Docket: 2003-3377(IT)G

BETWEEN:

MARCHÉ LAMBERT ET FRÈRES INC.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

Appeal heard on October 3, 2006, at Montréal, Quebec.

Before: The Honourable Justice B. Paris

Appearances:

Counsel for the Appellant:	Maurice Mongrain
Counsel for the Respondent:	Bernard Fontaine

JUDGMENT

The appeal from the assessment made under subsection 227(9.4) of the *Income Tax Act*, notice of which is dated August 14, 2002, is dismissed with costs, in accordance with the attached Reasons for Judgment.

Signed at Vancouver, British Columbia, this 10th day of August 2007.

"B. Paris"

Paris J.

Translation certified true
on this 24th day of January 2008.

François Brunet, Revisor

Citation: 2007TCCI466
Date: 20070810
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REASONS FOR JUDGMENT

Paris J.

[1] The Appellant is appealing from the assessment made on August 14, 2002, by the Minister of National Revenue (the Minister) and seeking the amount of $4,075.46 payable under subsection 227(9.4) of the *Income Tax Act*, R.S.C. 1985 (5th Supp.), c. 1 (the Act). According to the Minister, the Appellant failed to remit to the Receiver General the amount of tax withheld from wages of its employees for the period from July 15 to July 21, 2002.

[2] In 2001 and 2002, the Appellant used the payroll processing services provided by Le Paie Maître P.C. Inc. (Paie Maître). Paie Maître calculated the pay of the employees of the Appellant and source deductions, paid employees their net pay and submitted remittances to Receiver General, among other things. For the period in issue, Paie Maître failed to pay remittances to the Receiver General.

[3] According to subsection 227(9.4) of the Act, the liability to pay an amount deducted or withheld from a payment to another person is on the person who deducted or withheld the amount pursuant to the Act. Subsection 153(1) imposes on every person paying salary, wages or other remuneration a liability to withhold from the payment the amount determined in accordance with prescribed rules and remit that amount to the Receiver General on account of the payee's tax.

[4] The issue is whether the Appellant is the person who paid wages to the employees in accordance with subsection 153(1) and who was liable to deduct or withhold from those wages the prescribed amounts.

[5] In the case at bar, the Appellant claims that it did not pay its employees anything for the period from July 15 to July 21, 2002, and that, therefore, it had no liability to make remittances. According to the Appellant, the wages in question were paid by Paie Maître, that would therefore be liable under subsection 153(1).

[6] The Respondent states that Paie Maître was the Appellant's agent for purposes of the payment of net wages to the employees of the Appellant and remittances to the Receiver General, and that the Appellant is thereby the person who paid the wages in accordance with subsection 153(1).

Facts

[7] In 2002, the Appellant operated five food markets under the IGA banner pursuant to a membership agreement with Sobeys Québec Inc. (Sobeys), which owned the IGA trademark. In 2000, Sobeys entered into a payroll processing contract with Paie Maître and encouraged its affiliated merchants who operated IGA markets in Quebec and Ontario to use the services of Paie Maître. In 2002, Paie Maître processed payroll for all Sobeys affiliated merchants operating IGA stores and IGA stores operated by Sobeys. Generally speaking, for each pay period Sobeys paid Paie Maître the gross amount of wages owed to the employees, then Paie Maître calculated the required source deductions, paid employees their net wages and remitted the deductions to the Receiver General. Sobeys was reimbursed the gross amount of the wages by the merchants.

[8] In July 2002, owing to financial problems, Paie Maître failed to remit deductions for those merchants and Sobeys, who were then the subject of assessments similar to those in the case at bar.

[9] The parties prepared a statement of agreed facts, with attachments, which details the relevant events and reads as follows:

[TRANSLATION]

1. From the commencement of its activities in Quebec, Sobeys Québec Inc. ("Sobeys") provided its affiliated merchants with a payroll processing service.

2. Sobeys made the appropriate calculations and the affiliated merchants themselves issued remittance cheques for source deductions to tax authorities.

3. At the beginning of 2000, Sobeys realized that its payroll processing software was outdated and was no longer adequate for the task.

4. Instead of incurring programming costs for new software, Sobeys decided to outsource its payroll processing service.

5. On July 13, 2000, Sobeys entered into a framework agreement with Le Paie Maître P.C. Inc. ("Paie Maître") a copy of which is in Tab 9 of the Appellant's *List of Documents*.

6. The "whereas" clauses of the *Framework Agreement* set out that Paie Maître provides payroll processing services and that Sobeys intends to avail itself of said services.

7. Pursuant to article 4 of the *Framework Agreement*, Sobeys undertook to promote the services of Paie Maître to ensure their use [TRANSLATION] "by as many [of its affiliated merchants] as possible."

8. Article 3 of the *Framework Agreement* provided that Paie Maître would provide Sobeys with a file containing the total payroll processing costs itemized and the amounts paid out for each affiliated merchant, and that Sobeys would pay the total amount of the invoices for the affiliated merchants to Paie Maître.

9. Under Article 5 of the *Framework Agreement*, Paie Maître undertook to [TRANSLATION] "hold the money of the affiliated merchants in a bank account in trust for remittance purposes."

10. The appendices to the *Framework Agreement* described the services provided by Paie Maître and fees.

11. In spring 2001, the Appellant entered into a *Retail Contract* with Paie Maître, a copy of which is in Tab 8 of the Appellant's *List of Documents*.

12. The "whereas" clauses of the *Retail Contract* set out that Paie Maître provided payroll processing services and that the Appellant intended to avail itself of said services.

13. Under the *Retail Contract*, Paie Maître provided the Appellant with equipment allowing it to enter the relevant data, including the number of hours worked by each employee in a given week, the hourly rate of each employee, etc.; those data were then sent electronically to Paie Maître for processing purposes.

14. As appears in a letter dated September 28, 2001, a copy of which is in the last page of Tab 8 of the Appellant's *List of Documents*, Sobeys agreed to pay the gross amount of the wages of the Appellant's employees to Paie Maître, and the Appellant agreed to reimburse that amount to Sobeys. The letter confirmed the practice that was in effect for the period during which Paie Maître provided payroll processing services to the Appellant.

15. At the relevant time, the Appellant operated as a franchise five stores under the "IGA" banner, held by Sobeys, and it had about 800 employees.

16. Paie Maître provided payroll processing services to Sobeys, in respect of IGA stores it operated itself, and to all Sobeys affiliated merchants operating IGA stores both in Quebec and Ontario, including the Appellant.

17. Depending on the size of their payroll, affiliated merchants had to remit source deductions on a weekly, biweekly or monthly basis. In the case of the Appellant, deductions were remitted every week.

18. After processing the information received from Sobeys and its affiliated merchants, Paie Maître transmitted to Sobeys a *Weekly Report of Wage Costs and Charges* for all employees of Sobeys and its affiliated merchants, as well as a document entitled *Wage Publication / Payroll Costs* representing the fees owed to Paie Maître. A copy of those documents is reproduced in Tab 1 of the Appellant's *List of Documents*.

19. As appears in said documents shown in Tab 1, the total amount required by Paie Maître representing the wages and source deductions in respect of the employees of the affiliated merchants for the week ending July 13, 2002, was $3,248,666.08, whereas the total amount required for the employees of the markets operated directly by Sobeys was $311,635.11 for said week. Those two amounts represented a total amount of $3,560,301.19.

20. As appears in the copies of the Request for Payment and the cheques shown in Tab 1 of the Appellant's *List of Documents*, Sobeys paid said amount of $3,560,301.19 to Paie Maître on July 18, 2002.

21. Tab 2 of the Appellant's *List of Documents* also shows that Sobeys paid Paie Maître $3,592,022.02 for the week ending July 20, 2002, and the

statements of the Bank of Montréal shown at the end of Tab 2 confirm that payment.

22. Paie Maître then issued to Sobeys a document entitled [TRANSLATION] "Invoice," of which a copy was sent to the Appellant, which provided a breakdown of the amounts payable in respect of each store for a pay period, that is the net amounts paid to the employees, taxes withheld at the source, employee contributions to the various plans, as well as the fees payable to Paie Maître. A copy of that document is in Tabs 3 and 4 of the Appellant's *List of Documents*. Paie Maître then remitted to tax authorities the source deductions.

23. After paying to Paie Maître an overall amount for all the affiliated merchants and its own stores, Sobeys was immediately reimbursed by its affiliated merchants, including the Appellant, by charging to their account the amount attributable to them, that is the amount appearing on the "Invoice" mentioned in the preceding paragraph, as appears in the documents shown in Tabs 5 and 6 of the Appellant's *List of Documents*.

24. Article 3 of the *Framework Agreement* shown in Tab 9 of the Appellant's *List of Documents* reads as follows:

[TRANSLATION]

> The Company shall make a single withdrawal from the Client's account for the total invoices for certified retailers.

25. The Appellant undertook to complete and sign any form required by Paie Maître to allow it to perform its duties.

26. The net pay of the Appellant's employees was paid to them by direct deposit into their bank account from the bank account of Paie Maître and Paie Maître of the Appellant submitted to them a deposit slip prepared by Paie Maître. The deposit slips submitted to Ms. Venne and Ms. Hovington are examples of such slips.

27. Paie Maître was also responsible for the issuance of income statements (T4 slips) to the employees concerned; the T4 slips issued to the Appellant's employees indicated, inter alia, the Appellant's name as an employer, as well as its employer number. The T4 summary was also made in the Appellant's name regardless of the fact that during the year, the payroll service was performed by Sobeys, Paie Maître and after the bankruptcy of Paie Maître by the firm that took over Paie Maître.

28. A cheque for the remittance of deductions drawn on the bank account of Paie Maître was received by the Canada Revenue Agency, but was not

honoured by the financial institution on which it was drawn on the grounds that the funds were not freed up.

29. The requirement, provided for in the *Framework Agreement*, to deposit into a trust account the amount received by Sobeys and its affiliated merchants was not complied with; no verification was made prior to the end of July 2002 to ensure compliance.

30. On July 25, 2002, under the pretext that is was experiencing some difficulties with its data processing system, Paie Maître requested and obtained from Sobeys the amount owing to it via a bank transfer to replace the cheques already submitted to Paie Maître (see Tab 2).

31. In the late afternoon on Friday, July 26, 2002, Sobeys requested and obtained from Paie Maître the reimbursement of approximately $133,000, which was a portion of the amount sent to Paie Maître via an electronic transfer. That amount was eventually remitted to tax authorities.

32. The $133,000 was the amount Sobeys demanded be returned via electronic transfer, incorrectly believing that it is was the amount necessary to make the remittances to tax authorities.

33. When Sobeys realized that a greater amount should have been claimed and contacted Paie Maître on Monday, July 29, 2002, to obtain the difference, that is $370,265.78, it learned that it was no longer possible.

34. An interim receiver of the property of Paie Maître was appointed on July 31, 2002.

35. It was then that Sobeys realized, after communicating with Paie Maître, the Bank of Montréal and the interim receiver, that Paie Maître did not fulfill its commitment to hold the source deductions in a trust account, that several million dollars had vanished, that there was a balance of about $6M remaining, that Paie Maître had made direct deposits in the amount of most of the employees' net wages, but that it did remit source deductions for the weeks ending on June 29, July 6, 13 and 20, 2002.

36. On August 1, 2002, Sobeys also commenced before the Superior Court of the District of Montréal an action and applied for a seizure before judgement for, inter alia, the seizure of the amounts still in the bank accounts of Paie Maître, for purposes of remittance to various government authorities. Those proceedings are shown in Tabs 27 and 28 of the Respondent's *List of Documents*. The proceedings did not go further owing to the subsequent bankruptcy of Paie Maître.

37. On or around August 15, 2002, the interim receiver sent a notice of stay of proceedings by which all proceedings against Paie Maître, including the action and application for seizure by Sobeys, were stayed. (To be documented.)

38. In the days that followed, counsel for the Appellant met with counsel for the Respondent, Richard Corbeil, to convince it to use the provisions of the *Income Tax Act* (subsections 227(4) and (4.1)), creating a so-called "presumed" trust to its benefit, to try to get a hold of the balance that was in the bank account of Paie Maître.

39. Counsel for the Respondent argued that "tracing" would be impossible to prove, considering that all the amounts received by Paie Maître and hundreds of its clients had been commingled in its current account. Therefore, counsel for the Respondent refused to claim that the Respondent had a "super-privilege" under said provisions.

40. Paie Maître went bankrupt on September 20, 2002.

41. On November 21, 2002, Sobeys filed a proof of claim with the trustee in bankruptcy of Paie Maître. (To be documented.)

42. The proof of claim produced by Sobeys included the following:

[TRANSLATION]

> This Proof of Claim (including the Affidavit and Appendices I to IV) shall not prejudice any rights, recourse or submissions of any nature whatsoever that Sobeys Québec Inc. and its affiliated merchants could make before any other court and against whomever and without any admission and/or renunciation of any nature whatsoever in that regard. (To be documented.)

43. The proof of claim of Sobeys was denied by the trustee and the appeal periods were suspended. (To be documented.)

44. On August 14, 2002, the Respondent issued to the Appellant the notice of assessment at issue in this case, in respect of its employer account no. 103506184RP0007; the amount assessed, $4,075.46, represented the amount (including source deductions for income tax, employee contribution and employer contribution, owing under the *Employment Insurance Act*) that should have been paid to the Respondent, with respect to the remuneration paid to certain employees of one of the Appellant's markets for the period from July 15 to 21, 2002. That amount was not remitted to the Respondent. A copy of the notice of assessment is

in Tab 3 of the Respondent's *List of Documents*. (To be produced to the Court.)

45. On November 12, 2002, the Appellant filed a notice of objection against this assessment, which is reproduced in Tab 4 of the Respondent's *List of Documents*.

46. On July 3, 2003, the Respondent confirmed said assessment, as appears in the *Notice of Confirmation* reproduced in the Tab of the Respondent's *List of Documents*.

47. On February 26, 2004, under an initial order rendered by the Superior Court, part of the bankruptcy file of Paie Maître became an *arrangement* pursuant to the *Companies' Creditors Arrangement Act*. (To be documented.)

48. On March 18, 2004, Sobeys filed a proof of claim under the *Arrangement and Compromise Plan*, which included the following:

[TRANSLATION]

> This Proof of Claim (including Appendices I, II and III) shall not prejudice any rights, recourse or submissions of any nature whatsoever that Sobeys Québec Inc. and its affiliated merchants could make before any other court and against whomever and without any admission and/or renunciation of any nature whatsoever in that regard. (To be documented.)

49. An *Arrangement and Compromise Plan* was approved by the creditors on April 5, 2004, which contained, inter alia, the following clauses:

[TRANSLATION]

> 2.1.1 There is currently a complex legal dispute involving the TRUSTEE, several CREDITOR-CLAIMANTS and other parties over the appropriation of BANK FUNDS. Several parties involved have come to the conclusion that it is in the interest of all parties concerned to end this costly and unpredictable legal dispute through this PLAN.
>
> 2.2.1 The purpose of the PLAN is to end the legal dispute over the BANK FUNDS, offer a settlement resolving all CLAIMS OF CREDITOR-CLAIMANTS, including the DEBTS RELATING TO REAL RIGHTS, to settle, in part,

> the CLAIM OF GATX and to provide for the distribution of the BANK FUNDS, upon receipt by the TRUSTEE, as expeditiously as possible.
>
> 3.4 . . . This provision, this PLAN and the implementation of this PLAN are without prejudice to any personal right or corporate right (other than the DEBTS RELATING TO REAL RIGHTS) that all parties have, could have or could claim to have against any person. (To be documented.)

50. By order dated April 26, 2004, the Superior Court approved the Plan and stated that

[TRANSLATION]

> . . . this order, the Plan and the date of the Plan's implementation are without prejudice to any personal right or corporate right, other than the DEBTS RELATING TO REAL RIGHTS, that all parties have, could have or could claim to have against any person;
>
> . . . all property claims made by the CREDITOR-CLAIMANTS as well as the appeals from the TRUSTEE'S dismissal of the property claims are now null and void; (To be documented.)

51. In order to maintain harmonious business relations with its affiliated merchants, and without obligation to do so, Sobeys paid, with its own funds, all the assessments issued to its affiliated merchants, including the assessment issued to the Appellant and at issue in this appeal, as appears in the documents shown in Tab 7 of Appellant's *List of Documents*.

52. Each of the affiliated merchants gave a power of attorney to Sobeys to object to said assessments by means of a notice of objection and/or appeal, and each affiliated merchant transferred to Sobeys the reimbursement it may have obtained if said assessments were vacated, as it was Sobeys who paid them.

53. By letter dated March 25, 2003, addressed by counsel for the Appellant to Josée Rodrigue of the Appeals Division, a copy of which is in Tab 24 of the Respondent's *List of Documents*, the Appellant informed the Respondent that it did not object to the part of the assessments relating to Employment Insurance and Canada Pension Plan, as the dispute was limited to income tax amounts that were deducted from the remuneration paid to the Appellant's employees, but which were not remitted.

54. By letter dated April 22, 2003, also addressed to Josée Rodrigue of the Appeals Division, a copy of which is in Tab 25 of the Respondent's *List of Documents*, counsel for the Appellant confirmed the agreement according to which the appeal would serve as a test case for all the assessments issued to Sobeys and its affiliated merchants and that the notices of objection of the other merchants would be put on hold.

55. By letter dated October 19, 2004, addressed by the Respondent's representative to counsel for the Appellant, the Respondent confirmed that it would be willing not to enforce its presumed trust on the dividends payable to the creditor's-claimants represented by Sobeys to the extent that they agree, in the event that they are successful in the tax proceedings, that the Respondent may keep, from any reimbursement that would be payable to the creditor-claimant, an amount determined as follows: amount of the dividends received by the objecting creditor, multiplied by the amount of source deductions assessed under the *Income Tax Act*, and divided by the total amount of source deductions assessed under the *Income Tax Act*, the total amount of source deductions assessed under the *Employment Insurance Act* (if any) and the total source deductions assessed under the Canada Pension Plan (if any). (To be documented.)

56. By letter dated November 9, 2004, addressed to counsel for the Respondent, counsel for the Appellant accepted the Respondent's proposal described in the preceding paragraph. (To be documented.)

Legislative provisions

[10] The legal obligation to make source deductions and to remit those amounts to the Receiver General of Canada arise out of subsection 153 of the Act which reads, in part, as follows:

ARTICLE 153: Withholding.

(1) Every person paying at any time in a taxation year

(*a*) salary, wages or other remuneration, other than amounts described in subsection 212(5.1);

. . .

shall deduct or withhold from the payment the amount determined in accordance with prescribed rules and shall, at the prescribed time, remit that amount to the Receiver General on account of the payee's tax for the year under this Part or Part XI.3, as the case

> may be, and, where at that prescribed time the person is a prescribed person, the remittance shall be made to the account of the Receiver General at a designated financial institution.
>
> [Emphasis added.]

[11] Section 227 of the Act then provides that every person who is liable to withhold amounts under subsection 153(1) of the Act must pay the amounts collected but not remitted to the Receiver General of Canada. That liability, provided for more specifically in subsection 227(9.4) of the Act, is worded as follows:

> **SECTION 227: Withholding taxes.**
>
> . . .
>
> **(9.4) Liability to pay amount not remitted**. A person who has failed to remit as and when required by this Act or a regulation an amount deducted or withheld from a payment to another person as required by this Act or a regulation is liable to pay as tax under this Act on behalf of the other person the amount so deducted or withheld.
>
> [Emphasis added.]

Conditions to be met for subsection 153(1) of the Act to apply

[12] The Federal Court of Appeal in *The Queen v. Coopers & Lybrand Limited, as the agent of the Mercantile Bank of Canada and the receiver and manager of Venus Electric Limited*, [1981] 2 F.C. 169 (QL), set out three requirements to be met in order that liability may exist under under subsection 153(1) of the Act:

1) payments to employees must have been made;

2) such payments must have been with respect to wages or salaries due to the employees;

3) the person sought to be held liable must have made such payments.

[13] In the case at bar, the parties agreed that the first two conditions were met. Net wage payments were made to the Appellant's employees via electronic fund transfers to their bank accounts. What remains to be determined is whether it is the Appellant that paid the wages within the meaning of subsection 153(1) of the Act.

Appellant's arguments

[14] According to the Appellant, even though it was the employer of the employees who received the payments, that does not mean that it is, in the circumstances, the person referred to in subsection 153(1) of the Act. Subsection 153(1) speaks of the "person" who makes the payments, and does not require an employer-employee relationship between the payer and the payee.

[15] The Appellant claims that the person referred to in paragraph 153(1) is the one who controls the funds that are paid. In the case at bar, when the funds were transferred to Paie Maître to pay the wages and remittances, the Appellant no longer had any control. The Appellant claims that the funds became the property of Paie Maître when they were deposited into the latter's bank account, and that it was Paie Maître chose to pay the net wages to the employees without remitting to the Receiver General the source deductions. Therefore, the Appellant stated that it was Paie Maître who was liable under subsection 153(1).

[16] Counsel for the Appellant cited the following cases:

Dauphin Plains v. Xyloid and The Queen, [1980] 1 S.C.R. 1182;

Roll v. Canada, [2000] A.C.F. no. 2048 (QL);

In re Bankruptcy of G. & G. Equipment Co. Ltd., 74 DTC 6407 (S.C.B.C.);

Mollenhauer Ltd. v. Canada, [1992] A.C.F. no. 580 (QL);

The Queen v. Coopers & Lybrand Limited, as the agent of the Mercantile Bank of Canada and the receiver and manager of Venus Electric Limited, [1981] 2 F.C. 169 (QL);

Cana Construction Co. v. Canada, [1996] A.C.F. no. 827 (QL) (affirming appeal [1994] T.C.J. no. 809 (QL)); and

Soltrac International Inc. v. The Minister of National Revenue, 94 DTC 1900.

Analysis

[17] First, I agree with the Appellant that the element of decision-making power with respect to the funds paid to the employees is determinative as to the application of subsection 153(1).

[18] The relevant case law of the Federal Court of Appeal shows that a person is only liable under that subsection if it had decision-making powers over the payments to employees. In the case where a person physically makes the payments, but has no independent authority over the funds used to make them, that person is not liable to make remittances. In other words, if the person who makes the payments upon the directives of another person and not on his her own initiative, subsection 153(1) does not apply to him or her.

[19] In that respect, in *Roll v. Canada*, *supra*, the Federal Court of Appeal decided that the Appellant, who was a bare trustee of the funds that were used to pay the wages of the employees of another person, was not liable, under subsection 153(1), for the remittance of amounts withheld from those wages.

[20] Mr. Roll was a bookkeeper for Sea Hornet, which was experiencing financial problems. At one point, all funds deposited into Sea Hornet's bank account were likely to be seized by its creditors. Therefore, Mr. Roll acceded to the request of the principals of Sea Hornet that he allow the company to deposit into the Mr. Roll's bank account the funds received from the investors for the payment of the employees' net wages and that Mr. Roll pay those wages with the cheques drawn on his account. When Sea Hornet ceased its activities, it did not have the means to pay source deduction arrears and the Minister sought to impose on Mr. Roll the liability provided for in subsection 153(1) of the Act.

[21] In the judgment at first instance *(Roll (Harvey Roll Business Services) v. Canada*, [1999] T.C.J. no. 627 (QL)) this Court stated that the Appellant, Mr. Roll, exceeded his duties as the company bookkeeper by depositing into the bank account he controlled the funds received by Sea Hornet, and then disbursing them to the employees and the creditors according to the instructions given to him by Sea Hornet. For that reason, and because Mr. Roll knew that the only reason for Sea Hornet to enter into this arrangement with him was to keep its funds away from its creditors, the Court held that he was liable under subsection 153(1).

[22] The Court of Appeal set aside that decision stating that

> . . . once the Tax Court Judge determined that Mr. Roll was a bare trustee of the employer's funds, that he acted only on the directions of the principals of Sea Hornet and could exercise no independent authority over the disposition of the funds, and that the decision to pay the net salaries of the employees was that of the principals of Sea Hornet alone, he should have concluded that Mr. Roll was not within the scope of subsection 153(1) of the *Income Tax Act*.

[23] In *Coopers & Lybrand, supra*, the Federal Court of Appeal decided that a receiver and manager who paid net wages to employees of a company in receivership (Venus Electric) was liable to remit source deductions as it had decision-making power as to the payment of wages.

[24] Coopers & Lybrand, which had been appointed receiver and manager of Venus, decided to carry on the undertaking of Venus and, to that end, ensured the payment of wages to the employees of Venus.

[25] Coopers & Lybrand argued, inter alia, that as receiver and manager, it was not the agent of Venus and therefore could not be held personally liable as a result of the payment of net wages to the employees.

[26] The Court of Appeal found that Coopers & Lybrand did not act as a mere conduit for Venus and that the decision to pay the wages was that of Coopers & Lybrand itself. At paragraphs 40 and 41 the Court stated as follows:

> Having decided to circumvent these unwanted consequences of leaving the employees to realize their wage claims as best they could, the respondent of its own accord and solely on its own judgment initiated the steps which resulted in making payment to each employee of an amount equal to the amount of his or her earnings actually due. These payments would not have been made if it were not for the decision and direction of the respondent. Even if it be assumed that, so far as the respondent's responsibilities to Venus were concerned, the relationship between the respondent and Venus was that of agent and principal, the payment to the employees of the amount equal to the amount indicated to be due and payable to them personally according to the payroll calculations for the final pay period was not an act of which Venus was capable at that time. All of its property had been in the possession of the respondent from 1:00 a.m. 25th September. The payment of the amounts, which I have concluded were wages, was a result of a decision taken by the respondent in complete awareness of all the circumstances and carried out under its express directions. Even if it be assumed that the Bank concurred in the payments being made the person causing them to be made was the respondent.

> The attendant circumstances lead to one conclusion only — that the respondent was the person paying wages to employees and consequently coming within the ambit of section 153.
>
> [Emphasis added.]

[27] In *Cana Construction Co. v. Canada*, *supra*, the Federal Court of Appeal upheld a decision of this Court where it held that subsection 153(1) applied in circumstances where the Appellant maintained total control over the payment of wages made to the employees of one of its subcontractors, even if the cheques were drawn on the bank account of the subcontractor.

[28] Cana was a building contractor and Vidalin, its subcontractor, worked on one of its projects. Vidalin could not pay its employees so, to ensure the completion of the project, Cana decided that it was necessary that the employees of Vidalin be paid.

[29] To that end, Vidalin informed Cana of the amount owing to each employee and Cana allowed a bank draft to be drawn on its own account for the total amount. An employee of Cana and an employee of Vidalin went to Vidalin's bank and deposited the amount in question into Vidalin's account. At the same time, the bank certified the cheques issued by Vidalin to its employees, which represented the net wages of each employee. Those cheques were given to Vidalin to be submitted to the employees.

[30] Cana submitted that the payments that were made to Vidalin by means of bank drafts related to a contractual obligation that existed between the Appellant and Vidalin as a subcontractor, and they were not meant to cover the wages of Vidalin's employees. Moreover, the Appellant submitted that, because it did not issue the cheques to the employees, there was no actual payment and it could not, therefore, come within the ambit of subsection 153(1) of the Act.

[31] The Court found that the Appellant, Cana, maintained total control and dominion over the funds used to pay the wages of Vidalin's employees, that Cana was the person paying the employees wages and that it did so deliberately and with full knowledge that it was doing so. The judge stated as follows:

> . . . Vidalin acted on Cana's instructions and direction when it prepared the pay cheques and attached stub with deduction details. Cana retained complete control over the payment procedure. Section 153 states clearly that every person paying wages to an employee must withhold tax, it does not say that only employers must do so. (At paragraph 27 of the decision.)

[32] In affirming the decision, the Federal Court of Appeal stated as follows:

> . . . the Appellant's conduct and its maintenance of complete control over the sums ostensibly paid by Vidalin until such time as they were received by the employees supported the judge's finding that Vidalin was acting on Appellant's instructions and directions in preparing the payroll cheques whose stubs showed (wrongly) that the applicable deductions had been made. The judge was accordingly justified in concluding that the situation was no different than if the Appellant had itself directly paid Vidalin's employees and had failed to remit the taxes deducted.

[33] In my opinion, that case law is clearly to the effect that a person will be held liable under subsection 153(1) if he or she has decision-making power as to the payments of wages made to employees. He or she will not be held liable if he or she pays wages or salaries as a mere conduit or as an agent of another person.

[34] In the case at bar, in order to determine who between Paie Maître and Marché Lambert paid the wages within the meaning of subsection 153(1), it is important to determine the role of Paie Maître.

[35] The Retail Contract between the Appellant and Paie-Maître reads, in part, as follows:

[TRANSLATION]

> Whereas the COMPANY [Paie Maître] provides payroll processing services;
>
> Whereas the CLIENT [Marché Lambert] intends to avail itself of said services;
>
> The parties agree as follows:
>
> Generally speaking, the COMPANY provides to the CLIENT a time entry tool. The CLIENT records its employees' work time using this tool and transmits the data to the COMPANY that processes it, produces pay records, makes the payments, produces reports chosen for printing by the CLIENT.
>
> . . .
>
> 5. <u>CONDITIONS</u>
>
> . . .

c) The CLIENT undertakes to complete and sign any form required by the COMPANY, **enabling it to perform its duties.**

. . .

8. LIMITATION OF LIABILITY

. . .

a) The COMPANY accepts, without research or verification, all the information, data and instructions provided and transmitted by the CLIENT as part of this contract.

[Emphasis added.]

[36] The specifications attached to the Retail Contract, of which they were an integral part (within the meaning of paragraph 4 of the contract), provided that the following services would be provided by Paie Maître:

SPECIFICATIONS

SERVICES PROVIDED

1. Installation of the COMPANY's data entry software for the CLIENT. The CLIENT shall have at its disposal computer equipment meeting the following minimum requirements: (See Appendix 1A)

   Store and Forward Option

2. Training of the CLIENT's staff on data entry and the operation of the payroll system at the beginning of the initial contract

3. Tracking of time by department (as required)

4. Time entry list (as required)

5. "Employee" file including all information necessary for payroll, opening the file

6. Copy of "employee" file after any change

7. "Company" file

8. List of missing information (when required)

9. Direct deposit (P)

10. List of deposits (P)

11. Detailed record of wages by account receivable, by department, including the hours worked on a daily basis (P)

12. Summary of the record of wages by department and summary containing a breakdown of the total earnings, deductions and fringe benefits by period with monthly and annual accruals (P)

13. Summary of vacation credits (P)

14. Detailed invoicing of payroll processing costs and amounts disbursed (P)

15. Record of Employment Form (as required) (Completed and mailed by the COMPANY)

16. Choice of various lists by employee number, by department, by date of hiring, etc., indicating the address, telephone number, Social Insurance Number (SIN)

17. Report summarizing remittance to both levels of government and annual accruals

18. **Federal and provincial remittances made on behalf of the CLIENT**
(Retailer's choice)

19. Record of surplus funds of the C.S.S.T. (A)

20. Journal to balance annual accruals (A)

21. Calculation of assessment to the Commission des normes du travail (C.N.T.) (A)

22. Submission of the assessment to the Commission des normes du travail (C.N.T.) on behalf of the CLIENT (A)

23. If the remittances are made by the COMPANY: Federal summary and provincial summary completed with the relevant information provided by the CLIENT on the dates requested (Completed and mailed by the COMPANY) (A)

24. [DELETED]

25. T4 and Relevé 1 – balanced and inserted in an envelope (A)

26. Cost report, by department, including vacation allowances, of the C.S.S.T. and C.N.T. (P)

27. Accounting entry (Transfer by file to Quasimodo accounting system) (P)

28. Pension fund report (M)

29. RRSP report (M)

30. Group insurance report (M)

31. Union dues report (M)

32. Garnishment of wages pay code report (P)

33. Advancement of funds pay code report (M)

34. Self-sufficient fund report (P)

35. Report on the calculation of statutory holidays and bonuses (based on the 0.004 of the gross salary) (P)

36. Report on the calculation of statutory holidays and bonuses (according to labour standards) (P)

37. Report on dental contributions (M)

38. Periodic report on corporate funds (M)

39. Report on the Fonds de solidarité des travailleurs du Québec (M)

40. Report on and calculation of the retroactive amounts concerning wages (P) (end of March 2001)

41. Productivity comparative statement (in development with Sobeys):

    − for the current year and past year,
    − with the amount of sales hours and money
    − for regular employees and part-time employees
    − for weekly, monthly and annual periods (P)

42. Calculation of 90% of the payment for the first 14 days in respect of C.S.S.T. (end of March 2001)

43. Record of vacation (P)

44. Record of sick credits (P)

45. Record of statutory holidays (P)

46. Record of absenteeism (P)

47. Record of positions and salaries (P)

48. Notes sheet (disciplinary measures or other) (P)

49. Record of internal / external training and training expenses. (P)

50. Record of hours accumulated (P)

51. Record of hours worked

. . .

[Emphasis added.]

[37] The Appellant submits that the Retail Contract is a contract for the provision of services by Paie Maître to Marché Lambert. Paie Maître undertook to perform a number of tasks for Marché Lambert, including that of distributing to various stakeholders, such as the tax authorities, the amounts Marché Lambert sent to it.

[38] As for the Respondent, she submits that for the purposes of the payments of wages to the employees, Paie Maître was the agent of the Appellant and the other merchants.

[39] In light of all the evidence, I am of the opinion that Paie Maître did not act as a conduit for Marché Lambert, that is to say as its agent or a bare trustee. The Retail Contract referred to the performance by Paie Maître of its duties, and the "Framework" agreement provided, inter alia, that Paie Maître undertook to hold in a trust account the amounts received, so that it make the payments to the employees and stakeholders. (However, the funds were not deposited into a trust account and neither the Appellant nor Sobeys verified the fulfillment of that undertaking.) I would also like to point out that the cheques for the employees, although drawn on the bank account of Paie Maître, indicated that the payments were made [TRANSLATION] "on behalf of" the Appellant (Exhibit I-2). The T4 forms, "Statement of Remuneration paid," for 2001 and 2002 indicated that the Appellant was the employer, and the name of Paie Maître did not appear anywhere.

[40] It is clear that Paie Maître had at all times a duty to use the funds provided by Sobeys (on behalf of the merchants) according to the terms of the contract or the instructions of either the Appellant or Sobeys. Paie Maître did not have the right to do otherwise. It does not matter whether the contractual relationship between the Appellant and Paie Maître was a mandate or trust, what matters is the control the Appellant maintained over the funds that were in the hands of Paie Maître.

[41] Neither the Appellant nor Paie Maître ever intended for Paie Maître to have decision-making power or any discretion whatsoever over the payments that Paie Maître made to the employees and various stakeholders. When Paie Maître made the various payments, it did so according to the directives and under the control of the Appellant. It had no power to decide how to use the funds; it only distributed the funds on behalf of the Appellant in the normal performance of the payroll processing contract.

[42] The role of Paie Maître is similar to that of Mr. Roll in *Roll*, *supra*. It is true that in this case Paie Maître received the gross amount of the employees' wages whereas Mr. Roll only received the net amount from Sea Hornet, but the main point is that the payments to the employees in both cases were made according to the employer's instructions and with the employer's money. Just like Sea Hornet, the employer, in *Roll*, the Appellant caused the wage payments to be made.

[43] The Appellant submits that it is Paie Maître that is liable under subsection 153(1) because it was the person that decided to pay the net wages to the employees and not to make remittances to the Receiver General.

[44] First I agree with counsel for the Respondent that there is no evidence in this case that the failure to remit the source deductions was owing to a decision taken by Paie Maître. All that can be said is that there were not enough funds in the account of Paie Maître to allow the bank to honour the cheques Paie Maître sent to the Receiver General to make the remittances. There is no evidence that the lack of funds was owing to an intentional behaviour on the part of Paie Maître. Second, the language of subsection 153(1) does not suggest that the element of intent is relevant for determining who is liable to withhold amounts and remit the amounts withheld.

[45] In short, I hold that it is the Appellant who, for the period in issue, paid the wages to its employees within the meaning of subsection 153(1) of the Act and, accordingly, it is the Appellant who is liable under subsection 227(9.4) of the Act to pay the amounts withheld from the wages but not remitted to the Receiver General.

[46] For all these reasons, the appeal is dismissed with costs.

Signed at Vancouver, British Columbia, this 10th day of August 2007.

"B. Paris"

Paris J.

Translation certified true
on this 24th day of January 2008.

François Brunet, Revisor

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