Docket: 2010-2547(IT)G

BETWEEN:

ÉLISE BOHBOT-GAGNON,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

Appeal heard on April 4, 2013, at Montréal, Quebec.
Before: The Honourable Justice Lucie Lamarre

Appearances:

Counsel for the appellant:	Laurent Tessier
Counsel for the respondent:	Alain Gareau

JUDGMENT

The appeal from the reassessment made pursuant to section 227.1 of the *Income Tax Act* and section 83 of the *Employment Insurance Act* by the Minister of National Revenue, dated July 16, 2008, is dismissed.

The respondent is entitled to costs. At their request, the parties will make written submissions on the amount of the costs in the month following the signing of this judgment.

Signed at Ottawa, Canada, this 25th day of April 2013.

"Lucie Lamarre"

Lamarre J.

Translation certified true
On this 11th day of July 2013

François Brunet, Revisor

Citation: 2013 TCC 128
Date: 20130425
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REASONS FOR JUDGMENT

Lamarre J.

[1] The appellant is appealing from an assessment made by the Minister of National Revenue (Minister) dated July 16, 2008, whereby she was directed to pay $45,786.26 under section 227.1 of the *Income Tax Act* (ITA) and section 83 of the *Employment Insurance Act*.

[2] This amount corresponds to the unpaid source deductions that should have been remitted by Jus d'Or Inc. (Jus d'Or) to the Receiver General of Canada after being withheld from salaries paid to its employees in 2005 and 2006, including interest and penalties (Exhibit I-4).

[3] The Minister considers that the appellant was the director of Jus d'Or during the period from December 31, 2004, to July 18, 2006, and that, as such, she was jointly and severally responsible with Jus d'Or for the amount assessed since she did not show that she exercised the degree of care, diligence and skill to prevent the failure that a reasonably prudent person would have exercised in comparable circumstances.

[4] The appellant challenges this assessment, raising two arguments. First, she claims she resigned from her position as director on July 7, 2006, and that the assessment dated July 16, 2008, is therefore statute-barred under subsection 227.1(4) of the ITA. Under this provision, any action or proceedings to recover any amount payable by a director of a corporation under subsection 227.1(1) of the ITA shall be barred two years after the date the director last ceases to be a director of that corporation.

[5] In the alternative, the appellant claims she is not responsible for the failure of Jus d'Or to remit the amounts deducted from its employees' pay because she feels she acted with the degree of care, diligence and skill required under subsection 227.1(3) of the ITA.

Legislative provisions

INCOME TAX ACT

227.1 (1) Liability of directors for failure to deduct — 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.

(2) Limitations on liability — A director is not liable under subsection 227.1(1), unless

(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 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.

(3) Idem — 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.

(4) Limitation period — No action or proceedings to recover any amount payable by a director of a corporation under subsection 227.1(1) shall be commenced more than two years after the director last ceased to be a director of that corporation.

(5) Amount recoverable — Where execution referred to in paragraph 227.1(2)(*a*) has issued, the amount recoverable from a director is the amount remaining unsatisfied after execution.

(6) Preference — Where a director pays an amount in respect of a corporation's liability referred to in subsection 227.1(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 that amount not been so paid and, where a certificate that relates to that 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 hereby empowered to make.

(7) Contribution — A director who has satisfied a claim under this section is entitled to contribution from the other directors who were liable for the claim.

EMPLOYMENT INSURANCE ACT

83. (1) Liability of directors — If an employer who fails to deduct or remit an amount as and when required under subsection 82(1) is a corporation, the persons who were the directors of the corporation at the time when the failure occurred are jointly and severally, or solidarily, liable, together with the corporation, to pay Her Majesty that amount and any related interest or penalties.

(2) Application of *Income Tax Act* provisions — Subsections 227.1(2) to (7) of the *Income Tax Act* apply, with such modifications as the circumstances require, to a director or the corporation.

(3) Assessment provisions applicable to directors — The provisions of this Part respecting the assessment of an employer for an amount payable under this Act and respecting the rights and obligations of an employer so assessed apply to a director of the corporation in respect of an amount payable by the director under subsection (1) in the same manner and to the same extent as if the director were the employer mentioned in those provisions.

Facts

[6] Only the appellant testified. Jus d'Or was incorporated under the *Canada Business Corporations Act* (CBCA) on March 24, 1981 (see Registre des entreprises, Exhibit A-1, tab 1). In 1999, the appellant became the sole shareholder of Jus d'Or. From 1999 to 2004, she operated a business in the restaurant sector and held licences issued by the Régie des alcools, des courses et des jeux (video poker). In 2004, after an excessive increase in rent, she stopped operating that business and left the premises, taking care to cancel the liquor licence for the business at the place she was leaving.

[7] The appellant then started to look for employment. She first worked in a Tunisian restaurant preparing meals. Then, she was hired by the grocery store Poivre et Sel to prepare ready-made meals for takeout. It was at this second job that she met a client, a woman named Martine Clairoux, whose spouse at the time was Normand Descoteaux, a person with a criminal record. These two individuals operated many restaurants, bars and hotels on St. Catherine Street in Montréal. In the spring of 2005, Ms. Clairoux allegedly asked the appellant to come work for them as the manager of one of the restaurants, Le Club Sandwich. The appellant, who was only working a few hours per week at Poivre et Sel, accepted Ms. Clairoux's offer to, in her words, [TRANSLATION] "take on a challenge and hope for a higher salary." She took care of the banquets. A few weeks after she started at Club Sandwich, Ms. Clairoux and her spouse asked her to transfer the liquor licence she had through Jus d'Or to them. Because of his criminal record, Mr. Descoteaux could not obtain one himself.

[8] The appellant, having been made aware of this fact, first refused because she worried about legal issues if the licence, for which she was responsible, was not operated within the standards.

[9] She was also worried about legal consequences for Jus d'Or if the government remittances were not made properly. She was well aware of the procedure because she herself had operated a restaurant until 2004, and always followed the tax rules by signing the relevant cheques for the tax authorities in the presence of her accountant, Mr. Messire.

[10] Although I believe that she was not offered any compensation for operating her liquor licence, she was persuaded to let Jus d'Or act as a nominee for the purposes of operating the restaurants and bars belonging to Mr. Descoteaux (see paragraph 5 of the notice of objection, Exhibit I-2). She then allegedly took steps to reactivate the liquor licence granted to Jus d'Or. She allegedly made this decision after a meeting with Mr. Descoteaux's lawyer, Mr. Sénéchal. She did not know Mr. Sénéchal but she felt he was honest. He suggested preparing a management

contract under which a company, 9079-1526 Québec Inc., represented by a one Yves St-Arneault, agreed to manage the human resources for Jus d'Or, including the tax remittances for the employees in accordance with the applicable legislation.

[11] Apparently, the appellant showed this contract to her accountant who gave her his blessing even though she did not know that management company or its representatives. The accountant then allegedly gave the minutes book to the appellant and stopped looking after Jus d'Or. The management contract, a copy of which was submitted into evidence as Exhibit A-1 at tab 2, is not dated, and no compensation is provided for the management fees to be paid to the manager. The duration of the contract is also not indicated. The appellant stated that she was alone with Mr. Sénéchal when she signed this document and that she never met Mr. St-Arneault, who allegedly signed the contract at a later date.

[12] The appellant explained that she met with a secretary (Ms. Noiseux) every week, and she would show her the cheques prepared by the management company for the employees. She says she saw all the pay stubs on which the source deductions are shown to have been made. She, therefore, assumed that these amounts collected at the source were remitted to the government authorities, and did not ask any questions. She paid the management company by signing cheques drawn on the Jus d'Or account, which she then gave to the secretary.

[13] Moreover, a second service agreement was allegedly signed between Jus d'Or and another company, 6369910 Canada Inc., represented by Louise Mongeau. This agreement is dated September 16, 2005, and was submitted as Exhibit A-1 at tab 5. The appellant did not recall whether she was in Ms. Mongeau's presence when she signed this second agreement. It was Mr. Sénéchal who had her sign it and she did not ask for any explanations about the change to the management company. The secretary, Ms. Noiseux, simply told her that it was the same company, with a different name.

[14] Additionally, according to the cheques submitted into evidence as Exhibit I-3, the appellant also signed cheques to a third company, 9145-5287 Québec Inc. Again, she simply accepted the secretary's explanation that this was still the same management company. The appellant herself was paid $500 cash every week with no source deductions, because, as she stated, she was a self-employed person.

[15] According to the appellant's testimony, it was only at the end of December 2005 that she found out from two Canada Revenue Agency (CRA) inspectors that the amounts deducted at the source from the employees' pay had not been remitted to the

government authorities. She allegedly contacted Mr. Sénéchal at the beginning of January 2006 to let him know she wanted to sell Jus d'Or. He allegedly promised to find a buyer. At the end of February 2006, seeing that Mr. Sénéchal still had not found a buyer, she decided to contact the company Ceridian, known for its payroll management. She made Mr. Sénéchal hire Ceridian and from then on, Jus d'Or was no longer in default (according to Exhibit I-4, we see that the assessment for 2006 was made on March 10, 2006, which leads us to believe that after that date, Jus d'Or was in good standing with the tax authorities).

[16] On July 6, 2006, Mr. Sénéchal called the appellant to come sign the sales contract for Jus d'Or. She signed the contract for the sale of shares on July 7, 2006 (Exhibit A-1, tab 3). The purchaser, who Mr. Descoteaux found, was André Perreault, who, the appellant claimed, was not interested in the purchase of 100 shares for $1 each. The appellant said she did not discuss any of the clauses from the sale contract with Mr. Sénéchal. Clauses 7.1 and 7.2 of this contract provide for the appellant's resignation as director of Jus d'Or (the corporation) as follows:

> [TRANSLATION]
> 7. RESIGNATION
>
> 7.1 The seller shall resign from her position as President, Secretary and Director of the corporation on the date of this agreement;
>
> 7.2 This resignation is accepted by the corporation on the date of this agreement and shall be effective on the date of the corporation's next articles of amendment;

[17] According to her testimony, the registration of the sale at the Registre des entreprises was not a prerequisite for her resignation. The articles of amendment signed by André Perreault, the purchaser of the Jus d'Or shares, on July 18, 2006, were stamped at the Registre des entreprises on July 28, 2006, and August 23, 2006 (Exhibit A-1, tab 4). The appellant stated she had given her resignation on July 7, 2006, at the time the contract for the sale of shares was signed, and she signed the minutes book the same day. On the day of the sale, she was not given a copy of the sale contract or the resolution by the corporation Jus d'Or whereby she resigned from her position as director. According to her testimony, she collected a copy of the sales contract submitted to evidence after threatening Mr. Sénéchal that she would complain to the Barreau. She was never able to get the resolution from the minutes book. Mr. Sénéchal told her she no longer had access to this book after she sold her shares.

[18] After this sale, she received letters from the Ministère du Revenu at her home. She said she simply forwarded them to Mr. Sénéchal. Starting on July 7, 2006, she did not sign any other cheques from the Jus d'Or account.

[19] In August 2006, she received calls from the Ministère du Revenu advising her she owed money to the tax authorities. This is when she realized the sale had not been registered with the Registre des entreprises. She contacted Mr. Sénéchal many times so that he could correct this situation and, according to her testimony, the sale was finally registered that month, in August 2006. On October 25, 2006, she wrote a letter to the CRA stating indicating that she had not owned Jus d'Or since the beginning of August 2006 (Exhibit A-2).

Appellant's arguments

[20] The appellant first submits that the assessment is statute-barred. In her opinion, the contract for the sale of the Jus d'Or shares stipulates that she resigned from her position as director the same day as the sale. Seeing as Jus d'Or was incorporated under the CBCA, she cites on section 108, which provides as follows:

> ***CANADA BUSINESS CORPORATIONS ACT***
>
> **108. (1) Ceasing to hold office** — A director of a corporation ceases to hold office when the director:
>
> (*a*) dies or resigns;
> (*b*) is removed in accordance with section 109; or
> (*c*) becomes disqualified under subsection 105(1).
>
> **(2) Effective date of resignation** — A resignation of a director becomes effective at the time a written resignation is sent to the corporation, or at the time specified in the resignation, whichever is later.
>
> ---
>
> ***LOI CANADIENNE SUR LES SOCIÉTÉS PAR ACTIONS***
>
> **108. (1) Fin du mandat** — Le mandat d'un administrateur prend fin en raison :
>
> *a*) de son décès ou de sa démission;
> *b*) de sa révocation aux termes de l'article 109;
> *c*) de son inhabilité à l'exercer, aux termes du paragraphe 105(1).

> **(2) Date d'effet de la démission** — La démission d'un administrateur prend effet à la date de son envoi par écrit à la société ou, à la date postérieure qui y est indiquée.

[21] She also cites article 1425 of the *Civil Code of Québec* (CCQ) which provides that the parties' intention must be considered. This article provides as follows:

> ***CIVIL CODE OF QUÉBEC***
>
> BOOK FIVE
> **OBLIGATIONS**
> TITLE ONE
> **OBLIGATIONS IN GENERAL**
> CHAPTER II
> **CONTRACTS**
> DIVISION IV
> **INTERPRETATION OF CONTRACTS**
>
> Art. 1425. In interpreting a contract, the nature of the contract, the circumstances in which it was formed, the interpretation which has already been given to it by the parties or which it may have received, and usage, are all taken into account.

[22] The appellant insists on the fact that, by selling her shares on July 7, 2006, her clear intention was to give her resignation as administrator. Indeed, she no longer acted on behalf of Jus d'Or at all, as of that date. The appellant submits that the registration with the Registre des entreprises is not a requirement for the resignation to be valid.

[23] The appellant submits that once her shares were sold, she no longer had any power and even though the sale was registered later, she had ceased acting as the *de facto* director on the day she disposed of her shares. From that moment on, she was therefore no longer in position to exercise the degree of diligence required to prevent the failure to remit the source deductions. She cites a case of this court, *MacArthur v. Minister of National Revenue*, 1991 CarswellNat 553, at paragraph 19 ([1991] T.C.J. No. 335 (QL)).

[24] The appellant adds that it is the company and not the resigning director that is responsible for registering the change with the relevant government registry and the director cannot be penalized for failing to do so, for "postponing" the resignation (*Marcil v. Québec (Sous-ministre du Revenu*), 2010 CarswellQue 13723, 2010

QCCQ 11545 (Court of Québec), at paragraph 47; *Netupsky v. R.*, 2003 CarswellNat 5940, [2003] T.C.J. No. 30 (QL), (TCC), at paragraph 24).

[25] As for her second argument, the appellant submits that the evidence shows she exercised the degree of diligence required to avoid the directors' responsibility. She submits that a negative inference cannot be drawn because Mr. Sénéchal did not testify; at any rate, it seems he was not acting for her benefit but rather for the benefit of Mr. Descoteaux (she refers to a case of this Court, *Ehrhardt v. R.*, 2008 CarswellNat 3253, 2008 TCC 112, at paragraph 39).

Respondent's arguments

[26] The respondent cites on section 108 of the CBCA and clauses 7.1 and 7.2 of the sale contract in support of the argument that the appellant's resignation did not take effect on July 7, 2006, the day of the sale, but later, when the articles of amendment were produced, or signed by the purchaser, which was July 18, 2006, at the latest. The respondent cites on article 1428 of the CCQ, which provides that, when interpreting a contract, a clause "is given a meaning that gives it some effect rather than one that gives it no effect."

[27] The respondent adds that it would have been useless to add clause 7.2 to the contract if the true intention of the two parties had been for the resignation to take effect immediately. The absence of testimony by other parties to the contract cannot lead to a conclusion that the intention of the two parties was one that advances the appellant. Moreover, this interpretation would render clause 7.2 completely meaningless, which would be contrary to article 1428 of the CCQ.

[28] Additionally, the respondent notes that the appellant herself took steps and urged Mr. Sénéchal to register the sale with the Registre des entreprises. She was therefore aware that this was a requirement of the contract.

[29] Lastly, the respondent cites a case of this Court, *Arevian v. The Queen*, 2008 TCC 327, [2008] T.C.J. No. 426 (QL), 2008 CarswellNat 3612, which decides that the start date of the limitation period under subsection 323(5) of the *Excise Tax Act* (the equivalent of subsection 227.1(4) of the ITA) should be determined as of the moment the taxpayer ceases to be a director and not when she ceases acting as a director. Bédard J. of this court made the following comments at paragraphs 7 to 10:

[7] In my opinion, subsection 323(5) of the ETA indicates that what the Court must determine is the time when the Appellant ceased to be a director and not the time when he ceased to act as a director. Although the actions of a person may be relevant in determining whether the person was a *de facto* director of a corporation and the specific period of time during which the person was such, the case is different when it comes to determining the starting point of the time period for exercising a remedy against the director. The judgments to which the Appellant's counsel referred the Court (*Corsano* and *Silcoff*) are cases in which the courts had to determine whether the persons to whom the assessments pertained were *de facto* directors, which explains the analysis of their actions. I am of the opinion that, for the purposes of subsection 323(5) of the ETA, the provisions of the Corporation's incorporating legislation, namely, the *Canada Business Corporations Act*, should be consulted to determine when a *de jure* director ceased to be a director. That is what the Federal Court of Appeal decided in *The Queen v. Kalef*, docket no. A-11-95, March 1, 1996, 96 D.T.C. 6132, as follows:

> The Income Tax Act neither defines the term director, nor establishes any criteria for when a person ceases to hold such a position. Given the silence of the Income Tax Act, it only makes sense to look to the company's incorporating legislation for guidance….

[8] Section 108 of the *Canada Business Corporations Act* states the following:

> 108(1) A director of a corporation ceases to hold office when the director
>
> *a*) dies or resigns;
> *b*) is removed in accordance with section 109;
> *c*) becomes disqualified under subsection 105(1).
>
> (2) A resignation of a director becomes effective at the time a written resignation is sent to the corporation, or at the time specified in the resignation, whichever is later.

[9] In the case at bar, the Appellant ceased to be a director because of his removal from office, which was decided by the corporation's shareholders present at a special meeting held on July 30, 2002. For such a removal to be the subject of a resolution on July 30, 2002, the Appellant must have still been holding the office of director and not have submitted his resignation. The fact that he had ceased to act as director (if such is the case) in the days leading up to the shareholders' meeting at which he was removed from office does not alter his status as director within the meaning of the *Canada Business Corporations Act*.

[10] The provisions of the incorporating legislation with regard to the liability of directors for unpaid wages are similar. Thus, subsection 119(3) of the *Canada*

> *Business Corporations Act* sets the limit for exercising a remedy at two years after the person sued ceases to be a director. In response to defences based on the little participation or lack of participation of certain directors in the corporation's decisions, the courts have decided that it does not matter whether a director actively participates in the corporation's management for the director to be held liable.[4] This case law supports to some extent the Respondent's position that the actions of a director prior to his or her resignation or removal from office are not relevant for the purposes of determining the starting point of the two-year time period in subsection 323(5) of the ETA. In short, this case law supports the Respondent's position that it is the date of resignation or removal from office that alone must be considered in determining the starting point of the two-year time period in subsection 323(5) of the ETA.

4. *Champagne v Amiri*, (2004), J.E. 94-836 (C.A.Q.)

[30] As for the argument of due diligence, the respondent cites *Buckingham v. The Queen*, 2011 FCA 142, which holds that an objective standard should apply, namely, would a reasonable person in these circumstances have acted this way? The respondent feels that a reasonable person would not have acted as the appellant did and the appellant did not show, according to the evidence, that she exercised the degree of diligence required to remove herself from her responsibility.

Analysis

I Is the assessment statute-barred under subsection 227.1(4) of the ITA?

[31] The appellant submits that she resigned as director on July 7, 2006, when her Jus d'Or shares were sold. If she was no longer director as of that date, the July 16, 2008, assessment would be statute-barred because it was made more than two years after the appellant last ceased being the director of Jus d'Or.

[32] I do not accept this submission. Clause 7.1 of the sale contract clearly stipulates that the seller resigns on the present date [date of the sale] from her position as director of the corporation, but clause 7.2 stipulates that this resignation, accepted on the present date, shall take effect on the date of corporation's next articles of amendment.

[33] In *Kalef v. Canada*, [1996] F.C.J. No. 269 (QL), 1996 CarswellNat 188 (English), reminds us that we must look at the relevant provisions of the applicable

corporate law legislation for the purposes of applying subsection 227.1(4) of the ITA. In the present case, the federal statute, the CBCA applies. Section 108 of the CBCA provides that the mandate of the director may end because of the director's resignation and this resignation takes effect on the date a written resignation is sent to the corporation or at a later date indicated in the resignation. The English version states that a "resignation of a director becomes effective at the time a written resignation is sent to the corporation, or at the time specified in the resignation, whichever is later."

[34] Clause 7.2 of the sale contract specifically stipulates that the resignation "shall be effective on the date of the corporation's next articles of amendment." It is therefore difficult to submit that this resignation was effective on the date of the sale if the articles of amendment were not issued on that date.

[35] The appellant also claimed in her letter to the CRA that she had not been the owner since August 2006 (Exhibit A-2). She is therefore implicitly admitting that the sale did not come into effect on July 7, 2006. Moreover, the fact she could no longer act as *de facto* director after July 7, 2006, does not change the fact the appellant could only cease being the director of the corporation after the applicable legislative conditions were met, namely section 108 of the CBCA (see *Butterfield v. The Queen*, 2009 TCC 575, affirmed by the Federal Court of Appeal, 2010 FCA 330; *Arevian v. The Queen*, *supra*).

[36] *MacArthur*, *supra*, a case of this Court to which the appellant referred, noted that from the time the *de facto* director had established his intention to no longer act as director, this could have influenced the director's likelihood of acting with diligence despite the fact the company had delayed the formal recognition of the resignation. Here, the failure to make the remittance took place before the sale of the shares. Moreover, the issue is the starting date of the limitation period, and it is clear from *Butterfield* and *Arevian*, *supra*, that this start date is the date on which the taxpayer ceases to be the director under the applicable corporate legislation.

[37] Moreover, although it is true that it is the corporation and not the resigning director's responsibility to register the director's resignation with the Registre des entreprises (reference to *Marcil*, *supra*, raised by the appellant), I feel that, in the light of the appellant's actions, including the letter she wrote to the CRA, that she herself felt that the resignation did not take effect until the date of the corporate articles of amendment of August 2006. On the one hand, she knowingly signed the sale contract that included clause 7.2. The fact Mr. Sénéchal did not explain the clauses of the contract to her cannot be used to argue for a change to something that

is specifically included in the contract. If she did not understand this clause, she should have sought clarifications herself before signing anything. On the other hand, she implied during her testimony that Mr. Sénéchal was to take care of the registration upon his return from vacation after the sale. She should have insisted that he proceed with the registration when she received calls from the Ministère du Revenu. These elements tend rather to show that she did in fact understand the meaning of clause 7.2 of the contract.

[38] In my opinion, the appellant did not show that she last ceased to be the administrator on July 7, 2006. She did not show that the assessment was made more than two years after the time she last ceased being the director for Jus d'Or.

II Due diligence defence

[39] With regard to this defence, the Federal Court of Appeal stated in *Buckingham, supra,* at paragraph 33: "[t]he duty of care in subsection 227.1(3) of the *Income Tax Act* also specifically targets the prevention of the failure by the corporation to remit identified tax withholdings, including notably employee source deductions... The directors must thus establish that they exercised the degree of care, diligence and skill required "to prevent the failure". The focus of these provisions is clearly on the prevention of failures to remit.

[40] Moreover, it is now well settled that the standard of care, diligence and skill required under subsection 227.1(3) of the ITA is an objective standard, as stated by the Supreme Court of Canada in *Peoples Department Stores Inc.(Trustee of) v. Wise*, 2004 SCC 68, [2004] 3 S.C.R. 461.

[41] On this, the Federal Court of Appeal also stated the following in *Buckingham, supra*, at paragraphs 38 and 39:

> 38 This objective standard has set aside the common law principle that a director's management of a corporation is to be judged according to his own personal skills, knowledge, abilities and capacities: *Peoples Department Stores* at paras. 59 to 62. To say that the standard is objective makes it clear that the factual aspects of the circumstances surrounding the actions of the director are important as opposed to the subjective motivations of the directors: *Peoples Department Stores* at para. 63. The emergence of stricter standards puts pressure on corporations to improve the quality of board decisions through the establishment of good corporate governance rules: *Peoples Department Stores* at para. 64. Stricter standards also discourage the appointment of inactive directors chosen for show or who fail to discharge their

> duties as director by leaving decisions to the active directors. Consequently, a person who is appointed as a director must carry out the duties of that function on an active basis and will not be allowed to defend a claim for malfeasance in the discharge of his or her duties by relying on his or her own inaction: Kevin P. McGuinness, *Canadian Business Corporations Law*, 2nd ed. (Markham, Ontario: LexisNexis Canada, 2007) at 11.9.
>
> 39 An objective standard does not however entail that the particular circumstances of a director are to be ignored. These circumstances must be taken into account, but must be considered against an objective "reasonably prudent person" standard. As noted in *Peoples Department Stores* at paragraph 62:
>
> > The statutory duty of care in s. 122(1)(*b*) of the CBCA emulates but does not replicate the language proposed by the Dickerson Report. The main difference is that the enacted version includes the words "in comparable circumstances", which modifies the statutory standard by requiring the context in which a given decision was made to be taken into account. This is not the introduction of a subjective element relating to the competence of the director, but rather the introduction of a contextual element into the statutory standard of care. It is clear that s. 122(1)(*b*) requires more of directors and officers than the traditional common law duty of care outlined in, for example, *Re City Equitable Fire Insurance, supra* [[1925] 1 Ch. 407].

[42] Directors must therefore show that they were concerned with the required payments and exercised their duty of care, diligence and skill to prevent a failure by the corporation to remit the amounts involved, in regard to the objective standard of the "reasonably prudent person" in comparable circumstances.

[43] In the present case, once the appellant agreed to let Mr. Descoteaux operate Jus d'Or, she knew or should have known, that she should be particularly vigilant. She even stated that she had hesitated at first because she was not sure that the liquor licence would be used and source deductions would be processed in accordance with the rules. She stated that she was reassured by Mr. Sénéchal when he suggested she sign a service contract with a management company. However, the evidence shows there were some elements that should have alerted her. From the beginning, the other signing party to the contract was not present when the contract was signed. Moreover, the contract did not provide for any compensation for the management company. Then, she agreed to work with two other companies (including one with which no contract was signed), without asking too many questions. To prove her diligence, she submits that she ensured the source deductions had in fact been made from the employees' pay. Her diligence ceased at that point, however. She did not

inquire whether these amounts, deducted from the employees' pay, had been remitted to the government. She had operated a business herself from 1999 to 2004. She knew how the government remittances worked. During this period, she had an accountant to help her with this and she signed the cheques to the tax authorities in his presence. She, therefore, had to know that she had to verify not only whether the source deductions had been made from the employees' pay but whether they had then been remitted to the government. When she signed the cheques drawn from the Jus d'Or account, she should have asked either the secretary Ms. Noiseux or Mr. Sénéchal, who had gotten her to sign the management contracts, whether the money she was paying was being used for the government remittances.

[44] Knowing that Mr. Descoteaux had been in trouble with the law to the point of not being able to operate a restaurant-bar in his name, she should have been more attentive to the legal obligations of the company.

[45] By not seeking all the information about what became of the amounts deducted from the employees' pay, she cannot claim that she took care of the required payments to the government as a "reasonably prudent person" would have in comparable circumstances.

[46] The appellant gives the impression of a person who reacts rather than prevents. For example, in early 2006, she learned from the Ministère du Revenu inspectors that the tax remittances had not been made; she wanted to sell her company instead of first ensuring that everything was in order.

[47] It was only at the end of February 2006, when she saw that Mr. Sénéchal was not taking care of the sale that she forced him to work with Ceridian, a body that effectively takes care of payroll service. If the appellant knew to impose Ceridian on Mr. Sénéchal at the end of February 2006, she should also have required him to show her the company's books and make sure that everything was in order, which she neglected to do.

[48] Considering the above and the evidence, I feel that the appellant did not show, according to *prima facie* evidence, that she exercised her duty of care, diligence and skill to prevent the failure of the corporation to remit the amounts assessed that are being appealed from. She therefore cannot successfully invoke subsection 227.1(3) of the ITA to absolve herself from her joint responsibility.

[49] Consequently, the appeal is dismissed. The respondent is entitled to costs. The parties stated at the end of the hearing that there were settlement proposals and they

wished to make submissions following the outcome of the case. I therefore invite the parties to make their submissions on costs, in writing, in the month following the signature of my judgment.

Signed at Ottawa, Canada, this 25th day of April 2013.

"Lucie Lamarre"

Lamarre J.

Translation certified true
On this 11th day of July 2013

François Brunet, Revisor

CITATION:	2013 TCC 128
COURT FILE NO.:	2010-2547(IT)G
STYLE OF CAUSE:	ÉLISE BOHBOT-GAGNON v. HER MAJESTY THE QUEEN
PLACE OF HEARING:	Montréal, Quebec
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REASONS FOR JUDGMENT BY:	The Honourable Justice Lucie Lamarre
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