

Docket: 2006-2338(GST)G

BETWEEN:

EVELYNE RANCOURT,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

Appeal heard on April 28, 2008, at Montreal, Quebec.

Before: The Honourable Justice François Angers

Appearances:

Counsel for the Appellant: Michel Villeneuve

Counsel for the Respondent: Martine Bergeron

JUDGMENT

The appeal from the assessment for the period from August 1, 2003, to April 30, 2004, made under the *Excise Tax Act*, the notice of which is dated May 2, 2006, and bears number PM-12016-1, is allowed with costs, in accordance with the attached Reasons for Judgment.

Signed at Edmundston, New Brunswick, this 2nd day of June 2008.

"François Angers"

Angers J.

Translation certified true
on this 29th day of August 2008.

Erich Klein, Revisor

Citation: 2008TCC285
Date: 20080602
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EVELYNE RANCOURT,

Appellant,

and

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Respondent.

[OFFICIAL ENGLISH TRANSLATION]

REASONS FOR JUDGMENT

Angers J.

[1] This is an assessment issued against the appellant in her capacity as director of the company Criz'Antenne Centre d'éducation sur les arts d'interprétation (Criz'Antenne), the notice of which bears number PM-12016-1 and is dated May 2, 2006. The amount claimed from the appellant is \$9,414.96, including interest and penalties, and relates to the period from August 1, 2003, to April 30, 2004.

[2] Criz'Antenne was duly incorporated on July 2, 1996, as a non-profit organization. At all relevant times, it was registered for the purposes of Part IX of the *Excise Tax Act* (ETA). The corporation's activities involved distributing shows and operating a performance hall and bar under the name "L'Espace Alizé". For the period in question, Criz'Antenne failed to pay the Minister of Revenue (the Minister) the amounts of net tax that it was required to pay under the ETA. On September 8, 2004, the Minister had a certificate issued by the Federal Court attesting that Criz'Antenne owed a debt of \$19,610.47 for the period from November 30, 2002, to May 31, 2004. After a writ of execution was issued and property having a value of no more than \$150.10 was seized, the debt remained unpaid.

[3] The issue is therefore whether the appellant, in her capacity as a director of Criz'Antenne, exercised the degree of care, diligence and skill that a reasonably prudent person would have exercised in comparable circumstances to prevent the

failure of Criz'Antenne to remit all of the net tax owing for the period in issue. The relevant statutory provisions are reproduced below:

323(1) Liability of directors – If a corporation fails to remit an amount of net tax as required under subsection 228(2) or (2.3) or to pay an amount as required under section 230.1 that was paid to, or was applied to the liability of, the corporation as a net tax refund, the directors of the corporation at the time the corporation was required to remit or pay, as the case may be, the amount are jointly and severally, or solidarily, liable, together with the corporation, to pay the amount and any interest on, or penalties relating to, the amount.

323(3) Diligence – A director of a corporation is not liable for a failure under subsection (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.

[4] The appellant was born on September 13, 1978. At the relevant time, she had no particular training in, or knowledge of, accounting or taxation. In October 2001, she met Stéphane Toupin who was, at the time, the chairman of Criz'Antenne's board of directors and employed by Criz'Antenne as activities and programming manager. He was also the founder of the business. He hired the appellant as a barmaid, the job she worked in until October 2002 when she left to take similar employment elsewhere.

[5] A few months after she was hired, when she was still employed by Criz'Antenne, Stéphane Toupin offered her a place on the board of directors, and subsequently proposed that she sit on the board of directors of Criz'Antenne as a director, to which she agreed. In July 2002, at a general meeting of the members of Criz'Antenne, the appellant was elected to the board of directors, and she was given the office of secretary. The board of directors was composed of five members, four of whom were elected at that meeting, including the chairman, Stéphane Toupin, who held that position until 2003.

[6] Stéphane Toupin, in his capacity as manager and chairman, and one Sylvain Laplante were employees of Criz'Antenne who were responsible for ensuring that the day-to-day activities of Criz'Antenne went smoothly. Mr. Laplante coordinated the activities. The appellant's duties as secretary boiled down to preparing the minutes and organizing meetings. One of the matters referred to in the minutes of the first meeting of the new board of directors, held on August 4, 2002, was accounts payable, including unremitted source deductions (SDs) amounting to \$8,000. The meeting was obviously dominated by Stéphane Toupin and Sylvain Laplante and no participation

by the appellant is apparent, other than her seconding the adjournment of the meeting.

[7] The board of directors next met on December 16, 2002, but there were no minutes from that meeting introduced in evidence. It was not until the meeting on January 15, 2003, that an attempt was made to resume discussions, and it became apparent that Criz'Antenne was in a difficult situation and the accounting was poor, as there were conflicting figures and cash discrepancies. The appellant was not present at that meeting, which was again, in my view, dominated by Stéphane Toupin and Sylvain Laplante. According to the minutes, agreements were made regarding the SDs and the goods and services tax (GST) remittances were being made since July 2002, except that steps had to be taken to resolve the payment issue.

[8] A general orientation meeting for Criz'Antenne was held on February 11, 2003. The appellant was not present. The minutes indicate that individuals who were not on the board of directors were present and that there was a quorum. Among the matters discussed was the fact that the deficit was not all that disastrous, that an agreement had been made regarding the SDs and that there was only the GST to deal with. There seems to have been some uncertainty as to Criz'Antenne's GST liability to the government and the government's debt owing to the business. Sylvain Laplante was delegated to do what was necessary to resolve the matter.

[9] The next meeting of the board of directors was held on April 23, 2003. The appellant was present. A possible refund from Revenu Québec was questioned and the fact that the balance sheets for January to April 2003 were not available raised questions. Someone asked why they were not received every week. Sylvain Laplante explained that it was because of the lack of interest on the part of the board of directors and the fact that he had not required them from the then accountant because they owed him money. Stéphane Toupin and Sylvain Laplante again dominated the meeting.

[10] The minutes of the meeting of the board of directors on May 14, 2003, show that in January 2003 a cheque for \$13,000 was sent in payment of the GST amounts payable for a period of six months. Sylvain Laplante announced that he would be leaving the organization when his contract was finished at the end of August 2003. He proposed that he train someone to replace him. The meeting was informed that Criz'Antenne was paying about \$6,500 in GST and Quebec sales tax (QST) every quarter. It was also told that the board of directors was run by Stéphane Toupin. The appellant brought up the fact that the job descriptions were not detailed and specific enough as to each person's work, that there was a lack of organization and that there

were major shortcomings in the areas of promotion and publicity. A new development plan was discussed.

[11] During July and August 2003 there were two meetings of the board of directors. There were intense discussions about the financial situation and management of Criz'Antenne. The upshot was that Stéphane Toupin was dismissed on the ground that he had not followed the decisions made by the board of directors, in particular regarding certain renovations, failure to pay employees' wages, and the departure of employees and members of the board of directors.

[12] According to the appellant, Stéphane Toupin was not replaced, and another director, the vice-chairman, had stopped attending meetings, despite the fact that at the meeting on August 4, 2003, he, along with the appellant and Elaine Grisé, was appointed to sit as an acting director. Criz'Antenne thus found itself with no chairman or vice-chairman. Elaine Grisé was appointed as co-signer but we do not know the identity of the other co-signer. As for the appellant, she never signed any cheques. The accounting was still not satisfactory, despite the fact that someone had been hired to do it; that person, however, left Criz'Antenne. On August 18, 2003, at a special general meeting, Elaine Grisé was appointed as coordinator.

[13] The next meeting of the board of directors took place on November 13, 2003. The board of directors then had only three members: Elaine Grisé, Jean Beaumier and the appellant. Mr. Beaumier was not present at that meeting, since no one had been able to reach him. Elaine Grisé was looking after day-to-day activities and personnel management. Someone had been hired to do the accounting, for 10 hours a week. That person was responsible for the SDs, GST, payroll and financial statements. The appellant was not informed that the person had been hired until that meeting. It was also announced there that there were no longer any problems requiring immediate attention but that they still had to deal with previous debts. For the immediate future there was the matter of a \$900 debt to Revenue Canada which, according to the appellant, was the current monthly debt. The appellant was informed that the expense reduction process had been set in motion and that efforts to optimize revenue were being made. The appellant stayed on as a director because there was no one to take her place and she cared about the organization. In fact, had it not been for the fact that she wanted to vote in favour of dismissing Stéphane Toupin, she would have resigned in August 2003.

[14] A general meeting of members was scheduled for January 2004, but ultimately did not take place until March 20, 2004. The organization's accounting seems to have been managed better, but Criz'Antenne's financial situation and its future were

discussed, because there was a problem with the lease renewal. One last meeting of the members was convened for May 29, 2004, to discuss the future of Criz'Antenne, but no minutes from that meeting were introduced in evidence.

[15] During the period from November 2003 to Criz'Antenne's closing, the appellant met informally with Elaine Grisé to discuss Criz'Antenne's problems, the future of the organization and the difficulties associated with negotiating the lease renewal. The appellant testified that she had trusted Elaine Grisé and the accountant who was hired in the fall of 2003 but left in June 2004. It was only at the very end of 2004 that the appellant apparently learned that the debt to Revenue Canada amounted to over \$40,000.

[16] During the period in question, the quarterly GST return was submitted, either late or on time, but the remittances were never made. The appellant was assessed for the periods prior to those in issue here, and it was only at the objection stage that the period was reduced to that now before the Court.

[17] I do not wish to review here all of the case law on how to proceed in analyzing the defence of reasonable diligence where a director is liable as a result of the failure of a corporation to make the payments required by the ETA. Suffice it to note that in *Soper v. The Queen*, [1997] 3 C.T.C. 242, it was held that an "objective subjective" standard is to be applied in analyzing the reasonable diligence standard. In *Peoples Department Stores Inc. (Trustee of) v. Wise*, [2004] 3 S.C.R. 461, the Supreme Court of Canada modified that test and adopted an objective standard for applying paragraph 122(1)(b) of the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44, and thus, by necessary implication, for applying subsection 323(3) of the ETA, which is worded identically.

Paragraph 63 of that decision reads as follows:

To say that the standard is objective makes it clear that the factual aspects of the circumstances surrounding the actions of the director or officer are important in the case of the s. 122(1)(b) duty of care, as opposed to the subjective motivation of the director or officer, which is the central focus of the statutory fiduciary duty of s. 122(1)(a) of the CBCA.

[18] The Supreme Court further stated, at paragraph 67 of the decision, that the duty of care can be met if the directors acted prudently and on the basis of the information they had. It is not a duty to make the best decision, it is a duty to make a business decision that is reasonable in the circumstances. It is important to note that

in applying the diligence test, it is not a matter of analyzing the business situation in light of subsequent facts, but rather of doing so on the basis of the information available to the directors at the time they made their decision; I quote:

Directors and officers will not be held to be in breach of the duty of care under s. 122(1)(b) of the CBCA if they act prudently and on a reasonably informed basis. The decisions they make must be reasonable business decisions in light of all the circumstances about which the directors or officers knew or ought to have known.

[19] It should also be remembered that the courts have on numerous occasions stressed that subsection 323(3) of the ETA specifies when a director must act in order to come within the diligence exception to liability. The director must have exercised the degree of care, diligence and skill to prevent the failure that a reasonably prudent person would have exercised in comparable circumstances. The efforts made by a director to limit the failure after the fact, or to remedy the failure, are of no importance. The analysis must be done having regard to the measures taken to prevent the corporation's failure to fulfil its statutory obligations, and in light of the circumstances of each case. The applicable standard is also no different whether it is applied in the case of a director of a non-profit organization or in the case of the director of a business corporation. Flexibility is called for in applying the standard (see paragraph 24 of the decision of the Federal Court of Appeal in *Her Majesty the Queen v. Corsano*, 99 DTC 5658, reproduced below):

I agree with counsel for the appellant that the rationale for subsection 227.1 (1) is the ultimate accountability of the directors of a company for the deduction and remittance of employees' taxes and that such accountability cannot depend on whether the company is a profit or not-for-profit company, or I would add whether the directors are paid or not or whether they are nominal but active or merely passive directors. All directors of all companies are liable for their failure if they do not meet the single standard of care provided for in subsection 227.1(3) of the Act. The flexibility is in the application of the standard since the qualifications, skills and attributes of a director will vary from case to case. So will the circumstances leading to and surrounding the failure to hold and remit the sums due.

[20] This entire affair started for the appellant when she sought employment with Criz'Antenne, which resulted in her being hired as a barmaid. The appellant was 23 years old at the time, had no business experience and had no post-secondary education. At Stéphane Toupin's request, she subsequently became a director of Criz'Antenne because of her interest in the organization's objectives. She was assigned the role of secretary, which was limited to preparing the minutes. She did not sign cheques for Criz'Antenne, and the evidence was that her participation in the

activities of Criz'Antenne as a director was very limited. She left her job with Criz'Antenne in the fall of 2002. When we read the minutes, we indeed see that her involvement as a director was relatively passive in that she did not take part in discussions. We also see that the management of Criz'Antenne was in all respects handled by Stéphane Toupin and Sylvain Laplante, at least until they left in August 2003.

[21] In fact, it was after they left that the appellant became liable as a director. At that time, the appellant continued to act as a director, but it was Elaine Grisé who took over the day-to-day management of Criz'Antenne. In addition to being a director, Elaine Grisé became the coordinator and was, in that capacity, an employee.

[22] There is no doubt that at that time, Criz'Antenne was in crisis, and that steps had to be taken to set its financial situation right and get its operations back on track. Responsibility for so doing was in fact given to Ms. Grisé, who took steps to cut expenses and optimize revenue. With the authorization of the board of directors, she hired someone to put the accounting in order. Obviously the appellant was still not playing a very important role, and it was through her presence at the board of directors meeting on November 13, 2003, that she was able to learn that the situation had changed in that the accounting was under control and that the SD and, above all, GST remittances, were up to date, particularly the \$900 payment representing the current remittance, that is, the monthly remittance. The concrete action taken in August 2003, involving not only the dismissals but also the appointment of a new coordinator and an accountant, as well as the adoption of a new action plan, had borne fruit. For someone like the appellant, a person with little experience in business and management, there was reason to believe that the decisions made were the ones needed to redress the corporation's financial situation and ensure that the GST remittances were paid. In fact, as noted above, it was confirmed at the November meeting that the GST remittances were up to date, except for one month. In my opinion, the appellant, as a director who had nothing to do with the corporation's day-to-day activities, had reason to believe that the situation had been remedied and the GST remittances were going to be made in the normal course of things.

[23] However, the situation did not improve and only one general meeting took place in 2004, namely, that held on March 20. At that meeting, new members were admitted and they discussed certain matters that, in my opinion, should have been handled by the board of directors and not the members. The appellant's participation was again limited to preparing the minutes and reading the minutes of the previous meeting. Reading all the minutes did not give the appellant valuable experience in managing a corporation or enable her to take on the responsibilities of a director of a

corporation. She was there quite simply out of a feeling of identification with the corporation and a sense of duty, with no conviction that her ideas or suggestions might have any impact. It is apparent that the organization was run by one or two people who ignored the instructions given by the board of directors and acted without its authorization with respect to the renovations or hiring personnel. In the circumstances, it is difficult to require that someone like the appellant exercise a high degree of care, diligence and prudence, or to expect that she could even take any concrete action that might have prevented the failures to pay the net tax. For these reasons, I find that the appellant has discharged her burden of proof on the balance of probabilities, and that she has shown that she acted with reasonable care, prudence and diligence in the circumstances of this case. The appeal is allowed with costs.

Signed at Edmundston, New Brunswick, this 2nd day of June 2008.

"François Angers"

Angers J.

Translation certified true
on this 29th day of August 2008.

Erich Klein, Revisor

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APPEARANCES:

Counsel for the Appellant: Michel Villeneuve
Counsel for the Respondent: Martine Bergeron

COUNSEL OF RECORD:

For the Appellant:

Name: Michel Villeneuve

Firm: Brunet et Brunet
Montreal, Quebec

For the Respondent:

John H. Sims, Q.C.
Deputy Attorney General of Canada
Ottawa, Canada