit A-5). Under the terms of the settlement, CGLVM agreed to purchase the Adams family land for $245,000, and Canadevim gave up any monetary claims it may have had against Mr. Adams. The agreement was homologated by judgment of the Quebec Superior Court dated May 31, 2001 (Exhibit A-6). It should be noted that, in its judgment, the Court states that Mr. Adams denied the existence of a construction contract with Canadevim regarding the construction of a golf course on his land. The Court nevertheless accepted the agreement between Mr. Adams' estate and Canadevim.

[12] As for Mr. Lacasse, he continued to borrow funds for the project. He was forced to declare bankruptcy in January 2002.

[13] Lot 2016-1, the 200-acre lot acquired by Yoland Lacasse in Trust in order to build the golf course, was surrendered to Neil and Edgar Elliott by the trustee in bankruptcy on February 7, 2003. According to the deed of taking in payment and voluntary surrender (Exhibit A-1), the actual value of the consideration for the land was $1,162,548.57 on that date. According to Mr. Lacasse, Neil and Edgar Elliott were hypothecary creditors, and they paid the trustee $400,000 in the transaction. They were also partners in CGLVM, which took back control of the golf course project.

[14] Mr. Lacasse said that Canadevim never issued an invoice for the work that was done because they were waiting for enough progress to be made so that the land could be transferred to a company, which would then obtain financing to pay Canadevim. Due to Mr. Adams' illness and death, this plan was never carried out. Canadevim was never paid.

[15] Mr. Lacasse said that, following his bankruptcy in January 2002, the trustee in bankruptcy seized all the documents, including the purchase invoices paid by Canadevim with respect to which ITCs disallowed by the Minister are now being claimed. According to the bankruptcy record book (Exhibit A-7), that seizure took place on August 12, 2002, and the deadline that the Minister set for providing the invoices was August 22, 2002. Four of the 26 boxes that were seized were allegedly never returned.

[16] There was also evidence that the trustee in Yoland Lacasse's bankruptcy contested the validity of the legal hypothec on April 24, 2002 (Exhibit A-9) on the basis that Canadevim [TRANSLATION] "did not have the appropriate contractor's licence required by law" and [TRANSLATION] "never reported the income generated by the business or made any consumption tax remittances to the tax authorities concerned with its operations." No judgment has ever been rendered in that regard.

[17] The Minister is relying on the very same legal hypothec to assess Canadevim. In the Quebec Superior Court judgment dated December 7, 2006, authorizing Mr. Lacroix to contest the assessment on behalf of Canadevim (Exhibit A-10), it is noted that neither the trustee nor Canadevim ever collected the $1.2 million secured by the legal hypothec.

The Respondent's argument

[18] The Minister's assessment is based entirely on the notice of legal hypothec registered by Canadevim in July 1998. The Respondent argues that the registration of such a hypothec means that Canadevim was the creditor to which the $1.2 million was owed on the date of the notice of legal hypothec. In the Respondent's submission, the fact that Canadevim never issued an invoice for the amount of its claim is immaterial because the work was done in consideration of the amount stated in the notice. The Respondent argues that the consideration was due on the date the hypothec was registered and that the tax should accordingly have been collected from the recipients at that time.

[19] The Respondent is of the view that the recipients under the *Excise Tax Act* (ETA) were Yvon Lacasse in Trust and Mr. Adams, by virtue of a tacit agreement. The Respondent also relies on article 320 of the *Civil Code of Québec* (C.C.Q.) which makes a promoter who enters into a contract for a company that has not yet been created personally liable with respect to the obligations set out in the contract.

The Appellant's argument

[20] The Appellant submits that the notice of legal hypothec was not registered to mark the end of the work, but simply to protect the estimated increased value of the land, as a result of the work that had been done, at the time that Mr. Adams' portion of the land was transferred to a trust for the benefit of his spouse.

[21] The tax, the Appellant contends, only had to be collected at the time that the consideration for the work that had been done became due. That time corresponds to the invoicing date, or the date that the invoice should have been issued, that is to say, the time at which the work was substantially completed. The Appellant argues that the evidence shows that the work was not substantially completed at the time that the notice of legal hypothec was registered. The Appellant submits that article 2727 C.C.Q., which the Respondent invokes in her Reply to the Notice of Appeal as justifying the date of the completion of the work, refers to the obligation to register a legal hypothec no more than 30 days after the completion of the work in order for it to remain valid, because a legal hypothec for construction work exists without having to be published. Therefore, the Appellant argues, the date the notice of legal hypothec was registered cannot be used to determine the time at which the work was substantially completed and, accordingly, the time that the tax became payable.

[22] There is therefore no relationship between the date of the registration of the notice of legal hypothec and the state of the work's progress.

[23] As for the amount of $1.2 million in the notice of legal hypothec, it does not necessarily reflect the consideration for the supply at the time of registration. This legal hypothec was intended to protect the increase in the property's value, but the amount shown did not have to be proven at the time of its registration.

[24] Consequently, the Minister could not rely on that amount to determine the consideration on which he claims the tax should have been collected. Moreover, the Appellant submits that the Minister consented to the trustee's challenge of the legal hypothec. It is therefore quite inappropriate for the Minister to use it now as the basis of his assessment.

[25] Lastly, there is, in the Appellant’s opinion, no agreement providing a basis for saying that Yoland Lacasse in Trust and Mr. Adams were the recipients of the work done and that the tax should have been collected from them. The ultimate recipient was a company which, by reason of Mr. Adams' illness and death, was never formed.

The statutory provisions

The applicable version of the *Excise Tax Act* (ETA)

123. Definitions

"recipient" of a supply of property or a service means

(*a*) where consideration for the supply is payable under an agreement for the supply, the person who is liable under the agreement to pay that consideration,

(*b*) where paragraph (*a*) does not apply and consideration is payable for the supply, the person who is liable to pay that consideration, and

(*c*) where no consideration is payable for the supply

(i) in the case of a supply of property by way of sale, the person to whom the property is delivered or made available,

(ii) in the case of a supply of property otherwise than by way of sale, the person to whom possession or use of the property is given or made available, and

(iii) in the case of a supply of a service, the person to whom the service is rendered

and any reference to a person to whom a supply is made shall be read as a reference to the recipient of the supply;

"supply" means, subject to sections 133 and 134, the provision of property or a service in any manner, including sale, transfer, barter, exchange, licence, rental, lease, gift or disposition;

165. (1) **Imposition of goods and services tax —** Subject to this Part, every recipient of a taxable supply made in Canada shall pay to Her Majesty in right of Canada tax in respect of the supply calculated at the rate of 7% on the value of the consideration for the supply.

152. (1) **When consideration due —** For the purposes of this Part, the consideration, or a part thereof, for a taxable supply shall be deemed to become due on the
earliest of

(*a*) the earlier of the day the supplier first issues an invoice in respect of the supply for that consideration or part and the date of that invoice,

(*b*) the day the supplier would have, but for an undue delay, issued an invoice in respect of the supply for that consideration or part, and

(*c*) the day the recipient is required to pay that consideration or part to the supplier pursuant to an agreement in writing.

168. (1) **General rule —** Tax under this Division in respect of a taxable supply is payable by the recipient on the earlier of the day the consideration for the supply is paid and the day the consideration for the supply becomes due.

. . .

(3) Supply completed — Notwithstanding subsections (1) and (2), where all or any part of the consideration for a taxable supply has not been paid or become due on or before the last day of the calendar month immediately following the first calendar month in which

(*a*) where the supply is of tangible personal property by way of sale, other than a supply described in paragraph (*b*) or (*c*), the ownership or possession of the property is transferred to the recipient,

(*b*) where the supply is of tangible personal property by way of sale under which the supplier delivers the property to the recipient on approval, consignment, sale-or-return basis or other similar terms, the recipient acquires ownership of the property or makes a supply of it to any person, other than the supplier, or

(*c*) where the supply is under an agreement in writing for the construction, renovation or alteration of, or repair to

(i) any real property, or

(ii) any ship or other marine vessel, and it may reasonably be expected that the construction, renovation, alteration or repair will require more than three months to complete,

the construction, renovation, alteration or repair is substantially completed,

tax under this Division in respect of the supply, calculated on the value of that consideration or part, as the case may be, is payable on that day.

(6) **Value not ascertainable —** Where under subsection (3) or (5) tax is payable on a day and the value of the consideration, or any part thereof, for the taxable supply is not ascertainable on that day

(*a*) tax calculated on the value of the consideration or part, as the case may be, that is ascertainable on that day is payable on that day; and

(*b*) tax calculated on the value of the consideration or part, as the case may be, that is not ascertainable on that day is payable on the day the value becomes ascertainable.

Civil Code of Québec (C.C.Q.)

320. A person who acts for a legal person before it is constituted is bound by the obligations so contracted, unless the contract stipulates otherwise and includes a statement to the effect that the legal person might not be constituted or might not assume the obligations subscribed in the contract.

2725. The legal hypothecs of the State, including those for sums due under fiscal laws, and the hypothecs of legal persons established in the public interest may be charged on movable or immovable property.

Such hypothecs take effect only from their registration in the proper register. Application for registration is made by filing a notice indicating the legislation granting the hypothec, the property of the debtor on which the creditor intends to exercise it, and stating the cause and the amount of the claim. The notice shall be served on the debtor.

. . .

2726. A legal hypothec in favour of the persons having taken part in the construction or renovation of an immovable may not charge any other immovable. It exists only in favour of the architect, engineer, supplier of materials, workman and contractor or sub-contractor in proportion to the work requested by the owner of the immovable or to the materials or services supplied or prepared by them for the work. It is not necessary to publish a legal hypothec for it to exist.

2727. A legal hypothec in favour of persons having taken part in the construction or renovation of an immovable subsists, even if it has not been published, for thirty days after the work has been completed.

It subsists if, before the thirty-day period expires, a notice describing the charged immovable and indicating the amount of the claim is registered. The notice shall be served on the owner of the immovable.

It is extinguished six months after the work is completed, unless, to preserve the hypothec, the creditor publishes an action against the owner of the immovable or registers a prior notice of the exercise of a hypothecary right.

2728. The hypothec secures the increase in value added to the immovable by the work, materials or services supplied or prepared for the work. However, where those in favour of whom it exists did not themselves enter into a contract with the owner, the hypothec is limited to the work, materials or services supplied after written

> declaration of the contract to the owner. A workman is not bound to declare his contract.
>
> **2735.** Hypothecary creditors may institute legal proceedings to have their hypothec recognized and interrupt prescription, even though their claims are neither liquid nor exigible.

Analysis

I The $73,027.60 in GST alleged to be collectible

[26] Under subsection 168(1) of the ETA, the GST is payable by the recipient when the consideration for the supply is paid or when the consideration for the supply becomes due, whichever is earlier.

[27] Here, the fact that Canadevim was never paid for the work done is not in dispute.

[28] The question, therefore, is when the consideration for the work became due.

[29] Subsection 152(1) of the ETA provides that the consideration is deemed to become due either (a) when the invoice is issued, or (b) when the invoice should have been issued but for an undue delay, or (c) the day the recipient is required to pay that consideration pursuant to an agreement in writing.

[30] In this case, that no invoice was issued and that there was no written agreement between Canadevim (the supplier of services) and anyone else is not in dispute.

[31] The question, then, is whether Canadevim should have issued an invoice but for an undue delay.

[32] The explanations given by Mr. Lacasse reveal that there was a wait to obtain the financing needed to create a company that would acquire the land and pay for the work. In addition, when Mr. Adams, one of the partners in the project wanted to drop out for health reasons, a notice of legal hypothec was registered in order to protect the investment that had already been made.

[33] What is meant by an undue delay? As we can see, paragraph 168(3)(*c*) of the ETA provides that, where the supply is made under an agreement in writing for the

construction of real property, the consideration becomes due when the work is substantially completed.

[34] The work in this case was the construction of a golf course, which began in the autumn of 1996 and had still not been completed at the time of the opening of the course in the spring of 1999, owing to the special and clearly unanticipated circumstances created by the health of Mr. Adams, one of the partners. In fact, counsel for the Respondent acknowledged in his oral argument that when the notice of legal hypothec was filed in July 1998, the work was not completed, contrary to what is alleged in subparagraph 26(h) of the Reply to the Notice of Appeal.

[35] According to Mr. Lacasse, the work was perhaps 55% completed. Even though there was no written agreement, it seems to me that the completion test in paragraph 168(3)(*c*) of the ETA is a reasonable one for determining whether consideration was due, and can apply just as well whether there is a written agreement or not.

[36] Indeed, since Parliament has seen fit to specify that, where there is a written agreement, the consideration becomes due only when the work is substantially completed, it seems to me that this is a good reference point for determining when the consideration becomes due in instances where the supplier has issued no invoice for the consideration.

[37] Paragraph 152(1)(*b*) of the ETA provides that the consideration is deemed to become due on the day the supplier would have issued an invoice, but for an undue delay.

[38] Since the work was far from completed at the time that the notice of legal hypothec was registered (and this is no longer disputed by the Respondent), I do not believe that there had been at that time any undue delay in issuing an invoice.

[39] In addition, I think the Appellant may be correct in saying that the registration of a notice of legal hypothec does not necessarily mean that the work was completed within the meaning of article 2727 C.C.Q. either. The scholarly article submitted by the Appellant states that a building contractor can register a legal hypothec before the work has been completed if the contractor sees that there is a risk of not being paid (see P. Ouellet, "La fin des travaux en matière d'hypothèque légale de la construction", online: Association patronale des entreprises en construction du Québec (http://www.apecq.org/APECQ/Site/3cpp/cjuridique/cj2002080910.doc).

[40] Moreover, the question of whether work has been completed is a question of fact. During the time that the work is being performed, the construction is not supposed to be ready for its intended purpose. Thus, work is completed after the complete performance of all the work specified in the contract. If the contractor suspends the work for financial reasons, the work is generally not considered to have been completed (see J.A. Savard and B.P. Quinn, "L'hypothèque légale" in O.F. Kott and C. Roy, eds., *La construction au Québec : perspectives juridiques* (Montréal: Wilson & Lafleur, 1998), pages 599-635).

[41] Here, the work contemplated by the plans adduced as Exhibit A-2 was far from being completed in July 1998 when the notice of legal hypothec was filed.

[42] Moreover, the notice of legal hypothec does not constitute proof that the claim set out therein was payable at the time of filing. A notice of legal hypothec is merely a measure to preserve a right (see *Les Industries Falmec inc. c. Société de Cogénération de St-Félicien, société en commandite / St-Félicien Cogeneration Limited Partnership*, REJB 2003-40996).

[43] The evidence discloses that the notice of legal hypothec was registered to protect Canadevim's claim, but that procedure does not define the exact amount of the claim. At the registration stage, the notice serves merely to secure the claim that gave rise to added value, not to prove the exact amount of that added value (see *Beylerian c. Constructions et rénovations Willico inc.*, REJB 1997-00639 (Que. C.A)).

[44] Thus, the Respondent is wrong in saying, at paragraph 35 of the Reply to the Notice of Appeal, that Canadevim should have issued invoices in the months preceding the filing of the notice of legal hypothec, in order to substantiate its claim. Consequently, it cannot be said that the consideration was due on that date as contemplated by paragraph 152(4)(*b*) of the ETA.

[45] Lastly, Canadevim was never paid. In light of all of the foregoing, I find that the Minister was not justified in assessing Canadevim for the period in question on the basis of the notice of legal hypothec, which the Minister used to determine both when the tax should have been collected and the amount of the tax.

[46] For these reasons, I would vacate the assessment with regard to the $73,027.60 in tax, the penalty assessed under section 280 of the ETA and the related interest.

II The ITC claim of $16,662.52

[47] The Appellant submits that Canadevim claimed ITCs on a total of $355,956.79 worth of purchases in its return dated June 30, 1998 (Exhibit A-12, first page) but failed to claim ITCs on a $216,129.93 purchase made on September 30, 1997 (Exhibit A-12, third page).

[48] During the audit, Canadevim claimed additional ITCs as a result of that omission. The Minister allowed only $2,268.19 of those ITCs, and disallowed $15,154.70 (Exhibit A-12, last page).

[49] The Respondent submits that the ITCs on the $216,129.93 purchase total $13,276.38 (Exhibit A-12, second and third pages), and according to counsel for the Respondent, they had already been claimed on April 30, 1998, and allowed by the Minister (Exhibit A-13).

[50] The Appellant is asking that I permit him to resubmit everything to the Minister so that he can claim all the ITCs that Canadevim might not have claimed in the past.

[51] When asked whether he was aware of the ITCs claimed, in particular with respect to the $216,129.93 purchase referred to above, Mr. Lacasse was unable to provide an answer.

[52] Jacques Roberge, a tax specialist who testified for the Appellant with regard to this question, believes that the ITCs on that amount were never allowed because Canadevim did not claim them at the time. He said that Mr. Lacroix thought he could claim ITCs only on purchases that had been paid for, when, in reality, he would have been entitled to claim them from the moment he received the invoice. Mr. Lacroix did not testify.

[53] In my opinion, it is not clear from the evidence whether the ITCs that the Appellant is claiming before me have already been allowed or not. I am therefore unable to find that the Appellant is entitled to them.

[54] In any event, regardless of what was claimed or what was not, subsection 225(4) of the ETA enables a person to claim ITCs within four years. Here, it appears to be undisputed that this time limit has expired.

[55] Counsel for the Appellant relies on subsection 296(2) of the ETA in arguing that, before determining the amount of net tax reassessed, the Minister must allow

unclaimed ITCs where a person is reassessed for the period for which those ITCs could have been allowed. Subsection 296(2) of the ETA reads as follows:

> 296. (2) Where, in assessing the net tax of a person for a particular reporting period of the person, the Minister determines that
>
> > (*a*) an amount (in this subsection referred to as the "allowable credit") would have been allowed as an input tax credit for the particular reporting period or as a deduction in determining the net tax for the particular reporting period if it had been claimed in a return under Division V for the particular reporting period filed on the day that is the day on or before which the return for the particular reporting period was required to be filed and the requirements, if any, of subsection 169(4) or 234(1) respecting documentation that apply in respect of the allowable credit had been met,
> >
> > (*b*) the allowable credit was not claimed by the person in a return filed before the day notice of the assessment is sent to the person or was so claimed but was disallowed by the Minister, and
> >
> > (*c*) the allowable credit would be allowed, as an input tax credit or deduction in determining the net tax for a reporting period of the person, if it were claimed in a return under Division V filed on the day notice of the assessment is sent to the person or would be disallowed if it were claimed in that return only because the period for claiming the allowable credit expired before that day,
>
> the Minister shall, unless otherwise requested by the person, take the allowable credit into account in assessing the net tax for the particular reporting period as if the person had claimed the allowable credit in a return filed for the period.

[56] In *Byrnes v. The Queen*, 2008 TCC 57, Justice Little stated:

> [19] As a result of the current wording in paragraph 296(2)(c), it is my opinion that the Appellant has a right to claim the ITC where a credit is available to offset the tax. The deadline contained in subsection 225(4) of the *Act* does not apply in this situation.

[57] In this case, I have just found that the assessment must be vacated as regards the tax. In *obiter dictum,* I would say that subsection 296(2) allows unclaimed ITCs to be applied beyond the limitation period to reduce the net tax assessed.

[58] In my opinion, once the reassessed amount is cancelled, subsection 296(2) does not apply. In any event, in order to rely on that provision, the Appellant had to

prove, under paragraph 296(2)(*b*) of the ETA, that the credit in question was never claimed. As stated above, the Appellant has not provided such proof.

[59] Consequently, the applicable deadline is the deadline in subsection 225(4).

[60] I am therefore unable to analyze this issue or to refer everything back to the Minister so that he can redetermine whether Canadevim can claim ITCs that it does not believe it has already claimed. This would constitute a new audit, and my jurisdiction is limited to determining whether the assessment under appeal is well-founded or not.

[61] For these reasons, I would allow the appeal and refer the assessment back to the Minister for reassessment on the basis that Canadevim was not required to collect of GST of $73,027.60 as a consequence of the legal hypothec registered by Canadevim in July 1998, and the related penalty and interest must be cancelled.

[62] With respect to the ITCs of $16,662.52 disallowed by the Minister, the assessment shall remain unchanged.

[63] As for costs, the Appellant is entitled to costs under Tariff B of the *Tax Court of Canada Rules (General Procedure)* ("the Rules"), except the costs related to the Respondent's successful pre-trial motion to bar Mr. Roberge from testifying as an expert witness in this appeal (see the order of January 12, 2010). The Respondent is entitled to costs on that motion under Tariff B of the Rules.

Signed at Ottawa, Canada, this 18th day of March 2010.

"Lucie Lamarre"

Lamarre J.

Translation certified true
on this 31st day of May 2010.

Erich Klein, Revisor

CITATION:	2010 TCC 160
COURT FILE NO.:	2003-3159(GST)G
STYLE OF CAUSE:	JEAN-ROBERT LACROIX, representing CANADEVIM LTÉE under subsection 38(1) of the *Bankruptcy and Insolvency Act* v. HER MAJESTY THE QUEEN
PLACE OF HEARING:	Ottawa, Ontario
DATE OF HEARING:	January 12 and 13, 2010
REASONS FOR JUDGMENT BY:	The Honourable Justice Lucie Lamarre
DATE OF JUDGMENT:	March 18, 2010

APPEARANCES:

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Counsel for the Respondent:	Benoît Denis

COUNSEL OF RECORD:

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