

Federal Court
of Appeal



Cour d'appel
fédérale

Date: 20120130

Docket: A-308-10

Citation: 2012 FCA 33

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

BETWEEN:

HER MAJESTY THE QUEEN

Appellant

and

DAVID A. BARRETT

Respondent

Heard at Toronto, Ontario, on October 25, 2011.

Judgment delivered at Ottawa, Ontario, on January 30, 2012.

REASONS FOR JUDGMENT BY:

DAWSON J.A.

CONCURRED IN BY:

BLAIS C.J.
NADON J.A.

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REASONS FOR JUDGMENT

DAWSON J.A.

[1] Subsection 323(1) of the *Excise Tax Act*, R.S.C. 1985, c. E-15 (Act) provides that if a corporation does not remit GST as required, the directors of the corporation may be personally liable to pay the GST:

323. (1) Where a corporation fails to remit an amount of net tax as required under subsection 228(2) or (2.3), the directors of the corporation at the time the corporation was required to remit the amount are jointly and severally liable, together with the corporation, to pay that amount and any interest thereon or penalties relating thereto.

323. (1) Les administrateurs de la personne morale au moment où elle était tenue de verser une taxe nette comme l'exigent les paragraphes 228(2) ou (2.3), sont, en cas de défaut par la personne morale, solidairement tenus, avec cette dernière, de payer cette taxe ainsi que les intérêts et pénalités y afférents.

[2] Subsection 323(2) of the Act contains a number of provisions that limit the liability of directors. The only limit relevant to this appeal is that found in paragraph 323(2)(a):

323. (2) A director of a corporation is not liable under subsection (1) unless

(a) a certificate for the amount of the corporation's liability referred to in that subsection has been registered in the Federal Court under section 316 and execution for that amount has been returned unsatisfied in whole or in part; [emphasis added]

323. (2) L'administrateur n'encourt de responsabilité selon le paragraphe (1) que si :

a) un certificat précisant la somme pour laquelle la personne morale est responsable a été enregistré à la Cour fédérale en application de l'article 316 et il y a eu défaut d'exécution totale ou partielle à l'égard de cette somme; [Non souligné dans l'original.]

[3] Section 316 of the Act, referred to in paragraph 323(2)(a), sets out a mechanism for the collection of monies owing under the Act. Subsections 316(1) and (2), set out in the Appendix to these reasons, allow the Minister to certify the amount of an indebtedness owing under the Act and then register the certificate in the Federal Court. Once registered, the certificate has the same effect as a judgment obtained in the Federal Court against the debtor in the amount certified. One of the ways by which the certificate, once registered, may be enforced is through the issuance of a writ of seizure and sale which is executed by a sheriff (Rules 425 and 433(3) of the *Federal Courts Rules*).

[4] This is an appeal from a judgment of the Tax Court of Canada (2010 TCC 298) in which, by application of paragraph 323(2)(a) of the Act, the Judge vacated an assessment for unpaid GST levied pursuant to the director's liability provisions of the Act. The sole issue raised on the appeal is whether the Judge erred in law in his interpretation and application of paragraph 323(2)(a) of the Act.

[5] In my respectful view, for the following reasons, the Judge did err in his interpretation and application of paragraph 323(2)(a). I would therefore allow the appeal with costs in both this Court and the Tax Court.

The Facts

[6] The respondent, Mr. Barrett, was a director of Creative Promotions Limited (Creative). From October of 1993 to March of 1995 Creative failed to remit GST as required by the Act. Creative ceased carrying on business in 1995.

[7] The Minister registered a certificate against Creative under subsection 316(2) of the Act in the Federal Court on October 6, 1998. On the same day, the Minister obtained a writ of seizure and sale. On October 31, 2000, the Minister directed the sheriff to execute the writ of seizure and sale against Creative.

[8] On November 22, 2000, the sheriff returned a *nulla bona* report to the Minister, advising that the writ of seizure and sale could not be satisfied.

[9] On September 8, 2003, the Minister assessed Mr. Barrett in the amount of \$128,696.47 on account of Creative's unsatisfied GST liability.

[10] The Judge found that:

- i. In 1995, Mr. Barrett told a representative of the Canada Revenue Agency that Creative had no assets and no money with which to pay the GST liability (reasons, paragraph 29 (b)).
- ii. A writ of execution against Creative relating to unremitted source deductions was returned unsatisfied (reasons, paragraph 29 (j)).
- iii. While Mr. Barrett testified that in 1998 Creative possessed sufficient assets to pay the GST tax debt, “he could only provide generalizations as to what funds were left and when the assets might have been used up.” (reasons, paragraph 11).
- iv. After Creative ceased its operations, Mr. Barrett used its assets to pay for the education of his four children at university, a divorce and a small business investment. Additionally, his wife removed funds from Creative’s bank account (reasons, paragraph 12).

The Decision of the Tax Court

[11] The Judge began by rejecting Mr. Barrett’s submission that the assessment should be overturned on the ground that the Minister acted too slowly. The Judge found that the Minister had complied with the only applicable time limit contained in the Act: subsection 323(5). Subsection 323(5) prohibits an assessment from issuing against a director more than two years after the person ceases to be a director of the corporation.

[12] The Judge then turned to consider the Minister's collection efforts. The Judge's analysis of the nature and extent of the Minister's obligation was brief:

16 Whether or not "... execution ... has been returned unsatisfied ..." is essentially a question of fact as stated by Bowman C.J. in *Miotto v. The Queen*:⁸

42 Whether an execution is completed is essentially a factual determination. The execution of a writ of *feri facias* requires reasonable efforts on the part of the bailiff. It does not require perfection... .

17 It is clear that, in looking at what constitutes reasonable efforts, one must not only consider the actions of the sheriff but the actions of the creditor, the Respondent, in directing the sheriff.⁹ Put another way, in determining whether reasonable efforts were made, one examines the entire process of execution, a process which includes the steps taken by the CRA in searching for assets and in determining the instructions to give to the sheriff as well as the actions of the sheriff.

[13] Only one authority is cited in footnote 9 of the reasons to support the conclusion that a court must consider the reasonableness of the Minister's actions in directing a sheriff. That authority is the final two sentences of what the Judge referred to as paragraph 41 of the reasons of then Chief Justice Bowman in *Miotto v. Canada*, 2008 TCC 128 (while referred to as paragraph 41, the relevant passage appears in paragraph 27 in the QuickLaw version of the reasons). There, Chief Justice Bowman wrote:

27 These venerable authorities are probably still good law but I cannot think they go far enough to assist the appellant. The CRA collections officer quite reasonably believed that Pacific had no assets. Neither she nor the bailiff had any reason to suspect that perhaps some assets of Pacific were still in the possession of the appellants.

[14] In the Judge's view, the last two sentences of this paragraph reflect Chief Justice Bowman's conclusion that the reasonableness of the actions of both the collections officer and the bailiff must be considered.

[15] The Judge then went on to describe the efforts made to collect the GST debt from Creative.

At paragraph 32 he summarized the steps taken by the Minister before the sheriff was directed to execute the writ of seizure and sale:

32 To sum up, the key steps taken leading up to the direction to the sheriff were:

- (a) talking to the Appellant who stated there were no assets;
- (b) learning that the business ceased operations in 1995;
- (c) searching for personal property;
- (d) deciding where to send the sheriff and, in the course of this, determining from the file that the company no longer had a separate address of its own;
- (e) determining that a previous writ of execution for source deductions had been returned unsatisfied; and
- (f) possibly, the discovery of a bank account that had a very small amount of money in it (this occurred, but on the evidence it is impossible to know if it occurred before or after the sheriff was sent out).

[16] The Judge then reasoned as follows:

33 Were the efforts made to execute the writ reasonable? As I indicated above execution is a process and one must look at the entire process to determine whether the efforts of the CRA and the sheriff were reasonable in the circumstances.

34 I am satisfied it was reasonable for Ms. Kopli to send the sheriff to the address she found through the motor vehicle search given that she had reasons to think the other addresses were invalid.

35 Much was made by the Appellant of the fact that the collections officers took account of the Appellant's statement that there were no assets left in the company in their decision-making process as to what steps to take.

36 While one would expect a collections officer to consider carefully such a statement made by a director and co-owner, the Appellant could reasonably be expected to know if the company had assets and I am satisfied that it was reasonable for the collections officers to consider the statement in the circumstances given, among other considerations, the time that had passed since the company ceased operations.

37 One would normally expect that using information contained in CRA files to look for bank accounts would be a step in the process of execution, especially since the CRA will frequently have some indication of a taxpayer's financial institution.

38 In the absence of such a search for a bank account, considering the other steps in evidence, I would find that it was not reasonable to stop the process of execution at the point where it ended. [footnote omitted]

[17] Thus, based upon the Minister's failure to search for a corporate bank account, the Judge found that reasonable efforts were not made to execute the writ of seizure and sale. It followed, in his view, that the requirement of paragraph 323(2)(a) of the Act was not met so that the assessment should be vacated.

[18] The Judge made no finding about whether Creative owned assets sufficient to satisfy its tax debt either at the time the writ was issued or at the time the sheriff executed the writ.

Standard of Review

[19] The interpretation of paragraph 323(2)(a) of the Act is a question of law. The Judge's answer to that question is reviewable by this Court on the standard of correctness (*Housen v. Nikolaisen*, [2002] 2 S.C.R. 235 at paragraph 8).

Application of the standard of review

[20] The Supreme Court of Canada has expressed the preferred approach to the interpretation of statutes as follows:

10 It has been long established as a matter of statutory interpretation that "the words of an Act 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”: see *65302 British Columbia Ltd. v. Canada*, [1999] 3 S.C.R. 804, at para. 50. The interpretation of a statutory provision must be made according to a textual, contextual and purposive analysis to find a meaning that is harmonious with the Act as a whole. When the words of a provision are precise and unequivocal, the ordinary meaning of the words play a dominant role in the interpretive process. On the other hand, where the words can support more than one reasonable meaning, the ordinary meaning of the words plays a lesser role. The relative effects of ordinary meaning, context and purpose on the interpretive process may vary, but in all cases the court must seek to read the provisions of an Act as a harmonious whole. [emphasis added]

Canada Trustco Mortgage Co. v. Canada, 2005 SCC 54, [2005] 2 S.C.R. 601 at paragraph 10 [emphasis added].

[21] This formulation of the proper approach to statutory interpretation was recently restated in *Celgene Corp. v. Canada (Attorney General)*, 2011 SCC 1, [2011] 1 S.C.R. 3 at paragraph 21, and *Canada (Information Commissioner) v. Canada (Minister of National Defence)*, 2011 SCC 25, [2011] 2 S.C.R. 306 at paragraph 27.

[22] The text, legislative context and purpose of paragraph 323(2)(a) will now be considered.

a. **The text of paragraph 323(2)(a)**

[23] For ease of reference, the text of paragraph 323(2)(a) is again set out:

323. (2) A director of a corporation is not liable under subsection (1) unless

(a) a certificate for the amount of the corporation’s liability referred to in that subsection has been registered in the

323. (2) L’administrateur n’encourt de responsabilité selon le paragraphe (1) que si :

a) un certificat précisant la somme pour laquelle la personne morale est responsable a été enregistré à la Cour

Federal Court under section 316 and execution for that amount has been returned unsatisfied in whole or in part;
[emphasis added]

fédérale en application de l'article 316 et il y a eu défaut d'exécution totale ou partielle à l'égard de cette somme;
[Non souligné dans l'original.]

[24] The text of the Act only requires that the corporate liability be registered in the Federal Court under section 316 of the Act and that execution be returned unsatisfied. Nothing in the text of the provision imposes any requirement on the Minister to take reasonable steps to search for the assets of the corporate debtor prior to instructing the sheriff with respect to execution.

[25] However, as the Tax Court noted in *Turner v. Canada*, 2006 TCC 130 at paragraph 22, the rules of the court which issues a writ of execution set the standards which govern the execution of the writ.

[26] Subsection 55(4) of the *Federal Courts Act* mandates that the Federal Court's process is to be executed by a sheriff or a marshal. Rule 433(3) of the *Federal Courts Rules* requires that a writ of execution for the recovery of money (which includes a writ of seizure and sale) be endorsed with a direction to the sheriff to levy:

(a) the amount of money due and payable that is sought to be recovered;

(b) any interest thereon that is sought to be recovered, from the date of the order; and

(c) any sheriff's fees and costs of execution.

a) la somme exigible dont le recouvrement est poursuivi en vertu de l'ordonnance;

b) les intérêts y afférents dont le recouvrement est poursuivi, le cas échéant, calculés à partir de la date de l'ordonnance;

c) les honoraires du shérif et les frais d'exécution.

[27] Rule 439 provides:

439. (1) A person at whose instance a writ of execution is issued may serve a notice on the sheriff to whom the writ is directed requiring the sheriff, within such time as may be specified in the notice, to endorse on the writ a statement of the manner in which the sheriff has executed it and to send a copy of the statement to the person.

(2) Where a sheriff fails to comply with a notice served under subsection (1), the person by whom it was served may apply to the Court for an order directing the sheriff to comply with the notice.

(3) A sheriff may seek directions from the Court concerning any issue not addressed by these Rules that arises from the enforcement of an order.

439. (1) La personne qui a fait délivrer un bref d'exécution peut signifier au shérif à qui il est adressé un avis l'informant qu'il est tenu, dans le délai précisé, de rédiger sur le bref un procès-verbal indiquant de quelle manière il l'a exécuté et de lui envoyer une copie de ce procès-verbal.

(2) Si le shérif ne se conforme pas à l'avis signifié conformément au paragraphe (1), la personne qui le lui a signifié peut demander à la Cour de rendre une ordonnance enjoignant au shérif de se conformer à l'avis.

(3) Le shérif peut demander des directives à la Cour au sujet de toute question non prévue par les présentes règles qui découle de l'exécution d'une ordonnance.

[28] Nothing in the *Federal Courts Act* or *Rules* expressly imposes any obligation upon a judgment creditor to make reasonable efforts to search for assets of a judgment debtor before instructing a sheriff with respect to the collection of the debt.

[29] The *Federal Courts Rules* as to writs of execution are complemented by the provincial laws of execution. Subsection 56(3) of the *Federal Courts Act* provides that writs of execution issued by the Federal Court bind property in the same manner as provincial writs, and are to be executed as nearly as possible in the same manner as similar writs issued by the superior court of the province in which the writ is to be executed. Rule 448 also requires a sheriff when seizing assets to follow the

laws applicable to the execution of similar writs issued by a superior court of the province in which the property was seized.

[30] In the present case, the Federal Court writ was to be executed in Ontario. Nothing in the *Courts of Justice Act*, R.S.O. 1990, c. C-43, the *Execution Act*, R.S.O. 1990, c. E-24 or the *Rules of Civil Procedure* of Ontario expressly requires a judgment creditor to make reasonable efforts to search for assets.

b. The legislative context of paragraph 323(2)(a)

[31] Inherent in the contextual approach to statutory interpretation is the understanding that the grammatical and ordinary sense of a provision is not determinative of its meaning. In every case, statutory interpretation requires an examination of the legislative context.

[32] Paragraph 323(2)(a) is contained in Division VIII of Part IX of the Act relating to the administration and enforcement of GST. None of the other provisions in this Division assist in ascertaining Parliament's intent as to whether the Minister is obliged to make reasonable efforts to search for the assets of a corporate debtor before instructing the sheriff to execute a writ of seizure and sale.

[33] However, the legislative context also includes the nature of the tax debt in issue and the nature of the director's relationship to the corporate tax debtor.

[34] Subsection 222(1) of the Act provides that generally every person who collects an amount as or on account of GST is deemed to hold the amount in trust for Her Majesty in right of Canada. Thus, the director's liability is not in respect of an ordinary debt. Rather, it is an obligation in respect of monies collected from third parties and held in trust in respect of the third parties' obligations under the Act.

[35] As to the nature of the director's relationship to the corporate tax debtor, by virtue of his or her office a director of a corporation is presumed to be aware of both the corporation's obligation to remit monies held in trust and the corporation's ability to pay. A director is further presumed to have the legal authority to direct the corporation to remit the amounts in issue. A due diligence defence exists where the director has exercised the degree of care, diligence and skill to prevent the failure to remit that a reasonably prudent person would have exercised in similar circumstances (subsection 323(3)).

[36] Nothing in the nature of the tax debt or the nature of a director's relationship with a corporate debtor is consistent with the obligation imposed by the Judge upon the Minister to take reasonable steps to search for assets of a corporate debtor. This is particularly so where a director found liable under paragraph 323(1)(a) can be indemnified from any existing corporate assets. Where the tax debt has been proved in liquidation, dissolution or bankruptcy proceedings and the director pays an amount in respect of the tax debt, the director is entitled to any preference that Her Majesty in right of Canada would have been entitled to had the amount not been paid (subsection 323(7)).

c. **The purpose of paragraph 323(2)(a)**

[37] The purpose of paragraph 323(2)(a) is to protect directors from being personally liable for the tax debt of a corporation in circumstances where the corporation itself is able to pay the debt. However, as noted above, a director found liable under this provision is entitled to be indemnified by the corporation where the corporation has assets to satisfy the debt.

[38] Additionally, during oral argument counsel for Her Majesty acknowledged the public law obligation on the part of the Minister to act in good faith. In my view, the obligation on the part of the Minister to act without any ulterior or improper motive sufficiently safeguards the purpose of paragraph 323(2)(a) of the Act.

d. **Did the Judge err in his application of *Miotto*?**

[39] Before reaching a conclusion on the proper interpretation of paragraph 323(2)(a), it is important to consider whether, as the Judge found, Chief Justice Bowman in *Miotto* found it was necessary for the Minister to make reasonable efforts to locate assets and so direct the sheriff.

[40] In *Miotto*, after Chief Justice Bowman reviewed jurisprudence which considered common law principles of debtor and creditor law, he wrote at paragraphs 27 and 28:

27 These venerable authorities are probably still good law but I cannot think they go far enough to assist the appellant. The CRA collections officer quite reasonably believed that Pacific had no assets. Neither she nor the bailiff had any reason to suspect that perhaps some assets of Pacific were still in the possession of the appellants.

28 Whether an execution is completed is essentially a factual determination. The execution of a writ of *feri facias* requires reasonable efforts on the part of the bailiff. It does not require perfection. Certainly one could not expect the bailiff or the judgment creditor to be sufficiently clairvoyant to surmise (or even suspect) that some unspecified items of furniture and equipment of questionable provenance and indeterminate value lying around the office of Stonefield Development Corporation might conceivably have belonged at some time in the past to the judgment debtor Pacific. It requires a certain amount of nerve for the directors to challenge the assessments by criticizing the bailiff and the CRA for being remiss in failing to find such items when the directors themselves were responsible for their disappearance into another company and for Pacific's becoming, for all practical purposes, judgment proof. It is somewhat reminiscent of the classic example of chutzpah where a person convicted of murdering his parents asks the court for mercy on the ground that he is an orphan.

[41] In my view, Chief Justice Bowman did not intend in these paragraphs to impose a burden other than one of good faith upon the Minister. I reach this conclusion for two reasons. First, in paragraph 28 the Chief Justice referred to “reasonable efforts on the part of the bailiff” (my emphasis). Second, his comments concerning the reasonable belief of the CRA collections officer, the lack of any requirement of perfection when executing a writ of *feri facias* (now a writ of seizure and sale) and the inappropriateness of criticizing the CRA for failing to find certain items, are all consistent with a simple good faith requirement on the part of the Minister.

e. **Conclusion with respect to the proper interpretation of paragraph 323(2)(a)**

[42] Having reviewed the text, statutory context and purpose of paragraph 323(2)(a), I conclude that the Judge erred in interpreting paragraph 323(2)(a) of the Act to impose an obligation on the Minister to make reasonable efforts when directing the sheriff and to search for a specific asset.

f. **Application of the proper interpretation of paragraph 323(2)(a)**

[43] It follows that, in my view, the Judge erred by setting aside the assessment on the ground that the Minister's officials failed to look for a specific corporate bank account. The Judge made no finding that the efforts to enforce the debt against Creative were not made in good faith, and, in my view, no such finding could have been made on the evidence.

Conclusion

[44] For these reasons, I would allow the appeal with costs, set aside the judgment of the Tax Court of Canada and, rendering the judgment which ought to have been rendered, I would dismiss the respondent's appeal with costs from the Minister's assessment of his GST liability made pursuant to subsection 323(1) of the Act.

“Eleanor R. Dawson”

J.A.

“I agree.
Pierre Blais C.J.”

“I agree.
M. Nadon J.A.”

APPENDIX

Subsections 316(1) and (2) of the *Excise Tax Act* read as follows:

316. (1) Any tax, net tax, penalty, interest or other amount payable or remittable by a person (in this section referred to as the “debtor”) under this Part, or any part of any such amount, that has not been paid or remitted as and when required under this Part may be certified by the Minister as an amount payable by the debtor.

(2) On production to the Federal Court, a certificate made under subsection (1) in respect of a debtor shall be registered in the Court and when so registered has the same effect, and all proceedings may be taken thereon, as if the certificate were a judgment obtained in the Court against the debtor for a debt in the amount certified plus interest and penalty thereon as provided under this Part to the day of payment and, for the purposes of any such proceedings, the certificate shall be deemed to be a judgment of the Court against the debtor for a debt due to Her Majesty and enforceable as such.

316. (1) Tout ou partie des taxes, taxes nettes, pénalités, intérêts ou autres montants à payer ou à verser par une personne — appelée « débiteur » au présent article — aux termes de la présente partie qui ne l’ont pas été selon les modalités de temps ou autres prévues par cette partie peuvent, par certificat du ministre, être déclarés payables par le débiteur.

(2) Sur production à la Cour fédérale, le certificat fait à l’égard d’un débiteur y est enregistré. Il a alors le même effet que s’il s’agissait d’un jugement rendu par cette cour contre le débiteur pour une dette du montant attesté dans le certificat, augmenté des intérêts et pénalités courus comme le prévoit la présente partie jusqu’au jour du paiement, et toutes les procédures peuvent être engagées à la faveur du certificat comme s’il s’agissait d’un tel jugement. Aux fins de ces procédures, le certificat est réputé être un jugement exécutoire de la Cour contre le débiteur pour une créance de Sa Majesté.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-308-10

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DAVID A. BARRETT

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CONCURRED IN BY: Blais C.J.
Nadon J.A.

DATED: January 30, 2012

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