Docket: 2001-1331(IT)G

BETWEEN:

NICOLAS MATOSSIAN,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on common evidence with the appeals of *René Amyot* (2001-1332(IT)G) and *Michel Marengère* (2001-1333(IT)G) on April 20 and 21, 2004, at Montréal, Quebec.

Before: The Honourable Justice Paul Bédard

Appearances:

Counsel for the Appellant: Aaron Rodgers

Counsel for the Respondent: Jean Lavigne

JUDGMENT

The appeal of the assessment under the *Income Tax Act*, for which the notice of assessment is dated January 6, 2000, and numbered 13280, is dismissed without costs in accordance with the attached Reasons for Judgment.

Signed at Ottawa, Canada, this 23rd day of February 2005.

"Paul Bédard"

Bédard J.

Citation: 2005TCC21
Date: 20050223
Docket: 2001-1331(IT)G

BETWEEN:

NICOLAS MATOSSIAN,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent,

AND

2001-1332(IT)G

RENÉ AMYOT,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent,

AND

2001-1333(IT)G

MICHEL MARENGÈRE,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Bédard J.

[1] The Appellants were the sole directors of Dominion Bridge Inc. (DBI) when it failed to remit the employer and employee premiums set out in sections 67 and 68 of the *Employment Insurance Act* (the “EIA”). DBI made an assignment in bankruptcy in September 1998. The Minister of National Revenue (the “Minister”)

held the Appellants jointly and severally liable for the premiums not remitted by DBI and issued assessments of the Appellants dated January 6, 2000. The Appellants are appealing their assessments for the following reasons:

(i) first, they held that a claim had not been proved within six months after the date of DBI's assignment, as required by paragraph 227.1(2)(*c*) of the *Income Tax Act* (the "Act");

(ii) second, they claimed that the employer premiums were not included in the joint and several liability set out in section 227.1 of the Act and section 83 of the EIA;

(iii) last, they held that they had acted with due diligence in the instant case and thus could not be held jointly and severally liable for the tax liability of DBI.

A- Whether the Minister proved a claim within six months of DBI's assignment in bankruptcy

Position of the Appellants

[2] According to the Appellants, the Minister had to comply with subsection 124(4) of the *Bankruptcy and Insolvency Act* (the "BIA") to prove a claim under paragraph 227.1(2)(*c*) of the Act. They held that, although the Minister produced a proof of a claim in accordance with form 33 (accompanied, in Schedule A, by a breakdown of the amounts due according to the year, the assessment date and the nature of the amount in question), the Minister failed to produce supporting documentation for the claims at issue. According to the Appellants, it was not relevant that the trustee in bankruptcy accepted the Minister's claim. They claimed that the Minister had to at least attach the notices of assessment setting out the debts at issue. In support of their claims, the Appellants referred to the following cases: *Re Norris*, [1989] 2 C.T.C. 185 (C.A. Ont.); *Re Riddler* (1991), 3 C.B.R. (3d) 273, [1991] B.C.J. No. 36 (B.C.S.C.); and *Re Port Chevrolet Oldsmobile Ltd.*, 2004 BCCA 37.

Position of the Respondent

[3] According to the Respondent, the testimony of Danielle Dazé, Collection Officer with the Canada Customs and Revenue Agency (CCRA), clearly established that the notice of assessment (Exhibit I-33) had in fact been reproduced

in the proof of claim dated October 20, 1998, submitted to the trustee.[1] The Respondent held that the notice of assessment, as well as the proof of claim and appendices, clearly enabled the Minister to establish a claim with the trustee since the trustee paid the guaranteed part of the claim in full. The Respondent added that the role of the Court was simply to determine whether the Minister had proved a claim before the trustee. According to the Respondent, the Court cannot replace the trustee and can only accept that the trustee had concluded that the Minister's claim was proved. Last, according to the Respondent, not only did the decision in *Re Port Chevrolet Oldsmobile Ltd.*, *supra*, not support the Appellants' position, but rather it confirmed the discretionary power of the trustee to determine the proof required to be convinced of the existence of any claim.

Analysis

[4] For directors to be held jointly and severally liable, the Minister must meet the requirements of subsection 227.1(2) of the Act. In the instant case, since it is an assignment of properties, I agree with the parties that the requirements of paragraph 227.1(2)(*c*) of the Act must be met by the Minister and not those in paragraphs 227.1(2)(*a*) or (*b*) of the Act. Christie J. made the following comments with respect to these two paragraphs in *Kennedy v. The Queen*, No. 91-152(IT), June 17, 1991, 91 DTC 1037 (T.C.C.), aff'd by 92 DTC 6380 (F.C.A.):

> It is the appellant's contention that fulfilling the requirements of paragraph 227.1(2)(a) is not compliance with the condition precedent in all cases. Whether there must be observance of paragraph 227.1(2)(a) or (b) or (c) in order to do so will depend on the facts of each case. If a corporation has commenced liquidation or dissolution proceedings or has been dissolved, the route designated under paragraph 227.1(2)(b) must be followed. If a corporation has made an assignment or a receiving order has been made against it under the *Bankruptcy Act*, paragraph 227.1(2)(c) governs. In other circumstances, paragraph 227.1(2)(a) is applicable. I think that the foregoing is the proper approach.

Roy v. Canada, No. 93-107(IT)G, April 13, 1995, [1996] 1 C.T.C. 2269, at paragraph 20 (T.C.C.), aff'd by No. A-242-95, April 16, 1996, [1996] 2 C.T.C. 198 (F.C.A.), and *Pozzebon v. Canada*, No. 95-4143(IT)G, May 15, 1998, 98 DTC 1940, at paragraphs 42-43 (T.C.C.), reiterate this passage.

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[1] See Exhibit I-7, the written submissions of the Respondent at paragraphs 22 and 26 and the testimony of Ms. Dazé at pages 71 and 72 of the transcript of the stenographer's notes.

[5] Consequently, I believe that pursuant to paragraph 227.1(2)(*c*) of the Act, the Minister could only hold the Appellants jointly and severally liable in the case at bar if the claim was proved within six months of DBI's assignment. However, this raises two questions:

(i) Does this claim have to be proved objectively, independent of the fact that the trustee had been satisfied that it exists? I would repeat that, in the case at bar, the trustee paid the guaranteed part of the claim to the Minister.

(ii) Was there a particular method that the Minister had to use to prove the claim?

[6] I would answer the first question in the affirmative simply because of the words used by Parliament, and by relying on *Re Port Chevrolet Oldsmobile Ltd.*, *supra* at paragraphs 24-32 (having in mind *Re Galaxy Sports Inc.*, [2004] B.C.J. No. 1008 at paragraph 36 (B.C.C.A.). Parliament chose to use objective terms ("a claim…has been proved"), without, however, specifying who must be satisfied ("convaincu"). For this reason, I find that the question must be reviewed *de novo* by the Court, independent of the fact that the trustee could have been satisfied of the existence of part of the Minister's claim. If Parliament had chosen to include terms such as "if the trustee is satisfied," the Court would have only had to consider whether the trustee had exercised his discretion judicially (see, *inter alia*, *Cook v. Carter*, [1952] O.W.N. 155, at p. 158 (Ont. S.C.), where LeBel J. found that the use of the expression "satisfies the judge" refers to discretion to be exercised judicially).

[7] It follows that the Court has to determine whether the claim had been proved and must not limit itself to considering whether the trustee exercised his discretion judicially. This is how the Court proceeded in *Roy v. Canada*, *supra*, at paragraphs 19 and 29 (T.C.C.); and *Vanderpol v. Canada*, No. 2001-393(GST)I, February 18, 2002, [2002] T.C.J. No. 18 (T.C.C.), without explicitly mentioning it.

[8] The answer to the second question, regarding how the Minister had to prove his claim, may also be obtained, at least in part, from *Roy* and *Vanderpol*, *supra*. In these cases, the Court had followed the requirements of the BIA to come to its conclusions, without, however, saying why. The explanation is simple: the Crown is bound by the BIA pursuant to section 4.1 of this act. Accordingly, except where Parliament explicitly excludes the application of the BIA as it does in subsection 227(4.1) of the Act, for example (see *First Vancouver Finance v. M.N.R.*, [2002]

2 S.C.R. 720 (S.C.C.)), the Crown cannot use its royal prerogative to maintain priority as it could ordinarily: see *Re Cardston U.F.A. Co-op. Assn.* (1925), 7 C.B.R. 413 (Alta. S.C.); *R. v. Leach* (1929), 11 C.B.R. 214 (N.B.K.B); and *Comm. des valeurs mobilières c. Gagnon,* [1964] B.R. 349 (C.S. Qué.). These decisions are found on page 20 of *The 2004 Annotated Bankruptcy and Insolvency Act* by L.W. Holden and G.B. Morawetz, published by Thomson Carswell (the "2004 Annotated BIA").

[9] Thus, in *Roy*, *supra*, Garon J. (as he then was) referred in particular to section 124 of the BIA to arrive at the conclusion that by producing the right form, the Minister had complied with paragraph 227.1(2)(*c*) of the Act. However, it is not clear in reading this decision how the Minister met all the conditions of paragraph 227.1(2)(*c*) of the Act.

[10] Sarchuk J. had to deal with this question and section 124 of the BIA, in *Vanderpol*, *supra*. He found that the proof of claim filed by the Minister actually contained a statement of account showing some particulars of the claim. Sarchuk J. added that the notice of assessment did not have to be attached to the proof of claim because the BIA did not require it (see *Vanderpol*, *supra*, at paragraphs 8-10). Moreover, Beaubier J., in *MacGillivray v. Canada*, No. 96-2047(GST)I, February 19, 1997, [1997] T.C.J. No. 112 (T.C.C.), briefly stated that given that a proof of claim had been filed by the Minister, paragraph 227.1(2)(*c*) of the *Act* had been met (see paragraphs 9 and 10).

[11] If, in *Vanderpol*, *supra*, the Minister had failed to attach a statement of account to his proof of claim, it is possible that Sarchuk J. might not have come to the same conclusion. This would be in keeping with provincial case law regarding the importance of the statement of account with a minimum amount of acceptable details: see *Re McCoubrey*, (1924) 5 C.B.R. 248 (Alta. S.C.); *Re Vanderweghe Ltd.* (1937), 18 C.B.R. 403 (Que. S.C.); *Re Corduroys Unlimited Inc.* (1962), 4 C.B.R. (N.S.) 250 (Que. S.C.); and *Re Riddler*, *supra*. See also the 2004 Annotated BIA at page 516. A statement of account is important (a) to permit the chair of the meeting of creditors to examine the details of the claims (see Re *London Bridge Works Ltd.* (1926), 8 C.B.R. 73 (Ont. S.C.)) before allowing each creditor to vote at the meeting (see *Re Norris* (1988), 67 C.B.R. (N.S.) 246, rev'd on other grounds (1989), 69 O.R. (2d) 285, 75 C.B.R. (N.S.) 97 (Ont. C.A.); and *Re Riddler*, *supra*); and (b) to permit creditors to assess whether they should contest the claim at issue (see *Re Saykaly* (1926), 7 C.B.R. 570 (Ont. S.C.). For these decisions, see also the 2004 Annotated BIA at page 516. It may be recalled that the Appellants base their arguments on *Re Riddler* and *Re Norris*, *supra*.

[12] Although a proof of claim (and I would add a statement of account) should not be quashed because of simple technical errors given the commercial nature of the BIA (see *Atlas Acceptance Corp. v. Fratkin* (1978), 27 C.B.R. (N.S.) 220 (Man. C.A.)),[2] it remains that any proof of claim or statement of account must contain a reasonable amount of information.

[13] In the case at bar, the Appellants, at first glance, did not seem to challenge the proofs of claim or the schedules, but rather they focused on the absence of supporting documents for these claims. First, although it seems that the filing of notices of assessments was not specifically required by the BIA (see *Vanderpol*, *supra*)[3], it seems, in light of the evidence adduced, that the Minister had filed them.[4] Furthermore, although the Appellants claimed that "Schedule A" did not contain statements of account, I am of the opinion that they were in fact statements of account.

[14] Should other documents have been filed? I would answer this question in the negative, as subsection 124(4) of the BIA seems less clear with respect to supporting documents than it is for the statement of account. Case law also supports this reasoning.

[15] For these reasons, I find that the Minister had proved his claim in accordance with paragraph 227.1(2)(*c*) of the Act.

B- <u>Employer premiums</u>

[16] Are employer premiums included in the joint and several liability of the directors provided in section 227.1 of the Act and section 83 of the EIA?

[17] The Appellants held that under these two sections, they could only be held jointly and severally liable for the employee premiums, whether or not they were withheld, that were not remitted to the Receiver General for Canada. In arriving at this interpretation, the Appellants provided a rather original interpretation of

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2 The 2004 Annotated BIA also refers to other trial decisions at page 515.

3 See, however, *Re Port Chevrolet Oldsmobile Ltd.*, *supra* at paragraphs 24-32.

4 See paragraph 3 of these reasons.

sections 82 and 83 of the EIA, a comparison with other tax laws and an interpretation of the purpose and spirit of these provisions.

[18] The interpretation of sections 82 and 83 of the EIA given by counsel for the Appellants in his written submissions is worth quoting:

> [Translation]
>
> Section 83 EIA states that directors are jointly and severally liable together with the corporation for which they act. The section refers to section 82(1) EIA to determine the parameters of this liability. Furthermore, in subsection 2, using a reference technique, section 83 EIA specifies that the rules set out in subsections 227.1(2) to (7) ITA apply in this situation.
>
> Thus, section 83 EIA seems to be clear but the scope of the concept of "remittance" is not defined. This section uses the words "fails to deduct or remit". "Deduct" (*déduire*) is defined in the Petit Larousse as follows:
>
> "*Soustraire d'une somme*" [Translation] "subtract from an amount"
>
> This indicates to us that an amount to remit must first exist, which would come from a source deduction. The logical interpretation would be to view the directors' liability, under section 83 EIA, as it relates to the amount deducted from the wages paid, but that the employer failed to remit, as well as to the failure to deduct them. The effect of this section is that the directors are liable for the amount deducted from wages and they are liable to the Crown, for the equivalent amount regardless of whether it was deducted or not. The spirit of this section conforms perfectly with section 227.1 ITA, creating a liability for the director solely with respect to the employee premium or similar amounts.
>
> Section 82 EIA establishes the amount that the employer must deduct and remit to the Receiver General with the corresponding employer premium payable under section 68 EIA The use of the verb "remit" to describe the payment of an employer premium as well as the remittance of deductions leads to confusion.
>
> Section 83 EIA seems to limit the directors' liability to the amount, whether or not it was deducted, that was not remitted to the Receiver General. Section 82 EIA, read together with the definition of the word "deduct," completes section 83 EIA by specifying where the amount should be deducted from. In other words, deductions are

> taken from the wages of third persons (employees), amounts that are subject to a deemed trust with respect to the government. This interpretation conforms with the purpose of sections 83 and 82(1) EIA, which will be discussed below since the first step is to establish the ambiguity in reading these sections, considering the ordinary meaning of the words in them.
>
> The second paragraph of section 83 EIA applies subsections 227.1(2) to (7) ITA. The provisions in question do not in any way deal with the employer premium. The fact that section 83 EIA refers to the administrative provisions of section 227.1(1) ITA infers that there is some similarity between the amounts that the Crown is trying to recover from directors through these two sections.

[19] According to the Appellants, this interpretation based on the ordinary meaning of the words is supported by the spirit of the EIA, whose purpose is to ensure that the amounts that should be deducted and remitted are remitted despite the financial difficulties of the debtor corporation. Accordingly, by making directors jointly and severally liable for the employee premiums that have not been remitted by the employer corporation, whether or not they were deducted, Parliament intended, according to the Appellants, to reduce the increasing number of failures to remit caused by the recession that was wreaking havoc when these provisions were adopted in the early 1980's. Furthermore, to support their position, the Appellants referred briefly to provisions of other tax laws.

Analysis

[20] The relevant legislative provisions read as follows:

67. Subject to section 70, a person employed in insurable employment shall pay, by deduction as provided in subsection 82(1), a premium equal to their insurable earnings multiplied by the premium rate set by the Commission. **68.** Subject to sections 69 and 70, an employer shall pay a premium equal to 1.4 times the employees' premiums that the employer is required to deduct under subsection 82(1).	**67.** Sous réserve de l'article 70, toute personne exerçant un emploi assurable verse, par voie de retenue effectuée au titre du paragraphe 82(1), une cotisation correspondant au produit de sa rémunération assurable par le taux fixé par la Commission. **68.** Sous réserve des articles 69 et 70, la cotisation patronale qu'un employeur est tenu de verser correspond à 1,4 fois la cotisation ouvrière de ses employés qu'il est tenu de retenir au titre du paragraphe 82(1).

…	[…]
82. (1) Every employer paying remuneration to a person they employ in insurable employment shall (*a*) deduct the prescribed amount from the remuneration as or on account of the **employee's premium** payable by that insured person under **section 67** for any period for which the remuneration is paid; and (*b*) remit the amount, together with the **employer's premium** payable by the employer under **section 68** for that period, to the Receiver General at the prescribed time and in the prescribed manner.	**82.** (1) L'employeur qui paie une rétribution à une personne exerçant à son service un emploi assurable est tenu de retenir sur cette rétribution, au titre of the **cotisation ouvrière** payable par cet assuré en vertu de **l'article 67** pour toute période à l'égard de laquelle cette rétribution est payée, un montant déterminé conformément à une mesure d'ordre réglementaire et de le verser au receveur général avec la **cotisation patronale** correspondante payable en vertu de **l'article 68**, au moment et of the manière prévus par règlement.
…	…
83. (1) 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 liable, together with the corporation, to pay Her Majesty that amount and any related interest or penalties.	**83.** (1) Dans les cas où un employeur qui est une personne morale omet de verser ou de déduire un montant of the manière et au moment prévus au paragraphe 82(1), les administrateurs of the personne morale au moment de l'omission et la personne morale sont solidairement responsables envers Sa Majesté de ce montant ainsi que des intérêts et pénalités qui s'y rapportent.
(2) Subsections 227.1(2) to (7) of the *Income Tax Act* apply, with such modifications as the circumstances require, to a director of the corporation.	(2) Les paragraphes 227.1(2) à (7) of the *Loi de l'impôt sur le revenu* s'appliquent, avec les adaptations nécessaires, à l'administrateur of the personne morale.
(3) 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	(3) Les dispositions of the présente partie concernant la cotisation d'un employeur pour un montant qu'il doit payer en vertu of the présente loi et concernant les droits et les obligations d'un employeur cotisé ainsi s'appliquent à l'administrateur d'une personne morale pour un montant que celui-ci doit payer en vertu du

director under subsection (1) in the same manner and to the same extent as if the director were the employer mentioned in those provisions.	paragraphe (1) of the manière et dans la mesure applicables à l'employeur visé par ces dispositions.
Income Tax Act	***Loi de l'impot sur le revenu***
227.1. (1) Where a corporation has failed to deduct or withhold an amount as required by subsection 135(3) 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 liable, together with the corporation, to pay that amount and any interest or penalties relating thereto.	**227.1.** (1) Lorsqu'une société a omis de déduire ou de retenir une somme, tel que prévu au paragraphe 135(3) ou à l'article 153 ou 215, ou a omis de remettre cette somme ou a omis de payer un montant d'impôt en vertu of the partie VII ou VIII pour une année d'imposition, les administrateurs of the société, au moment où celle-ci était tenue de déduire, de retenir, de verser ou de payer la somme, sont solidairement responsables, avec la société, du paiement de cette somme, y compris les intérêts et les pénalités s'y rapportant.
(2) A director is not liable under subsection 227.1(1), unless … (*c*) the corporation has made an assignment or a receiving 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 receiving order.	(2) Un administrateur n'encourt la responsabilité prévue au paragraphe (1) que dans l'un ou l'autre des cas suivants: *c*) la société a fait une cession ou une ordonnance de séquestre a été rendue contre elle en vertu of the *Loi sur la faillite et l'insolvabilité* et **l'existence of the créance** à l'égard de laquelle elle encourt la responsabilité en vertu de ce paragraphe **a été établie** dans les six mois suivant la date of the cession ou de l'ordonnance de séquestre.
(3) 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.	(3) Un administrateur n'est pas responsable de l'omission visée au paragraphe (1) lorsqu'il a agi avec le degré de soin, de diligence et d'habileté pour prévenir le manquement qu'une personne raisonnablement prudente aurait exercé dans des circonstances

	comparables.

[21] In short, sections 67 and 68 of the EIA create the obligation to pay premiums and set their amounts, whereas subsection 82(1) of this act obliges the employer to deduct employee premiums from their earnings and remit them to the Receiver General for Canada with the employer premiums payable under sections 66 and 67 of the EIA, which provide that these premiums equal a certain percentage of the "insurable earnings" of an employee. It seems very clear to me in reading sections 67 and 68 and subsection 82(1) of the EIA that the employer premiums must be "remitted" by the employer to the Receiver General for Canada. The sole purpose of subsection 83(1) of the EIA is to make directors jointly and severally liable for the employer corporation's failure to meet its obligations under subsection 82(1) of this act. Furthermore, using the reference technique, subsection 83(2) of the EIA specifies that the rules found in subsections 227.1(2) to (7) of the Act are applicable.

[22] In order to accept the Appellants' interpretation of these legal provisions, the conclusion would have to be made that the grammatical and ordinary meaning of the words "pay" or "remit" is that to remit an amount, it first has to be deducted form a specific source.

[23] In my opinion, the modern method of legislative interpretation must be applied in the case at bar, specifically the rule set out by E.A. Driedger in *Construction of Statutes* (2nd ed., 1983) at page 87, which reads as follows:

> …the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act and the intention of Parliament.

[24] This rule has been adopted by the Supreme Court of Canada many times in all areas, including tax law.[5]

[25] It follows that the first part of my analysis will involve determining the ordinary and grammatical meaning of the word "remit" and the French words "verser" and "payer." Since these words are not defined in the EIA and they do not

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5 *Markevich v. Canada*, [2003] 1 S.C.R. 94, at para. 12; *Ludco Enterprises Ltd. v. Canada*, [2001] 2 S.C.R. 1082, at paras. 36 and 37; *Canada (Deputy Minister of National Revenue) v. Mattel Canada Inc.*, [2001] 2 S.C.R. 100, at para. 41.

have a well-defined and recognized legal meaning, I will have to determine their ordinary and grammatical meaning. In other words, I will have to determine whether one of these words supports the Appellants' thesis.

[26] As it is acceptable to use dictionaries to find the meaning of words (P.-A. Côté, *Interpretation of Legislation in Canada*, 3rd ed., Carswell, 2000, at 261-262), I will look at the definitions of "*verser,*" "*payer*" and "remit" given in the *Petit Robert, Dictionnaire de la langue française*, 1991, the *Grand dictionnaire terminologique* of the Office québécois de la langue française, electronic version, 2003, the *Dictionnaire de droit québécois et canadien*, 2nd ed., Wilson & Lafleur, 2001, the *Oxford English Dictionary Online*, Oxford University Press, 2004, and *Black's Law Dictionary*, 7th ed., 1999:

> Le Petit Robert, Dictionnaire de la langue française, 1991
>
> > "verser"...Apporter (de l'argent) à une caisse, à une personne, à titre de paiement, de dépôt, de mise de fonds. V. Payer. *Les sommes à verser au fisc.*
>
> Le Grand dictionnaire terminologique of the Office québécois de la langue française, electronic version, 2003
>
> > "verser" Verser (de l'argent).
>
> Dictionnaire de droit québécois et canadien, 2nd ed., Wilson & Lafleur, 2001
>
> > "versement" Action de remettre à quelqu'un une somme d'argent en paiement d'une dette ou à tout autre titre.
> > English: payment
>
> Oxford English Dictionary Online, Oxford University Press, 2004
>
> > 2. To give up, resign, surrender (a right or possession). ...14. To send or transmit (money or articles of value) to a person or place.
>
> Black's Law Dictionary, 7th ed., 1999
>
> > "remit" To transmit (as money).

[27] An examination of these definitions leads me to conclude that the Appellants cannot use the grammatical meaning of these words to conclude that to remit an amount, it must first be deducted from a given source. The ordinary meaning of these words has the same effect. In fact, few people would conclude that to remit an amount, it must first be deducted from a given source. My overall analysis of all the legislative provisions involved and the ordinary and grammatical meaning of these words leads me to conclude that the amounts to remit are not limited to the amounts that must be deducted from the employees' insurable earnings, but include all the amounts referred to by Parliament in the legislative provisions involved.

[28] In my opinion, this interpretation respects the spirit and purpose of the EIA and Parliament's intent as presented by the Appellants. However, if, as the Appellants claim, Parliament had wanted to reduce the increasing number of failures to pay caused by the recession, why would Parliament have limited itself to making the directors jointly and severally liable for employee premiums and not employer premiums? In theory, these amounts are as important to the effective operation of the EIA as the employee premiums are. *Ferreira v. Canada (M.N.R.)*[6] is quite eloquent in this respect:

> The legislation is called "unemployment insurance". The concept of insurance is that a person will pay a certain amount (called a "premium") in order to be wholly or partly indemnified against a foreseeable risk. If the premium is not paid, there is no indemnity against the risk. In the scheme of this legislation, the risk is unemployment. Applying the basic concept of insurance, I should think that if no employee's or employer's premiums were paid during the 28-month period, then the Appellant had no unemployment insurance with respect to that period. This elementary thought is reinforced by the terms of certain Regulations connected with the Unemployment Insurance Act.

[29] If that is the consequence of not paying employee and employer premiums, it is even more obvious that Parliament wanted to guarantee its funding source for the employment insurance program and that one of the means chosen was to make directors liable for the employee and employer premiums not remitted by the employer.

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6 No. 95-456(UI), November 21, 1995, [1995] T.C.J. No. 1548, at para. 8 (T.C.C.).

[30] Last, the Appellants tried, in their written submissions, to refer to other tax laws as well as subsection 71(2) of the former *Unemployment Insurance Act, 1971*. I do not see how their submissions in this regard could convince me otherwise. In fact, their analysis of these other provisions seemed irrelevant to the case at bar. As for subsection 71(2), although it only deals with the employee premiums, the Appellants failed to cite section 68 of this act (now subsection 82(1)), that sets out the obligation to pay employee and employer premiums.

C- <u>In the case at bar, did the Appellants exercise due diligence?</u>

<u>Testimony</u>

[31] Nicolas Matossian is the only one of the three Appellants who testified at the hearing. Vitold Jordan, Vice President-Finance of Dominion Bridge Corporation (DBC) also testified for the Appellants. Danielle Dazé, Collection Officer with CCRA, testified for the Respondent. I would note that the testimony of these people seemed credible and convincing to me.

[32] In 1997, the Appellants were the only directors of DBI[7] when it failed to remit[8] the employer and employee premiums for three periods in 1997, July 15 to 21, August 22 to 31 and October 22 to 31. The unpaid premiums totalled $57,000, $47,000 and $97,000 for the three periods respectively.

[33] The Appellants' involvement in DBC and Cedar Group Canada (Cedar) began in 1994.[9] DBI was a subsidiary of Cedar, which in turn was a subsidiary of DBC. Cedar had six other subsidiaries.[10] It would seem that the Appellants were directors of DBC and Cedar from 1994 until April 28, 1998. In addition to being directors of these corporations, Messrs. Matossian and Marengère were managers at some of them.[11]

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7 See the testimony of Mr. Matossian at page 83 of the stenographer's notes.

8 According to the Response to the Notice of Appeal, the amounts were deducted but not remitted. The testimony does not deal with this fact.

9 See the testimony of Mr. Matossian at pages 90-91.

10 The relationship between these corporations is summarated at page 83 of the testimony of Mr. Matossian.

11 See the testimony of Mr. Matossian at pages 83, 84, 86 and 87. Upon reading the transcript of the stenographer's notes, two things remain uncertain: first, it is not clear whether

[34] Mr. Matossian was the Chief Operating Officer of DBC.[12] As such he was responsible in particular for acquisitions and the activities of the subsidiaries of Cedar during the period at issue.[13] He was also the director who was the most involved in issues dealing with pay and source deductions. He was very competent. In fact, he holds a B.A. from McGill, an M.B.A. from Harvard and a Ph.D. in economics from McGill. He had taught, and worked in both the private and public sectors. Furthermore, he has over 30 years of business experience.

[35] Mr. Marengère was chairman and CEO of DBC.[14] Although he held the most senior position, he was mainly responsible for funding activities and acquisitions.[15] Messrs. Marengère and Matossian communicated daily regarding everything that involved acquisitions and activities, including source deductions.[16]

[36] As for the Appellant Amyot, he was a retired lawyer in his late sixties during the year at issue and should only be considered an outside director[17] according to the Appellant Matossian. He was not involved in the daily activities of the corporations, but rather was a simple representative of the shareholders of these corporations. He had already been president of Air Canada and a director of Rothmans International.[18]

Mr. Marengère was also a director of Cedar. Second, I cannot conclude that the Appellants were directors for all the years in question. However, Mr. Matossian did not state the opposite.

12 Testimony of Mr. Matossian at page 88.

13 Testimony of Mr. Matossian at page 90.

14 Testimony of Mr. Matossian at page 88.

15 Testimony of Mr. Matossian at page 90.

16 For more information about their relationship, see pages 160-161 of the testimony of Mr. Matossian.

17 *Soper*, cited below, defines inside directors as follows at paragraph 44: “those involved in the day-to-day management of the company and who influence the conduct of its business affairs.” As we will see later, even if we agree that Appellant Amyot is an outside director, he still did not show due diligence. Accordingly, for the purposes of this analysis, I assume that he is an outside director of the corporation in question.

18 For these comments about Appellant Amyot, see pp. 86, 88, 96, 177 and 181 of the testimony of Appellant Matossian.

[37] During the years at issue, Cedar acquired about seven corporations, all of them tied directly or indirectly to the manufacturing, construction and petroleum industries in Canada and abroad.[19] DBI was the first of these acquisitions in 1994. In 1997, these corporations employed approximately 7500 persons,[20] and it was increasingly apparent that these corporations were difficult to manage[21] and operated "under duress."[22]

[38] Among the other acquisitions, the one that concerns us the most is that of Steen Pipeline Contractors (Steen). In fact, before DBI failed to remit the source deductions at issue, Steen had already failed to remit source deductions twice, in 1996 and 1997, consisting of considerable amounts, in excess of C$8 million. Mr. Matossian had immediately been informed of Steen's two failures by Mr. Jordan.[23]

[39] The role of Mr. Jordan in the organization essentially involved going from corporation to corporation within the group to look for business opportunities and solve problems. He was a type of "problem solver."[24] However, no one, including Mr. Jordan, was supposed to "bother" Mr. Matossian regarding problems involving amounts under $20,000, and even under $100,000. The following is how Mr. Matossian viewed his relationship with his employees in this regard:

> A. …You know, as usual in things like that, if there was a $20,000 gap, they wouldn't come to me to tell me, they would fix it themselves. I mean, we had our own management in place to do things like that.
>
> Q. Okay. So $20,000 gap wouldn't have been material enough for them to bother you.

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19 The description of these acquisitions is found at pages 91 to 101 of the testimony of Mr. Matossian.

20 Testimony of Mr. Matossian at page 102.

21 Testimony of Mr. Matossian at pages 150 and 152.

22 Testimony of Mr. Jordan at page 213.

23 See pages 111, 112 and 116 of the testimony of Mr. Matossian.

24 See the testimony of Mr. Matossian at pages 106 to 110 for more details about Mr. Jordan's duties.

> A. No. No.
>
> Q. Or for Mr. Jordan to bring it to your attention.
>
> A. No, no. And frankly, if they'd come to me with a $100,000 gap, I would have said, you know, what are you coming to me for? This is the kind of thing that you should be fixing yourself.
>
> Q. Okay. And Mr. Jordan was aware of this?
>
> A. Yes.[25]

To a certain extent, Mr. Jordan corroborated the testimony of Mr. Matossian on this subject.[26]

[40] Mr. Matossian had been informed of Steen's failures to pay because the amounts far exceeded $100,000. He was also able to identify the causes of these failures. The testimony of Mr. Matossian in this respect is worth quoting:

> …I don't know how they were doing their payments but instead of paying the full amount of deductions at source, they had paid the suppliers more than … Oh yes, that's right. I remember now, yes. It's always the way it works, you know. They had paid the suppliers, I think, a disproportionate amount – the pipeline supplier – a disproportionate amount because if they did so, they would get, you know, a discount and a much better deal on the pipeline.
>
> So the DAS took a back seat to that particular thing which was not the way we do things, and therefore we immediately sat down, calculated what the discrepancy was and made the correction.[27]

And then at pages 163-165:

> Without going into the details, my understanding, my recollection is that the amounts were properly calculated and tabulated but the remittances were not made a hundred percent (100%). Why?

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[25] See the testimony of Mr. Matossian at pages 117 and 118 of the stenographer's notes.

[26] See the testimony of Mr. Jordan at page 237.

[27] Testimony of Mr. Matossian at page 115.

> Because we had a special deal, I would say, with the pipeline supplier and that's where things went wrong. I believe that they allocated some of that money to save money on supplies rather than pay a hundred percent (100%) of the deductions…
>
> …but if the supplier says you pay me in ten days and I'm going to knock off $1 M off your bill, then all of a sudden, it becomes attractive for the project manager who's trying to … who actually gets paid on a bonus basis too, it becomes attractive to maybe skimp on paying you DAS. Of course, that was not acceptable.
>
> …So, when we got wind of that, we pulled the plug on the management and we put things straight and because we wanted to do things right…

[41] In response to the Steen's two failures, Mr. Matossian had also concluded, following a recommendation by Mr. Jordan, that voluntary disclosure would be appropriate[28] to try to eliminate the penalties.[29] However, since a CCRA auditor was already on site in fall 1997[30] to audit DBI, CCRA did not permit Steen to make a voluntary disclosure.[31] Since voluntary disclosure was not possible, Mr. Matossian then asked Mr. Jordan to verify whether DBI was really in default, and if so, to what extent. The following is how Mr. Matossian explained the result of this review at pages 113-114 of his testimony:

> …And he [Mr. Jordan] came up with no red light which doesn't surprise me because of all the units that we had, DBI was certainly the oldest one and the best oiled machinery that we have in terms of payroll and accounting, and all that.

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28 Testimony of Mr. Matossian at pages 112 to113.

29 For Mr. Matossian, the purpose of the voluntary disclosure by Steen was in large part to not have to pay the penalties tied to these failures. See, *inter alia*, page 119 of the testimony of Mr. Matossian. However, it was more difficult to get an admission to this from Mr. Jordan if we rely on his testimony at pages 218 to 231.

30 Mr. Matossian is not sure of the exact period when the Revenue Canada auditor was on site, but he believes that it was around November or December 1997. See page 159 of his testimony. Mr. Jordan, for his part, states that the meeting the the tax officers regarding the impossibility of volutary disclosure was around the end of October or beginning of November 1997. See page 195 of his testimony.

31 See also pages 112 to 113 of the testimony of Mr. Matossian.

> So then, the auditor [from CCRA] who had been put there just to check everything, I guess, left, and we were able to go to Steen to make the voluntary disclosure, which we subsequently resolved. But just to tell you that in the process it so happened that we had to find out what was going on in DBI because we had not had any red light, and our investigation, as the auditor at the time…And we were quite satisfied that looking, ourselves looking at our own books, we found no error, no omissions, and we were also satisfied that the auditor who was there at the time, by the time he left, he hadn't found, I think, otherwise he would have told us.

Mr. Jordan's version was however a little different from that of Mr. Matossian. His testimony[32] on this subject is worth quoting:

> …So in that meeting [late October, early November 1997], we were advised that Dominion Bridge Inc. in Montreal was under the payroll withholding audit, so that being a sister company, we could not take advantage of the voluntary disclosure. So I went back to the office quite disappointed and let the time run. Then the auditor, for whatever the reason was not coming back, so I went downstairs and inquired with the plant personnel as to what the situation was. The lady in charge of payroll advised me that we may have a problem but it would not be more than $20,000. I talked to the plant controller, he told me the same thing and then I told the V.P. Finance of Dominion Bridge Inc. and he had the same story.
>
> So at this time, we decided to call the tax auditor and asked him to come back and complete and audit so we could get Dominion Bridge Inc. out of the way and proceed with Steen Becker. So the answer that came back is that the auditor was assigned on another file and he didn't feel very well and he would come back when he would get around to it. So we let the time slide…[we then] suggested [to Revenue Canada] that we would like to take advantage of voluntary disclosure nevertheless.
>
> Then the things went a little bit sideways, for a lack of a better word, we were summoned to a meeting in North York and there were six representatives of Revenue Canada and a counsel from Justice Department so we kind of … Yes, we thought we were in a little bit of trouble, which would be understandable under the circumstances. So that started the process.

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[32] See the testimony of Mr. Jordan at pages 195 to 197.

> We met again three weeks later and we came to an arrangement with Revenue Canada to settle the Steen Becker money owed…

[42] These two testimonies clearly show that Mr. Jordan's investigation of DBI's failure was not very probing. In fact, he simply talked to three or four people from accounting. The person responsible for pay had even told him that, contrary to what Mr. Matossian believed, liability for DBI's failure was under $20,000. The fact that the failure was under the $100,000 threshold established by Mr. Matossian would explain in part why Mr. Matossian testified that Mr. Jordan had not told him about DBI's failure.

[43] Appellants Marengère and Amyot were finally informed of the facts surrounding the voluntary disclosure of Steen around the same time as Mr. Matossian, in fall 1997.[33] Thus, DBI had already failed to remit payments three times by the time when the Appellants were informed that it was impossible to make a voluntary disclosure. That is not the issue, however. As we have already seen, Mr. Matossian was aware of Steens' failures well before DBI failed to make remittances (the testimonies do not allow for any other conclusion). As for Mr. Marengère, given his daily relationship with Mr. Matossian and the fact that they discussed all the problems, including those related to deductions and remittances, it must be concluded that he was aware of Steen's failures well before those of DBI (the testimonies do not allow any other conclusion). For Mr. Amyot, although it is harder to draw a conclusion regarding his knowledge of this subject, it is clear that he should have been aware of it, that he should have at least asked questions. Since Messrs. Marengère and Amyot did not testify at the trial, it is now difficult to come to the opposite conclusion.

<u>Position of the Appellants</u>

[44] The Appellants held that they should be allowed to rely on those who were responsible for the day-to-day management of Cedar and its subsidiaries (the "group"). They claim that the accounting and compensation services of the group were well structured and their staff was competent. Furthermore, these services were supervised by Mr. Jordan, who informed Mr. Matossian of the problems he deemed important. It was in this capacity that Mr. Jordan was instructed by Mr. Matossian to do an internal audit of DBI's books when he learned that Steen, at the time had failed to make remittances, could not make a voluntary disclosure since DBI was being audited. This internal audit of DBI apparently, according to

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[33] Testimony of Mr. Matossian at pages 160, 161, 176 and 179.

the Appellants, did not reveal any failure to deduct or remit the amounts owing to the Respondent, which reassured them. According to the Appellants, these actions were more than sufficient to fulfil their duty of due diligence following the first two failures by Steen. Finally, they claimed that directors of such complex corporations should not be required to micro-manage their corporations.

Position of the Respondent

[45] The Respondent held that the Appellants had only reacted to the problems when they occurred and that they had never really tried to prevent subsequent problems. Furthermore, according to the Respondent, the Appellants did not want to be informed of problems deemed less important, thus creating a systematic problem for communicating problems.

Analysis

[46] What is the scope of the due diligence requirement? Robertson J.A. said the following on the subject in *Soper v. Canada*, [1998] 1 F.C. 124 (F.C.A.):

> [50] In order to satisfy the due diligence requirement laid down in subsection 227.1(3) a director may…take "positive action" by setting up controls to account for remittances, by asking for regular reports from the company's financial officers on the ongoing use of such controls, and by obtaining confirmation at regular intervals that withholding and remittance has taken place as required by the Act: see Information Circular, No. 89-2…at paragraph 7.
>
> [51] Likewise, some commentators have advised directors that, if they wish to be able to rely successfully on the due diligence defence, it would be wise for them to consider undertaking a number of "positive steps" including, in certain circumstances, the establishment and monitoring of a trust account from which both employee wages and remittances owing to Her Majesty would be paid: see e.g. Moskowitz, supra, at pages 566-568.
>
> [52] While such precautionary measures may be regarded as persuasive evidence of due diligence on the part of a director, in my view, those steps are not necessary conditions precedent to the establishment of that defence. This is particularly true with respect to the establishment of a separate trust account for source deductions to be remitted to the Receiver General. It is difficult to hold otherwise given the fact that Parliament abolished that express requirement for the purpose of achieving other legislative

> goals. Above all, a clear dividing line must be maintained between the standard of care required of a director and that of a trustee. Accordingly, an outside director cannot be required to go to the lengths outlined above. As an illustration, I would not expect an outside director, upon appointment to the board of one of Canada's leading companies, to go directly to the comptroller's office to inquire about withholdings and remittances. Obviously, if I would not expect such steps to be taken by the most sophisticated of business-persons, then I would certainly not expect such measures to be adopted by those with limited business acumen. This is not to suggest that a director can adopt an entirely passive approach but only that, unless there is reason for suspicion, it is permissible to rely on the day-to-day corporate managers to be responsible for the payment of debt obligations such as those owing to Her Majesty…
>
> [53] In my view, the positive duty to act arises where a director obtains information, or becomes aware of facts, which might lead one to conclude that there is, or could reasonably be, a potential problem with remittances. Put differently, it is indeed incumbent upon an outside director to take positive steps if he or she knew, or ought to have known, that the corporation could be experiencing a remittance problem. The typical situation in which a director is, or ought to have been, apprised of the possibility of such a problem is where the company is having financial difficulties… (My emphasis.)
>
> …
>
> [56] It is important to note that whether a company is in serious financial difficulty, such as to suggest a problem with remittances, cannot be determined simply by the fact that the monthly balance sheet bears a negative figure. For example, many firms operate on a line of credit to deal with fiscal fluctuations. In each case it will be for the Tax Court Judge to determine whether, based on the financial information or documentation available to the director, the latter ought to have known that there was a problem or potential problem with remittances. Whether the standard of care has been met, now that it has been defined, is thus predominantly a question of fact to be resolved in light of the personal knowledge and experience of the director at issue. (My emphasis.)

[47] A review of these passages leads to the following comments:

(i) First, no one could deny that that to satisfy the due diligence requirements, the Appellants could take "positive steps" by setting up controls to account for remittances (see *Soper*, *supra*, at paragraph 50). However, these

controls should not contain inherent flaws that prevent a director form being informed of problems related to deductions and remittances. This is clearly what happened in the case at bar when everyone in the group followed the rule by which no problem should be brought to the directors' attention unless it reached a significant and undefined threshold. I include the three Appellants in this group, as they know or should have known that this threshold existed. In order to solve the problem, the directors should not have imposed such a threshold. Then, the directors should have made sure that everyone else was aware that there was no threshold. The Appellants could have also followed the advice of Robertson J.A. in *Soper*, at paragraph 50, "by asking for regular reports from the company's financial officers on the ongoing use of such controls, and by obtaining confirmation at regular intervals that withholding and remittance has taken place as required by the Act."

(ii) Second, it is clear from reading paragraphs 51 to 53 of *Soper* that, although directors are not required to take overly rigorous preventative steps, as soon as a director (even an outside director) becomes aware of a possible problem with deductions and remittances, or he suspects or should have known that the controls are defective, he must take action to prevent any future failure. In other words, when a director becomes aware of a failure, even though he cannot correct this failure and thus avoid the liability set out in subsection 227.1(3) of the Act, he will be allowed to rely on the due diligence defence for any subsequent default if he "act[s] with due diligence to correct such default [the first failure] and prevent its recurrence" (see *McDougall v. Canada (Attorney General)*, 2002 FCA 455, at paragraph 2 (F.C.A.)). See also *Hanson v. Canada*, No. A-792-96, October 2, 2000, at paragraph 7 (F.C.A.); *Cadrin v. Canada*, No. A-112-97, December 17, 1998, at paragraphs 5 to 8; and *Cameron v. Canada*, 2001 FCA 208, at paragraphs 7 and 8 (F.C.A.), where the Federal Court of Appeal ruled on the obligation of an outside director to not act passively.[34] In the case at bar, neither the Appellants, nor

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[34] *Hanson*, paragraph 7:

> [7] There is in this case no evidence, as in *Cadrin*, that the appellant without knowing the law did what she was required to do. She did not stay generally informed about what was happening with the business nor did she inquire when she was told that the business was encountering a "rocky spot" (Transcript, p. 41) or that things were not going great (Transcript, pp. 29-30).

Cameron, paragraphs 7 and 8:

> [7] Let us look more closely at his conduct. Early in his tenure of office, and on many occasions thereafter, the appellant, because he was aware of some problems, frequently asked management about the status of the tax remittances and he was

Mr. Jordan had tried to correct the controls of the group following Steen's failures in order to avoid any future failure. It should not be forgotten that not only were the controls set up for Steen, but there were for all the corporations in the group. The Appellants had not even delegated the responsibility for correcting these controls. In fact, the testimonies of Mr. Matossian[35] and Mr. Jordan[36] indicate that the role of Mr. Jordan was to find problems and solve them, not to suggest corrective actions for the controls and measures once a problem was identified. The internal audit of DBI (which I would describe as superficial) carried out by Mr. Jordan very clearly shows, in my opinion, that the *modus operandi* of the organization was to react rather than to prevent. Of course, the Appellants claimed that they did not only react to problems, but rather they had taken corrective actions to prevent problems. In fact, did Mr. Matossian not testify that as soon as he became aware that management at Steen had preferred to pay the suppliers first in order to save money and increase their bonuses, he "pulled the plug on the management and put things straight." However, his testimony was silent with respect to the corrective actions that were actually taken by the Appellants to prevent such problems. In any case, to ensure that the controls in place were more effective, for all the corporations in the group, the Appellants would have had to react in a more significant manner than simply dismissing managers at Steen.

[48] I will close by answering the question that Bowman A.C.J. often asks when dealing with issues of due diligence: what could the Appellants have done that they did not do? See *McKinnon v. The Queen*, No. 2001-2757(IT)G, December 3, 2003, 2004 DTC 2049, at paragraph 16 (T.C.C.); *Fremlin v. The Queen*, No. 2001-3060(GST)I, May 24, 2002, [2002] T.C.J. No. 268, at paragraph 32 (QL) (T.C.C.); and *Mosier v. Canada*, No. 96-3504(GST)G, October 10, 2001, [2001] T.C.J. No. 692, at paragraphs 33-35 (QL) (T.C.C.). First, eliminate the threshold. Second, inform everyone involved of the importance of respecting the requirements of tax laws. Third, force the employees involved to inform the directors of flaws in the controls in place so that the directors can ensure that the appropriate corrective measures are taken. Fourth, be regularly informed of the

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> always assured that they were in order. He unwisely relied on these false assurances; in fact, the remittances were not in order as management professed.
>
> [8] In September of 1994, documentary evidence emerged to demonstrate that management had not been truthful…

35 See his testimony at pages 106 to 109, 112, 113, 115 to 117 and 164.

36 See his testimony at pages 194 to 200.

status of deductions and remittances, either by asking for reports on the subject or regularly obtaining confirmations from finance officers in the group that the deductions and remittances have been made in accordance with the Act and the EIA, or by taking any other acceptable steps. I believe that the Appellants should have done these things. It is not asking the impossible or for perfection. In light of *Smith v. The Queen*, F.C.A. No. A-154-00, March 26, 2001, 2001 DTC 5226, at paragraphs 31 and 32, and *Cameron*, *supra*, theses measures seem quite reasonable to me in the case at bar.

Signed at Ottawa, Canada, this 23rd day of February 2005.

"Paul Bédard"

Bédard J.

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