

Federal Court  
of Appeal



Cour d'appel  
fédérale

**Date: 20111220**

**Docket: A-131-11**

**Citation: 2011 FCA 361**

**CORAM: NOËL J.A.  
DAWSON J.A.  
TRUDEL J.A.**

**BETWEEN:**

**741290 ONTARIO INC.**

**Appellant**

**and**

**HER MAJESTY THE QUEEN**

**Respondent**

Heard at Toronto, Ontario, on December 15, 2011.

Judgment delivered at Ottawa, Ontario, on December 20, 2011.

REASONS FOR JUDGMENT BY:

NOËL J.A.

CONCURRED IN BY:

DAWSON J.A.  
TRUDEL J.A.

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**HER MAJESTY THE QUEEN**

**Respondent**

**REASONS FOR JUDGMENT**

**NOËL J.A.**

[1] This is an appeal from a decision of Bowie J. of the Tax Court of Canada (the Tax Court judge) upholding the assessment of penalties issued pursuant to subsection 227(9) of the *Income Tax Act*, R.S.C. 1985, c. 1 (5<sup>th</sup> Supp.) (the Act) for failure by the appellant to remit source deductions withheld from the salaries paid to its employees as and when required to do so.

[2] The issue in this appeal is whether the penalties assessed are subject to the due diligence defence which was successfully advanced by the appellant's directors against assessments issued pursuant to subsection 227.1(3) of the Act.

[3] Like the Tax Court judge, I am prepared to assume for present purposes that a defence may be validly advanced against a failure to remit where the failure is caused by events beyond the employer's control. However, such a failure cannot possibly be justified by a decision by the employer to appropriate for its own use source deductions in order to keep the businesses afloat in difficult times as was done here (reasons, paras. 21 and 22). In choosing to act as it did, the appellant ignored the unconditional duty imposed on it by subsection 153(1) and is, as such, liable to the assessed penalties.

[4] This duty being distinct and separate from that imposed on corporate directors pursuant to section 227.1, no issue estoppel or abuse of process can result from the fact that the directors in this case were found to have made reasonable attempts to prevent the failure.

[5] I would dismiss the appeal with costs.

“Marc Noël”

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J.A.

“I agree.

Eleanor R. Dawson J.A.”

“I agree.

Johanne Trudel J.A.”

**FEDERAL COURT OF APPEAL**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

**DOCKET:** A-131-11

**APPEAL FROM A JUDGMENT OF THE HONOURABLE MR. JUSTICE BOWIE OF THE TAX COURT OF CANADA DATED MARCH 3, 2011, DOCKET NO. 2007-3055(IT)G.**

**STYLE OF CAUSE:** 741290 ONTARIO INC. and HER MAJESTY THE QUEEN

**PLACE OF HEARING:** Toronto, Ontario

**DATE OF HEARING:** December 15, 2011

**REASONS FOR JUDGMENT BY:** Noël J.A.

**CONCURRED IN BY:** Dawson J.A.  
Trudel J.A.

**DATED:** December 20, 2011

**APPEARANCES:**

Osborne G. Barnwell FOR THE APPELLANT

Louis L'Heureux FOR THE RESPONDENT

**SOLICITORS OF RECORD:**

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