

Date: 20071210

Docket: A-509-06

Citation: 2007 FCA 393

**CORAM: RICHARD C.J.A.
DÉCARY J.A.
LÉTOURNEAU J.A.**

BETWEEN:

BRASSERIE FUTURISTE DE LAVAL INC.

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Hearing held at Montréal, Quebec, on December 10, 2007.

Judgment delivered from the bench at Montréal, Quebec, on December 10, 2007.

REASONS FOR JUDGMENT OF THE COURT BY:

LÉTOURNEAU J.A.

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REASONS FOR JUDGMENT

(Delivered from the bench at Montréal, Quebec, on December 10, 2007.)

LÉTOURNEAU J.A.

[1] The appellant raised ten grounds of appeal in its memorandum of fact and law, but at the hearing it argued only the following three issues:

1. the sampling analysis by the Ministère du Revenu du Québec auditor for calculating sales of alcoholic beverages was deficient;

2. the judge, without justification, dismissed the expert report submitted by the appellant; and
3. the judge erred in ruling that the appellant committed gross negligence justifying the imposition of penalties pursuant to section 285 of the *Excise Tax Act*, R.S.C. 1985, c. E-15 (the Act) by failing to report and pay amounts of goods and services tax.

[2] The Court is not satisfied that these objections are valid.

[3] The judge, supported in this by the appellant's expert witness, characterized the sampling used by the auditor to calculate the sales of alcoholic beverages as thorough. She was able [TRANSLATION] "to effectively establish the average selling prices for beer (for example, beer by the bottle, by the glass or bock, by the pitcher and by the half-pitcher), the percentage of sales that each category accounted for, and the average markup percentages on wine and liquor sales": see paragraphs 30, 31, 126, 151 and 152 of the reasons for decision. In this regard the judge said [TRANSLATION] "all in all, this was work of exemplary rigour and attention to detail . . . Ms. Morand's [the auditor's] work is a consequence of the Appellant's methods. It is irreproachable, and the results must be accepted in the absence of persuasive evidence to the contrary": *ibid.*, at paragraphs 151 and 152.

[4] It was for the judge to assess both the evidentiary value of the auditor's report and that of the report by the expert witness submitted by the appellant. It is not accurate to say that he simply dismissed the report by the appellant's expert witness. He rejected certain aspects of the auditor's

report, just as he did not accept certain conclusions or data in the report by the appellant's expert witness. In both cases, he provided explanations and justifications in support of his conclusions.

[5] In the case of the report by the appellant's expert witness, the criticisms which he made regarding it are supported by the evidence. The judge noted this evidence, in particular the weekly expenses of \$1,000 paid in cash, adjusted by the expert witness to \$300, and appropriations of funds attributed to Michel Légaré, which he set initially at \$240,000 and then adjusted to \$24,599: see paragraphs 139 to 144 of the reasons for judgment. The judge questioned the explanation given by the expert witness and the reliability of the sources on which the latter had relied in making the reduction of the amounts.

[6] It is not this Court's function to take the place of the trial judge and reassess the credibility of witnesses which we did not see or hear. In the absence of a palpable and overriding error, which the appellant could not establish, this ground of appeal must be dismissed: see *Housen v. Nikolaisen*, 2002 SCC 33.

[7] Finally, as mentioned earlier, the appellant alleged that the judge imposed on it the penalty set out in section 285 of the Act. That penalty is incurred when there is gross negligence, which the courts have defined as involving greater neglect than simply a failure to use reasonable care: see *Cloutier v. The Queen*, 78 DTC 6485, at 6487 (F.C.T.D.), and *Venne v. Canada*, [1984] F.C.J. No. 314 (QL), 84 DTC 6247, at 6256 (F.C.T.D.). It should be noted that, *inter alia*, the appellant deliberately and regardless of the obligations imposed on it by the Act continued to destroy

employees' daily reports, despite the request made to it to preserve them: see also paragraphs 166 to 169, where the judge sets out a list of the appellant's deficiencies.

[8] The judge referred to this case law and properly directed himself in law on the point. The conclusion which he drew from application of the rule of law to the facts of the case at bar was, in the Court's view, amply supported by the evidence.

[9] For these reasons, the appeal will be dismissed with costs.

“Gilles Létourneau”

Judge

Certified true translation
Susan Deichert, Reviser

FEDERAL COURT OF APPEAL

SOLICITORS OF RECORD

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STYLE OF CAUSE: Brasserie Futuriste de Laval inc. v.
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DELIVERED FROM THE BENCH BY: LÉTOURNEAU J.A.

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