Federal Court of Appeal | Cour d'appel fédérale

Date: 20090508

Docket: A-188-08

Citation: 2009 FCA 139

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

BETWEEN:

AMIANTE SPEC INC.

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Heard at Montréal, Quebec, on April 20, 2009.

Judgment delivered at Ottawa, Ontario, on May 8, 2009.

REASONS FOR JUDGMENT BY: TRUDEL J.A.

CONCURRED IN BY: LÉTOURNEAU J.A.
PELLETIER J.A.

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REASONS FOR JUDGMENT

TRUDEL J.A.

Introduction

[1] The appellant is appealing a decision of Justice Favreau (the judge) of the Tax Court of Canada, 2008 TCC 89, dated March 27, 2008. The judge dismissed the appellant's appeal against a notice of assessment issued by the Minister of Revenue of Québec on behalf of the Minister of National Revenue (collectively the Minister) pursuant to the *Excise Tax Act*, R.S.C. 1985, c. E-15

(the Act). The notice covers the period from November 1, 1998, to February 28, 2002, (period in issue) and increased the appellant's tax liability for that period by $139,791.69 in net tax, in addition to a penalty of $56,056.69 and interest in the amount of $14,021.61 (sections 280 and 285 of the Act).

[2] The issues before this Court are clearly identified. The three grounds that form the basis for this appeal can be summarized as follows:

(a) the judge erred in imposing on the appellant a heavier burden of proof than her initial burden to "demolish", on a balance of probabilities, the exact assumptions made by the Minister to make the assessment. (*Hickman Motors Ltd. v. Canada*, [1997] 2 S.C.R. 336 at paragraph 92 [*Hickman*], Appellant's Memorandum, paragraphs 14-40).

(b) the judge erred in drawing a negative inference from the absence of one Réal Pomerleau from the witness box and therefore concluding that his testimony "would have been unfavourable to the Appellant's case". (reasons for judgment, paragraph 89) (reasons).

(c) the judge made palpable and overriding errors in his assessment of the evidence, more specifically the evidence surrounding the appellant's submission of false documents to tax authorities during the audit conducted prior to the issuance of

the assessment, and the evidence of the cashing of the cheques submitted to pay the challenged invoices in discount cheque-cashing centres.

[3] These questions being now clearly defined, it is not necessary to describe all of the facts adduced in evidence before the Tax Court of Canada, which the judge laid out in great detail in his reasons at paragraphs 1 to 71.

[4] For the purposes of this appeal, it is sufficient to know that the appellant, Amiante Spec Inc., is a business operating in the field of asbestos fibre removal and building insulation installation. It is duly registered in the Goods and Services Tax/Harmonized Sales Tax (GST/HST) Program with the Canada Revenue Agency.

[5] In the course of carrying on its business, the appellant regularly uses the services of subcontractors for, *inter alia*, the following services and supplies:

(a) rental and setup of platforms enabling the appellant's employees to perform work;

(b) cleaning work of sites; and

(c) professional accounting services.

[6] The appellant claims to have paid $1,832,592.25 to 10 subcontractors for the services allegedly supplied during the period in issue, as follows:

Para. 10 of reasons	Subcontractors	Consideration	GST
(a)	Construction Des Forges Inc.	150,859.75	10,560.18
(b)	9085-6329 Québec Inc. (Systèmes intérieurs modernes)	99,500.00	6,965.00
(c)	Échafaudage Unic Inc.	20,737.50	1,451.63
(d)	3587991 Canada Inc. (Gestion St-Martin-Concorde)	301,775.00	21,124.25
(e)	9092-0638 Québec Inc. (Grands travaux J.J.B.)	97,570.00	6,829.90
(f)	9088-5518 Québec Inc. (Chomedey Métal-IK)	165,715.00	11,600.00
(g)	9104-0667 Québec Inc. (Construction Carnaval)	569,000.00	39,830.00
(h)	Poliquin et associés	361,435.00	25,300.45
(i)	Leonardo Canzeri	51,000.00	3,570.00
(j)	9085-5925 Québec Inc.	15,000.00	1,050.00
	Total	1,832,592.25	128,281.41

[7] The Goods and Services Tax (GST) corresponding to that consideration amounts to $128,281.41. When it prepared its statutory declarations and determined its net tax, the appellant claimed, *inter alia*, that amount as an input tax credit (ITC). Its claim was disallowed for reasons that are clear from the conclusions and assumptions of fact that formed the basis for the Minister's assessment (Appeal Record, vol. I, page 38, paragraph 27).

[8] The appellant is not appealing the judge's conclusions upholding the Minister's refusal to allow the ITCs for the subcontractors appearing at rows (h) and (i) of the above table. Although the amount of the disputed ITCs is reduced from $128,281.41 to $99,410.96 in this partial appeal, (Appellant's Memorandum, pages 1 and 14), the nature of the dispute between the parties remains unchanged.

[9] To return to the Minister's conclusions and assumptions, I note that the following are the most relevant to the issues. Together, they form the respondent's main argument:

> [TRANSLATION]
>
> the appellant did not acquire any of the supplies of goods or services in question that it alleges having acquired from the ten (10) subcontractors, or it acquired those supplies but from a completely different supplier from those stated on the supporting documents provided for the period in issue;
>
> the supporting documents for the disallowed ITCs in the amount of $128,281.41 respecting the supplies of goods or services that it purportedly acquired during the period in issue are false and constitute invoices of convenience used to enable the appellant to claim ITCs to which it was not entitled in determining its net tax for the period in issue;
>
> the appellant's records contain, furthermore, false documents from the Commission de la santé et de la sécurité du travail (hereafter "CSST") [certificate of compliance] and from the Commission de la construction du Québec (hereafter "CCQ") [situation letter], which were not submitted to the Minister until after the draft assessment was filed. (Appeal Record, vol. I, pages 40-41, subparagraphs m, j and n).

Standard of Review

[10] It can be readily seen that the issues relate primarily to the judge's handling of the evidence with regard to these assumptions. The matter of whether or not the assumptions were rebutted was thus a question of mixed fact and law that was for the judge to decide.

[11] It is trite law that "[t]he Trial Judge is better situated to make factual findings owing to his or her extensive exposure to the evidence, the advantage of hearing testimony *viva voce*, and the

judge's familiarity with the case as a whole. Because the primary role of the Trial Judge is to weigh and assess voluminous quantities of evidence, the expertise and insight of the Trial Judge in this area should be respected." (*Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, page 251).

[12] Thus, our Court will adopt a deferential attitude unless it is established that the Trial Judge made some palpable and overriding error which affected his assessment of the facts (*Geffen v. Goodman Estate*, [1991] 2 S.C.R. 353, pages 388-389).

[13] Bearing in mind this standard of review, I intend to begin by analyzing the appellant's first and third grounds for appeal.

First and third grounds: burden of proof and assessment of the evidence

[14] The appellant argues that the judge :

> [TRANSLATION]
>
> . . . distorted the test set out in *Hickman* in imposing on it the burden of proving on the balance of probabilities, rather than *prima facie*, the services provided by the subcontractors (Appellant's Memorandum, page 20).

[15] *Hickman* reminded us that the Minister proceeds on assumptions in order to make assessments and that the taxpayer has the initial burden of demolishing the exact assumptions stated by the Minister. This initial onus is met where the taxpayer makes out at least a *prima facie* case that demolishes the accuracy of the assumptions made in the assessment. Lastly, when the taxpayer has

met his or her onus, the onus shifts to the Minister to rebut the *prima facie* case made out by the taxpayer and prove the assumptions (*Hickman*, supra, at paragraphs 92, 93 and 94).

[16] The appellant argues that it has fulfilled its obligations and demolished the assumption that it did not acquire any of the supplies of goods or services that it alleges to have acquired by filing in the record of the Court the contracts entered into with subcontractors, including the associated invoices and settlement cheques (Appellant's Memorandum, page 22).

[17] What is more, it submits that the eight witnesses that it called before the Court, whose testimonies were not contradicted,

> [TRANSLATION]
>
> . . . showed that the subcontractors had been on site with the equipment required for the services that were to be rendered to the appellant and that they had made the supplies appearing on the invoices that gave rise to the assessment (Appellant's Memorandum, paragraph 24).

[18] In support of its argument, the appellant refers more specifically to the testimonies of its president, Mr. Spiridigliozzi, and those of Gilles Goupil, Maurice Duguay, Louis-Pierre Lafortune, Joyca Pellerin, Raïd Kassawat, Tullio Ricci and Nicolaï Tcheboratev, all of whom were called to the stand in a bid to prove the supply of services for which the appellant had made an ITC claim.

[19] The judge briefly summarized the testimonies of most of those witnesses, deeming it "very telling" that the appellant did not call to the witness stand any of the subcontractors whose invoices are challenged by the Minister (except for Mr. Poliquin, whose services are no longer disputed in this appeal).

[20] The appellant's reply is that it [TRANSLATION] "could not call as witnesses people who had defrauded the tax authorities and did not remit the tax amounts collected" (Appellant's Memorandum, paragraph 81), adding at the hearing that it is not up to the appellant to bear the economic burden of its subcontractors' deception. (*Joseph Ribkoff Inc. v. The Queen*, 2003 TCC 397, paragraph 100; Appellant's Memorandum, paragraph 61). In the case at bar, that is not what the Minister did. Rather, the Minister submits that the appellant did not acquire the services corresponding to the ITCs it claimed. That is what the appellant had to prove on a *prima facie* basis.

[21] In this case, however, the judge concluded that "[b]ased on the testimonial and documentary evidence, the appellant has not shown that the transactions referred to in the invoices were genuine services in view of the record as a whole" and that the shifting of the burden of proof was therefore not justified (reasons, paragraph 79). The judge agreed with the Minister's contention that the invoices from the subcontractors were invoices of convenience, that is :

> [TRANSLATION]
>
> ... a scheme in which one company issues invoices to another in exchange for a selling price per invoice. The accommodator that issues the invoice is not engaged in any commercial activity and sells the invoice to the purchaser, which, generally, will pay its workers under

> the table, appropriate the funds as an officer or pay a subcontractor a third of the amount in cash (Appeal Record, vol. XV, testimony of Robert Bergeron, pages 3177-3178, lines 24-25, 1-6).

[22] Since the appellant criticizes the judge for having imposed too heavy a burden on it, it is appropriate to review what constitutes a *prima facie* case.

[23] A *prima facie* case is one "supported by evidence which raises such a degree of probability in its favour that it must be accepted if believed by the Court unless it is rebutted or the contrary is proved. It may be contrasted with conclusive evidence which excludes the possibility of the truth of any other conclusion than the one established by that evidence" (*Stewart v. Canada*, [2000] T.C.J. No. 53, paragraph 23).

[24] Although it is not conclusive evidence, "the burden of proof put on the taxpayer is not to be lightly, capriciously or casually shifted", considering that "[i]t is the taxpayer's business" (*Orly Automobiles Inc. v. Canada*, 2005 FCA 425, paragraph 20). This Court stated that the taxpayer "knows how and why it is run in a particular fashion rather than in some other ways. He [or she] knows and possesses information that the Minister does not. He [or she] has information within his [or her] reach and under his [or her] control" (*ibid.*).

[25] It is self-evident that the Minister's assumptions had to be rebutted *prima facie* for each of the subcontractors since the Minister's grounds for refusal could vary from one to the next.

[26] Accordingly, the appellant's evidence regarding the services billed on the invoices relevant to this appeal had to demonstrate, *prima facie*, that the appellant had rented the platforms and that they had been assembled and disassembled by the subcontractors that were parties to the contracts giving rise to the appellant's claim.

[27] Therefore, in the cases of subcontractors Poliquin (h), Canzeri (i) and Chomedey Métal-IK (f), the Minister had relied on subsection 169(4) of the Act and section 3 of the *Input Tax Credit Information (GST/HST) Regulations*, SOR/91-45, to declare that the supporting documentation was inadequate, since either the name of the recipient or the supplier was not shown, the GST registration number was incorrect or had been cancelled, or the supplier no longer existed (reasons, paragraph 87, Appeal Record, vol. XVI, Argument of Mr. Denis, pages 3476-3477; Canzeri: Appeal Record, vol. I, page 232; Poliquin: Appeal Record, vol. I, pages 204, 208, 212, 217, 219, 221, 223, 225, 227 and 229; Chomedey Métal-IK: Appeal Record, vol. I, page 167).

[28] Since the appellant is no longer appealing from the judgment respecting the first two suppliers and did not advance any particular argument against the judge's conclusion regarding Chomedey Métal-IK, there is no basis for commenting on the judge's reasons concerning these suppliers except to recall that the evidence on them was before him when he made his findings "in view of the record as a whole" (reasons, paragraph 79).

[29] What is the case for the other subcontractors? In his reasons, the judge briefly summarizes what he concluded from the evidence on each of them. I do not intend to reassess the copious

evidence adduced during the eight-day trial. I will limit my discussion to the appellant's criticisms in its memorandum and, in particular, to the witness statements that it cited in support of its arguments.

[30] Before that, however, some general comments are in order. Firstly, the services that the appellant could allege to have received were for platforms, not scaffolding. This distinction is important for the purposes of the assessment and was brought to the attention of the judge by the engineer, Mr. Kassawat (Appeal Record, vol. XII, page 2637, lines 20-25; page 2643, lines 18-25; see also Argument of Mr. Denis: Appeal Record, vol. XVI, page 3548, lines 19-22). Essentially, scaffolding is temporary and on wheels with breaks, while platforms are not. A Quebec construction decree stipulates that the latter must be assembled by specialized subcontractors (Appeal Record, vol. XII, testimony of Gilles Goupil, page 2552, lines 16-20).

[31] Secondly, the Minister is not challenging that the appellant may sometimes need platforms for the performance of its work and that, at such times, it calls in specialized subcontractors.

[32] Thirdly, several subcontractors, namely Systèmes intérieurs modernes, Échafaudage Unic Inc., Gestion St-Martin-Concorde, Construction Des Forges Inc. and Construction Carnaval (reasons, paragraph 89), were, at one time or another, represented by Réal Pomerleau. He did not testify, leading the judge to draw from that fact a negative inference, which forms the subject of the appellant's second ground for appeal, to which I will return later.

[33] Fourthly, the appellant submits that the testimony of Mr. Spiridigliozzi, the president of the appellant (its vice-president and secretary during the period in issue), and the corroborating testimony of the appellant's superintendant, (its foreman during the period in issue) Gilles Goupil, [TRANSLATION] "who worked on the sites at the crux of this dispute" (Appellant's Memorandum, paragraph 28) :

> [TRANSLATION]
>
> . . . appear to be sufficient to establish *prima facie* the appellant's allegations and reverse the burden of proof . . . (Appellant's Memorandum, paragraph 29).

[34] Yet, the judge did not believe Mr. Spiridigliozzi's testimony, finding that his testimony "about the circumstances surrounding the contracts' being granted to the subcontractors was very vague" (reasons, paragraph 89).

[35] It is, therefore, not surprising that the judge did not discuss the testimony of Mr. Goupil (Appeal Record, vol. XII, pages 2535- 2556), who, moreover, was unable to place any of the suppliers in issue at the job sites contemplated by the appellant's contracts, merely stating that the appellant had used the services of specialized companies when platforms were required.

[36] Lastly, all of the subcontractors concerned by this appeal were characterized as [TRANSLATION] "tax offenders", each for reasons more varied than the last, for example: (a) neglecting to file tax returns; (b) neglecting to file returns for source deductions or making

inadequate returns; (c) neglecting to register for the GST/HST program; and (d) neglecting to report their contract with the appellant to the CCQ.

[37] That said, I will now examine the appellant's grounds for criticism of the judge's conclusions for each of these subcontractors in the order in which they appear in the above table (see paragraph 6 of these reasons).

Construction Des Forges Inc. (reasons, paragraphs 45-53)

[38] This supplier sent the appellant invoices for work done to install temporary platforms at three separate job sites (Centre d'éducation des adultes Lemoyne: Appeal Record, vol. I, page 59; École St-Zotique: Appeal Record, vol. I, page 64; Hôpital Lindsay: Appeal Record, vol. I, page 72), each of which the appellant paid by cheque, including one certified cheque.

[39] The judge noted that the supplier had cashed one of these cheques at a discount cheque-cashing business.

[40] In its memorandum, the appellant refers to Mr. Lafontaine's testimony regarding the work done at Hôpital Lindsay, asserting that he had attested not only :

> [TRANSLATION]
>
> . . . to the existence of a subcontractor, Construction Des Forges Inc., but also to the fact that this subcontractor owned platforms located on the hospital job site. . . . (Appellant's Memorandum, paragraph 32).

[41] This is a rather inattentive reading of the testimony of Mr. Lafontaine, who, during the period in issue, was the vice president of Fortier Transport, a company specializing in crane rental (Appeal Record, vol. XII, page 2525, lines 9-11). He was called to explain the invoice and work order sent to the appellant on August 21, 2000, for the rental of a crane on the Lindsay site, seemingly for "Construction Des Forges Inc." for [TRANSLATION] "taking down equipment" (Appeal Record, vol. I, pages 79-80). The client on the work order is A&A Demolition, and he was given the information it contains over the telephone by someone named Nino, whom he does not know. To add to this confusion, the witness never went to the job site (Appeal Record, vol. XII, page 2529).

[42] In such circumstances, I fail to see how the appellant can criticize the judge for not having mentioned this testimony and for not having taken it into account in his assessment of the *prima facie* case it had the onus to make.

9085-6329 Québec Inc. (Systèmes intérieurs modernes) (reasons, paragraphs 42-44)

[43] In his reasons, the judge referred to an invoice dated August 28, 2000, that merely described the services provided as "temporary protection for five floors", the fourth phase of the work done at Hôpital Hôtel-Dieu de Saint-Hyacinthe (Appeal Record, vol. I, page 151).

[44] In its memorandum, the appellant did not mention any particular error made by the judge in his assessment of the evidence on this supplier. As a result, I conclude that the appellant's dissatisfaction is related to the negative inference the judge drew from the absence of Mr. Promerleau, since he was the appellant company's representative.

Échafaudage Unic Inc. (reasons, paragraphs 32-35)

[45] Regarding this supplier, the judge refers to an invoice dated August 15, 2000, for [TRANSLATION] "scaffolding for a work platform for a stairwell" (Appeal Record, vol. I, page 156).

[46] In its memorandum, the appellant writes the following on this subject:

> [TRANSLATION]
>
> 30. The appellant called Maurice Duguay, an employee of the Commission de la santé et sécurité au travail, whose testimony is above suspicion. As the person responsible for inspecting one of the appellant's work sites (Parthenais), he saw three (3) employees of the subcontractor, Échafaudage Unic, setting up platforms. At the time of his inspection, he met Réal Pomerleau, who identified himself as the representative of Échafaudage Unic (Appellant's Memorandum, paragraph 30).

[47] I reread Mr. Duguay's testimony closely (Appeal Record, vol. XII, pages 2650 and following). It turns out that he visited one of the job sites of the appellant—Parthenais—on October 23, 2001. It was on his first visit to the site (*ibid*., page 2652, lines 10-11) that three persons identified themselves as working for Échafaudage Unic Inc., while the appellant's subcontractor for this work was Construction Carnaval (reasons, paragraph 82). Therefore, the judge did not err in

rejecting Mr. Duguay's testimony, not because it lacked credibility, but because it did not in any way support the appellant's claim regarding the services supposedly performed in 2000 by Échafaudage Unic Inc.

3587991 Canada Inc. (Gestion St-Martin-Concorde) (reasons, paragraphs 58-62)

[48] The appellant argues that it has presented the necessary evidence of its contractual relationship with this supplier by means of the testimonies of the following persons:

> [TRANSLATION]
>
> (a) Joyca Pellerin, who saw the platforms set up on the Radio-Canada job site and representatives of the subcontractor, Gestion St-Martin-Concorde (Appellant's Memorandum, paragraph 33; Appeal Record, vol. XII, pages 2580-2585).
>
> (b) Tullio Ricci, who saw platforms identified as those of the subcontractor, Gestion St-Martin-Concorde, at the École Hubert-Maisonneuve job site (Appellant's Memorandum, paragraph 35; Appeal Record, vol. XIII, pages 2757-2762).
>
> and
>
> (c) Nicolaï Tchebotarev, a project engineer. At the request of Gestion-St-Martin-Concorde, one of the appellant's subcontractors, he prepared plans for the Radio-Canada site. Furthermore, Mr. Tchebotarev also inspected the platform once it had been installed on that site (Appellant's Memorandum, paragraph 36, Appeal Record, vol. XII, pages 2679-2688).

[49] A full answer to this argument made by the appellant may be found at paragraphs 83 to 85 of the reasons under appeal. In fact, the judge concluded from these witnesses—who knew, moreover, of the job sites on which the appellant was doing work—that they had been unable to associate the suppliers at issue with the claims disallowed by the Minister.

9092-0638 Québec Inc. (Grands travaux J.J.B.) (reasons, paragraphs 36-41)

[50] Just as in the case of Systèmes intérieurs modernes, the appellant did not raise any particular error regarding this supplier.

[51] In the case at hand, the judge noted that the Minister had allowed in part the appellant's claim for this subcontractor (working at Hydro-Québec). As for the disallowed invoice for the work done at I.O.C. in Sept-Îles (Appeal Record, vol. I, page 162), the judge had the benefit of hearing the Revenu Québec auditor, Sylvie Davrieux, who had verified the nature of the work and learned that there had been no platform because :

> [TRANSLATION]
>
> . . .all demolition [at I.O.C.] had been done using motorized equipment. Additionally, it gave me the list of all the equipment that passed through the gate for I.O.C. So, for the I.O.C. project, all equipment going on to the job site was checked at the gate, and the equipment that entered the site was all motorized equipment. (Appeal Record, vol. XIII, page 2891, lines 10-16).

Construction Carnaval (reasons, paragraphs 63-70)

[52] The judge concluded from the evidence that four invoices were problematic for this subcontractor, of which three related to the Armstrong site.

[53] In this respect, the appellant submits that one witness, Mr. Kassawat, saw the representatives of the supplier and platforms at this site (Appellant's Memorandum, paragraph 34).

[54] In fact, the judge mentions that this witness confirmed by letter that he had seen this supplier at the job site in connection with two work orders for the Armstrong company (letter dated June 13, 2002: Appeal Record, vol. I, page 173; work orders: Appeal Record, vol. IV, pages 867-870). However, he adds the following at paragraph 83 of his reasons:

> . . . On cross-examination, he was unable to associate the work orders with the numbers of the Armstrong buildings on which the Appellant did work, or with the various phases of the work. Furthermore, he was unable to specify exactly which representatives he met, or specify the dates or places where he met with the subcontractors. . . .

9085-5925 Québec Inc. (reasons, paragraphs 30-31)

[55] The judge said very little about this supplier, whose only invoice amounted to $15,000 (Appeal Record, vol. I, page 235). On that invoice, the work is described as the supply of [TRANSLATION] "temporary protective materials at three schools". The appellant makes no argument specific to this subcontractor.

[56] What is more, I note that in addition to the significant deficiencies in the appellant's evidence regarding the services allegedly supplied by the subcontractors, the judge pointed out other troubling facts:

> - all of the subcontractors, without exception, were tax offenders (reasons, paragraphs 31, 34, 41, 44, 53, 57, 61, 68, 73, 80 and 86).
>
> - the subcontractors' cashing of cheques at discount cheque-cashing centres was "another serious indication that there was a fraudulent scheme in which invoices of convenience were used" (reasons, paragraph 86).

> - the appellant received, from five subcontractors, false documents appearing to have been issued by the CCQ and the CSST to establish the current situation at certain job sites (reasons, paragraph 74; Appeal Record, vol. XVI, Argument of Mr. Denis, page 3543, lines 12 and following).
>
> - the amounts claimed by the subcontractors for platforms represented a high percentage of the total value of the contracts (Appeal Record, vol. XII, page 2497; vol. XIII, page 2882, lines 3 and following; (reasons, paragraph 86).
>
> - the appellant reached an agreement with the CCQ to pay $90,000 in settlement for violations of the applicable legislation (reasons, paragraphs 71 and 74).

[57] Therefore, on the basis of the record, I cannot see any error, palpable or otherwise, in the conclusions that the judge drew from the evidence. Essentially, he had to weigh the evidence filed in light of the principles of law set out by the Supreme Court of Canada in *Hickman*, and that is what he did. He concluded, and rightly so, that the evidence provided by the appellant lacked sufficient credibility to make a *prima facie* case that would demolish the assumptions raised by the Minister. He made no error in confirming the imposition of the penalty under section 285 of the Act.

Second ground: negative inference

[58] Since I have reached this conclusion, I do not believe it necessary to deal with the second ground for appeal, namely the negative inference drawn by the judge and resulting from Mr. Pomerleau's absence. Even if the appellant had been correct in arguing that the judge had erred, which I do not in any way suggest, such an error would not have altered the outcome of the appeal. However, I cannot help but note that the appellant is not complaining about the fact that the judge also drew a negative inference from the absence "of important witnesses", namely, the

subcontractors themselves (reasons, paragraph 81), but merely asserts that it could not run the risk of calling them as witnesses considering the scheme in which they were participating without its knowledge.

Conclusion

[59] For these reasons, I would dismiss this appeal with costs.

"Johanne Trudel"
J.A.

"I agree.
Gilles Létourneau J.A."

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

Certified true translation
Sarah Burns

FEDERAL COURT OF APPEAL

SOLICITORS OF RECORD

Docket:	A-188-08
APPEAL FROM A DECISION OF JUSTICE FAVREAU OF THE TAX COURT OF CANADA DATED MARCH 27, 2008 (2008 TCC 89)	
STYLE OF CAUSE:	Amiante Spec Inc. v. Her Majesty the Queen
PLACE OF HEARING:	Montréal, Quebec
DATE OF HEARING:	April 20, 2009
REASONS FOR JUDGMENT:	TRUDEL J.A.
CONCURRED IN BY:	LÉTOURNEAU J.A. PELLETIER J.A.
DATE OF REASONS:	May 8, 2009

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