Docket: 2006-2297(IT)G

BETWEEN:

JEAN-PIERRE CADORETTE,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

Appeal heard on April 9, 2008, at Québec, Quebec

Before: The Honourable Justice Réal Favreau

Appearances:

For the Appellant:	The Appellant himself
Counsel for the Respondent:	Suzanne Morin

JUDGMENT

The appeal from the assessment made under the *Income Tax Act* and the *Employment Insurance Act* in respect of the 1998 and 1999 taxation years is dismissed, with costs, in accordance with the attached Reasons for Judgment.

Signed at Montréal, Quebec, this 18th day of July 2008.

"Réal Favreau"

Favreau J.

Translation certified true
on this 28th day of November 2008.

Brian McCordick, Translator

Citation: 2008TCC416
Date: 20080718
Dockets: 2006-2297(IT)G

BETWEEN:

JEAN-PIERRE CADORETTE,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

REASONS FOR JUDGMENT

Favreau J.

[1] Jean-Pierre Cadorette is appealing from an assessment made on March 16, 2004, by the Minister of National Revenue ("the Minister") under subsection 227.1(1) of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.), as amended ("the ITA") and section 83 of the *Employment Insurance Act*, S.C. 1996, c. 23, as amended ("the EIA"). The Minister held Mr. Cadorette liable, as a director of 9056-3826 Québec Inc. ("the Company"), for amounts that the Company failed to remit to the Receiver General for Canada for the 1998 and 1999 taxation years ("the relevant period"). The amount of the assessment is $42,399.65 and consists of source deductions, interest and penalties that the Company failed to pay under the notice of assessment issued to the Company on March 6, 2002.

[2] In making the assessment in issue, the Minister relied on the following facts, which are set out in paragraph 21 of the Reply to the Amended Notice of Appeal:

[TRANSLATION]

(a) 9056-3826 Québec Inc. ("the Company") failed to remit, to the Receiver General for Canada, the source deductions that it was required to remit during the 1998 and 1999 taxation years. Those deductions amounted to the following:

	1998	1999
Federal income tax	$11,742.04	$1,135.16
Employment insurance premiums	$12,167.62	$688.56

(b) As at March 16, 2004, the penalties and interest payable by the Company following the failures referred to in the preceding subparagraph totalled $15,712.56 for 1998, and $953.71 for 1999.

(c) The amounts referred to in the two preceding subparagraphs, i.e. the unpaid source deductions, penalties and interest, totalled $42,399.65 as at March 16, 2004.

(d) The Appellant was a director of the Company when the Company was required to remit the amounts referred to above in subparagraph (a).

(e) The Federal Court issued a certificate against the Appellant in the amount of $43,193.51 on June 22, 2004, under section 223 of the ITA.

[3] By confirming the assessment in issue, the Minister also relied on the following facts, which are set out in paragraph 22 of the Reply to the Amended Notice of Appeal:

[TRANSLATION]

(a) The facts referred to in paragraph 21 of the Reply to the Amended Notice of Appeal.

(b) The Company's registration had been struck off by the enterprise registrar on May 5, 2000, but that striking-off was revoked on November 5, 2002.

[4] According to the Quebec enterprise registrar's CIDREQ system, the Company was incorporated on October 29, 1997, under Part 1A of the *Companies Act*, for the purpose of operating a restaurant and bar. The Company was registered on November 3, 1997, and, according to the initial declaration filed on November 21, 1997, Mr. Cadorette was the sole director and majority shareholder of the Company.

[5] The Company operated Resto BBM in Québec from 1983 to 1990, at which point it was operated by others until 1999, when it was permanently closed. Mr. Cadorette owned the building in which the restaurant was operated.

[6] In addition to this investment in the Company, Mr. Cadorette held franchise interests in 17 A&W restaurants in the Québec and Trois-Rivières areas from 1988 to 2006. According to Mr. Cadorette, the franchise agreements required exclusivity, but he managed to secure some time in which to dispose of his other restaurant business interests.

[7] Although Resto BBM was operated by third parties, the Company, being the owner of the restaurant, kept tabs on the operating results. For the fiscal year ended November 22, 1998, the unaudited financial statements of the Company, tendered as Exhibit A-1, showed a $194,927 operating deficit. The short-term liabilities included amounts payable for rent, property tax, insurance, GST, sales tax, and federal and provincial source deductions.

[8] In early 1999, the Company permanently closed the restaurant, and, in a "giving in payment" instrument, the hypothecary creditor took over ownership of the building that housed the restaurant.

[9] According to the CIDREQ system, the Company was struck off the register *ex officio* on May 5, 2000; notices of failure to file declarations had been issued to the Company on May 21, 1999. On November 5, 2002, the Inspecteur général des institutions financières filed an order under section 56 of the *Act respecting the legal publicity of sole proprietorships, partnerships and legal persons*, R.S.Q., c. P-45, revoking the Company's striking-off in the register of sole proprietorships, partnerships and legal persons.

[10] Mr. Cadorette adduced no evidence confirming that he had resigned from his position as director of the Company.

Analysis

[11] The question that the Court must decide is as follows: Can a person who was a director of a company at the time that it was struck off the register be held liable for the company's tax debts following the revocation of its striking-off?

[12] The power of the enterprise registrar to strike off the registration of a registrant and to revoke that striking-off is granted by sections 50 to 57 of the *Act respecting the legal publicity of sole proprietorships, partnerships and legal persons*, R.S.Q., c. P-45, as amended by S.Q. 2002, c. 45, which came into force on February 1, 2004, and by S.Q. 2005, c. 14, which came into force on June 17, 2005. The sections relevant to the instant case are as follows:

> **50.** The enterprise registrar may, ex officio, strike off the registration of a registrant having failed to file two consecutive annual declarations or to comply with a request made under section 38, by filing an order to that effect in the register. He shall transmit a copy of the order to the registrant.
>
> The striking off of the registration of a legal person constituted in Québec entails its dissolution.
>
> However, that legal person is deemed to continue in existence in order to terminate any judicial or administrative proceeding.
>
> **54.** The enterprise registrar may, on application and on the conditions he determines, revoke a striking off under section 50.
>
> The application for revocation must be presented with the fees prescribed by regulation.
>
> **55.** The enterprise registrar shall revoke the striking off of the registration of every legal person constituted in Québec that has resumed its existence under the particular Act applicable to it.
>
> **56.** The enterprise registrar shall revoke the striking off of the registration of a registrant by depositing an order to that effect in the register. He shall transmit a copy of the order to the registrant.
>
> The revocation of the striking off of the registration of a legal person constituted in Québec results in its resuming existence on the date of deposit of the order.

> **57.** Subject to the rights acquired by any person or group, the registration of a registrant is deemed to have never been struck off and the legal person constituted in Québec is deemed to have never been dissolved.

[13] By virtue of section 57, *supra*, once the striking-off has been revoked, the registration of the company is deemed never to have been struck off, and the legal person constituted in Quebec is deemed never to have been dissolved. The effect of the revocation of the striking-off is retroactive, "subject to the rights acquired by any person or group." Paul Martel, in *La Compagnie au Québec, volume 1 : Les aspects juridiques* (Wilson & Lafleur) made the following remarks, at paragraph 34.53, concerning the reservation of rights acquired by a person or group:

> [TRANSLATION]
>
> Thus, the revival has some, but not full, retroactive effect. The company's existence is resumed, but is subject to rights that anyone may have acquired, including, for example, third parties who, during the period between the dissolution and the reconstitution, have acquired prescription against a company or obtained a security, hypothec or prior claim on its property, and third parties who began to use a name identical or similar to the company's name during that period.

However, this reservation of acquired rights is not a basis on which the Appellant can assert that his term as director of the Company ended.

[14] Section 123.76 of the *Companies Act*, R.S.Q., c. C-38, contains the following statement concerning the termination of a director's term:

> 123.76 Notwithstanding the expiry of his term, a director remains in office until he is re-elected, replaced, or removed.
>
> A director may resign from office by giving notice to that effect.

[15] The noteworthy conditions under which a directorship can terminate include the death, personal bankruptcy or protective supervision of the director, and the voluntary or judicial liquidation of a company incorporated under the laws of Quebec.

[16] Since the evidence does not disclose that the Appellant resigned from his position as director, went bankrupt or availed himself of protective supervision, or that the Company was liquidated, the Appellant must be considered never to have lost his status as director between the time that its registration was struck off and the time that the enterprise registrar revoked the striking-off of its registration. Consequently, the Appellant can be held liable for the tax debts of the Company if the applicable requirements of the ITA and EIA are met.

[17] The Minister's remedy under section 227.1 of the ITA and section 83 of the EIA was not time-barred at the time that the assessment in issue was made because the Appellant was still a director of the Company. The two-year limitation period imposed by subsection 227.1(4) of the ITA is not applicable to the case at bar because it only begins to run at the time that the Appellant ceases to be a director. Unfortunately for him, Mr. Cadorette never resigned, and the evidence has not established the date until which the Company continued to exist. If a person has not ceased to be a director, the two-year limitation period does not run.

[18] Subsection 227.1(1) of the ITA holds the director of a corporation liable for its failures to remit income tax and other source deductions in respect of employee remuneration, and subsection 227.1(3) of the ITA relieves a director of such liability if the director can show that he or she exercised the degree of care, diligence and skill to prevent the failure that a reasonably prudent person would have exercised in comparable circumstances.

[19] Counsel for the Respondent submits that the Appellant presented no facts showing that he exercised the degree of care, diligence and skill that a reasonably prudent person would have exercised in comparable circumstances to prevent the Company's failure to remit source deductions totalling $23,909.66 in 1998 and $1,823.72 in 1999.

[20] At the hearing, the Appellant acknowledged that he knew that the Company was having financial problems in 1998 and 1999, but could not cure those problems. In addition, the Appellant stated that he was not in bad faith, but acknowledged that he was negligent.

[21] The Appellant was an experienced restaurateur. He had personally operated Resto BBM, and had operated A&W franchises covering 17 restaurants for several years. He knew that the restaurant in question was running a deficit and that it was not making source deductions, because he had access to the monthly results. The Appellant lost a lot of money in the venture, including unpaid rent, but the restaurant had to stay in operation to preserve the acquired rights as well as the value of the building that housed it.

[22] The Appellant cannot plead ignorance of the ITA and of his responsibilities, nor can he claim not to have known the Company's true financial state in 1998 and 1999. In my opinion, the Appellant did nothing to prevent the failure because the restaurant's financial condition was too disastrous, and only by taking over the restaurant's operations again and injecting substantial capital could he have restored it to health.

[23] Given the circumstances, I do not believe that the Appellant exercised reasonable care. Rather, he was passive, and allowed things to worsen until they collapsed.

[24] In my opinion, it has not been shown that Mr. Cadorette could avail himself of the defence of due diligence.

[25] For these reasons, Mr. Cadorette's appeal must be dismissed, with costs.

Signed at Montréal, Quebec, this 18th day of July 2008.

"Réal Favreau"

Favreau J.

Translation certified true
on this 28th day of November 2008.

Brian McCordick, Translator

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PLACE OF HEARING:	Québec, Quebec
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REASONS FOR JUDGMENT BY:	The Honourable Justice Réal Favreau
DATE OF JUDGMENT:	July 18, 2008

APPEARANCES:

For the Appellant:	The Appellant himself
Counsel for the Respondent:	Suzanne Morin

COUNSEL OF RECORD:

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Name:

Firm:

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