



T-207-94

IN THE MATTER OF the *Income Tax Act*

BETWEEN

COOPERS & LYBRAND LIMITED,

Plaintiff,

- and -

HER MAJESTY THE QUEEN,

Defendant.

REASONS FOR JUDGMENT

PINARD J.

Pursuant to subsection 172(1) of the *Income Tax Act*¹ (hereinafter the "Act") as it applies to this case, the plaintiff has appealed the judgment of the Tax Court of Canada (89-1430(IT)O) dated January 11, 1994, dismissing its appeal from the assessment made against it on March 9, 1982, in respect of source deductions not remitted to the Minister of National Revenue.

THE FACTS

The plaintiff, Coopers & Lybrand Ltd. (hereinafter "C. & L."), is a company acting as agent and mandatary of the National Bank of Canada (hereinafter "National Bank") and of the Mercantile Bank of Canada (hereinafter "Mercantile Bank"), pursuant to security that is described *infra*.

¹

S.C. 1970-71-72, as amended by S.C. 1980-81-82-83, c. 158.

The Mercantile Bank and the National Bank, Canadian chartered banks, reorganized into a single corporate person on February 10, 1986, under the business name "National Bank of Canada".

Canadian Admiral Corporation Ltd. (hereinafter "CAC") was a company incorporated under the laws of Canada, doing business in Toronto, Ontario.

During 1979 and 1980, CAC had obtained lines of credit from the Mercantile Bank and the National Bank for substantial amounts and, to secure the repayment of the advances thus made by the banks, gave both banks security pursuant to s. 178 of the *Bank Act* (formerly s. 88), as appears from the following documents:

- (a) prior notice registered at the office of the Bank of Canada in Toronto on November 30, 1979, as No. 277504, of its intent to give the defendants *pari passu* security pursuant to s. 178 of the *Bank Act*;
- (b) an agreement regarding loans and advances dated December 23, 1980;
- (c) a credit application and promise to give security dated February 2, 1981;
- (d) an assignment of property under the *Bank Act* dated February 2, 1981;

On October 27, 1981 the Mercantile Bank of Canada and the National Bank of Canada demanded that CAC repay \$40 million owing to them, and gave it one week to do so.

On November 4, 1981, in view of CAC's failure to pay the amounts owed to the Mercantile Bank and the National Bank, the banks appointed C. & L. as their agent to realize on the security held by them, with instructions, *inter alia*, to take possession of all property covered by the security pursuant to section 178 of the *Bank Act*, namely raw materials, inventories of finished goods and accounts receivable, which was done the same day. On

November 4, 1981, C. & L. took control and possession of a majority of CAC's assets, including accounts receivable; C. & L. also took control and possession of cash in hand and bank accounts, in an amount later determined to be \$1,522,573.45.

On November 23, 1981, a petition in bankruptcy was filed against CAC and subsequently granted, appointing Campbell Sharp Limited as trustee in bankruptcy.

On November 4, 1981, CAC was operating a number of plants in Canada; it had 1,400 employees, more or less. A portion of those employees' wages, for a period prior to November 4, 1981, was unpaid at the time that the plaintiff took possession. The banks in question, being of the opinion that it was in their interest that a portion of the operations that CAC had been carrying on up to that point be continued for a period of time, gave the plaintiff instructions to [TRANSLATION] "settle all prior wage claims" by CAC's employees, for the period from October 26, 1981 to November 4, 1981, in consideration for each of those employees signing an [TRANSLATION] "assignment of his/her wage claims" in an amount equal to the amount paid. Thus on or about November 4, 1981, the plaintiff circulated the following notice to CAC's employees:

NOTICE TO EMPLOYEES

November 4, 1981

Coopers & Lybrand Limited has today been appointed Agent on behalf of Canadian Admiral Corporation Limited's (Company) Bankers.

Representatives of Coopers & Lybrand Limited have taken possession of the Company's bank accounts, accounts receivable and inventories.

To the best of our knowledge and belief the Company is not in a position to meet present payrolls. The Agent has arranged financing to pay wages owing for work done up to and including today and these payments will be made to all employees who sign a form (which the Agent will provide) assigning their wages claim in the same amount as the cheque given to each employee by the Agent.

Representatives of the Agent will be offering to hire many of the employees on a day-to-day basis to assist the Agent in it [sic] duties. The Agent will pay wages for such work at the same rate as that paid by the Company.

The company will be attempting to effect a refinancing or reorganization to enable it to continue operations in the ordinary course as soon as possible. The Agent's primary responsibility is to protect the interests of the Company's Bankers. The Company and the Agent will appreciate your cooperation in these difficult times.

COOPERS & LYBRAND LIMITED.

Each assignment of claim took the form of the following document, signed by each CAC employee who received a payment from the plaintiff, and duly completed by entering the appropriate amount:

ASSIGNMENT

IN CONSIDERATION OF the payment to me of \$, receipt of which is acknowledged, the undersigned hereby sells assigns [sic] to Coopers & Lybrand Limited, Agent for The Mercantile Bank of Canada and The National Bank of Canada (the "Assignee") all my right to and interest in wages/salaries up to an amount of \$ for services rendered to or on behalf of Canadian Admiral Corporation Ltd. for the period inclusive, together with all rights of preference or priority of payment and all rights of lien, charge or trust upon any property, real or personal, which I may have in respect thereof, whether statutory or otherwise, as well as any other rights I may have against any other persons for the said wages/salaries, (the "Assigned Claim") and I hereby irrevocably nominate the Assignee as my agent and authorize the Assignee to take whatever steps the Assignee may see fit to collect, obtain or enforce payment of the Assigned Claim.

On November 5, 1981, C. & L. sent its initial report to the banks. That document stated, *inter alia*:

[TRANSLATION]

... 1. On Wednesday, November 4, 1981, we took possession of the books of accounts receivable and of the inventories at all locations and appropriate bank accounts were opened in our name at the National Bank of Canada.

...

7. In accordance with the instructions we received before we were appointed, we are attempting to settle all prior wage claims, with the exception of vacation pay, by obtaining from each of the employees an assignment of wage claims in the same amount as we are paying.

(Emphasis mine)

Payment to the employees was made by cheques bearing the name of CAC and the signature "Coopers & Lybrand Limited, Agent - Banque nationale du Canada"; each cheque stub bore the notation [TRANSLATION] "Statement of wages and deductions" and showed the gross wages for the period covered and the appropriate source deductions (the slip also showed the cumulative amounts for the year).

The gross earnings and source deductions for the periods covered by the payments to the employees were entered in CAC's books; C. & L. submitted the T-4 record on behalf of CAC and provided the employees with the corresponding T-4 slips showing gross earnings and source deductions for the periods covered by the payments (which were made to the employees on November 5, 13 and 27, 1981).

The source deductions (income tax, unemployment insurance, Canada Pension Plan) totalling \$163,404.56 (excluding penalties and interest) were not remitted to the Receiver General of Canada either by the plaintiff or by CAC on December 15, 1981.

On March 9, 1982, the Minister of National Revenue issued notice of assessment No. 624565, claiming a debit balance of \$186,008.01 from C. & L., and stating:

You are hereby assessed the amounts indicated for failure to remit as required for November 1981.

The \$186,008.01 payment in question was broken down as follows:

<u>Assessment made</u>	
Federal income Tax	79,654.52 DR
Provincial income tax	37,686.86 DR
Canada Pension Plan	13,253.76 DR
Unemployment insurance	32,809.42 DR
Penalty	16,340.45 DR
Interest	<u>6,263.00 DR</u>
Balance	186,008.01 DR

On June 4, 1982, the plaintiff objected to the notice of assessment, and on March 14, 1989, the Minister of National Revenue notified the plaintiff that the notice of assessment was being upheld for the following reasons:

The taxpayer has been properly assessed and a penalty has been properly levied, for failure to remit amounts deducted from remuneration, within the provisions of subsection 153(1), (1.3), (1.4) and 227(9) of the Act and subsections 100(1), (3) and 108(1) and section 101 of the Income Tax Regulations.

THE APPLICABLE LEGISLATION

It is important here to set out paragraph 153(1)(a) and subsections 153(1.3), 153(1.4), 227(8) and 227(9) of the Act, and also subsections 100(1), 100(3) and 108(1) of the *Income Tax Regulations*:

Act

153. Withholding

(1) Every person paying

- (a) salary or wages or other remuneration to an officer or employee,**

...

at any time in a taxation year shall deduct or withhold therefrom such amount as may be prescribed and shall, at such time as may be prescribed, remit that amount to the Receiver General of Canada on account of the payee's tax for the year under this Part.

153.(1.3) Payments by trustee, etc.

For the purposes of subsection (1), where a trustee who is administering, managing, distributing, winding up, controlling or otherwise dealing with the property, business, estate or income of another person authorizes or otherwise causes a payment referred to in subsection (1) to be made on behalf of that other person, the trustee shall be deemed to be a person making the payment and the trustee and that other person shall be jointly and severally liable in respect of the amount required under subsection (1) to be deducted or withheld and to be remitted on account of the payment.

153.(1.4) Definition of "trustee"

In subsection (1.3), "trustee" includes a liquidator, receiver, receiver-manager, trustee in bankruptcy, assignee, executor, administrator, sequestrator or any

other person performing a function similar to that performed by any such person.

227. Withholding taxes

(8) Any person who has failed to deduct or withhold any amount as required by this Act or a regulation is liable to pay to Her Majesty

(a) if the amount should have been deducted or withheld under subsection 153(1) from an amount that has been paid to a person resident in Canada, or should have been deducted or withheld under section 215 from an amount that has been paid to a person not resident in Canada, 10% of the amount that should have been deducted or withheld, and

(b) in any other case, the whole amount that should have been deducted or withheld,

together with interest on the amount that should have been deducted or withheld, at the prescribed rate per annum.

227.(9) Every person who has failed to remit or pay

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

(b) an amount of tax that he is, by subsection 116(5) 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).

Regulations

Tax deductions

100.(1) In this Part and in Schedule I,

"employee" means any person receiving remuneration;

"employer" means any person paying remuneration;

"remuneration" includes any payment that is

(a) in respect of

(i) salary or wages, or

(ii) commissions or other similar amounts fixed by reference to the volume of sales made or the contracts negotiated (referred to as "commissions" in this Part),

paid to an officer or employee.

100.(3) For the purposes of this Part, where an employer deducts or withholds from a payment of remuneration to an employee one or more amounts each of which is

- (a) a contribution under the *Canada Pension Plan* or under a provincial pension plan as defined in section 3 of the *Canada Pension Plan*,
- (b) a contribution to or under a registered pension fund or plan, or
- (c) a premium under the *Unemployment Insurance Act, 1971*,

the balance remaining after deducting such amount or amounts, as the case may be, shall be deemed to be the amount of that payment of remuneration.

Remittances to Receiver General

108.(1) Amounts deducted or withheld under subsection 153(1) of the Act shall be remitted to the Receiver General on or before the 15th day of the month next following the month in which the amounts were deducted or withheld.

THE ISSUES

Essentially, the issue is whether the Minister of National Revenue was justified in issuing and upholding notice of assessment no. 62465, claiming a debit balance of \$186,008.01 from the plaintiff, relying on section 153 and subsection 227(9) of the Act and on subsections 100(3) and 108(1) of the *Income Tax Regulations*.

The plaintiff essentially submits it in no way comes within section 153 of the Act. In the alternative, the plaintiff submits that if it comes within subsection 153(1.3) of the Act, the Minister of National Revenue may not rely on any provision of the Act as justification for issuing the notice of assessment in question or for collecting interest.

The defendant argues that the plaintiff comes directly within subsection 153(1) of the Act, that in any event it comes within that section by the operation of subsection 153(1.3) of the Act, and lastly, that this Court has no jurisdiction to hear the appeal in so far

as it relates to source deductions subject to the *Income Tax Act* (Ontario), the *Unemployment Insurance Act, 1971* and the *Canada Pension Plan*.

ANALYSIS

First, it is important to determine whether the plaintiff falls directly within the purview of subsection 153(1) of the Act. It seems plain to me, having regard to the evidence, that at all relevant times the plaintiff was a person who had paid remuneration to each of the CAC employees in question. I see no reason to decide that the expression "any person" does not apply to an agent such as the plaintiff, acting on behalf of the creditor banks of the employer, CAC. As Mr. Justice Pigeon put it so well in *Dauphin Plains*,² in which he construed the same provision of the Act:

Here the question is whether the receiver comes within the words "Every person paying salary or wages ..." and I fail to see any reason for holding that the receiver did not come within the terms of this provision. There is no need to consider the definition of "person" in the Act. In any case this definition is not a restrictive but an extensive definition due to the word "includes".

It is also settled that what was paid to the CAC employees for the period from October 26, 1981, to November 4, 1981, was wages owing. This may be seen, *inter alia*, in the written notice of November 4, 1981, which the plaintiff sent to the employees to inform them that it had been appointed as agent of CAC's banks, and that:

The Agent has arranged financing to pay wages owing for work done up to and including today and this payment will be made to all employees who sign a form (which the Agent will provide) assigning their wages claim in the same amount as the cheque given to each employee by the Agent.

²

Dauphin Plains v. Xyloid and the Queen, [1980] 1 S.C.R. 1182, at p. 1194.

In fact, each employee was given a cheque in an amount equal to his or her net wages, that is, the gross wages for the period in question less the authorized deductions, including the amounts withheld for income tax. The details of the amounts withheld appeared on the slip attached to the paycheque, and the subsequent T-4 Supplementary issued to each employee confirmed the amounts withheld. It is not disputed that these cheques were drawn by the plaintiff itself on its own bank account, which was opened for the purpose of carrying out the instructions given to it as agent for the banks in question, and that the plaintiff arranged for the cheques to be given to the CAC employees. There being no doubt that the payees of the cheques were in fact employees of CAC, and since the expression "to an officer or employee" in paragraph 153(1)(a) does not require that there be any employer-employee relationship between the payer and the payee, I am of the opinion, in the circumstances, that the plaintiff is in fact the person who paid wages to the employee, and that it is therefore directly subject to subsection 153(1) of the Act. This conclusion appears to me to be consistent with the interpretation of that provision given by the Federal Court of Appeal in another case involving the plaintiff³, in which Kelly D.J. wrote that three requirements must be met in order that liability may exist under subsection 153(1) of the Act:

- (1) payments to employees must have been made;
- (2) such payments must have been made with respect to wages or salaries due to the employees;
- (3) the person sought to be held liable must have made such payments.

A little later,⁴ Mr. Justice Kelly stated:

The appellant submits that to meet the requirements of the *Income Tax Act* it is not necessary that there exist between the recipient of the payments and the payor an employee/employer relationship.

I agree with this submission.

³ *The Queen v. Coopers & Lybrand Ltd.*, [1981] 2 F.C. 169, at p. 176.

⁴ *Ibid.*, at p. 177.

It remains to be determined whether the plaintiff satisfied the requirements for deducting or withholding amounts as laid down in subsection 153(1) of the Act, it being admitted that no amounts deducted or withheld in respect of the wages in question were remitted to the Receiver General by the plaintiff or by anyone else. Having regard to the specific facts of this case, I am of the opinion that the prescribed deductions were made by the plaintiff.

The fact that the plaintiff prepared a slip and gave it to each employee, attached to his or her paycheque, setting out the gross wages, net wages and prescribed deductions for the period in question, and the fact that each employee was subsequently given a T-4 Supplementary by the plaintiff confirming the wages and deductions, are sufficiently serious, precise and consistent that they create a strong, although not irrefutable, presumption that the prescribed amounts were deducted or withheld by the plaintiff. These documents clearly suggest to the employees that the plaintiff was assuming responsibility for payment of their gross wages and that it was paying them the balance of their wages, after deducting the prescribed amounts for their benefit. As well, it was to the plaintiff's advantage that the employees not think otherwise, the objective of paying these wages being to obtain the employees' cooperation so that the products then being manufactured could be completed and to secure the assets of which it had taken possession on behalf of the banks. In the circumstances, I do not believe that there was any intention to mislead the CAC employees, which would clearly have been the consequence if the plaintiff had failed to deduct or withhold the prescribed amounts, having regard to the following opinion stated by the Federal Court of Appeal in *Coopers & Lybrand Ltd.*, *supra*, at page 183:

If the person paying fails to deduct, his failure has no effect on the liability of the employee for income tax it being assumed that the taxing authority will recover from the employee the full amount of the income tax; the only liability incurred by the person paying the salary or wage is a penalty calculated as a percentage of the amount he has failed to deduct.

In this situation, there having been no meeting between the employees' representatives and the plaintiff before the wage arrears were paid, it cannot be concluded from the mere fact that the assignment of claim signed by the employees showed an amount equivalent to their net wages that the employees might reasonably have thought that the deductions were purely fictitious. Nor, absent any specific evidence, is it up to me to speculate as to what considerations of a legal or practical nature might have been the reason that those assignments of claims specify an amount equivalent to the net wages rather than of the gross wages. The identical testimony given by the representatives of the plaintiff and of the two banks concerned on the question of the instructions given by those banks to the plaintiff, to pay the "net wages" owing to the employees in exchange for equivalent assignments of claims, is certainly not conclusive on the question of whether or not the prescribed amounts were deducted or withheld. Even though that brief oral description of the instructions, which was given more than fifteen years after the events, refers to payment of "net wages", this does not mean that the plaintiff was not authorized to cover the cost of the gross wages by paying the net wages to the employee and also deducting or withholding the prescribed amounts to be remitted to the Receiver General. In other words, I do not see any restriction in the instructions, as summarized orally at the trial, that would prevent the plaintiff, as agent for the banks, from paying out more than the employees' net wages under the head of wage arrears. Nor does the documentary evidence, which is the best evidence on this point, contain any such restriction. (1) As I indicated earlier, the notice given to the employees at the time in question stated simply:

To the best of our knowledge the Company is not in a position to meet present payrolls. The Agent has arranged financing to pay wages owing for work done up to and including today and these payments will be made to all employees who sign a form (which the Agent will provide) assigning their wages claim in the same amount as the cheque given to each employee by the Agent.

(2) In its written report to the banks dated November 5, 1981, the plaintiff wrote:

[TRANSLATION]

7. In accordance with the instructions we received before we were appointed, we are attempting to settle all prior wage claims, with the exception of vacation pay, by obtaining from each of the employees an assignment of wage claims in the same amount as we are paying.

None of these documents refers to "net wages" and there is nothing therein that would prevent the plaintiff from assuming responsibility for payment of gross wages by deducting or withholding the prescribed amounts, so that they could be remitted to the Receiver General, and paying the balance, the net wages, to the employees.

In any event, whether we rely on the oral evidence or the documentary evidence, it is clear that the plaintiff had the authority or had instructions to pay the employees' net wages directly to them; however, and I would stress this point, there is nothing in that written and oral evidence alone to support the conclusion that the plaintiff was not authorized at the same time to deduct or withhold the prescribed amounts, based on their gross wages, and to remit them to the Receiver General. The rest of the evidence, on the contrary, tends to establish that the plaintiff was authorized to do both things: not only was it in the plaintiff's interest not to alienate the employees, whose cooperation was so important if it was to be able to carry out its instructions for the benefit of the banks, but it also had all the cash it needed and, while it may not have known this at the time, all the credit, which the banks were supplying, needed to cover all the arrears of the gross wages owing to the CAC employees.

The least that can be said, having regard to the evidence as a whole, is that the plaintiff has not succeeded in rebutting the strong presumption resulting from the slips and T-4 Supplementaries referred to *supra*, which it prepared itself.

In *Coopers & Lybrand*, supra, the Court of Appeal did conclude that the person who paid the wages had failed to withhold amounts for income tax, and not to remit amounts actually withheld, the result of which was that liability arose under subsection 227(8) rather than under subsection 227(9) of the Act. On this point, the instant case may be distinguished primarily because the funds given to the plaintiff by the banks were not limited to the amount of the net wages in question. In the other case, at page 184, Kelly D.J. wrote:

However, there is uncontradicted evidence to the effect that the aggregate amount of money which was provided by the debenture holder to the respondent for the purpose of "making a payment to each employee by the amount of which they (the employees) are 'out of pocket' with respect to work done for the company as a result of the company's failure and the company could not pay" was the net amount after deduction, which the employees together would have received for the final pay period.

My colleague Mr. Justice Rouleau made the same distinction in *Deloitte Haskins & Sells*,⁵ another case involving the same provisions of the Act:

In both cases, the *prima facie* evidence provided by payroll records indicate that deductions were made. In *Coopers & Lybrand*, however, the receiver never had access to funds to pay gross wages, let alone the deductions; in fact the monies came directly from the debenture holder and only the net amount was provided.

In the present appeal there is no evidence to rebut the *prima facie* inference drawn from the payroll records. Although the receiver never actually set money aside, funds were available not only to pay wages but to pay the remittance to the Crown on account of the deductions it calculated.

Counsel for the Plaintiff stressed that only nominal, rather than actual, deductions were made. In other words, they were only bookkeeping entries to enable the determination of net wages. As persuasive as this argument may first appear, I do not accept it. In pursuing this course of conduct, the receiver raised a presumption, albeit rebuttable, that it had actually withheld amounts on account of income tax, which it would then be liable to remit at the prescribed time. I would note that this presumption would prevail in the minds of the employees who received wage or salary cheques in the usual amount accompanied by information slips indicating that deductions had been duly made. To rebut this presumption and cast the employees with the burden of paying an amount on account of income tax which they had every reason to presume had already been paid would require clear evidence.

⁵

Deloitte Haskins & Sells v. The Queen, 89 DTC 5225, at pp. 5229-30.

That passage further helps to rebut the assertion made by counsel for the plaintiff at trial, which was that the prescribed amounts had not been deducted or withheld because the corresponding amounts had not been deposited in a trust account.

Accordingly, the Court having concluded that the plaintiff is directly liable, under subsection 153(1) of the Act, for failing to remit to the Receiver General the prescribed amounts deducted or withheld from the CAC employees' wages for the period in question, the plaintiff is also liable under subsection 227(9) of the Act, as reflected in the Minister's assessment in issue.

Given that these conclusions result in the complete dismissal of the plaintiff's action, it will not be necessary to consider the plaintiff's alternative argument or the additional issue of the jurisdiction of this Court, which was raised by counsel for the defendant, in relation to the source deductions under the Ontario *Income Tax Act*, the *Unemployment Insurance Act* and the *Canada Pension Plan*.

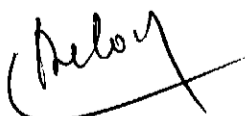
For these reasons, the action is dismissed with costs.

OTTAWA, Ontario
This 13th day of February 1997

YVON PINARD

J.

Certified true translation



C. Delon, LL.L.

FEDERAL COURT OF CANADA
TRIAL DIVISION

NAMES OF COUNSEL AND SOLICITORS OF RECORD

COURT FILE NO: T-207-94

STYLE OF CAUSE: COOPERS & LYBRAND LIMITED

PLACE OF HEARING: MONTRÉAL, QUEBEC

DATE OF HEARING: FEBRUARY 4, 1997

REASONS FOR JUDGMENT OF THE HONOURABLE MR. JUSTICE PINARD

DATED FEBRUARY 13, 1997

APPEARANCES:

MICHEL LEGENDRE FOR THE PLAINTIFF

DANIEL MARECKI FOR THE DEFENDANT

SOLICITORS OF RECORD:

DESJARDINS DUCHARME STEIN MONAST FOR THE PLAINTIFF
MONTRÉAL, QUEBEC

GEORGE THOMSON FOR THE DEFENDANT
DEPUTY ATTORNEY GENERAL
OF CANADA