Date: 20080131

Docket: A-2-07

Citation: 2008 FCA 37

CORAM: **DÉCARY J.A.**
LÉTOURNEAU J.A.
NADON J.A.

BETWEEN:

HER MAJESTY THE QUEEN

Appellant

and

DAVID NISKER

Respondent

Heard at Montréal, Quebec, on January 9, 2008.

Judgment delivered at Ottawa, Ontario, on January 31, 2008.

REASONS FOR JUDGMENT BY: LÉTOURNEAU J.A.

CONCURRED IN BY: DÉCARY J.A.
NADON J.A.

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REASONS FOR JUDGMENT

LÉTOURNEAU J.A.

Issues

[1] The appellant seeks a reversal of a decision rendered by judge Lamarre-Proulx of the Tax Court of Canada (judge) on December 4, 2006 (2006 TCC 651). The judge ruled that the respondent, Mr. David Nisker, was entitled to deduct in the calculation of his income a payment made to settle an action in tort against him when the events that gave rise to his liability took place at the corporate level.

[2] The appellant raises the following three grounds of appeal at paragraph 39 of her memorandum of fact and law:

a) whether the judge erred in concluding that the expense was incurred to protect the respondent's business;

b) whether the judge erred in ruling that the respondent's activities as a "corporate officer" constituted business activities; and

c) whether the judge erred in finding that the corporate veil of 157699 Canada Inc. had been pierced, thereby entitling the respondent to claim the deduction "as if the business had been carried on by the taxpayer himself".

[3] For the reasons that follow, I think that each one of these questions must receive an affirmative answer.

The Facts

[4] The case before the Tax Court of Canada proceeded on an agreed statement of facts. The statement appears at paragraph 3 of the judge's reasons for judgment. I will give a summary of the facts relevant to this appeal. But for the sake of completeness and to give an idea of the scheme

devised by the respondent and other investors which led to his civil liability and that of corporation 157699 Canada Inc., of which he was a corporate officer and director, I reproduce the agreed statement:

> [3] The facts are not really in dispute. At the outset of the hearing, an agreed statement of facts was tendered to the Court. It reads as follows:
>
> 1. The Appellant has been involved in real estate for fifty years. He has acted as a developer and has owned and managed property, mostly with others. His past activities include building residential homes, apartment and office buildings as well as owning hotels, apartment-hotels and shopping centers.
>
> 2. Regarding taxation years 2000 and 2001, his business activities generated a rental income of approximately twelve million dollars per year ($12,000,000).
>
> 3. The investments, developments and businesses undertaken by the Appellant were usually undertaken together with others.
>
> 4. On May 12, 2003, the Appellant was reassessed for his 2000 and 2001 taxation years and was refused deductions claimed by him following the payment of an amount of $350,000 in settlement of legal proceedings.
>
> 5. On May 29, 2003, the Appellant filed a notice of objection against these two taxation years reassessed.
>
> 6. On April 19, 2004, the Canada Revenue Agency (hereinafter CRA) confirmed the reassessments dated May 12, 2003, for the 2000 and 2001 taxation years for the following reason:
>
> > For the fiscal year end December 31, 2000, the loan amount of $350,000 was not made to earn income from a business or property. Therefore, this amount cannot be deducted from income according to paragraph 18(1)(*a*). This amount does not qualify as an allowable business investment loss pursuant to paragraphs 39(1)(*c*), 50(1)(*a*), 111(1)(*b*) of the *Income Tax Act*, and pursuant to subparagraph 40(2)(*g*)(ii) of the *Income Tax Act*, any resulting capital loss is deemed to be nil.
>
> 7. On November 27, 1987, pursuant to an emphyteutic lease, La Corporation Trisud Inc. (hereinafter "Trisud") sold their rights to 152817 Canada Inc. for an amount of $8,000,000 payable in two instalments.
>
> 8. Under the agreement, an amount of $2,000,000 was due and payable to Trisud by 152817 Canada Inc. on the sixth anniversary of the closing, plus interest.

9. Regarding the transaction with Trisud on November 27, 1987, 152817 Canada Inc. was acting in trust for and on behalf of 149788 Canada Inc.

10. On December 1, 1987, 149788 Canada Inc. sold the rights to the emphyteutic lease to Saviva Holdings Ltd., 157699 Canada Inc., 146236 Canada Inc. and 144945 Canada Inc.

11. On the same day, by a prête-nom agreement, unknown by Trisud, 152817 Canada Inc. acknowledged that it was acting in trust for the new owners which were Saviva Holdings Ltd., 157699 Canada Inc., 146236 Canada Inc. and 144945 Canada Inc.

12. Since 1997, the Appellant was an officer and director of 157699 Canada Inc.

13. Since 1987, Appellant's daughter was the sole shareholder of 157699 Canada Inc. until 1990 when the Appellant's spouse became a shareholder.

14. In the course of the transaction on December 1st, 1987, 157699 Canada Inc., unknown to Trisud, acted as a prête-nom for and on behalf of 81008 Canada Inc. which became owner of a 10% undivided co-ownership interest in the emphyteutic lease.

15. Until June 1, 1992, the Appellant held 163,000 Class "C" preferred shares of 81008 Canada Inc. after which he was not a shareholder.

16. On January 14, 1988, the National Bank of Canada entered into a loan agreement with 152817 Canada Inc. for an amount [of] $5,350,000, to be guaranteed in part by personal guarantees.

17. The Appellant personally guaranteed 10% of the amounts owed to the National Bank of Canada.

18. In 1993, 152817 Canada Inc. defaulted and the National Bank of Canada exercised its security, taking over the rights in the emphyteutic lease.

19. On December 20, 1993, Trisud formally requested repayment of the balance of sale.

20. On March 29, 1994, Trisud filed a writ of summons and declaration in the Superior Court against 152817 Canada Inc. and David Stein under court file number 500-05-003691-944.

21. On December 9, 1996. Trisud filed an amended writ of summons and declaration adding Saviva Holdings Ltd., 157699 Canada Inc. and 144945 Canada Inc. as Defendants in the said Court file number 500-05-003691-944.

22. On December 10, 1999, the Quebec Superior Court rendered judgment in Court file no.: 500-05-003691-944 and condemned 152817 Canada Inc., Saviva Holdings Ltd., 157699 Canada Inc. and 144945 Canada Inc., jointly and severally, to pay to Trisud $2,570,024.00

plus interest and costs. By the same judgment, David Stein was condemned jointly and severally with the other Defendants to pay $500,000 plus interest and costs.

23. On January 7, 2000, the judgment was inscribed in appeal by 157699 Canada Inc., Saviva Holdings Ltd. and 144945 Canada Inc. under Court file number 500-09-009116-005.

24. On January 28, 2000, Trisud filed an action in the Superior Court under file number 500-05-003691-944 against Sam Greenberg, the Appellant, Pinchos Freund, Saviva Holdings Ltd., 2853523 Canada Inc. and 2630-1374 Quebec Inc. in order to establish the solidary liability of these Defendants with those in court file no. 500-05-003691-944 (Appeal Court number 500-09-009116-005).

25. On November 30, 2000, a transaction agreement was signed between Trisud, Sam Greenberg, the Appellant, Saviva Holdings Inc., 2853523 Canada Inc., 2630-1374 Quebec Inc. and 157699 Canada Inc. regarding file 500-05-003691-944 (Appeal Court no.:500-09-009116-005) and 500-05-055612-004.

26. By said transaction, 157699 Canada Inc. and Saviva Holdings Ltd. agreed solidarily to pay to Trisud the sum of $700,000 in final settlement regarding court file 500-05-003691-944 (Appeal Court no. 500-09-009116-005) in consideration of which Trisud subrogated 157699 Canada Inc. and Saviva Holdings Ltd. to the extent of 50% each, all of its rights against 152817 Canada Inc., David Stein, 144945 Canada Inc. and Pinchos Freund.

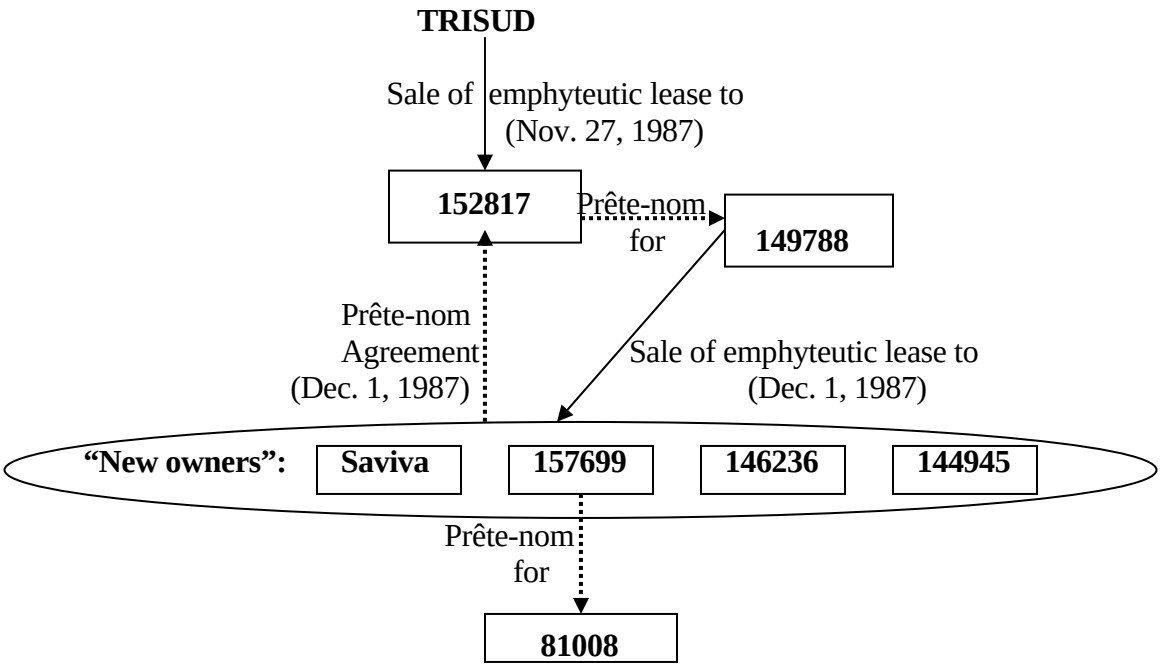
27. By said transaction, the Appellant and Sam Greenberg obligated themselves solidarily with Saviva Holdings Ltd. and 157699 Canada Inc. to pay Trisud the said amount of $700,000.

28. Pursuant to the transaction, the Appellant paid an amount of $350,000.

29. In consideration of the payment of $700,000 to Trisud, a Declaration of Settlement in Court file 500-05-009116-005 was executed.

30. In consideration of the payment of same, Trisud discontinued its action in court file 500-05-055612-004 without costs and without further recourse against all Defendants, including the Appellant.

[5] The following schema illustrates the various transactions:



[6] In a nutshell, the events relevant to this appeal unfolded as follows.

[7] An emphyteutic lease of a shopping center was acquired on November 27, 1987. The sale price was to be paid in installments. The original buyer was 152817 Canada Inc. (152817), a corporation set up for the acquisition of the emphyteutic lease and controlled by Mr. Stein, an experienced real estate businessman unrelated to the Respondent: see Dalphond J.'s reasons for judgment in the lawsuit *La Corporation Trisud Inc. v. 152817 Canada Inc., David Stein, Saviva Holdings Ltd., 157699 Canada Inc. and 144945 Canada Inc.*, C.S. Montréal no. 500-05-003691-944, December 10, 1999, appeal book, volume 1, at page 115. Unknown to the seller La Corporation Trisud Inc. (Trisud), 152817 was, with respect to this deed of sale, acting in trust for

and on behalf of 149788 Canada Inc.: see the appellant's memorandum of fact and law, at paragraph 8.

[8] In a subsequent transaction dated December 1, 1987, also unknown to the original seller, 149788 sold its right in the emphyteutic lease to 157699 Canada Inc. (157699), a corporation of which the respondent was a corporate officer and director, and other unrelated investors (Saviva Holdings Ltd., 146236 Canada Inc. and 144945 Canada Inc.), hereinafter the "new owners". Once again, unknown to Trisud, 152817 served as a prête-nom for the new owners. The deed of sale was carefully drafted to ensure to the new owners a secured access to the income and tax depreciation related to the property, without having to assume any liability with respect to the balance of the purchase price. As for 152817, it ended up with no property, no income and no tax benefits but still solely responsible for the debt owned to Trisud. Consequently, the balance of the purchase price owing to Trisud was never paid: see Dalphond J.'s reasons for judgment, *supra*, at page 121.

[9] In December 1999, Dalphond J. of the Superior Court of Quebec rendered a judgment holding 152817 in breach of its contractual obligations and the new owners liable in tort. They were condemned to pay, jointly and severally, to Trisud, the amount of $2,570,024 plus interest. Subsequent to that decision, a lawsuit was launched by Trisud against the principals and controlling minds of the new owners personally which included the respondent. This eventually led to a settlement. The respondent paid half of the $700,000 agreed between the parties.

[10] The role and involvement of the respondent can be summarized as follows: he was a corporate officer and director since January 14, 1997, of 157699, one of the new owners of the emphyteutic lease. His daughter was the sole shareholder of that corporation until 1990 when his spouse also became a shareholder. In the transaction dated December 1, 1987, 157699 was acting as a prête-nom for and on behalf of 81008 Canada Inc. (81008). In the course of this transaction, 81008 acquired a 10% interest in the emphyteutic lease. 81008 was a corporation of which the respondent was at all times an unpaid corporate officer and director: see amended Reply to the Notice of Appeal, appeal book, at page 40, paragraph 14d). He was also a shareholder until June 1992. The common shareholders of 81008 were at all relevant times the respondent's spouse, his daughter and his son. The respondent had also guaranteed personally 10% of a loan by the National Bank of Canada to 152817. In 1993, following a default, the bank repossessed the property and the rights under the emphyteutic lease.

Whether the judge erred in concluding that the expense was incurred to protect the respondent's business

[11] At paragraph 31 of her reasons for judgment, the judge concluded that the respondent settled the proceedings against him for fear of "losing his own rental properties as well as his reputation as a corporate officer". With respect, this conclusion is in part not supported by, and in part contrary to, the evidence.

[12] By the time the appeal before the Tax Court of Canada was heard, the respondent suffered from illnesses which prevented his from testifying. It is true that his daughter, Joyce Nisker, testified

that her father settled the case because he was afraid of the risk of having to pay a larger amount and having his reputation tarnished: see her testimony, appeal book, volume 2, at pages 305 and 308.

[13] It is legitimate for a party to a lawsuit to try to limit the amount of damages that it may have to pay personally. That being said, however, there is no evidence whatsoever on the record that the respondent would have had to sell income producing assets to meet his liability for his wrongful act. Indeed, the respondent's lawyer testified that, when assessing the risk of having to pay a larger amount, his client asserted that he had the necessary funds to pay the larger amount. At pages 261-262 of the transcript, appeal book, volume 2, the witness said:

> Alors lors de cette rencontre avec lui seul, il se posait encore la question, est-ce que vraiment il aurait dû faire la transaction personnellement, s'impliquer personnellement et est-ce qu'il n'aurait pas été mieux d'aller plus avant dans le dossier. Alors, évidemment je lui ai rappelé que la transaction était conclue, on en avait discuté beaucoup, mais je lui ai rappelé tous les motifs et le risque sérieux qu'il avait, si on perdait l'appel, d'être condamné personnellement à plusieurs millions de dollars, et lui ai rappelé qui si ça arrivait, de ce que je connaissais de la situation, lui et Sam Greenberg devraient débourser ces montants-là. Et je me souviens de lui avoir dit : « Écoutez, je ne connais pas votre situation financière personnelle mais je prends pour acquis que vous pourriez payer le montant, donc c'est encore plus sérieux comme risque ». Il a dit oui, ça si j'étais condamné, je pourrais le payer. Et je lui ai dit : « Le risque est encore plus grand. Si vous me disiez que vous n'avez pas les fonds, bien, le risque serait théorique ».
>
> [Emphasis added]

[14] As for the respondent's fear of having his reputation tarnished, I agree with counsel for the appellant that this was already done by the judgment of the Quebec Superior Court. Justice Dalphond, now on the Quebec Court of Appeal, found that it was no accident if the new owners could not be held liable for the balance of the purchase price. This was the plan and the documents were drafted in such a way that liability would remain with 152817 which had been stripped of all

its assets and had become an empty shell. Except for the initial deed of sale between Trisud and 152817, the documents relating to the subsequent sale were not registered to avoid transfer taxes. In addition, no notice of these documents were given to Trisud: see the reasons for judgment, appeal book, volume 1, at page 121.

[15] At page 12 of his reasons, *ibidem*, at page 125, Justice Dalphond wrote:

> Moreover, the evidence has shown that Messrs. Stein, Greenberg, Nisker and Freund intentionally had the deed of transfer drafted in such a way that their companies would not become liable towards Trisud for the balance of the purchase price.
>
> [Emphasis added]

[16] The Superior Court found that, to the knowledge of the new owners and the respondent, 152817 committed a breach of the deed of sale as well as a breach of its obligations pursuant to the deed of sale. As for the new owners, including the respondent's corporation, the Superior Court ruled that they committed a wrongful and dishonest act for which they had to be held accountable: *ibidem*, at pages 125 and 126; see also the decision of Pigeon J. in *Trudel v. Clairol Inc. of Canada*, [1975] 2 S.C.R. 236, at pages 241 to 243, quoted by Dalphond J. at page 13 of his reasons, where Justice Pigeon accepted that "it is an act of dishonesty to be associated knowingly with a breach of contract".

[17] I think the appellant's first ground of appeal is well founded.

Whether the judge erred in ruling that the respondent's activities as a "corporate officer" constituted business activities

[18] The respondent derived his income from rental properties that he co-owned corporately or owned personally through his wife, and their management: see appeal book, volume 2, at pages 288-289, 293, 313 and 330 to 334. He also acted as an unpaid corporate officer and director of 157699 and 81008. As far as other corporations are concerned, very little evidence, if any at all, was provided of the respondent's role in these corporations in which he had invested with others. Yet, relying upon a 1969 decision of a US Court of claims, i.e. *Mitchell v. The United States*, 408 F. 2d 435, the judge found that the respondent's activity as a corporate officer was a business activity.

[19] With respect, the *Mitchell* case has simply no application in the present instance. While there is some analogy between the *Mitchell* case and our case, there are substantial factual and legal differences which distinguish the two cases.

[20] Mr. Mitchell was sued by a corporation in 1958 for having fraudulently represented the facts relating to the corporation's liabilities for Federal income and excise taxes and for product warranties. He was the president, chief executive officer and major stockholder of that corporation. In February 1960, the litigation was settled with the corporation for one million, of which Mitchell was to pay $678,000.

[21] He later sued to recover taxes that he alleged were illegally assessed by reason of the Internal Revenue Department refusing the deduction of his legal and accounting expenses

necessarily incurred ($135,340.) in defending the lawsuit brought against him by the corporation. He claimed the deduction of his expenses under section 162(*a*) of the *Internal Revenue Code* of 1954. He contended that the suit against him by the corporation "constituted an attack upon his integrity and jeopardized his business activities as a corporate officer": see page 1 of the syllabus of the case. Section 162(*a*) allowed for the deduction of ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business (emphasis added).

[22] The evidence showed that, in addition to his involvement with the corporation which sued him, Mr. Mitchell was a corporate officer of numerous unrelated corporations and shareholders during the fifties and sixties from which he received substantial compensation ($64,000, for example, from four corporations during the period of 1947-1955): see pages 3 and 4 of the decision.

[23] In a majority decision, the Court found that Mr. Mitchell's primary trade or business had always been that of being a corporate official of various business corporations. His investments and managements of real estate projects and developments were secondary. In the Court's view, his activity as a corporate official constituted the carrying on of a trade or business within the meaning of section 162(*a*).

[24] In the present instance, contrary to Mr. Mitchell, the respondent was not in the business of marketing himself and selling his services as a corporate official. Actually, he was not paid as a corporate official of 157699 and 81008 and he, therefore, had no source of income from or connected to that activity as required by section 3 of the Act: see *Stewart v. Canada*, [2002] 2

S.C.R. 645, at paragraphs 49, 50 and 53 to 55. As previously mentioned, his sources of income were from rental properties and their management. They were unconnected and unrelated to his activity as a corporate officer and director of 81008 and 157699 of which, in this last instance, he became a corporate officer and director only in 1997. Furthermore, according to the evidence filed before the Tax Court, his activities as a corporate officer and director appeared to be limited to family-related corporations.

[25] The appellant also relies upon subsection 248(1) of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) (Act) to challenge the judge's ruling. This subsection excludes from the definition of "business" an office or employment. In addition, the definition of "office" includes the position of a corporate director. The subsection reads:

"business" includes a profession, calling, trade, manufacture or undertaking of any kind whatever and, except for the purposes of paragraph 18(2)(*c*), section 54.2, subsection 95(1) and paragraph 110.6(16)(*f*), an adventure or concern in the nature but does not include an office or employment.	**« enterprise »** Sont compris parmi les entreprises les professions, métiers, commerces, industries ou activités de quelque genre que ce soit et, sauf pour l'application de l'alinéa 18(2)*c*), de l'article 54.2, du paragraphe 95(1) et de l'alinéa 110.6(14)*f*), les projets comportant un risque ou les affaires de caractère commercial, à l'exclusion toutefois d'une charge ou d'un emploi.
"office" means the position of an individual entitling the individual to a fixed or ascertainable stipend or remuneration and includes a judicial office, the office of a minister of the Crown, the office of a member of the Senate or House of Commons of Canada, a member of a legislative assembly or a member of a legislative or executive council and any other office, the incumbent of which is elected by popular vote or is elected or appointed in a representative capacity and	**« charge »** Poste qu'occupe un particulier et qui lui donne droit à un traitement ou à une rémunération fixes ou vérifiables, y compris une charge judiciaire, la charge de ministre de la Couronne, la charge de membre du Sénat ou de la Chambre des communes du Canada, de membre d'une assemblée législative ou de membre d'un conseil législatif ou exécutif et toute autre charge dont le titulaire est élu au suffrage universel ou bien choisi ou nommé à titre représentatif, et comprend aussi le poste

also includes the position of a corporation director, and **"officer"** means a person holding such an office.	d'administrateur de société; «fonctionnaire » ou «cadre » s'entend de la personne qui détient une charge de ce genre, y compris un conseiller municipal et un commissaire d'école.

[Emphasis added]

In other words, the appellant says, income gained as a corporate officer is income from office or employment, not from business. On the facts of this case, I certainly agree with that submission.

[26] However, counsel for the respondent submits that the definition of business does not apply in the present instance because the respondent was not paid when acting as a corporate officer and director. He relies on the decision of the Tax Court of Canada in *St-Georges v. R.*, 2006 D.T.C. 2969 where the Tax Court judge ruled, at paragraph 22, that the definition of office, in order to apply, requires as a necessary condition that the corporate director be entitled to a fixed or ascertainable stipend or remuneration. He submits that the Tax Court decision was affirmed by our Court in *St-Georges v. Canada*, 2006 FCA 207.

[27] It is true that our Court affirmed the decision of the Tax Court of Canada, but not on the point raised by counsel for the respondent. Mr. St-Georges was a chartered accountant and a bankruptcy trustee. He operated under the name of Société St-Georges Hébert & Compagnie, which he owned and which he used to account for and declare the income earned. He agreed to act as a director of a corporation which was a client of his accounting firm. Our Court was of the view that

the accounting services rendered to the corporation by Mr. St-Georges were not rendered by him on a personal basis, but through his accounting firm.

[28] In view of my conclusion that the respondent did not have a source of income connected with his corporate officer's or director's activities, it is not necessary to decide whether subsection 248(1) of the Act requires that a corporate director be paid in order to fall within the parameters of the definition. In any event, either way, that is to say whether the respondent was paid or not as a corporate director, the amount that he paid in this case as damages resulting from personal liability in tort is not a business expense under the Act.

Whether the judge erred in finding that the corporate veil of 157699 Canada Inc. had been pierced, thereby entitling the respondent to claim the deduction "as if the business had been carried on by the taxpayer himself"

[29] The appellant strongly takes issue with the judge's conclusion on the piercing of the corporate veil and the consequence that she drew from that. The essence of the judge's analysis is found in paragraphs 41 and 42 of her reasons for judgment. They read:

> [41] In other words, where in a particular matter the corporate veil is pierced by a court decision, and the separate liability of a corporation is thereby disregarded so as to include the individual who is the brain of the corporate entity and thus to find both the individual and the corporation liable in tort, it is as if with respect to that particular matter the business had been carried on by both. If the corporation was entitled to deduct the amount as having been laid out for the purpose of carrying on business, it follows that, similarly, the individual who paid the damages in tort would be entitled to a deduction for having incurred the expense for the purpose of carrying on business.
>
> [42] It was not disputed that the corporation would have been entitled to deduct the amount pursuant to sections 3 and 9 of the Act (*65302 British Columbia Ltd.* (*supra*) and *McNeill* (*supra*)). It is therefore my view that the Appellant, who was exposed to the risk of being

> found liable in tort together with the company for which he had acted as a corporate officer and who decided to settle the matter and pay the amount personally, is entitled, as was the corporate entity, to claim the deduction as if the business had been carried on by the taxpayer himself.
>
> [Emphasis added]

[30] From her analysis of the judgment of Dalphond J. of the Superior Court of Quebec in the lawsuit against the new owners and 152817, she concluded that the learned Superior Court judge had pierced the corporate veil to find the respondent liable in tort: see paragraph 39 of her reasons for judgment.

[31] Counsel for the respondent acknowledged in his memorandum of fact and law that it is not evident that Dalphond J. had the intent of piercing the corporate veil and that this was the effect of his judgment: see paragraphs 32 and 33 of the respondent's memorandum of fact and law. He also conceded that her "analysis couched in the terms of "piercing", "lifting" or otherwise disregarding a corporate "veil" is not particularly helpful": see paragraph 36 of the respondent's memorandum of fact and law.

[32] Finally, counsel for the respondent admitted that the language in the second sentence of paragraph 42 of the judge's reasons for judgment, *supra*, is too broad. However, he submitted that the essence of the statement therein applied to his client and allowed him "to claim the deduction as if the business had been carried on by the taxpayer himself".

[33] I believe the judge drew an erroneous conclusion as to the effect of the decision rendered by Dalphond J. of the Quebec Superior Court. What Dalphond J. said and found was simply that the respondent was aware of all the transactions that followed the original deed of sale to avoid assuming liability for the balance of the purchase price, the content of that deed of sale, the obligations of 152817 pursuant to it, and that this knowledge could be imputed to his company, i.e. 157699. The following two paragraphs contain in essence what the learned judge said on the question:

> As for Messrs. Nisker and Freund, they attended the closing where the Deed of Sale was signed, they discussed the deal with Messrs. Stein and Greenberg and they executed subsequent documents where they acknowledged the existence of the Deed of Sale and its registration. Messrs. Stein and Greenberg testified that they did not want to become liable for the balance of the purchase price. The Court can infer that they were aware of the content of the Deed of Sale and of the obligations of 152817 pursuant to it (art. 2848 C.c.Q.). This knowledge can also be imputed to their respective company.
>
> Moreover the evidence has shown that Messrs. Stein, Greenberg, Nisker and Freund intentionally had the deed of transfer drafted in such a way that their companies would not become liable towards Trisud for the balance of the purchase price.
>
> [Emphasis added]

[34] Indeed, the theory of the lifting of the corporate veil has no application here. While some of the jurisprudence on this theory has been ambiguous at times, probably because there were situations where an individual was a corporate officer and a shareholder at the same time, it now seems that the piercing of the corporate shield is directed towards the shareholders, not the corporate officers. The respondent was a corporate officer and director of 1577699 which was found liable as a new owner.

[35] This is true under the *Civil Code of Quebec*, L.Q. 1991, c. 64, as it was under the former Code, i.e. the *Civil Code of Lower Canada*. This aspect was analysed by the reputed author Paul Martel in his seminal book *Business Corporations in Canada*, Thomson Carswell, Toronto, 2007, at pages 1-66. Section 1457 of the *Civil Code of Quebec* is the source of extra-contractual liability for corporate director. At pages 1-66, the learned author writes:

> We should add to this list article 1457 of the *Civil Code of Québec*, which is the only true possible source of civil liability for corporate directors and which does not require lifting of the corporate veil to be applied. This "lifting" actually covers shareholders and not directors as such.
>
> …
>
> On the contrary, a director who participates in the fault is jointly and severally liable under article 1526 – he cannot hide behind a mandate. It is neither necessary nor even relevant to invoke lifting the corporate veil to impose personal liability on a director for an extra-contractual fault he has committed, or that of the corporation to which he has contributed. This was true before 1994, and the legislator did not wish to change this situation when it enacted article 317.

[Emphasis added]

This analysis has been endorsed by the Quebec Court of Appeal in *Brasserie Labatt Ltée v. Lanoue*, [1999] J.Q. no. 1108, J.E. 99-457.

[36] The respondent chose to do business through corporations to spread the risks and to diminish the risk that he could be personally liable to pay large amounts of money: see the testimony of her daughter, Mrs. Joyce Nisker, appeal book, volume 2, at page 307. Eventually, as

the Superior Court of Quebec found, the respondent overstepped the boundaries and committed a wrongful act for which he was made personally liable.

[37] In *Kosmopoulos v. Constitution Insurance Co.*, [1987] 1 S.C.R. 2, at page 11, the Supreme Court of Canada reiterated the principle that the lifting of the corporate veil is to be done in the interests of third parties who would suffer as a result of those who chose the benefits of incorporation. Wilson J., writing for a unanimous Court, said:

> There is a persuasive argument that "those who have chosen the benefits of incorporation must bear the corresponding burden, so that if the veil is to be lifted at all that should only be done in the interests of third parties who would otherwise suffer as a result of that choice".
>
> [Emphasis added]

[38] In the present instance, the judge lifted the corporate veil in the interests of the wrongdoer to grant him a tax benefit to the detriment of all Canadian taxpayers. The respondent, having sought the benefits of incorporation, I fail to see how and why, both factually and legally, the carrying on of business by his corporation 157699 can suddenly become a carrying on of business by the respondent personally so that, as the judge concluded, he can claim "as if the business had been carried on by the taxpayer himself", the deduction for an amount paid as damages resulting from personal liability in tort as a corporate officer.

[39] Counsel for the respondent submitted that the conclusion reached by the judge can be supported by the principles of agency. I do not think so. As the learned author Paul Martel pointed

out in the excerpts previously cited, a corporate director who participated in a wrongful act cannot find shelter behind the notion of agency to escape personal liability.

[40] I should mention here that, under section 321 of the *Civil Code of Quebec*, a director of a corporation is considered to be the agent (“mandataire” translated in English to “mandatary”) of the corporation. This is to be contrasted with the Act which, in subsection 248(1), defines “employee” as including an officer and “officer” as meaning a person holding an office as defined by the word “office”, which includes the position of a corporation director. It is difficult to see under the Act how the business of the corporation can become the personal business of its corporate officer or director who is its employee.

[41] In any event, coming back to the notion of agency, an agent acts for a principal. The business of the principal remains the business of the principal. It is nothing less than a fiction to say that the carrying on of business by the principal becomes the carrying on of business by the agent, so that he can claim a deduction for an expense incurred personally “as if the business had been carried on by the taxpayer himself”. The Act thrives on legal fictions in the form of deeming provisions. However, this is one that I have not found in the Act and for which the respondent has been unable to direct us to a statutory foundation.

[42] For these reasons, I would allow the appeal with costs, set aside the decision of the Tax Court of Canada and, proceeding to render the judgment that should have been rendered, I would dismiss the respondent's appeal to the Tax Court of Canada with costs.

"Gilles Létourneau"

J.A.

"I agree
Robert Décary J.A."

"I agree
Marc Nadon J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-2-07
STYLE OF CAUSE:	HER MAJESTY THE QUEEN v. DAVID NISKER
PLACE OF HEARING:	Montréal, Quebec
DATE OF HEARING:	January 9, 2008
REASONS FOR JUDGMENT BY:	LÉTOURNEAU J.A.
CONCURRED IN BY:	DÉCARY J.A. NADON J.A.
DATED:	January 31, 2008

APPEARANCES:

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