Federal Court of Appeal | Cour d'appel fédérale

Date: 20100707

Docket: A-257-09

Citation: 2010 FCA 180

CORAM: **BLAIS C.J.**
NADON J.A.
EVANS J.A.

BETWEEN:

GIOVANNI ZEN

Appellant

and

THE MINISTER OF NATIONAL REVENUE

Respondent

Heard at Vancouver, British Columbia, on April 21, 2010.

Judgment delivered at Ottawa, Ontario, on July 7, 2010.

REASONS FOR JUDGMENT BY: EVANS J.A.

CONCURRED IN BY: BLAIS C.J.
NADON J.A.

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REASONS FOR JUDGMENT

EVANS J.A.

A. INTRODUCTION

[1] Giovanni Zen was a director of Pacific Refineries Inc. in the years when, in breach of its statutory duty, it failed to remit to the Minister of National Revenue payroll source deductions in respect of its employees. The Minister issued notices of assessment to Pacific Refineries for the amount owing. The Minister also issued a notice of assessment to Mr Zen on the basis that he was jointly and severally liable for the tax debt that Pacific Refineries incurred while he was a director. Neither Pacific Refineries nor Mr Zen discharged the liability. Both are liable for the interest that has continued to accrue.

[2] The question to be decided in this appeal is whether Mr Zen is required to pay the interest that accrued on the unpaid debt after the Minister of National Revenue issued the notice of assessment to him, or whether the Minister must issue another notice of assessment with respect to that interest before he can take steps to collect it. In other words, the question is not whether Mr Zen is jointly liable with Pacific Refineries for the accrued interest (it is conceded that he is), but whether the Minister can collect it without having to issue a notice of assessment for this amount.

[3] The appellant says that, even though subsection 227.1(1) of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp) (ITA), imposes on directors a continuing liability for interest on their corporation's unpaid tax debt and the amount of their liability in respect of that debt has been assessed, no provision of the ITA requires them to pay interest that accrues after the assessment. Consequently, he argues, the Minister cannot take collection measures without a further assessment.

[4] The Minister, on the other hand, submits that, once the amount owing by a director by virtue of subsection 227.1(1) has been assessed under subsection 227(10), those provisions, when read together, require the director to pay subsequently accrued interest without the need for a further assessment. Accordingly, collection measures can be taken against the director to recover both the amount assessed and the interest that has subsequently accrued.

[5] Mr Zen appeals from a decision of the Federal Court (2009 FC 531), in which Justice Blanchard (Judge) granted an application by the Minister for a compliance order in respect of requirements for information (RFIs) issued to Mr Zen to determine his ability to pay the interest that

has accrued on Pacific Refineries' debt since his liability for that debt was assessed. At the same time, the Judge dismissed an application for judicial review by Mr Zen to set aside the RFIs, which he has challenged on the ground that he is not liable to pay the unassessed interest that accrued after the assessment.

[6] The Judge held that the combined effect of subsections 227.1(1) and 227(10) of the ITA imposes an obligation on Mr Zen to pay the post-assessment interest, and that the Minister was therefore authorized to issue RFIs to assist in collecting it from him. In my view, the Judge correctly interpreted the relevant provisions of the ITA, which are appended to these reasons, and I would therefore dismiss the appeal.

B. FACTUAL AND LEGAL BACKGROUND

[7] The relevant facts can be stated briefly. Mr Zen was a director of Pacific Refineries from 1981 to 1986. Starting in 1982, the Minister issued notices of assessment to Pacific Refineries under subsection 227(10) determining the amount that it owed for failing to remit payroll source deductions as required by subsection 153(1) of the ITA. The amounts in question related mainly to income tax, but also included relatively small amounts for Canada Pension Plan and Unemployment Insurance. The assessments issued to Pacific Refineries also included penalties, and a substantial amount of interest, imposed at that time by subsection 227(9) (see now subsection 227(9.2)).

[8] On December 8, 1986, the Minister also issued a notice of assessment to Mr Zen pursuant to subsection 227(10) with respect to his liability under subsection 227.1(1). The amount assessed was

$103,463.62, which included the amounts of the payroll source deductions that Pacific Refineries had failed to remit, as well as penalties and the interest that had accrued to date.

[9] Having filed a notice of objection to the assessment, which the Minister confirmed on July 3, 1987, Mr Zen appealed to the Tax Court, but discontinued his appeal on January 5, 1996. Mr Zen also unsuccessfully applied to the Minister for relief under the "fairness package" in respect of the 1986 assessment.

[10] Because the amount for which Mr Zen had been assessed remained unpaid, the Minister served him with RFIs under paragraph 231.2(1)(*a*) of the ITA seeking net worth information in order to determine his ability to pay the outstanding balance which, as of February 26, 2006, the Minister calculated to be $615,587.20. This comprised the amount of the 1986 assessment ($103,463.62) and the interest that had subsequently accrued over the nearly twenty years that the assessed amount remained unpaid.

[11] Following the institution of the present proceedings, Mr Zen paid to the Minister on February 21, 2007, the amount for which he had been assessed in 1986, that is, $103,463.62. The Minister acknowledged the payment on May 15, 2008, and advised Mr Zen that his outstanding balance was now $629,849.47, comprising the interest that had accrued since the 1986 assessment. Because the RFIs under review in these proceedings were issued after Mr Zen had paid the 1986 balance, they relate solely to his ability to pay the post-1986 assessment interest. If Mr Zen is not liable to pay the unassessed interest, the RFIs are unauthorized and must be set aside.

C. DECISION OF THE FEDERAL COURT

[12] The Judge stated that subsection 227.1(1) makes directors jointly and severally liable for the amount of any payroll source deductions that their corporation failed to remit "and any interest or penalties relating to it". He noted that subsection 227(10) empowers the Minister to assess "at any time" the amount payable under subsection 227.1(1) and provides that, when a notice of assessment is issued, "Divisions I and J of Part I apply with any modifications that the circumstances require." Division I of Part I of the ITA includes section 161, the section on interest. Among other things, subsection 161(1) requires the taxpayer to pay interest "at the prescribed rate" on the balance of "the taxpayer's taxes payable" outstanding on the due date.

[13] The Judge held that, when subsections 227.1(1) and 227(10) are read together, it is clear that directors are liable to pay interest accruing after their liability has been assessed under subsection 227(10), without the need for a further assessment. He noted that, while the ITA does not expressly impose this liability to pay, subsection 227(10) incorporates subsection 161(1), "with any modifications that the circumstances require". To modify subsection 161(1) so that it applies, not only to a taxpayer's taxes payable, but also to a director's third party debt under subsection 227.1(1), would not, the Judge held (at para. 26), be a substantive change, because Parliament clearly intended directors to be liable on an ongoing basis for the accruing interest and penalties owed by their corporation with respect to amounts that it had failed to remit.

[14] The position adopted by the appellant, the Judge said (at para. 28),

> … would result in the Minister having to issue a new assessment in order to collect what is clearly a continuing liability of directors for accrued interest under the Act.

This would be inconsistent with the clear language of the Act and the intention of Parliament.

D. ISSUE AND ANALYSIS

[15] The issue to be decided in this appeal is whether directors, to whom notices of assessment have been issued under subsection 227(10) in respect of their joint and several liability for a corporate tax debt, are required to pay interest that has accrued after those assessments were issued, when that interest has not itself been the subject of a notice of assessment. This issue has not previously been considered by this Court.

(i) Appellant's argument

[16] Counsel conceded that it is open to the Minister to issue a notice of assessment to Mr Zen for the amount of interest that has accrued since the 1986 assessment was issued. Subsection 227.1(1) provides that directors are jointly and severally liable for an amount not remitted by a corporation in breach of the ITA "and any interest or penalties relating to it." Subsection 227(10) empowers the Minister to assess a director "at any time" for an amount payable under section 227.1.

[17] Since Mr Zen discontinued his appeal against the 1986 assessment, it would seem that he could not object to an assessment of the interest that has accrued since 1986 on the ground that he was not jointly liable with the corporation for the amount of either the source deductions not remitted by Pacific Refineries, or the penalties and interest that had accrued up to the date of the assessment. He could, however, refuse to pay the amount of subsequently accrued interest that the Minister was seeking to collect, on the ground that it had not been calculated correctly. Nonetheless, without another assessment, counsel submits, Mr Zen is not indebted to the Minister for the interest

that has accrued since 1986. Accordingly, the RFIs issued in respect of that interest are not authorized by the ITA and must be set aside.

[18] The conceptual basis of the appellant's argument is the well established legal principle that, in the absence of a provision in the ITA to the contrary, taxpayers are not required to pay an amount for which the ITA makes them liable until the Minister has issued a notice of assessment of the amount payable.

[19] Subsection 161(1) is an exception to this general principle. It provides that when a taxpayer is late in paying the amount of her "taxes payable", the taxpayer "shall pay to the Receiver General interest at the prescribed rate" on the balance owing. The effect of this provision is that, once a taxpayer has been assessed, he or she can be required, without the need for another assessment, to pay interest that accrues on the amount of the tax debt after the assessment was issued.

[20] In contrast, counsel for Mr Zen says, subsection 227.1(1) only makes a director jointly and severally liable for the corporation's unpaid tax debt. Accordingly, he argues, a director can be required to pay that debt, including any penalty and accrued interest, only after the Minster has issued a notice of assessment under subsection 227(10).

[21] No provision of the ITA, counsel submits, requires the director to pay interest that accrues after the assessment. He says that section 161 does not apply to interest accruing on assessments made under subsection 227(10) with respect to the joint and several liability imposed on a director

by subsection 227.1, because that liability is not for “taxes payable”. Therefore, in order to collect from Mr Zen the interest that has accrued since the 1986 assessment, the Minister must issue another notice of assessment.

(ii) ITA, section 160

[22] Counsel for Mr Zen says that cases decided under section 160 of the ITA support his argument. Like subsection 227.1(1), section 160 is essentially a collection provision, in the sense that both make a third party jointly and severally liable for the tax debt of a principal tax debtor, in order to enhance the Minister’s ability to recover the tax owed by the principal debtor.

[23] Subsection 160(1) provides that, when a person with an unpaid tax liability transfers property in a non-arm’s length transaction, the transferee is jointly and severally liable for the transferor’s tax debt, including interest payable by the transferor. The Minister can assess the transferee under subsection 160(2) “at any time” for the amount owing under subsection 160(1).

[24] However, unlike the joint and several liability imposed on a director by subsection 227.1(1), the amount of a transferee’s liability under section 160 is not coterminous with that of the tax debtor. Thus, a transferee is not liable for an amount that exceeds the lesser of the following two amounts: the value of the property transferred, minus any consideration given for it by the transferee (subparagraph 160(1)(*e*)(i)), and the total tax and interest that the transferor was liable to pay in or in respect of the year of the transfer and any preceding years (subparagraph 160(1)(*e*)(ii)).

[25] *Algoa Trust v. Her Majesty The Queen*, 98 DTC 1614 (T.C.C.) is a leading authority on section 160. The transferee of property in that case, Algoa Trust, successfully appealed against a notice of assessment issued to it under subsection 160(2). The assessment included interest on the transferor's unpaid tax. Algoa Trust appealed on the ground that, when the amounts that it had already paid on account of its liability under section 160 were included, the amount of the assessment exceeded the value of the property transferred. *Algoa Trust* is thus distinguishable from the present appeal because subsection 227.1(1) contains no analogous cap on a director's liability for the corporation's debt.

[26] However, Justice Dussault also made the following more general statements about the nature of the liability imposed by section 160 and the transferee's liability for interest.

> [3] The rule stated in s. 160 of the Act does not have the effect of creating a tax debt. The effect of the provision is not to create a second debt: there is only one tax debt. The wording of the Act is quite clear: the purpose of s. 160 is essentially to add another debtor who is jointly and severally liable with the transferor. This new debtor is called the transferee. There is thus no new debt created under the Act and the obligation arises not from the assessment but from the Act itself. Fundamentally, therefore, there is only one debt and only that debt can bear interest.
>
> [4] First, subsection (1) of s. 160 in fact states that the transferee is jointly and severally liable and that his or her liability is limited to the lesser of the two amounts mentioned in s. 160(1)(*e*)(i) and (ii), namely (i) the value of the property transferred less the consideration, and (ii) the total of all amounts which the transferor is liable to pay in or in respect of the year of the transfer or any preceding year, that is to say, for the year of the transfer and for any preceding years.
>
> [5] Secondly, s. 160(2) provides that the Minister of National Revenue ("the Minister") may at any time make an assessment. This is also quite clear. However, the limit imposed in s. 160(1)(*e*) must be observed for each assessment.
>
> [6] Thirdly, I would say that there is no provision of the Act regarding interest that may be applicable to an assessment issued pursuant to s. 160 of the Act. This is logical, since there is

> no new tax debt and an assessment under s. 160 already incorporates the interest which the transferor owed in addition to the tax. The assessment may also incorporate penalties and interest thereon. (Emphasis added)

[27] Counsel for Mr Zen relies on these passages for two propositions. First, like the liability imposed by section 160, the liability of a director under subsection 227.1(1) is not a tax debt. There is only one tax debt, namely that of the corporation that failed to remit. Section 160 and subsection 227.1(1) merely add a second debtor in order to assist the Crown in recovering the tax debt owed by the principal debtor. I agree with this analysis, which I do not understand the Minister to have challenged in the present appeal.

[28] The second proposition on which counsel for Mr Zen relies is that interest is not applicable to an assessment under subsection 160(2) of the amount owed by the transferee. In my opinion, however, this proposition does not assist Mr Zen. Whether or not interest is applicable to Mr Zen's 1986 assessment is not determinative of his liability for accruing interest, because subsection 227.1(1) provides that directors are jointly and severally liable to pay the amount that the corporation ought to have remitted "and any interest … relating to it." Thus, even if Mr Zen is not liable to pay interest on his unpaid 1986 assessment, he is liable to pay the interest that has accrued since 1986 on Pacific Refineries' unpaid tax debt.

[29] However, because subsection 227.1(1) is only a charging provision it cannot resolve the issue raised by this appeal: is the Minister authorized to institute legal proceedings to recover from a director interest on an unpaid corporate tax debt that accrued after the director was assessed?

[30] Counsel relies on *Ho-A-Shoo v. Attorney General of Canada*, 2000 DTC 6293 (Ont. Sup. Ct. J.) (*Ho-A-Shoo*), also a section 160 case, for the proposition that the Minister cannot require the transferee to pay interest that accrues after the transferee has been assessed under subsection 160(2). Dr Ho-A-Shoo was the representative plaintiff in a class action against the Minister by transferees of property from a tax debtor at less than market value. They were seeking to recover payments that they had made to the Minister which, they alleged, were in excess of their liability under section 160.

[31] On a motion by the Minister to strike the action, Justice Cumming formulated (at para. 11) the first issue in the class action as whether the Minister was authorized to demand from a transferee of property an amount of interest that both exceeded the limit on her liability imposed by subparagraph 160(1)(*e*)(i) (the market value of the transferred property) and had not been the subject of a notice of assessment.

[32] Relying on *Algoa Trust*, Justice Cumming held (at paras. 12-13) that the Minister could not assess under subsection 160(2) for an amount that exceeded the caps that subsection 160(1) imposed on the liability of a transferee of property. To this extent, *Ho-A-Shoo* is distinguishable from the present case.

[33] However, the Judge also addressed an argument analogous to that advanced in the present case by Mr Zen's counsel (who, incidentally, had also represented Dr Ho-A-Shoo), namely that

section 160 does not authorize the Minister to recover from a transferee interest accruing after the transferee had been assessed, unless it had been the subject of a subsequent assessment.

[34] Relying again on *Algoa Trust*, Justice Cumming held (at para. 21) that the joint and several liability of a transferee under section 160 is not a tax debt. It is therefore not a debt in respect of "taxes payable" for the purpose of section 161. Accordingly, the Minister could not rely on that as the basis of the transferee's obligation to pay interest. See also *Kirkwood v. Her Majesty The Queen*, 2003 DTC 277 (T.C.C.) at para. 26.

(iii) Summary of conclusions

[35] First, Pacific Refineries was liable to pay the assessed amount of payroll source deductions that it had failed to remit, together with penalties and interest accrued to that time.

[36] Second, Mr Zen was jointly and severally liable under subsection 227.1(1) for Pacific Refineries' tax debt and penalties, as well as the interest accruing on it.

[37] Third, Mr Zen's liability under subsection 227.1(1) for the corporation's debt arises from his joint liability with the corporation, and is not itself a tax debt.

[38] Fourth, by virtue of subsection 227(10), the Minister may assess at any time the amount of Mr Zen's joint and several liability under subsection 227.1(1) for the corporation's debt, together with penalties and accrued interest.

[39] Fifth, subsection 161(1) as enacted does not require a director to pay interest accruing on a corporation's debt after the Minister has issued a notice of assessment to the director under subsection 227(10). This is because subsection 161(1) applies to "taxes payable" under Parts I, I.3, VI or VI.1. The amount assessed under subsection 227(10) in respect of the joint and several liability imposed on the director by subsection 227.1(1) is not for "taxes payable", let alone for "taxes payable" under those Parts of the ITA, since sections 227 and 227.1 are located in Part XV.

[40] To this extent, I agree with the submissions of counsel for Mr Zen. However, one other issue remains to be considered. Subsection 227(10) provides that, when the Minister assesses the amount payable by a director under subsection 227.1(1) and sends a notice of assessment, "Divisions I and J of Part I apply with any modifications that the circumstances require." Section 161 is found in Division I of Part I of the ITA.

[41] The question to be decided is whether the modifications to subsection 161(1) that would be required for it to apply to an assessment under subsection 227(10) are permitted by the words "with any modifications that the circumstances require."

(iv) ITA, subsection 161(1): "with any modifications that the circumstances require"

[42] In order to apply subsection 161(1) to an assessment under subsection 227(10), it would be necessary to add to paragraphs (*a*) and (*b*) of subsection 161(1) words such as "or any amount for which a director is liable under subsection 227.1(1)".

[43] I return to a question raised, but not clearly answered, in *Ho-A-Shoo*. Justice Cumming expressed dissatisfaction (at para. 16), from a policy perspective, with a result that exempted transferees from liability for unassessed interest on their unpaid joint and several liability for the transferor's tax debt. He asked himself (at para. 18) if the words of subsection 160(2) which he italicized might not make interest chargeable "in respect of a transferee's unpaid fixed liability determined under s. 160".

160. (2) The Minister may at any time assess a taxpayer in respect of any amount payable because of this section *and the provisions of this Division apply, with any modifications that the circumstances require, in respect of an assessment made under this section as though it had been made under section 152*.	160. (2) Le ministre peut, en tout temps, établir une cotisation à l'égard d'un contribuable pour toute somme payable en vertu du présent article. *Par ailleurs, les dispositions de la présente section s'appliquent, avec les adaptations nécessaires, aux cotisations établies en vertu du présent article comme si elles avaient été établies en vertu de l'article 152*.

[44] Subsection 160(2) thus deems an amount assessed under that provision to have been "tax payable": section 152 requires the Minister to determine the amount, if any, of the tax payable for the year by a taxpayer. Nonetheless, Justice Cumming seems to have concluded that these words were not enough to attract the obligation to pay interest imposed by subsection 161(1). His reasons do not address the possibility of modifying subsection 161(1).

[45] In 2007, the Government introduced an amendment to subsection 160(2) in *Bill C-10* which was intended to put beyond doubt a taxpayer's liability to pay interest, despite the absence of an assessment. If enacted, the amendment would have added, after the words "the provisions of this Division", "(including, for greater certainty, the provisions in respect of interest payable)". Section

161 is in the same Division of Part I of the ITA as section 160. *Bill C-10* lapsed on the dissolution of Parliament in September 2008.

[46] However, even without this proposed amendment, subsection 160(2) would seem better suited than subsection 227(10) to attract subsection 161(1). Unlike subsection 160(2), subsection 227(10) does not treat assessments made under it as though they had been made under section 152, that is, for "taxes payable under Part I". Nonetheless, I do not regard the differences between subsections 160(2) and 227(10) as necessarily determinative of whether it is permissible for a court to modify subsection 161(1) by adding words that would enable the interest provisions of the section to apply to assessments under subsection 227(10) in respect of a director's liability under subsection 227.1(1).

[47] In my view, the modern approach to statutory interpretation should be applied to the interpretation of the words "with any modifications that the circumstances require" as they appear in subsection 227(10). Hence, they are to be read "in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act and the intention of Parliament": *Placer Dome Canada Ltd. v. Ontario (Minister of Finance),* 2006 SCC 20, [2006] 1 S.C.R. 715 at para. 21. This is subject only to the proviso that, when tax legislation is precise, unequivocal and detailed, and taxpayers are entitled to rely on its clear meaning in structuring their affairs, the text of the statute should "play a dominant role in the interpretive process".

[48] While the statutory words “any modifications that the circumstances require” appear to confer a broad power on the courts, counsel for Mr Zen submits that the jurisprudence demonstrates that this provision, as previously worded, had generally been regarded as quite narrow.

[49] Thus, in *Ketz v. Her Majesty The Queen*, 79 DTC 5142 (F.C.T.D.) (*Ketz*), the Court refers (at 5144) to authorities interpreting the Latin phrase *mutatis mutandis*, which the current drafting of subsection 227(10) replaces. These authorities restrict the scope of the phrase *mutatis mutandis* to necessary changes in points of detail, as opposed to changes to the very substance of the provision in question.

[50] The current legislative phrase, “with any modifications that the circumstances require”, has been considered in *Lord Rothermere Donation v. Her Majesty The Queen*, 2009 TCC 70, 2009 DTC 312 at para. 21 (*Rothermere*). In that case, Justice Archambault held that the current phrase (in the French text *« avec les modifications nécessaires »*) enables more extensive changes to be made to a statutory provision than were permitted by *mutatis mutandis*: no longer are they limited to points of detail.

[51] Justice Archambault also noted (at para. 21) that when the words *mutatis mutandis* were first replaced, the English version referred to “such modifications as circumstances require”. The English version of the text, but not the French, was subsequently changed again, and “any” was substituted for “such”. Justice Archambault observed that if Parliament had intended to preserve the narrow scope that the courts had given to *mutatis mutandis*, it could easily have expressly limited permitted

modifications to points of detail, rather than permitting any modifications that circumstances require.

[52] Whether the changes to the statutory text also changed the law is not an easy question. The words *mutatis mutandis* in subsection 227(10) seem first to have been replaced with English and French words in 1983 by the *Income Tax Act (No. 2)*, 29-30-31-32 Elizabeth II, 1980-81-82-83, c. 40, subsection 123(2). The English text of subsection 227(10) was amended again by the *Income Tax Amendments Act, 1997*, c. 19, subsection 226(3), which changed "such modifications" to "any modifications" in the English version; no corresponding change was made to the French text.

[53] It is reasonable to conclude that when Parliament in 1983 replaced the Latin phrase in subsection 227(10) with "plain" English and French words it merely intended to make the provision more accessible. This suggests that the change was in the nature of a consolidation of the law. There is a strong presumption that consolidations are not intended to make substantive changes to the law: Ruth Sullivan, *Sullivan on the Construction of Statutes*, 5th ed. (Markham, Ontario: LexisNexis Canada Inc., 2008) at 655-59.

[54] On the other hand, the amendments to the pre-1983 version were enacted by Parliament as a small part of a large series of amendments to the ITA, and the change to the English text in 1997 was made for reasons other than the elimination of Latin. These considerations suggest that the amendments to subsection 227(10) may have been intended to have had a substantive effect.

[55] However this may be, I need express no concluded opinion on the matter. I am satisfied that, when the modification power conferred by subsection 227(10) is viewed contextually and purposively, the modification required to subsection 161(1) to make it applicable to an assessment under subsection 227(10) in respect of the liability imposed by subsection 227.1(1), is closer to a change in point of detail than to a change to the very substance of subsection 161(1).

[56] In contrast, the modification refused in *Ketz* would have extended to non-residents the benefit of a general averaging provision that Parliament had provided to residents. Justice Dubé concluded (at 5144-45):

> … residence for the previous year is an essential condition for the application of subsection 118(1), not merely a point of detail. … If it had been the intention of Parliament to open the general averaging provisions of subsection 118(1) to non-residents, that intention would have been clearly spelled out in the statute.

In other words, the modification would have decreased the amount of tax payable by non-resident taxpayers by conferring on them a benefit that Parliament had conferred only on taxpayers resident in Canada. Since the proposed modification would have reduced the amount of tax for which non-residents were otherwise liable, it constituted a substantive change in the law and the statutory scheme.

[57] The reasons in *Ho-A-Shoo* do not explain why the modification provision in subsection 160(2) did not apply in that case. However, the plaintiff also alleged that her payment exceeded a statutory cap on her liability under section 160 (that is, the value of the property transferred).

Therefore, the modification required to render her liable for unassessed interest under subsection 161(1) would have amounted to a substantive change to the ITA.

[58] The dispute in *Rothermere* concerned the date from which interest was payable by the Minister on tax refunds. The ITA had been amended so that interest on refunds under Part I did not start to accrue until forty five days after the filing deadline had elapsed. This enabled the Minister to process timely returns without incurring interest. The question was whether an "any modifications that the circumstances require" clause enabled the provision to be applied to refunds in respect of Part XIII tax as well. Justice Archambault held (at para. 30) that, although more than "a point of detail", the modification proposed was permissible, because "the result is in harmony with the scheme of the Act and the intent of Parliament" (para. 28).

[59] Although he does not address the issue explicitly, Justice Blanchard's reasons indicate (at paras. 21-26) that he concluded that subsection 161(1) could be modified so that it applies to assessments under subsection 227(10). For the following reasons, I agree that the modifications required to make subsection 161(1) applicable to assessments under subsection 227(10) in respect of liability imposed by subsection 227.1(1) do not change the very substance of subsection 161(1).

[60] First, as counsel conceded, to modify subsection 161(1) so as to apply it to Mr Zen's liability to pay the interest accruing on Pacific Refineries' tax debt does not increase the amount for which he is liable under subsection 227.1(1). True, the legal basis of the liability of a director under subsection 227.1(1) is not a tax debt, and the amount assessed under subsection 227(10) is therefore

not for “tax payable”. Nonetheless, the single debt for which Mr Zen is jointly liable with Pacific Refineries is a tax debt, at least to the extent that it arose from the corporation’s failure to remit income tax source deductions.

[61] Second, subsection 227(10) authorizes the Minister to issue an assessment of a liability under subsection 227.1(1) “at any time”. Hence, if the Minister were to issue a notice of assessment tomorrow requiring payment of the interest that accrued after Mr Zen’s 1986 assessment, counsel agrees that he would be required to pay the amount assessed, if it had been properly calculated. Thus, the modification to subsection 161(1) does not alter the amount that the Minister can require Mr Zen to pay pursuant to subsection 227.1(1).

[62] Third, counsel for the appellant also agreed that there was no reason of policy or principle why a director who has been assessed under subsection 227(10) in respect of a liability under subsection 227.1(1) should not be liable to pay subsequently accruing interest as if the amount owing were “tax payable”. After all, once the amount of a corporation’s tax debt has been assessed, for which a director is jointly liable, the corporation is now liable to pay accruing interest without the need for another assessment by virtue of subsection 227(9.2).

[63] Subsection 227(10) could have been modelled on subsection 160(2), and deemed the amount assessed under it to be tax payable under section 152, so as to make section 161 applicable. Further, the amendment proposed to subsection 160(2), which was designed to make it quite clear that the interest provisions of Part I apply, could have been extended to subsection 227(10).

However, given the complexity of the ITA, I draw no particular inference from these disparities in provisions located in different Parts of the Act.

[64] Fourth, the effect of modifying section 161 as proposed, and thereby requiring Mr Zen to pay the interest that has accrued since the 1986 assessment, would deprive him of the procedural rights of objection (subsection 165(1)) and appeal (subsection 169(1)) that arise following the issue of a notice of assessment.

[65] However, Mr Zen has already been assessed for the amount of the corporation's debt, including the penalties and interest that had accrued up to the date of that assessment in 1986. He exercised his rights to object and appeal but, with the benefit of legal advice, discontinued his appeal. Consequently, since the discontinuance of the appeal would seem to preclude Mr Zen from disputing the correctness of the 1986 assessment, there would appear to be little left for Mr Zen to appeal if the Minister were required to issue a notice of assessment with respect to the interest that has accrued since the 1986 assessment. It would always be open to Mr Zen, in the course of enforcement proceedings in the Federal Court, to challenge the correctness of the Minister's calculation of the amount of the post-assessment interest, which is a largely mechanical exercise.

[66] Accordingly, Mr Zen will not be deprived of a fair opportunity to challenge in a judicial proceeding the calculation of the amount of interest owing if the modification enables the Minister to start proceedings with a view to collecting the post-1986 assessment interest without having to issue another notice of assessment.

[67] Fifth, modifying section 161 so as to make it applicable to a subsection 227(10) assessment of liability under subsection 227.1(1) enables the Minister to commence collection measures as soon as a director had been advised by the Minister of the amount of interest that had accrued since the last assessment was issued. Normally, the Minister does not commence collection proceedings until an objection to a notice of assessment has been determined and, if the Minister's decision is appealed, the Tax Court has decided the appeal, or the time for objecting and appealing has elapsed. See Canada Revenue Agency, Tax Guide, P148, "Resolving Your Dispute: Objections and Appeal Rights under the *Income Tax Act*" (December 2009) at 19, online: http://www.cra arc.gc.ca/E/pub/tg/p148/p148-09e.pdf.

[68] The loss of an opportunity to further delay the collection of the interest that has continued to accrue by virtue of subsection 227.1(1) may well thus be detrimental to Mr Zen.

[69] Nonetheless, since, for twenty years, Mr Zen has had the use of money that the 1986 assessment required him to pay, an argument that he is entitled to further delay the collection of the interest that has accrued since 1986 is unlikely to evoke much sympathy among Canadian taxpayers. There seems no valid reason for treating directors who are jointly liable with their corporation for its tax debts differently from the corporation itself (see now subsection 227(9.4)) or, indeed, from other taxpayers who can be required, as a result of section 161 (with or without necessary modifications), to pay accrued interest on tax debts without the need for a further notice of assessment and the consequential benefit of the postponement of collection measures.

[70] The modification to subsection 161(1) required in the present case to enable the Minister, without having to issue another assessment, to collect the amount for which Mr Zen is liable would thus be consistent with the scheme of the ITA, and would enhance its efficient administration.

[71] On the other hand, to adopt Mr Zen's position that the power to modify in subsection 227(10) does not permit the modification required here opens up the possibility of an unending succession of notices of assessment, notices of objection, and appeals, which are apt to serve little purpose other than to delay the collection of tax. Thus, by the time that one notice of assessment for interest accrued was issued, objected to, and appealed, additional interest would have accrued, and another notice would be required before that interest could be collected.

[72] In my opinion, there is little to commend in an interpretation of the modification power in subsection 227(10) that is likely to result in even more delay in the collection of accrued interest, and serves only to deprive Mr Zen of the opportunity to postpone the payment of an amount for which he is liable under subsection 227.1(1).

[73] A statutory modification provision confers an unusual power on courts. The normal role of the judicial branch of government with respect to legislation is to interpret and apply the law as enacted by the Legislature. A cornerstone of parliamentary democracy is that changes to the law require the authorization of the Legislature. However, the exigencies of administration in the modern state have also long required Legislatures to delegate extensive law-making powers. In Canada, these powers are most often delegated to politically accountable bodies and officials with

an institutional expertise in public administration, such as the Governor (or Lieutenant Governor) in Council, individual Ministers of the Crown, and municipalities.

[74] The fact that courts have neither of these qualities counsels a cautious approach to the scope of the power delegated to them to modify provisions of the ITA, and indicates that it should be interpreted more narrowly than the current text suggests. Thus, determining whether a proposed modification is permitted by the delegated power (to use the terminology associated with *mutatis mutandis*: is it a change in detail or in substance?) requires a court to consider whether considerations of efficiency outweigh the benefits of subjecting it to the scrutiny of the normal legislative process.

[75] In my opinion, the modifications to subsection 161(1) proposed in the present case do not warrant the costs of requiring a Parliamentary amendment. They do not involve the kinds of technical issues, policy choices or wide ranging implications for the administration of the ITA which our notions of democratic and responsible government require to be left to be resolved through the legislative process.

[76] For all the above reasons, the modifications to subsection 161(1) required to apply it to an assessment under subsection 227(10) of a liability under subsection 227.1(1) are, in my opinion, the very kind contemplated by Parliament when it conferred the power to modify. They do not change the very substance of the provision.

E. CONCLUSIONS

[77] For these reasons, I would dismiss the appeal with costs.

"John M. Evans"

J.A.

"I agree
Pierre Blais C.J."

"I agree
M. Nadon J.A."

APPENDIX A

Income Tax Act, R.S.C. 1985, c. 1 (5th Supp)

152. (1) The Minister shall, with all due dispatch, examine a taxpayer's return of income for a taxation year, assess the tax for the year, the interest and penalties, if any, payable and determine

…

152. (1) Le ministre, avec diligence, examine la déclaration de revenu d'un contribuable pour une année d'imposition, fixe l'impôt pour l'année, ainsi que les intérêts et les pénalités éventuels payables et détermine :

[...]

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

(a) salary, wages or other remuneration, other than amounts described in subsection 115(2.3) or 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, …

153. (1) Toute personne qui verse au cours d'une année d'imposition l'un des montants suivants :

a) un traitement, un salaire ou autre rémunération, à l'exception des sommes visées aux paragraphes 115(2.3) ou 212(5.1) ;

[…]

doit en déduire ou en retenir la somme fixée selon les modalités réglementaires et doit, au moment fixé par règlement, remettre cette somme au receveur général au titre de l'impôt du bénéficiaire ou du dépositaire pour l'année en vertu de la présente partie ou de la partie XI.3. …

160. (1) Where a person has, on or after May 1, 1951, transferred property, either directly or indirectly, by means of a trust or by any other means whatever, to

…

160. (1) Lorsqu'une personne a, depuis le 1er mai 1951, transféré des biens, directement ou indirectement, au moyen d'une fiducie ou de toute autre façon à l'une des personnes suivantes :

[…]

the following rules apply:

(*d*) the transferee and transferor are jointly and severally liable to pay a part of the transferor's tax under this Part for each taxation year equal to the amount by which the tax for the year is greater than it would have been if it were not for the operation of sections 74.1 to 75.1 of this Act and section 74 of the *Income Tax Act*, chapter 148 of the Revised Statutes of Canada, 1952, in respect of any income from, or gain from the disposition of, the property so transferred or property substituted therefor, and

(*e*) the transferee and transferor are jointly and severally liable to pay under this Act an amount equal to the lesser of

(i) the amount, if any, by which the fair market value of the property at the time it was transferred exceeds the fair market value at that time of the consideration given for the property, and

(ii) the total of all amounts each of which is an amount that the transferor is liable to pay under this Act in or in respect of the taxation year in which the property was transferred or any preceding taxation year,

…

les règles suivantes s'appliquent :

d) le bénéficiaire et l'auteur du transfert sont solidairement responsables du paiement d'une partie de l'impôt de l'auteur du transfert en vertu de la présente partie pour chaque année d'imposition égale à l'excédent de l'impôt pour l'année sur ce que cet impôt aurait été sans l'application des articles 74.1 à 75.1 de la présente loi et de l'article 74 de la *Loi de l'impôt sur le revenu*, chapitre 148 des Statuts révisés du Canada de 1952, à l'égard de tout revenu tiré des biens ainsi transférés ou des biens y substitués ou à l'égard de tout gain tiré de la disposition de tels biens;

e) le bénéficiaire et l'auteur du transfert sont solidairement responsables du paiement en vertu de la présente loi d'un montant égal au moins élevé des montants suivants :

(i) l'excédent éventuel de la juste valeur marchande des biens au moment du transfert sur la juste valeur marchande à ce moment de la contrepartie donnée pour le bien,

(ii) le total des montants dont chacun représente un montant que l'auteur du transfert doit payer en vertu de la présente loi au cours de l'année d'imposition dans laquelle les biens ont été transférés ou d'une année d'imposition antérieure ou pour une de ces années;

[…]

(2) The Minister may at any time assess a taxpayer in respect of any amount payable because of this section and the provisions of this Division apply, with any modifications that the circumstances require, in respect of an assessment made under this section as though it had been made under section 152.

(2) Le ministre peut, en tout temps, établir une cotisation à l'égard d'un contribuable pour toute somme payable en vertu du présent article. Par ailleurs, les dispositions de la présente section s'appliquent, avec les adaptations nécessaires, aux cotisations établies en vertu du présent article comme si elles avaient été établies en vertu de l'article 152.

161. (1) Where at any time after a taxpayer's balance-due day for a taxation year

161. (1) Dans le cas où le total visé à l'alinéa *a*) excède le total visé à l'alinéa *b*) à un moment postérieur à la date d'exigibilité du solde qui est applicable à un contribuable pour une année d'imposition, le contribuable est tenu de verser au receveur général des intérêts sur l'excédent, calculés au taux prescrit pour la période au cours de laquelle cet excédent est impayé :

*(*a) the total of the taxpayer's taxes payable under this Part and Parts I.3, VI and VI.1 for the year exceeds

a) le total des impôts payables par le contribuable pour l'année en vertu de la présente partie et des parties I.3, VI et VI.1;

(*b*) the total of all amounts each of which is an amount paid at or before that time on account of the taxpayer's tax payable and applied as at that time by the Minister against the taxpayer's liability for an amount payable under this Part or Part I.3, VI or VI.1 for the year, the taxpayer shall pay to the Receiver General interest at the prescribed rate on the excess, computed for the period during which that excess is outstanding.

b) le total des montants représentant chacun un montant payé au plus tard à ce moment au titre de l'impôt payable par le contribuable et imputé par le ministre, à compter de ce moment, sur le montant dont le contribuable est redevable pour l'année en vertu de la présente partie ou des parties I.3, VI ou VI.1.

165. (1) A taxpayer who objects to an assessment under this Part may serve on the Minister a notice of objection, in writing, setting out the reasons for the objection and all relevant facts,

…

165. (1) Le contribuable qui s'oppose à une cotisation prévue par la présente partie peut signifier au ministre, par écrit, un avis d'opposition exposant les motifs de son opposition et tous les faits pertinents, dans les délais suivants :

[…]

169. (1) Where a taxpayer has served notice of objection to an assessment under section 165, the taxpayer may appeal to the Tax Court of Canada to have the assessment vacated or varied after either

(a) the Minister has confirmed the assessment or reassessed, or

(b) 90 days have elapsed after service of the notice of objection and the Minister has not notified the taxpayer that the Minister has vacated or confirmed the assessment or reassessed,

but no appeal under this section may be instituted after the expiration of 90 days from the day notice has been mailed to the taxpayer under section 165 that the Minister has confirmed the assessment or reassessed.

169. (1) Lorsqu'un contribuable a signifié un avis d'opposition à une cotisation, prévu à l'article 165, il peut interjeter appel auprès de la Cour canadienne de l'impôt pour faire annuler ou modifier la cotisation :

a) après que le ministre a ratifié la cotisation ou procédé à une nouvelle cotisation;

b) après l'expiration des 90 jours qui suivent la signification de l'avis d'opposition sans que le ministre ait notifié au contribuable le fait qu'il a annulé ou ratifié la cotisation ou procédé à une nouvelle cotisation; toutefois, nul appel prévu au présent article ne peut être interjeté après l'expiration des 90 jours qui suivent la date où avis a été expédié par la poste au contribuable, en vertu de l'article 165, portant que le ministre a ratifié la cotisation ou procédé à une nouvelle cotisation.

227. (9) (**repealed**) Idem - Every person who has failed to remit or pay

(a) an amount deducted or withheld as required by this Act or a regulation, or

(b) an amount of tax that he is, by

227. (9) (**abrogé**) Idem. Toute personne qui n'a pas remis ni payé

a) un montant déduit ou retenu, comme l'exige la présente loi ou un règlement, ou

b) un montant d'impôt qu'elle est

section 116 or by a regulation made under subsection 215(4), required to pay,

is liable to a penalty of 10% of that amount or $10, whichever is the greater, in addition to the amount itself, together with interest on the amount at the rate per annum prescribed for the purposes of subsection (8).

tenue de payer en vertu de l'article 116 ou d'un règlement établi aux fins du paragraphe 215(4),

est passible d'une pénalité de 10% de ce montant ou de $10, le montant le plus élevé des deux étant à retenir, en sus du montant lui-même, avec l'intérêt de ce montant au taux annuel prescrit aux fins du paragraphe (8).

227. (9.2) Where a person has failed to remit as and when required by this Act or a regulation an amount deducted or withheld as required by this Act or a regulation, the person shall pay to the Receiver General interest on the amount at the prescribed rate computed from the day on which the person was so required to remit the amount to the day of remittance of the amount to the Receiver General.

227. (9.2) La personne qui ne remet pas, de la manière et dans le délai prévus à la présente loi ou à son règlement, un montant déduit ou retenu conformément à la présente loi ou à son règlement doit payer au receveur général des intérêts sur ce montant calculés au taux prescrit pour la période commençant le jour où elle était tenue de remettre ce montant et se terminant le jour où le montant est remis au receveur général.

227. (9.4) 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.

227.(9.4) La personne qui ne remet pas, de la manière et dans le délai prévus à la présente loi ou à son règlement, un montant déduit ou retenu d'un paiement fait à une autre personne conformément à la présente loi ou à son règlement doit payer, au nom de cette autre personne, à titre d'impôt en vertu de la présente loi, le montant ainsi déduit ou retenu.

227.(10) The Minister may at any time assess any amount payable under

*(*a) subsection 227(8), 227(8.1), 227(8.3) or 227(8.4) or 224(4) or

227. (10) Le ministre peut, en tout temps, établir une cotisation pour les montants suivants :

a) un montant payable par une personne en vertu des paragraphes (8),

224(4.1) or section 227.1 or 235 by a person,

…

and, where the Minister sends a notice of assessment to that person or partnership, Divisions I and J of Part I apply with any modifications that the circumstances require.

(8.1), (8.2), (8.3) ou (8.4) ou 224(4) ou (4.1) ou des articles 227.1 ou 235 ;

[…]

Les sections I et J de la partie I s'appliquent, avec les modifications nécessaires, à tout avis de cotisation que le ministre envoie à la personne ou à la personne ou à la société de personnes.

227.1 (1) Where a corporation has failed to deduct or withhold an amount as required by subsection 135(3) or 135.1(7) or section 153 or 215, has failed to remit such an amount or has failed to pay an amount of tax for a taxation year as required under Part VII or VIII, the directors of the corporation at the time the corporation was required to deduct, withhold, remit or pay the amount are jointly and severally, or solidarily, liable, together with the corporation, to pay that amount and any interest or penalties relating to it.

227.1 (1) Lorsqu'une société a omis de déduire ou de retenir une somme, tel que prévu aux paragraphes 135(3) ou 135.1(7) ou aux articles 153 ou 215, ou a omis de verser cette somme ou a omis de payer un montant d'impôt en vertu de la partie VII ou VIII pour une année d'imposition, les administrateurs de la société, au moment où celle-ci était tenue de déduire, de retenir, de verser ou de payer la somme, sont solidairement responsables, avec la société, du paiement de cette somme, y compris les intérêts et les pénalités s'y rapportant.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-257-09
(APPEAL FROM A DECISION OF THE HONOURABLE JUSTICE BLANCHARD OF THE FEDERAL COURT DATED MAY 26, 2009, FILE NO. T-1360-06).	
STYLE OF CAUSE:	Giovanni Zen v. MNR
PLACE OF HEARING:	Vancouver, British Columbia
DATE OF HEARING:	April 21, 2010
REASONS FOR JUDGMENT BY:	EVANS J.A.
CONCURRED IN BY:	Blais C.J. Nadon J.A.
DATED:	July 7, 2010

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