

Docket: 2004-4382(GST)G

BETWEEN:

DANIEL BEAUCHEMIN,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

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Appeal heard on October 16, 2006, at Montréal, Quebec.

Before: The Honourable Justice Paul Bédard

Appearances:

Counsel for the Appellant: Serge Fournier

Counsel for the Respondent: Brigitte Landry

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**JUDGMENT**

The appeal from the assessment under the *Excise Tax Act* (notice number LO 03 0403 dated December 10, 2003) for the period between August 31, 1999, and December 31, 2001, is allowed with costs, and the assessment is referred back to the Minister of National Revenue for reconsideration and reassessment in accordance with the attached Reasons for Judgment.

Signed at Ottawa, Canada, this 19th day of February 2007.

“Paul Bédard”

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Bédard J.

Translation certified true

on this 31st day of August 2007.

Daniela Possamai, Translator

Citation: 2007TCC105  
Date: 20070219  
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**REASONS FOR JUDGMENT**

Bédard J.

[1] This is an appeal under the general procedure in respect of an assessment made under subsection 323(1) of the *Excise Tax Act* (the “Act”) by the Minister of National Revenue, through the Quebec Minister of Revenue (the “Minister”), against the Appellant.

[2] In assessing the Appellant, the Minister relied on the following findings and assumptions of fact, set out at paragraph 25 of the Reply to the Notice of Appeal.

[TRANSLATION]

- (a) The Company is a corporation incorporated under the *Companies Act*, Part IA (R.S.Q. c. C-38); (admitted)
- (b) The Company is registered for the purposes of Part IX of the ETA and its registration number is 141399683; (admitted)

- (c) On February 25, 2002, the Minister assessed the Company for the amount of \$37,992.75 representing the unpaid net tax for the period between February 1, 1998, and October 31, 2001, including interest and penalties; (admitted)
- (d) On May 8, 2002, the Minister assessed the Company for the amount of \$597,18 representing the unpaid net tax for the period from December 1, 2001, to December 31, 2001, including interest and penalties; (admitted)
- (e) The Company did not file any notice of objection against the notices of assessment of February 25, 2002, and May 8, 2002; (admitted)
- (f) On November 19, 2002, in accordance with section 316 of Part IX of the ETA, the Minister filed in the Federal Court a certificate of taxes, penalties and interest due and payable by the Company in the amount of \$40,829.74; (admitted)
- (g) The Minister's certificate was duly registered in the Federal Court and as a result, the Company was sentenced to pay \$40,829.74 to the Minister; (admitted)
- (h) On January 27, 2003, a writ of seizure and sale was issued by the Federal Court to levy on the personal property of the Company the amount of \$40,829.74 with interest, penalties and costs; (admitted)
- (i) The writ of execution was not wholly executed and therefore, execution for the amount mentioned in the certificate was returned unsatisfied in part; (admitted)
- (j) The Appellant was a de facto director of the Company during the periods it was required to pay the net tax to the Respondent; (denied)
- (k) During the periods the Company was required to pay the net tax to the Respondent, Suzanne Blanchard, the Appellant's spouse, acted as president and sole director of the Company in accordance with the corporate records; (admitted)
- (l) As a de facto director of the Company, the Appellant did not exercise the degree of care, diligence and skill to prevent the failure that a reasonably prudent person would have exercised in comparable circumstances; (denied)
- (m) In particular, the Appellant took no concrete and positive steps to prevent the failures of the Company; (denied)

- (n) The bank signature card of the Company demonstrates that the Appellant was authorized to sign the cheques and bank documents of the company from the Caisse populaire Desjardins; (denied)
- (o) In fact, the Appellant signed a number of the Company's cheques and he also signed tax returns, source deduction remittances, summaries of source deductions, as well as a declaration of the Company on form CO-17 for the period ending January 31, 1999; (admitted)
- (p) In his answers to a questionnaire completed at the request of the Centre de perception fiscale of the Ministère du Revenu du Québec, the Appellant indicated that he received a salary from the Company as manager and that his main duties were to oversee daily operations; (admitted)
- (q) The Appellant identified himself as the head of the company and signed an Amended Declaration – Legal Person filed with the Inspecteur général des institutions financières on or around August 20, 1998; (denied)
- (r) The Appellant also identified himself as the head of the Company on the Annual Declaration – Legal Person for 2001 filed with the Inspecteur générales institutions financières; (denied)
- (s) The Company was audited for the period from February 1, 1998, to October 31, 2001, for the retail businesses located at 45, 49 and 51 De l'Église, Lacolle, including a convenience store with a bakery counter, a restaurant and a bar; (admitted)
- (t) The Appellant was present throughout the entire audit process; he identified himself as the person responsible for the businesses, and stated that he was in charge of the administration and accounting activities of the company and that he was the head; (denied)
- (u) The Appellant described himself as the director of the Company in the draft assessments entitled [translation] "*statement of adjustments from the GST/HST audit*" and "*statement of adjustments from the QST audit*" which he signed on December 17, 2001; (denied)
- (v) The Appellant identified himself as the owner of the Company in lease agreements signed with Richelieu Amusement Ltée; (admitted)
- (w) The Appellant introduced himself to an investigator with the Ministère du Revenu du Québec as a director of the Company; (denied)

- (x) The Company ceased its activities on March 26, 2003, day of the sale under execution of the personal property of the Company and the Appellant acted as a de facto director of the Company until that date; (denied)
- (y) Furthermore, the convenience store and the restaurant were formerly operating under the company name 2629-8349 QUÉBEC INC., of which the Appellant was the sole director and majority shareholder; (denied)
- (z) 2629-8349 QUÉBEC INC. made an assignment of its property on February 27, 1996, and its sole director, Daniel Beauchemin, the Appellant, also made an assignment of his property on March 4, 1996; (admitted)
- (aa) 9038-1765 QUÉBEC INC., was incorporated on July 11, 1996, and the Appellant's spouse, Suzanne Blanchard, was appointed director of the new company; (admitted)
- (bb) 9038-1765 QUÉBEC INC. resumed the operations of the convenience store previously operated by 2629-7349 QUÉBEC INC. where the Appellant continued to work; (denied)
- (cc) The Appellant did not take the appropriate measures to ensure the implementation of an effective system aimed at ensuring payment by the Company of the amounts due to the Minister under the ETA; (denied)

### Issue

[3] The sole issue is whether the Appellant was a de facto director of 9038-1765 Québec Inc. (the “company”) during the period between August 31, 1999, and December 31, 2001 (the “relevant period”) as the Appellant chose not to avail himself of the due diligence defence.

Testimony of Suzanne Blanchard

[4] The evidence and testimony of Suzanne Blanchard, the Appellant's spouse (the "spouse"), whose credibility need not be doubted in this case, revealed that

(i) 2629-8349 Québec Inc. of which the Appellant was the sole director and majority shareholder, operated a convenience store and a restaurant until February 27, 1996, date on which it made an assignment of its property. She also stated that the Appellant also made an assignment of his property on March 4, 1996;

(ii) in order to secure employment for her spouse, she incorporated the company in July 1996;

(iii) the company purchased the ongoing business of 2629-8349 Québec Inc., including the inventory and equipment related to the operation of the restaurant and the convenience store, from the trustee;

(iv) therefore, in July 1996, the company resumed the operations of the restaurant and convenience store that were previously operated by 2629-8349 Québec Inc. and the Appellant continued to work there;

(v) she managed the company herself. She explained that she exercised all the rights associated with the company's cash flow. The Appellant had to wait for her instructions before paying the company's creditors. She stated that the Appellant had no control over the remission of amounts due and owing under tax legislation. At the very most, the Appellant prepared declarations respecting the remission of amounts due and owing under tax legislation, signed them and filed them but not without obtaining her authorization;

(vi) she regularly met with the company's external auditors in preparing balance sheets and tax returns that were approved and signed by her;

(vii) she negotiated bank arrangements with the company's banker. She was the only person authorized to communicate with the company's bankers;

(viii) as director of the company, she put her spouse in charge of the company's daily operations. Accordingly, the Appellant managed staff, the supply of warehouse stock, relations with suppliers, government relations and the company's bookkeeping, but always under her supervision and direction;

(ix) not only did she supervise her spouse's daily management activities but she was also responsible for important company records. She also stated that she took steps to obtain a licence to sell beverages and to operate video lottery terminals.

### Appellant's testimony

[5] The Appellant basically repeated his spouse's testimony with respect to the work and responsibilities she assigned to him within the company. He explained that he had no decision-making power in terms of managing the company and that he was always supervised by his spouse. He also indicated that he was present throughout the entire time the company was audited. He also acknowledged that he was the only one who had discussions and negotiations with the Minister's delegate as part of the audit.

[6] The Appellant also testified that

(i) he signed a number of cheques;

(ii) he signed tax returns, source deduction remittances, summaries of source deductions, as well as a declaration of the Company on form CO-17 for the period ending January 31, 1999 (Exhibits 1-6, 1-7);

(iii) he identified himself as the head of the company on an Amended Declaration – Legal Person which he signed and filed with the Inspecteur général des institutions financières on or around August 20, 1998 (Exhibit 1-2);

(iv) he also identified himself as the head of the company on the Annual Declaration – Legal Person for 2001 (Exhibit 1-3) which he signed and filed with the Inspecteur général des institutions financières;

(v) he co-signed by mistake with his spouse the company's tax return for its fiscal year ending January 31, 1999 (Exhibit 1-4);



(vi) he signed the application to register the company for the purposes of the Act (Exhibit 1-10). It is important to note that the application was accompanied by a power of attorney signed by Ms. Blanchard as director of the company, authorizing the Appellant to sign the form and take all steps necessary to obtain a registration number for the purposes of the Act.

(vii) he answered, in a questionnaire completed at the request of the Centre de perception fiscale of the Ministère du Revenu du Québec (Exhibit 1-8), that he received, as manager, a salary from the company and that his main duties were to oversee daily operations; it should be noted that the Appellant stated in the questionnaire that he never signed, as a guarantor or co-signer, a loan on behalf of the company. I would also like to note that in the questionnaire the Appellant stated that he was not a director of the company.

(viii) he received the draft assessment (Exhibit 1-9) as an authorized representative of the company and not as a director as submitted by the Respondent. He explained that when he signed the document, he did not notice that the Minister's delegate wrote by his own hand in the box entitled "Title" (which is not where the Appellant signed the document) the word "director."

(ix) he signed a few lease agreements for game equipment with Richelieu Amusements Ltée on behalf of the company (Exhibit 1-5). It is important to note that the lease form used by the lessor was not suitable in the case where the lessor was a company. In fact, the word "owner" appeared below the line where the lessor had to sign the lease agreement. What is more, in the two lease agreements filed as Exhibit 1-5, the Appellant signed his name on the line in questions without indicating that he was acting on behalf of the company. Furthermore, in the other lease agreements adduced in evidence, the Appellant signed his name on the line in question adding however that he was acting on behalf of the company.

Testimony of Serge Samson

[7] The testimony of Serge Samson, the company's banker during the relevant period, basically revealed that Ms. Blanchard represented the company in all discussions, meetings and negotiations related to the company's banking affairs. Mr. Samson clearly indicated that the Appellant was in no way responsible for managing the company's banking affairs.

Testimony of Danielle Rivest

[8] Danielle Rivest, the financial management officer for the Ministère du Revenu du Québec who audited the company's goods and services tax filings for the relevant period, testified that she had never seen or met Ms. Blanchard, nor did she have discussions with her during the audit. She only spoke with the Appellant.

Testimony of Claude Paradis

[9] Claude Paradis, the collection officer for the Ministère du Revenu du Québec, testified that, in 2002, he went to the company's place of business to collect the debt owed by the company, a debt related to the unremitted goods and services tax for the relevant period. He stated that seeing as there was no one to speak to at the company's place of business, he left a written note on the premises addressed to Ms. Blanchard asking her to telephone him. He explained that it was the Appellant who telephoned him and that at the time he identified himself as director of the company. Mr. Paradis added that he met with the Appellant and the company's accountant on one occasion as part of his collection mandate. He stated that during that meeting the parties were unable to reach an agreement on the payment of the unpaid taxes.

Testimony of Nathalie Phoenix

[10] According to the testimony of Ms. Phoenix, the collection officer for Revenu Québec who was in charge of collecting the company's tax debt, that the Appellant met with Ms. Phoenix and spoke with her on several occasions in 2002 and 2003 to try to settle the company's tax debt and take back its property which was to be sold under execution. I would like to point out that at no time did Ms. Phoenix suggest during her testimony that the Appellant introduced himself as a director of the company. Although Ms. Blanchard told Ms. Phoenix from the very beginning that it was the Appellant who was in charge of the corporation, it is

however important to note that it was Ms. Blanchard, accompanied by the accountant of the company, who made the first settlement proposal for the company's tax debt to Ms. Phoenix. Also according to the testimony of Ms. Phoenix, on February 13, 2003, the Appellant submitted to her a power of attorney, provided by Ms. Blanchard, authorizing him to represent the company in discussions about the collection of the company's tax debt.

### Analysis and conclusion

[11] The notion of de facto direction was definitely recognized by the Federal Court of Appeal in *Wheeliker*.<sup>1</sup>

[12] What are the factors that allow us to determine whether a person is a de facto director of a corporation? In my opinion, a person shall be considered as such if

(i) he or she usurps that function by taking actions normally required of or reserved for the directors of a corporation under the incorporating legislation of the corporation concerned: for instance, participating in board of directors meetings, signing board resolutions, etc.

(ii) he or she introduces himself or herself to third parties as a director of the corporation concerned.

[13] I think one ought to be careful about applying the concept of de facto director. I do not believe this concept encompasses all those who exercise powers within a corporation. For instance, the signing of a corporation's bank account cheques or of reports addressed to government authorities and negotiating on behalf of the company a settlement with tax authorities or an acquisition contract or a contract sale of assets cannot, in my opinion, be regarded as establishing a presumption that the person undertaking those actions does so as a de facto director. If that were the case, any person authorized to perform such actions under the supervision of a corporation's board of directors or under the powers delegated by the board would automatically be a de facto director to third parties. I am of the opinion that a person who takes such actions can be considered a de facto director by third parties only if he or she introduces himself or herself as the director of the corporation or clearly suggests that he or she performs such actions as the director of the corporation. It appears to me that this position is consistent with directive RCD 95-12 established by the Minister on the subject

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<sup>1</sup> *Wheeliker v. Canada*, [1999] F.C.J. No. 401.

even though it does not have the force of law. In his directive, the Minister stated as follows:

Caution should be exercised prior to assessing an alleged “de facto” director. It is not sufficient that a person be signing cheques for the corporation for him or her to be considered a “de facto” director. The general rule is that it is not appropriate to assess an alleged “de facto” director if there are legally appointed directors in office at the relevant times. The assessment of a de facto director should be considered only in cases where a person is representing himself or herself as a director. There should be written evidence of such behavior available.

[14] In the case at bar, the Appellant convinced me that he was not a de facto director. The Appellant was merely a manager who exercised his functions under the direction and supervision of the sole director of the company, his spouse, Ms. Bertrand. Ms. Bertrand convinced me that she alone had control of the company. Her testimony, supported by that of Mr. Samson, the banker of the company, regarding her management of the company’s finances, was very eloquent with respect to her role within the company. Ms. Bertrand persuaded me that she exercised all the powers relating to the company’s cash flow. She met with the external accountant to prepare the company’s balance sheets and income tax returns. She signed the balance sheets and income tax returns. She reviewed government reports prepared by the Appellant before he signed them and sent them to the authorities concerned. She also took steps to obtain a licence to sell alcoholic beverages and to operate video lottery terminals. She met with Ms. Phoenix along with the company’s accountant. Furthermore, the powers of attorney signed by Ms. Bertrand authorizing the Appellant to represent the company are equally eloquent examples demonstrating that she was the sole director.

[15] The Appellant certainly had some powers within the company. However, when he exercised those powers, he was subject to the direction and supervision of his spouse or he exercised them within the limits of the powers delegated by her. It was in that capacity that the Appellant prepared and signed government reports and cheques and leased personal property and negotiated with tax authorities. He did not perform those actions as a director of the company. He did not introduce himself as director of the company when he dealt with third parties.

[16] The Respondent attempted to demonstrate that the Appellant introduced himself to third parties as a director of the company. The Respondent’s evidence in that respect is based on the following facts, which, in my opinion, are largely irrelevant, isolated considering all the evidence surrounding the Appellant’s conduct, and largely inconclusive:

(i) the evidence revealed that on one occasion, the Appellant told Claude Paradis that he was director of the company. This action by the Appellant cannot, in my opinion, create a presumption of his capacity of de facto director as, in my opinion, it was an isolated incident which, moreover, occurred outside the relevant period.

(ii) the Respondent submitted that the Appellant's signature on Exhibit 1-9 created a presumption of his capacity of de facto director. I am of the opinion that the signature on that document does not create such a presumption. The Appellant's explanation that when he signed the document, he did not notice that he was explicitly mentioned as director of the corporation convinced me.

(iii) finally, the Respondent submitted that the Appellant's signature on two lease contracts created a presumption that he was a de facto director. In other words, I cannot conclude that the Appellant represented the corporation by taking the title of director. That form was not meant to be used in cases where the lessor was a company and therefore caused confusion.

[17] For these reasons, the appeal is allowed with costs.

Signed at Ottawa, Canada, this 19th day of February 2007.

“Paul Bédard”

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Bédard J.

Translation certified true

on this 31st day of August 2007.

Daniela Possamai, Translator

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COURT FILE NO.: 2004-4382(GST)G  
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DATE OF JUDGMENT: February 19, 2007

APPEARANCES:

Counsel for the Appellant: Serge Fournier

Counsel for the Respondent: Brigitte Landry

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