Federal Court  Cour fédérale

Date: 20140324

Docket: T-953-10

Citation: 2014 FC 286

Ottawa, Ontario, March 24, 2014

PRESENT: The Honourable Mr. Justice Barnes

BETWEEN:

GARY HENNESSEY

Plaintiff

and

HER MAJESTY THE QUEEN

Defendant

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an action by Gary Hennessey claiming damages from the federal Crown said to arise from the conduct of several officials of the Canada Revenue Agency (CRA) in St. John's, Newfoundland. Mr. Hennessey maintains that CRA officials acted maliciously and unlawfully in their efforts to collect payroll remittance arrears and, in so doing, caused the collapse of his payroll management business, Administrative Services.

[2] The Statement of Claim filed on behalf of Mr. Hennessey is not a model of legal or factual clarity. For the most part it sets out a litany of complaints about the conduct of CRA officials in their treatment of his business as a payroll administrator.

[3] Mr. Hennessey's primary allegation is that CRA officials intentionally, maliciously, negligently, arbitrarily and unlawfully conspired to pursue him for the recovery of payroll remittances that were owed by his clients and for which, he says, he bore no legal responsibility. The CRA's collection actions are described as strong arm tactics and a form of blackmail. Mr. Hennessey also alleges wrongdoing by the CRA in the initiation of criminal charges against him for tax evasion and fraud and for conducting an illegal search and seizure of his records. All of this, he asserts, led to the collapse of his business and to personal bankruptcy.

[4] The specific causes of action that are pleaded include negligence, Charter breaches and the torts of misfeasance in public office, defamation and malicious prosecution. The claim for relief includes damages for the loss of business and personal income, the loss of credit, reputational harm, damage to his physical and mental health and for various Charter violations.

Background

[5] For approximately 19 years Mr. Hennessey ran a business in Newfoundland that provided payroll management on behalf of clients. The business operated until 2007 as a proprietorship under the name "Administrative Services".

[6] Most of the clients of Administrative Services were persons living with disabilities who required on-going provincially funded home and respite care (the clients). As it was initially conceived, the Province of Newfoundland (Province) or, later in this case, the Eastern Health Board (Eastern Health) assessed the needs of the clients and authorized them to engage the services of the necessary care providers. The Province funded these services by paying to the clients the amounts required to meet their payroll obligations including the portion required for payroll remittances (ie. income tax, Canada Pension Plan, Employment Insurance). Under this model the clients were the intended employers of the care workers. The clients were, accordingly, responsible to pay the wages and payroll remittances and to prepare the required T4 documentation. Not surprisingly this model was mostly unworkable. Many of the clients or their guardians lacked the training, experience or capacity to act as employers and could not fulfill the requirements of managing a payroll. Over time several hundred of the clients fell into arrears in making payroll remittances and the CRA naturally became quite concerned about the growing problem. Discussions with the Province ensued and it was decided that the solution lay in the engagement of payroll service providers. These payroll providers would act as agents for the clients in fulfilling their payroll obligations. The Province, in turn, agreed to pay an administrative fee to the payroll providers for each payroll transaction.

[7] Mr. Hennessey ultimately became the largest payroll provider in St. John's and in the surrounding area. Much of the growth of his business came from referrals including recommendations from staff at Eastern Health (see, for example, the evidence of Mary Tobin at page 158, Volume 1 of the trial transcript). Before the collapse of his business, Mr. Hennessey managed several hundred home and respite care accounts. When Administrative Services went out

of business in 2007, the accrued liabilities of its clients to the CRA for outstanding payroll remittances exceeded $1 million. The culminating event that caused Mr. Hennessey to close the business was the issuance of a Requirement to Pay by the CRA to Eastern Health to intercept 30% of payments due to the business for ongoing payroll remittances.

Issues

[8] Is the Defendant liable to the Plaintiff for damages arising from the closure of his proprietorship, Administrative Services?

The Evidence

[9] Although the Plaintiff called numerous witnesses, including several current and past employees of the CRA, very little of the testimony that emerged had any relevance to Mr. Hennessey's liability allegations. No precise financial accounting of what occurred was established, but the general outline of events was mostly not a matter of controversy or disagreement among the witnesses. Set out below are those parts of the evidence that I consider to be the most relevant.

Betty Farrell

[10] Ms. Farrell was employed for 21 years with the Newfoundland Department of Social Services and, later, for more than 15 years as an administrative clerk for the Eastern Health Board. Her responsibilities included the receipt of approvals for respite and home care from field staff and the preparation of the necessary authorizations to support the hiring of care workers. She described the process for authorizing home care in the following way:

> A. Our clients are people who are physically, developmentally handicapped and they would have a bookkeeper do their bookkeeping for the home care workers. Like the home care workers would be hired to come in and do the home care, the respite, and a bookkeeper would do the payroll on behalf of the client to the home care worker. So then the bookkeeper would submit their invoices to Eastern Health, which I was the person who would enter the invoices into the system based on the authorization, which would have been the approval that was done for that client.

[11] Under the system described by Ms. Farrell, once a client had engaged a payroll provider, the necessary financial and administrative transactions were carried out among the provincial funding agency, the payroll provider and the care workers. Although the clients were notionally the employers of the care workers, all of the payroll obligations fell to the payroll provider to perform.

[12] One fundamental weakness remained with this system. Although the clients typically required long-term and uninterrupted service from their care workers, the administrative model could not always keep pace and funding delays were common. Ms. Farrell explained the funding delays in the following testimony:

> Q. So if you can explain to your lordship just a hypothetical, if I was Administrative Services and provided Eastern Health with an invoice saying that in fact, okay, this is the number of

hours that were worked and I want my pay for that, were there any delays? Could there be any delays in be obtaining that invoice amount that I put forward?

A. Oh yes, it could be delays from a month to six months.

Q. And why would that -

A. An invoice may not get paid for six months.

Q. And why would that be, Ms. Farrell?

A. That could be, it could be several different reasons. You could be just waiting on the financial assistance officer to enter the authorization into the system, to enter the approval into the system, or you could be waiting for the social worker to send the information the financial assistance officer. That's about–and invoices, it could take often probably six months.

JUSTICE:

Q. How often did that happen? How many invoices were you dealing with every month?

A. You dealt with your invoices on a biweekly. The invoices were sent in biweekly.

Q. How many accounts were you looking at? How many different client accounts were you dealing with?

A. Probably over a thousand.

Q. A thousand. And of those, how many might be running more than a month late in terms of payment?

A. It varied. Like your authorization was generated, the approval could be for a month. It could be for three months. It could be six months. It was no longer than a year. That's as long as your approval could be. So when you generated that authorization, you either generated it for a month, three, six or a year. So those authorizations would expire. So, you could take - it could take three months to get a new approval from a worker. Now it was verbal approval given to the bookkeeper to go ahead to keep paying the invoices because the client was eligible but the authorization would not get

done until the worker got around to generating the authorization and getting the approval into the system.

Q. So are you able to say approximately how many of those situations would arise? Of the thousand accounts, how many of them were falling -

A. Oh, on a biweekly pay period, you could have three or four clients every biweekly pay period like that, because some could be done for a month, so you could be waiting for another two months before you could get another approval and then that might be approved for six months and you're okay for six months.

Q. But three or four out of how many in total might get into that situation where payment was being made quite late?

A. Oh, it was a lot. It was always - it was a continuous basis.

Q. No, I'm sure there was always a situation from what you've described where there would be late payments, but I'm just trying to get a sense of how many of the accounts, the client accounts, would fall into that category in the run of a pay period, as a percentage. Is it three percent, five percent, ten percent?

A. On a biweekly pay period, like I could have probably five or six clients, invoices that I could not pay on every biweekly pay period.

Q. Five or six out of how many?

A. We have about a thousand. At that time when I was doing this, we had about a thousand.

[13] According to Ms. Farrell the systemic funding deficiencies that created payment delays to the payroll providers were exacerbated during a period of several months in 2005 when she was off work on sick leave. In the case of Mr. Hennessey's business, biweekly funding shortfalls of several thousand dollars were "very common". Despite this problem Mr. Hennessey continued to pay at least some of the wages of the care providers while the necessary approvals were pending.

[14] Ms. Farrell testified that she would often provide a verbal assurance of funding eligibility to Mr. Hennessey in the expectation that he would cover the payroll until the required paperwork was in place. Needless to say Mr. Hennessey frequently contacted Ms. Farrell to press for reimbursement for payroll accounts in arrears. On other occasions the clients or their care workers would call Ms. Farrell to request payment when Mr. Hennessey was either unwilling or unable to cover a payroll obligation. Despite these funding delays, Ms. Farrell acknowledged that Mr. Hennessey was ultimately reimbursed when "the invoices eventually got entered into the system" (see page 87 and 96, Volume 1 of the trial transcript). She also confirmed that in about 2003, the Province attempted to address the funding delay problem by making lump sum advances to Mr. Hennessey. According to Ms. Farrell this was not an ideal solution because the advances had to be reconciled first from subsequently issued approved funding.

Michelle Simmons

[15] Ms. Simmons worked as a financial assistance officer with Eastern Health for a number of years. In that capacity she was responsible for determining client eligibility for home care. Once an approval was generated, she would issue an authorization to a payroll administrator chosen by the client. The payroll administrator would, in turn, send biweekly invoices to Eastern Health for payment and a cheque would then issue.

[16] Ms. Simmons dealt frequently with Mr. Hennessey mainly concerning payment delays. Like Ms. Farrell, she confirmed that payments "were constantly being delayed" and that payment arrears due to Mr. Hennessey were often in the thousands of dollars.

[17] Ms. Simmons also acknowledged that before the involvement of payroll administrators many clients were unable to manage a payroll and fell behind on their remittances to the CRA. She described the problem in the following way:

> A. Yes, and it all started basically back in 1996 when a CRA representative came into our program to show the caregivers how to do payroll and how to remit because the government wasn't going to be paying administrative fees. So when I came on in '99 what happened was we were getting phone calls from these people that, you know, "I have - I don't know how to do this. I don't know what I'm doing. I need someone to have a look at this" or, you know, "I don't know how to do the payroll. Why should we be doing this?" and this is the kind of things we got. So they started to send me out to do - in the homes to do the audit and basically just about everyone I've done, that was their response, "we don't know how to be doing this. We don't know what we're doing." And some, some were legitimately doing it wrong and intentionally doing it wrong and not doing what they're supposed to be doing and not remitting.
>
> Q. So the benefit of bringing in a professional administrator is you get the remittances looked after?
>
> A. Yes.
>
> Q. Hopefully in a professional way and in a proper way?
>
> A. Yes.

[18] According to Ms. Simmons, when Mr. Hennessey took over an account with existing remittance arrears, no arrangements were made by Eastern Health to protect or to otherwise isolate him from the client's prior obligations including the accrual of associated interest and penalties.

[19] In 2005 a meeting between representatives from Eastern Health and the CRA was convened to discuss the problem of client remittance arrears. The conclusion reached was that the money would not be collected from the clients because of the likelihood of a public outcry and because most could not pay in any event.

Carlson Young

[20] Mr. Young is employed as a Trust Examiner with the CRA in St. John's Newfoundland. He commenced employment with CRA in 1981 and in 1985 he became a Payroll Auditor (now titled a Trust Examiner).

[21] In 1995 Mr. Young met with provincial officials to discuss the growing problem of payroll remittance arrears in the provincial home care program. In the course of that meeting, the parties discussed the provincial concern that it not be deemed the employer of home care workers. Mr. Young explained the hallmarks of an employment relationship and recommended that the Province avoid taking control over the management of the program. In particular, he advised that the choice of a payroll provider be left to the individual client.

[22] In the course of Mr. Young's employment as a Trust Examiner he had frequent contact with home care payroll providers including Mr. Hennessey and his staff. This involved periodic audits of home care payroll accounts. Although these accounts were maintained by the CRA in the names of the individual clients, a client authorization permitted the CRA to deal directly with Mr. Hennessey. Periodic statements of client accounts from the CRA would also be sent to Mr. Hennessey on behalf of his clients.

[23] During Mr. Young's audits of Mr. Hennessey's client accounts between 2002 and 2004, he identified remittance shortages and brought them to Mr. Hennessey's attention. Mr. Hennessey explained to Mr. Young that part of the problem stemmed from pre-existing arrears balances that had accrued before his involvement. According to Mr. Hennessey, this problem was compounded when the CRA applied some of his clients' current remittances to arrears that pre-dated his involvement. Mr. Young explained that this could happen if a current remittance was not correctly designated as payable to the current year, in which case it would be applied to arrears.

[24] Mr. Young attempted to work with Mr. Hennessey to identify these problem accounts. He testified that "every account that [Mr. Hennessey] addressed to me that he thought was wrong or incorrect I addressed it and replied to Mr. Hennessey". These discussions and adjustments are reflected in some of the communications between Mr. Hennessey and Mr. Young particularly in the early part of 2004 (Exhibits D-3, D-4, D-5, D-6, D-7, D-8, D-9, D-10, D-11, D-12 and D-13).

[25] Mr. Young also confirmed that Mr. Hennessey could have protected his business from the problem of pre-existing arrears by simply requesting that the CRA create a new payroll account when he took on a new client. In the absence of such a change, the CRA managed each client account as a continuous obligation and without regard to Mr. Hennessey's intervening involvement.

Amanda Dawe

[26] Ms. Dawe is a former client of Mr. Hennessey. She testified that when Mr. Hennessey took over the management of the home care payroll account for her daughter in 2007 she owed

remittance arrears to the CRA. In a letter prepared on her behalf by Mr. Hennessey dated March 21, 2009 (Exhibit P-2), Ms. Dawe stated that, to the best of her knowledge, Mr. Hennessey paid off the outstanding balance to the CRA. Under cross-examination, however, it was apparent she had no direct knowledge that the arrears had been paid. She assumed that to be the case because she was never approached again by the CRA for payment.

Ed Brown

[27] Mr. Brown had been employed by the CRA for over 25 years. During the last 10 years of his employment he worked as a Rulings Officer. He is now retired.

[28] In 2007 Mr. Brown was asked to prepare a ruling to identify the "employer" of home and respite care workers on one payroll account managed by Mr. Hennessey. This ruling was intended to sort out which of the involved parties was responsible for the payment of payroll remittances. Mr. Brown determined that a payroll provider "performing a payroll service only, is not considered an employer or deemed employer for purposes of EI/CPP Legislation (Exhibit P-4 and the testimony at page 114, Volume 2 of the trial transcript). In the matters under consideration, Mr. Brown found that neither Mr. Hennessey nor Eastern Health "can be considered the deemed employer" (Exhibit P-5).

Robert Fitzpatrick

[29] Mr. Fitzpatrick worked for Mr. Hennessey as an administrative assistant for about 2 years in the 1990s. On a later visit to Mr. Hennessey's office in 2004, he overheard a telephone conversation between Mr. Hennessey and a Mr. Moffatt of the CRA. Mr. Fitzpatrick testified that

Mr. Moffatt threatened to seize Mr. Hennessey's assets unless outstanding client payroll remittances were brought up to date. Mr. Fitzpatrick also said he overheard similar speaker phone conversations during other visits to Mr. Hennessey's office and was present on one occasion when two CRA auditors arrived. He described their "tone" on that occasion as aggressive. Mr. Moffatt is now deceased.

William Collins

[30] Mr. Collins is a chartered accountant. He took over one client payroll account from Mr. Hennessey. He also worked briefly as a payroll provider on a few other home care accounts. He prudently gave up the work out of frustration with funding delays by Eastern Health and the corresponding need to cover the payroll in the interim from his own resources.

Susan Norman

[31] Ms. Norman is a lawyer practising with the Stewart McKelvey firm in St. John's. In early 2007 she represented Eastern Health in its dealings with the CRA concerning the problem of outstanding source deductions on home care payroll accounts. In that capacity she wrote to the CRA to counter its suggestion that Eastern Health carried some legal responsibility for the accrued arrears (Exhibit P-7). Despite taking the position that neither Eastern Health nor Mr. Hennessey carried any liability, Ms. Norman's letter contained a without prejudice offer of settlement of $100,000.00. The offer was conditional on the clearance by the CRA of "all pre-2007 arrears, penalties and interest owing on the various client accounts". The offer was subsequently rejected by the CRA and no resolution was ever achieved.

George Butt

[32] Mr. Butt is a chartered accountant who has worked for the Province of Newfoundland for many years. Since 1990 he has been employed in a number of senior administrative positions in the health care field. At the time of his testimony he was the Vice President of Corporate Services for Eastern Health reporting to its Chief Executive Officer.

[33] Mr. Butt explained that Eastern Health was created in 2005 from the consolidation of seven legacy health boards in eastern Newfoundland.

[34] Mr. Butt first learned about the problem of outstanding remittances on home care payroll accounts in 2006. The problem came to his attention when he was contacted by a CRA representative who was looking for payment. Mr. Butt looked into the matter and concluded that the situation had "spiralled pretty well out of control" and that there was some merit to Mr. Hennessey's concern about his assumption of unfunded liabilities. Later Mr. Butt described the situation as a "mess" (see page 86, Volume 3 of the trial transcript).

[35] The situation as perceived by Mr. Butt at the time is summarized in his letter of November 7, 2006 (Exhibit P-8) to the Assistant Deputy Minister for the Department of Health and Community Services:

> Administrative Services is an accounting/bookkeeping service used by Eastern Health to facilitate payroll services for employees of clients in receipt of home support services. Administrative Services has been providing, this service to clients for approximately 18 years, back to the period when Human Resources and Employment administered the home support program. Throughout this period Administrative Services has been responsible for the payroll accounts of approximately 540 clients and caregivers.

As you are aware, Eastern Health has been brought into the middle of a dispute between Canada Revenue Agency (CRA) and Administrative Services regarding outstanding payroll remittances. CRA prepared two reports listing the outstanding balances for client accounts administered by Administrative Services. The first report presented on January 09, 2006 listed the total amount due as $442,300 on 132 accounts. A second report presented on January 20, 2006 listed the total amount due as $463,400 on 134 accounts. Both amounts include penalties, interest, and principal (tax, CPP, El). CRA is demanding that Eastern Health settle the debt or they will take action against Eastern Health and the clients directly.

Administrative Services claims that this situation is the "snowballing" effect of having assumed at Eastern Health's request, 50 accounts with delinquent balances totalling $175,900 ($44,800 in P&I and $131,100 in principal). Administrative Services also attributes the outstanding arrears to the fact that there were delays in receiving funding from the former Health and Community Services Board and before that the Department of Human Resources and Employment. Administrative services paid interest and penalties on these accounts, which they claim to be in the area of $800,000 to $1 million from their regular cash flow, resulting in current accounts slipping into arrears. Administrative Services indicate that they have made Eastern Health (then HCCSJ) and government aware of the problems that they have experienced, although they provide little in the way of documentation.

On becoming aware of this, our first concern was that money intended for payment of the cost of client services may have been misappropriated. We engaged the firm of Grant Thornton to do a review of the situation and they found no evidence of wrongdoing on the part of Administrative Services, and confirmed their portrayal of the problem as the "snowballing" effect of paying from their current cash flow, penalties, interest and arrears on inherited delinquent accounts.

We also asked the law firm of Stewart, McKelvey, Stirling Scales to review our exposure in this situation and their opinion is attached. They outline a number of options that we feel require the concurrence of government, involving both the Department of Health and Community Services and the Department of Finance.

It would be very helpful if you could arrange a meeting between you, ourselves, and who ever in government you feel should be involved. This situation is worsening and needs a response.

[36] It was presumably out of the meeting proposed by Mr. Butt that Eastern Health authorized its legal counsel to propose a $100,000.00 settlement of the CRA claim. That offer was not taken up because, as Mr. Butt recalled it, the CRA ultimately concluded that Eastern Health bore no liability for the client remittance arrears.

[37] Mr. Butt went on to say that the reference in his letter to $800,000.00 to $1 million of accrued penalties and interest assumed by Mr. Hennessey came anecdotally from Administrative Services and was not verified by the Province. When he was asked if Eastern Health had attempted to quantify the amounts that Mr. Hennessey was claiming, he said "it was virtually impossible to do" (see page 63, Volume 3 of the trial transcript). The most Mr. Butt was able to do was to describe the genesis of the problem as follows:

> A. As I understood it, the previous model for this program, and again this was before my time, was that the care recipients themselves were responsible for paying their own employees and doing their own remittances, and I think for some care recipients that became a problem, and the remittances weren't being made. I think initially back maybe in the 90s when the decision was made to move these accounts from the clients to payroll services like Administrative Services, some of these accounts when they were transferred had amounts owing on them that weren't funded to Mr. Hennessey's firm. In other words, he was passed a bunch of accounts to manage that were already in arrears.
>
> Q. Okay.
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> A. And as I understand it–the number that I recall hearing, and I can't recall why–I can't verify it, was, like, $60,000.00 of these amounts were–of these accounts–cumulative balance of these accounts that weren't properly funded or had fallen into arrears in the hands of the clients themselves were, in fact, transferred to Administrative Services, and this was sort of

> the seed of all these problems, in that it wasn't addressed and then in efforts to meet obligations on one account, the amounts were transferred from another, and attracting penalty and interest to that one, and these penalties, as I understand it, were 10 percent every time you're late, so it doesn't take long to see how this would go in a hurry. So that's what I understood to be sort of the genesis of this whole situation.

[38] Mr. Butt also testified that the $100,000.00 settlement offer proposed by Eastern Health to the CRA was based on Mr. Hennessey's likely assumption of about $60,000.00 in pre-existing arrears along with $40,000.00 in accumulated interest and penalties to that date.

[39] Under cross-examination Mr. Butt confirmed that Eastern Health had failed to impose any financial conditions on the payroll providers and had no means to know if payroll remittances were actually being made. He also said that Eastern Health had an expectation, albeit undocumented, that its payroll providers would cover unfunded home care payrolls from their own resources on a short term basis. At the same time Mr. Butt said that it would not have been the responsibility of Eastern Health to reimburse the clients or the payroll providers for interest and penalties that arose from any delay in funding.

[40] Notwithstanding the expectation that Mr. Hennessey would meet home care payrolls that were awaiting formal approval from his own resources, Mr. Butt took the seemingly contradictory position that Mr. Hennessey could not reimburse his business for those advances. This view is apparent in the following exchange:

> Q. And there's an expectation, as you've said earlier, that payroll service providers remit funds to the worker, the funds, and to the Canada Revenue Agency?

A. Right.

Q. But if he instead of remitting funds to Canada Revenue Agency used those funds to pay his personal debt, you would have no problem with that?

A. Oh, absolutely, I would have a problem with that, yes.

Q. All right, so he was - according to Eastern Health, he was not supposed to be doing that?

A. Our expectation would be that the money that we gave Mr. Hennessey for remittance to Revenue Canada would be remitted to Revenue Canada.

Gerald Power

[41] Mr. Power is a past employee of the Department of Health and Community Services. He retired in about 2005. His responsibilities included the supervision of the provincial home care program in the St. John's region. He described the program in some detail along with the process for obtaining approvals for home care service. He said that many "situations were very fluid, requiring very immediate high intensity kinds of services" that could change from time to time.

[42] Mr. Power was aware of Administrative Services and knew it to be the largest payroll provider in the St. John's area. He also acknowledged the delays that were experienced in getting some payroll cheques out on a timely basis. He explained the problem in the following exchange:

A. Clients would call and say I've got a situation, I don't seem to have the funding in place or whatever, so, yes, there were disruptions and there were delays, no question.

Q. And would these delays be more of a recurring thing or an anomaly?

> A. Keep in mind, I'm trying to be fair here now. Most times we were–I mean, 96 percent of the time we had it perfect.
>
> Q. Okay.
>
> A. There were situations that were for various reasons like I describe where, no, it did not happen and delays were - sometimes they were weeks on end, and it could be a situation where, like I said, a social worker was trying to gather up more information or an FAO was trying to gather up more information. Sometimes simply because of the workload, simply because of sick leave, a lot of things intervened to cause the delays.

[43] Mr. Power testified that in the case of Mr. Hennessey's clients, payroll arrears were often in the tens of thousands of dollars and, at times, exceeded $100,000.00. Nevertheless, Mr. Hennessey knew "that various cheques would show up in due course to be applied to various client situations" and with that expectation, Mr. Hennessey covered the payroll. Mr. Power also testified that other payroll providers "took the approach that if you guys don't have the money to me, I'm not paying anything out, I'm not putting one cent of my money into it, you deal with the client, you deal with the caregiver." According to Mr. Power it was Mr. Hennessey who made "some decisions along the way that he would put his money into it." Under cross-examination he conceded that he was uncertain about whether Mr. Hennessey was personally covering unfunded payroll accounts or did so from lump sum payroll advances made by Eastern Health.

Gerard Ennis

[44] Mr. Ennis is now retired from the CRA. For about 6 years before retiring in 2011 he was employed as a Collections Officer. Prior to that he worked for a number of years as a Source Deductions Auditor.

[45] Mr. Ennis first met Mr. Hennessey in early 2006. After that they had frequent contact. Mr. Ennis' sole responsibility at that point was working on Mr. Hennessey's outstanding accounts. He said that the initial meeting was introductory and intended to inform Mr. Hennessey that he had been assigned to manage Mr. Hennessey's home care payroll accounts. Mr. Ennis told Mr. Hennessey that they would work together to attempt to bring some resolution to the problem of remittance arrears: specifically, "to identify Mr. Hennessey's accounts, to work with him to clear up any balances that existed and to even adjust for balances that may not be accurate, that we could confirm."

[46] Mr. Ennis was made aware of the concern that Mr. Hennessey had taken over client accounts with pre-existing balances and that some current remittances had been applied by the CRA to those arrears. He said that after he began to examine the accounts he was, with the assistance of Mr. Hennessey, able to identify some accounts with pre-existing arrears.

[47] Mr. Ennis testified that between January 2006 and July 2007 he devoted all of his time to reviewing Mr. Hennessey's payroll accounts and making adjustments to arrears balances. The culmination of his work is reflected in Exhibit P-14.

[48] Mr. Ennis made the point that the CRA had no means of knowing if Mr. Hennessey had made a payment on a client account from his own resources. The working assumption by the CRA was always that the funds came from the client and account credits accrued to the benefit of the client. Arrears were also collected "specifically on that particular account" (page 132, Volume 4 of the trial transcript).

[49] Part of Mr. Ennis' work involved the identification of client accounts that had come to Mr. Hennessey with pre-existing arrears or where arrears had arisen after his involvement had ceased. In an email dated March 15, 2007, Mr. Ennis identified 10 such accounts with a total credit balance of $138,547.15 (Exhibit P-15). Whether and to what extent Mr. Hennessey had made payments against those amounts was not clearly established. Mr. Ennis did say, however, that absent advice from Mr. Hennessey, the CRA had no definitive way to determine when he actually took over the administration of a particular client account.

[50] Under cross-examination Mr. Ennis identified a communication from Mr. Hennessey dated July 23, 2007 where he acknowledged payroll remittance arrears for the 2006 calendar year in the amount of $615,188.46 (Exhibit D-14). According to Mr. Hennessey's own calculations, in 2006 he ought to have remitted $1,038,404.65 but paid only $423,216.19. For the first 6 months of 2007, Mr. Hennessey admitted a further shortfall of $188,003.70.

Mary Benson

[51] Ms. Benson retired from the CRA in 2012 having worked there for over 20 years in a number of capacities. Her testimony was focused mainly on her involvement with Mr. Hennessey's

Access to Information (ATIP) requests. She described the process of handling such matters and said that they were initiated and concluded within the CRA's ATIP directorate in Ottawa. The local office was responsible for collecting and forwarding all relevant materials to Ottawa, sometimes with recommendations concerning redactions. Nevertheless, it was the role of the ATIP directorate to determine what could be lawfully disclosed or withheld and to make all necessary redactions:

> A. The people at the ATIP directorate would make the decision as to whether or not the information is released. They do not come back and say whether or not they agree with us or don't agree with us. We just make the recommendation and they make the decision as to what gets sent out to the client. We don't get to decide that.
>
> [Also see page 30, Volume 5 of the trial transcript]

[52] Ms. Benson was asked about the handling of Mr. Hennessey's ATIP requests and confirmed that she followed the usual process. She also knew that Mr. Hennessey was not satisfied with the level of disclosure that was initially provided. This is evident from the following exchange:

> A. I don't remember all the details. I know that there were several requests received from Mr. Hennessey, and I know that the division was searched more than once for information to try and see if there was anything that was there that we hadn't sent to him. I never did understand what was missing so I couldn't go to a specific division and say, "Mr. Hennessey is looking for something from your division." I just know that—and unless I got another request, that would not be my responsibility.
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> Q. Are you aware that Mr. Hennessey was complaining not only that he didn't get all the documents, that the documents were altered, the ones that he got, and they were blocked out and redacted? Were you aware of that, and I'm talking about -
>
> A. The first thing I ever heard about any information being altered was this morning, here today.

[53] After 2009 Ms. Benson was no longer involved with the matter and had no knowledge of what transpired thereafter.

Glenda Bartlett

[54] Ms. Bartlett worked for the CRA for 28 years. She retired in 2008. At the time of her dealings with Mr. Hennessey she was a team leader in collections. In early 2006 provincial officials asked the CRA to calculate penalties and interest on all of the client accounts from the dates Mr. Hennessey took them over (Exhibit P-19). Ms. Bartlett was of the view that this task would take months to accomplish. An agreement was reached with the Province that this information would be provided for 20 sample accounts that had previously been examined by the CRA. Ms. Bartlett was questioned about Exhibit P-19 and gave the following evidence:

> Q. And it says, "As of today's date, we have provided Gary Hennessey with additional information that Health and Community Services requested. Both parties have been advised that we have been very co-operative and that we can no long dedicate resources to this issue." What do you mean by that?
>
> A. What I mean by that is there were so many accounts that Gary Hennessey was involved with Administrative Services that it would have taken full-time resources several months to determine the information that the province was looking for. Gary Hennessey himself would have had a great deal of this information, or should have had, in his own bookkeeping. We did dedicate the resources to do these 20 as a sample, but the function of CRA is not, really, to provide this information so we did not have the resources available in our budget to be able to do that for them.
>
> Q. As far as you know, is there any legislative right as a–for a taxpayer to come to you and say, "I want this information." Do you have to provide that information, whether it takes a day or 10 days or–

A. If he had asked for it, I'm not sure what the procedure would've been, if Gary himself had come and asked for those specific accounts, but he would've had to have been very specific. Like, he would have to come and say, "I want the information for this particular account."

Q. Okay. In this case, Mr. Grandy has talked to you and said, "Give me a breakdown of the penalty and interests," and then from that you've generated 20 accounts.

A. Yes.

Q. But to get all the accounts of payroll services, you didn't have the resources to do that.

A. That's correct, yes.

Q. And you didn't feel that it was an obligation of the CRA to provide that.

A. Sorry?

Q. You didn't feel that there was an obligation on CRA to provide the full accounting of the penalties and interest.

A. Not under those circumstances, no.

[55] Ms. Bartlett went on to observe that Mr. Hennessey's own accounting records ought to have been sufficient to identify the arrears that had accrued on the payroll accounts he administered. The information would also have come to him in the CRA's periodic requests for payment on every account in arrears. She also said that Mr. Hennessey was looking to Eastern Health for reimbursement for remittance arrears. Accordingly, it was not the responsibility of the CRA to gratuitously provide him with additional evidence to support his claim.

[56] One of Mr. Hennessey's assertions was that the CRA had a responsibility to directly reimburse him for current remittances that the CRA had applied to pre-existing client arrears. Ms. Bartlett did not agree as can be seen from the following testimony:

> A. If that indeed had happened, if we received a payment for an account that was not from Gary or an account that was not his responsibility, then, yes, that would've been credited back to the account that it was intended to go to. It would not have been refunded back to Gary in that particular case. Like, if I go in to make a payment on my individual return and it ends up on your account by mistake and I go in and say, "Where's my; I paid it; where is it," they locate the payment and it went into your account, they won't refund it to me. That goes onto my account, so it doesn't come directly back to me as a cheque. It would go to the correct account.
>
> Q. Why wouldn't it come back directly to me?
>
> A. Because it was meant for a payment on an account somewhere, so in order to correct it they would move the payment to where it should've gone in the first place.
>
> Q. But if Mr. Hennessey is saying, "But hold now, that payment that I made included all this money. I paid it and now you're going to credit that account, but I want my money, like, I can decide where that–let's say it's a thousand dollars, okay?
>
> A. Right.
>
> Q. Robert Anstey owes a thousand dollars. Robert Anstey doesn't pay that thousand dollars.
>
> A. Yes.
>
> Q. Gary Hennessey, in order to clear that account, pays Robert Anstey's bill of a thousand dollars. For whatever reason, he does, okay? So he pays that thousand dollars. Shouldn't Gary Hennessey get that refund of that thousand dollars?
>
> A. Gary Hennessey would have to go back to Mr. Anstey then to get that money.. That would not be the responsibility of CRA.

[Also see page 120, Volume 5 of the trial transcript]

Ms. Bartlett also pointed out that Mr. Hennessey could have directed that payments made on behalf of any client be applied against the current year and not against previous arrears.

[57] Ms. Bartlett gave essentially the same answers in response to the suggestion that Mr. Hennessey had a personal claim to a client tax refund to reimburse himself for monies he had previously advanced (see pages 114-115, Volume 5 of the trial transcript). Ms. Bartlett said that was a problem Mr. Hennessey had to resolve with his clients and not with the CRA.

[58] Ms. Bartlett was also questioned about a CRA memorandum dated December 22, 2004 from Dale Moffatt (Exhibit P-21). That memo referred to an arrears problem in the payroll account of Administrative Services where a demand had been placed against the business bank account and to the problem of client payroll arrears. In referring to the latter issue, Mr. Moffatt stated:

> Mr. Hennessey said that he still hopes to present a case to the province for them to pay him for all the penalties and interest incurred because of their late payments to him. Mr. Moffatt asked Mr. Hennessey if he could get authorizations signed by his clients to allow CRA to discuss their accounts with the Health and Community Services Board. When he asked how that would help his case, Mr. Moffatt explained that if we could discuss specific accounts and potential collection action to resolve the accounts, the Health and Community Services Board might look at the accounts. If they felt their history of making late payments to Administrative Services contributed to the problem they might do something on behalf of the clients.
>
> There were no comments to the effect that CRA would seize assets, or threaten to seize assets, of Gary Hennessey. The balances on the accounts are not legally collectable from Mr. Hennessey or Administrative Services. Administrative Services may be under

> remitting but the balances are those of the clients for which he administers payroll accounts.

Ms. Bartlett agreed that the above represented the position of the CRA at that point in time.

[59] Ms. Bartlett was asked if she had redacted any documents she had delivered in response to Mr. Hennessey's ATIP request and she answered "absolutely not". When asked if the CRA would have disclosed the amounts in arrears on client accounts Mr. Hennessey was taking over, she said that information would have been given to him if supported by a client authorization.

David Taylor

[60] Mr. Taylor is a long-term CRA employee who, in 2005, was the team leader of the trust examination unit. It was in that capacity that he was briefly involved with the problem of Mr. Hennessey's client remittance arrears.

[61] In a meeting with Mr. Taylor in early September 2005, Mr. Hennessey explained the problem he was having with delayed payroll funding from Eastern Health. Mr. Taylor described the situation in the following way:

> A. At the time he probably had about 300-and-some-odd active accounts.
>
> Q. Right.
>
> A. And so with that what was happening is money would come in. Some of these employees were coming in demanding for money. He would pay them, but meanwhile he didn't have the money from Eastern Health to pay them.
>
> Q. And did he tell you—right, so did he -

A. So he was taking the money that more than likely was meant for another account.

Q. Right, okay, and did he explain at that time that he was taking any of his own personal money to pay for these people or did it just –

A. I can't say with one hundred percent certainty if it was his personal money. It—he made a statement along the lines of, you know, money was coming in for other respite accounts. That money wasn't, necessarily, coming into Canada Revenue Agency on those particular accounts. Money was in his bank account, so if people had to be paid he was paying the people, but then it meant shortchanging the account where the money should've went in.

Q. So it's –

A. He—oh –

Q. Sorry, go ahead.

A. He also indicated there is often times he would have to take money off his credit card to pay for whatever expenses –

Q. So I think the common expression is to take from Peter to pay Paul. Is that what he was –

A. Actually, I believe during that conversation that's kind of what came out.

Q. Right, so he realized that he should be paying it; but if he didn't have the money to pay it, either (a) he got—took it from another account, or (b) he took it from his own credit cards or line of credits, or whatever he did, to make sure that those people were paid, but then you had a compounding problem with the people that were coming afterwards. They were going to be looking for their money, is that right?

A. Well, you had other people coming. They'd be looking for their money, but here's the other piece that even exasperated that. Then you had Canada Revenue Agency coming looking for their money.

Q. And did—yes, okay. I don't mean to laugh at—I'm not laughing at you. I'm just –

A. No, no, and I don't see it that way. You know, quite honestly, when we were there I really felt for Mr. Hennessey because here he was—these people needed money. He was there to give them money. They performed the job of taking care of a person who needed that help, and he was there paying these people.

[62] Mr. Hennessey also told Mr. Taylor about arrears balances that he inherited from some of his new clients. According to Mr. Taylor this problem was dealt with by Mr. Hennessey in a similar way – that is, by trying to deal with the arrears by applying current payroll funding:

A. It's not as—if I could put it this way, it's not straightforward. It's going out. Mr. Hennessey provides us with information. We raised assessments based on that information. That, to me, is pretty straightforward, simple. This now became complicated because you had a situation of Mr. Hennessey inheriting accounts that had previous balances.

Q. Okay.

A. And then I suppose in turn you had Mr. Hennessey—Mr. Hennessey was kind of adding to the problem because now you have a balance outstanding. "I've just inherited that. I have a person that's calling. Now I got to pay on this." You're taking money from here that was meant for this, so this account now is being assessed. You're having penalties and interest on this account, whereas the money was probably there for this account, and if it had to come in there would no penalties and interest charge.

Q. Right, so if I got this right again—that if you didn't have the problems with the delays and you didn't have the problems with the arrears—so when Eastern Health paid my 15 dollars—let's suppose that I'm Administrative Services.

A. Yeah.

Q. Then I would have that money to pay the current payroll remittances. Now, whether I did that or not—but that's a

> court decision that the court has got to decide, but at least I'm going to have the money to pay that payroll remittance.
>
> A. Mr. Anstey, what you're saying, yes, that is correct.

Also see page 88, Volume 6 of the trial transcript.

[63] Although Mr. Taylor expressed considerable sympathy for Mr. Hennessey's situation, he said that "Mr. Hennessey has to take some responsibility here too to go back to Community Health and say 'There's a balance on this. This got to be cleared up. I can't take this over.'" He also told Mr. Hennessey that the problem of delayed funding was a business issue and not CRA's problem (see page 52, Volume 6 of the trial transcript).

[64] Because of Mr. Hennessey's concerns, trust examinations on his accounts were carried out from which it was determined that about $525,000.00 in total was owing on the client accounts. With information provided by Mr. Hennessey, the CRA attempted to determine the amounts of arrears that were inherited and paid by Mr. Hennessey on new client accounts. Mr. Taylor said that this was not an easy exercise because Mr. Hennessey had, in some cases, paid off arrears balances by allocating current funding:

> A. No, I don't recall him looking for a breakdown. I do recall him saying, like, "You know, I inherited a lot of this," and I had said that, "Yes, but we're still working on that part with regards to breaking it down."
>
> Q. Okay.
>
> A. And what I mean by "breaking it down" is trying to determine when Mr. Hennessey took it over.
>
> Q. Okay.

> A. But it's not as easy as that of when he took it over because what you had then is Mr.—money came in from Eastern Health and went in to Mr. Hennessey.
>
> Q. Okay.
>
> A. Mr. Hennessey then paid—because what was happening, he had—there were collectors from Canada Revenue Agency contacting Mr. Hennessey, so then, actually, Mr. Hennessey, he did not want the collector to issue a requirement to pay and he didn't want a situation where the collector was going to the person whose name was on the account.
>
> Q. Okay.
>
> A. So Mr. Hennessey would end up paying.
>
> [Also see page 235, Volume 5 of the trial transcript]

[65] On October 21, 2005, Mr. Hennessey advised Mr. Taylor that he lacked the means to pay the outstanding remittances on his clients' accounts. Mr. Hennessey said that he was seeking a meeting with the Premier to discuss financial assistance. Mr. Taylor met with Eastern Health in late October to advise them that the CRA intended to take collection action against the clients to recover what was owed and to stress that the Province had some responsibility for the problems of funding delays and inherited arrears. At that point Mr. Taylor had an expectation that Eastern Health would consider a financial contribution (see page 56, Volume 6 of the trial transcript).

[66] Mr. Taylor also came to the conclusion that Mr. Hennessey had to isolate the problem of past arrears and keep current on his accounts going forward. In particular, he wanted to end Mr. Hennessey's practice of "robbing Peter to pay Paul" (see page 8, Volume 6 of trial transcript). The agreed solution was to consolidate all of Mr. Hennessey's accounts into a single payroll

account to be monitored by one CRA employee. Mr. Taylor described the understanding as follows:

> ...Mr. Hennessey said to me, look, you know, I'd like to be able to get to a fresh start here. You know, how can I get to a fresh start? I said to him, well, you can get to a fresh start. Maybe what you should do is open up an account and put the remittances into this one account. If you pay your current-year remittances, okay, and keep them up to date, when you file the T4s at the end of February of the following year, then it should just balance out, and we still have the three hundred and some odd accounts that we still need to work on, because at that stage we still needed to break down the balances. Like determine--again, Mr. Hennessey had taken them over at certain dates, determine those balances, but also you had a situation where Mr. Hennessey had decided which accounts to be paid because that was based on--if he got a call from Canada Revenue Agency, okay, that they were looking for a payment, well then Mr. Hennessey was paying on that account, because Mr. Hennessey, he did not want us to be contacting the name on the account and I could only assume from that, he didn't want us to contact because in some of these situations here, Eastern Health did pay on time but now these accounts had penalties and interest because Mr. Hennessey used that money to pay on other accounts. So it was really a snowball effect. It was going to take more than a couple of--quite honestly, when I first started this, I thought okay, let's go out, assess the balances, look for payment, that's it. No, this was going to take a lot more effort, more resources on Canada Revenue's side because you had to break these things down and you know. So I guess that in November, we still were working on that part.

This arrangement was implemented on January 1, 2006. Mr. Hennessey undertook to keep his current remittances up-to-date and he agreed not to cover any further unfunded payroll (see pages 95-96, Volume 6 of the trial transcript).

[67] Mr. Taylor also identified his email dated December 19, 2005 (Exhibit P-22) where he provided an estimate of $100,000.00 to $150,000.00 in pre-existing arrears on accounts Mr. Hennessey had inherited and paid. Mr. Taylor suggested a possible resolution based on

payments of $150,000.00 from Eastern Health and $200,000.00 from Mr. Hennessey with the balance to be forgiven by the CRA.

[68] Under cross-examination Mr. Taylor agreed that Mr. Hennessey would have been aware if an account carried an arrears balance from CRA statements subsequently sent to him. Mr. Taylor also confirmed that in 2005 Mr. Hennessey's Administrative Services payroll account carried arrears of about $45,000.00.

Wade Hiscock

[69] Mr. Hiscock is a Certified General Accountant. He currently holds the position of Director of the Newfoundland and Labrador Tax Services Office. He has worked for the CRA for more than 32 years. His first involvement with Mr. Hennessey came in 2003 when he was the Assistant Director of Revenue Collections in St. John's.

[70] Mr. Hiscock described a host of payroll remittance problems that had arisen in the provincial home care program over several years including that of delayed payroll funding. Mr. Hiscock was sufficiently concerned with Mr. Hennessey's practices that in 2005 he assigned Mr. Taylor to delve into his accounts. At the same time, Mr. Hiscock was mindful of the need to ensure the continuity of home care service to disabled clients.

[71] Mr. Hiscock was involved with the decision to reject the settlement offer of $100,000.00 from Eastern Health. He said that the CRA had no legal authority to compromise a debt owing and for that reason the offer was refused. Although the income tax fairness provisions could be

employed to reduce accrued interest and penalties, that relief was not available as a bulk measure; it had to be based on the individual circumstances of each home care client (page 192, Volume 6 of the trial transcript). It was Mr. Hennessey's decision not to follow up with his clients to pursue fairness relief (page 193, Volume 6 of the trial transcripts).

[72] Like the other CRA witnesses, Mr. Hiscock refused to accept the premise that Mr. Hennessey had somehow taken ownership of the clients' accounts and was thereby entitled to act independently and in his own financial interest. According to Mr. Hiscock, the payroll accounts were those of the individual clients and were throughout managed on that basis by the CRA (pages 195-196, Volume 6, of the trial transcript). The point was made by Mr. Hiscock (page 2 of Volume 7 of the trial transcript) that the CRA was simply looking for payment of the amounts owed:

> A. I'm not sure of this forgiving thing. I mean, there was an amount of money owing. We recognize that at times in the past, Mr. Hennessey probably used his own money to pay. I don't know what arrangements he had with the account holders or the clients. You know, we recognized it but we were interested in getting the appropriate amount of tax bill cleared and the money that was put on the table was just not enough to clear the bill.

[73] Mr. Hiscock described the CRA's efforts to collect client remittance arrears before its final garnishee as "soft collection calls" to Mr. Hennessey. Because of CRA concerns about the reliability of some of its pre-2006 arrears assessments, no attempts were made to seize client assets beyond freezing some income tax and GST refunds. Mr. Hiscock explained the motivation and the process followed for the interception of 30% of the payroll funding from Eastern Health in early August 2007:

A. CRA headquarters in a technical capacity. We have technical advisors up there. And we were getting ready to - well, we had issued a requirement to Eastern Health to pay to us funds that amounted to what we felt was source deductions due for that period on the monies they were giving Mr. Hennessey. What we were trying to do was, it had became evident that even though on January 1st, 2006, we had set the balance at zero, there were still large amounts of source deductions not being paid, so we had issued a Requirement to Pay to Eastern Health that said from here on forward, let Mr. Hennessey keep the net amount that he needs to pay the employees, let him keep his administrative fee for doing it, but submit or remit to us directly the CPP and EI and income tax that were deducted from source, as well as employer portion of the CPP and EI, and we had issued that requirement to them in good faith. They had come back and had said to us that we can't do what you ask because where we're paying Mr. Hennessey in advance, we don't know specifically what the net cheques would be, so we can't comply; we'd only be guessing. So we met again. We met and discussed that fact and at that point in time we issued a garnishee or a Requirement to Pay that was at 30 percent. We had discussions, which was your question, on the 30 percent, and what we were doing was trying to come up with a figure that would have given us the same thing that Mr. Hennessey would have been able to pay all the salary for respite workers, would have been able to keep his administrative fee, but the source deductions would have come to us directly. The tax rates in Newfoundland at the time ranged from 17 to 43, so we wanted to be somewhere in that range, maybe a little bit on the lower side considering that in addition to the tax rate, we had to put in a percentage or two for unemployment insurance deducted and employer share and a percentage or two for Canada Pension deducted and the employer share. So we came up with 30 percent as being a realistic figure that would include income tax, CPP, and EI, as well as CPP and EI employer share, issued the garnishee, and at the same time we issued it, we had a discussion with Eastern Health that said, let's try this for a month. If we're not taking enough money to cover the current, we will adjust, and if we're taking too much money, we will adjust. The intent was to just get the source deductions that were due at that particular point in time and we would deal with the balances owing some other way.

> Q. And on that issue, was the headquarter's determination that in fact that they wanted a garnishment of 100 percent?
>
> A. No. My understanding is headquarters were in line with what we were suggesting. It was a reasonable amount.
>
> …
>
> A. …What we were trying to do, and this was our decision, even though Mr. Albertini was giving advice, it was certainly a local decision, what we were trying to was to just keep Mr. Hennessey current without, without putting him out of business. We didn't want the payroll, we didn't want the employees not to get paid and we wanted Mr. Hennessey to keep his administrative fee so he could keep doing the payroll, but yet the bleeding would stop, the source deductions would come in on time and finally we would be able to say, okay, now we got an arrears balance versus an arrears balance plus a current balance that was continuing to grow.

The garnishee was implemented with a Requirement to Pay issued to Eastern Health on August 8, 2007 (Exhibit D-18). Mr. Hennessey closed Administrative Services shortly thereafter. It was only at that point that the CRA issued Requirements to Pay on Mr. Hennessey's bank (page 166, Volume 7 of the trial transcript).

[74] When asked if the CRA could have handled the situation with Mr. Hennessey differently, Mr. Hiscock testified that it had been fully accommodating:

> A. In my opinion, we went beyond what we had normally done in the past. I mean, we had met with the province up front to try to get payments made in advance, which was something I had never done before. We had frozen the accounts up to December 31st, 2005, recognizing there were problems and say let's start new in January 2006, which I had never seen done before, and we had put many many hours into generating statements of account, working with Mr. Hennessey to try to come up with what actually had

> happened and what were the true amounts owing, so I don't know what else we could have done. We had asked for - we had advised Mr. Hennessey we couldn't accept a bulk fairness. He didn't want us to contact the individuals individually to talk about the fairness, he was the representative on the account, and we had made that offer and he didn't want us to go down that road. So I'm not sure what else we could have done to -

Aubrey Pope

[75] Mr. Pope is the Assistant Director of Revenue Collections and Client Services for the CRA in St. John's. He has been employed with the CRA for 31 years.

[76] Mr. Pope's first involvement with Mr. Hennessey came in 2006 in his capacity as a team leader in the revenue collections unit.

[77] Under direct examination by Mr. Anstey it was suggested to Mr. Pope that the remittance problems encountered by Mr. Hennessey arose from circumstances beyond his control. Mr. Pope disagreed. He said that the payroll accounts in question were all in the names of Mr. Hennessey's clients and the CRA took no collection action against Mr. Hennessey personally (pages 90-91, Volume 7 of the trial transcript). He made the same point at pages 92-93:

> Q. So my question is, do you believe at this time or subsequent time that these were matters beyond Mr. Hennessey's control, these two issues?
>
> A. No, I don't, my lord.
>
> Q. Can you explain why not?
>
> A. Because the amounts in question, we were working directly with Mr. Hennessey, first of all, trying to determine the liabilities. You questioned me earlier with regard to the

> employer issue and the individual accounts. What we were attempting to do was to clearly segregate any amounts that would not certainly be the responsibility of Mr. Hennessey, but to confuse matters, what was happening was there were remittances being made, and if I could refer to a piece of correspondence going back to May of 2004 by then Assistant Deputy Commissioner Barbara Slater of our organization, responding to ministerial correspondence that came in, in my opinion it clearly identified that there were several factors that had to be considered when we looked at this particular file and the circumstances surrounding them. There was no question, based on this particular email you refer to here and subsequent emails that I was party to personally, that there were some issues with regards to arrears amounts having been in place before Mr. Hennessey took over responsibility for the current remittances, but that was further complicated by the reference I made to the intercepts where I know for a fact we found cases where Mr. Hennessey had come in and paid arrears balances. Whether he was responsible for them or not, I couldn't say, but he paid arrears balances so that the individual intercepts on the personal income tax refunds would be paid out, but it wasn't a circumstance beyond his control. This was, in my opinion, an issue that he took upon himself. We didn't enforce Mr. Hennessey in any way to come in and pay these arrears. So my response is in relation to my understanding of the events that took place with regard to those arrears amounts.

[78] Mr. Pope also pointed out that the CRA's sole responsibility lay in the timely collection of payroll remittances. It had no authority to ignore a default because of the irregularity or frailty of the business practices employed by Mr. Hennessey or by Eastern Health. He also confirmed that the CRA viewed Mr. Hennessey as an agent for his clients. It looked to collect any outstanding remittances from the clients and not directly from Mr. Hennessey (page 102, Volume 7 of the trial transcript). This was consistent with Mr. Brown's ruling that neither Eastern Health nor Mr. Hennessey could be considered to be the employer of home care workers. Mr. Pope did express the view that Mr. Hennessey likely did attract personal liability for the arrears on any

payroll account over which he purported to exercise some discretion (page 127, Volume 7 of the trial transcript).

[79] When asked about the CRA's unwillingness to pursue a compromise settlement with Mr. Hennessey and Eastern Health, Mr. Pope confirmed that there was no statutory authority available to the CRA to excuse a remittance debt (page 142, Volume 7 of the trial transcript).

[80] Mr. Pope said that Mr. Hennessey's calculation of the remittance arrears incurred after January 1, 2006 corresponded quite closely with the CRA's trust examination findings. It was because of the significant and acknowledged shortfall that Mr. Pope decided to issue a Requirement to Pay to Eastern Health. His testimony explains the rationale for that decision:

> A. And hence the Requirement to Pay was issued. As a matter of fact, the Requirement to Pay was not going to in any way deal with the arrears amounts. Our concern was because of the significant amounts that Mr. Hennessey had acknowledged in his piece of correspondence, even before the payroll review was done, here's the amounts I've under-remitted, we felt that to allow the payroll deductions amounts to continue to flow into Mr. Hennessey's bank account was certainly not going to give us any comfort level that those funds were going to be remitted because for a period of 15, 16 months, there was significant under-remittance taking place, so the decision that I made was to issue the Requirement to try and intercept all of the payroll deductions but excluding the net payroll to the employees and Mr. Hennessey's fee or commission, whatever it was called, and again the concern there was strictly to make sure that we could stop the escalation of this arrears amount for payroll deductions, but at the same time recognizing that there's innocent parties here, number one, the individuals receiving the respite care, who were certainly disadvantaged in many cases both financially and physically and mentally, and also the workers providing the care, we wanted to make sure that they would get their pay cheques. So the decision was made and I authorized the issuance of the Requirement to Pay. The

> wording on the Requirement, I don't have it specifically but it referred to intercepting all funds except the net pay payable, salaries payable, and any fees, if my memory serves me correct.

[81] Mr. Pope later asked Mr. Hennessey about where the remittance shortfall for 2006 and 2007 had gone. Mr. Hennessey admitted that the funds had been used to pay his personal bills including credit card balances (page 169, Volume 7 of the trial transcript). Mr. Pope told Mr. Hennessey that the funds that he had taken in during that time were trust funds not to be used for other purposes. He also pointed out that any voluntary payments Mr. Hennessey had made on client accounts did not give him the right to divert trust remittances to his own use (pages 171-172, Volume 7 of the trial transcript).

Robert Clark

[82] Mr. Clark is retired from the CRA. He testified by video-link from Arizona. From 2005 to 2010, he held the position of Assistant Director of Revenue Collections and Client Services in St. John's. It was in that role that he dealt with Mr. Hennessey.

[83] Mr. Clark corroborated the point made by other witnesses that requests for fairness relief could not be considered in bulk but required a file-by-file assessment on behalf of each home care client. For Mr. Hennessey to seek such relief on behalf of his clients he required their authorizations – a step that he declined to take.

[84] Mr. Clark was asked about Mr. Taylor's estimate of $100,000.00 to $150,000.00 representing Mr. Hennessey's contribution to the pre-existing remittance arrears of his clients.

Mr. Clark testified that, after Mr. Ennis' review, the actual figure was closer to $139,000.00 (page 53, Volume 9 of the trial transcript).

[85] When Mr. Clark was asked if he was aware of any action to undermine Mr. Hennessey's ATIP request, he responded: "No, I did not personally and I do not know of anybody who did such a thing".

[86] Mr. Anstey asked Mr. Clark if the fact that Mr. Hennessey had personally paid "in excess of $300,000.00" to look after pre-2006 client arrears ought to have been considered by the CRA before the Requirement to Pay was issued to Eastern Health in 2007. He answered as follows:

> A. Are you saying he paid over 300,000 of his own money to pay off debts he wasn't legally liable to pay?
>
> Q. Well, whether he's legally liable or not, I mean, I guess that that's what the Judge has to determine, but if I was to put it to you that Mr. Hennessey paid, out of the monies that were coming from Eastern Health, instead of paying it on the payroll remittance that he was obligated to pay on, he took some of the money to pay on the obligations that he had with these keep codes, people who were coming to him.
>
> A. Okay. I would say that no consideration would have been given because Mr. Hennessey would have been well aware through his conversations with collections that the idea – one of the reasons an individual account was set up in January 2006 was to facilitate him keeping current with current remittances. The debts that existed prior to 2006, even though there would have been keep codes on some of those accounts, he has no legal liability in my mind to pay those, so because of that he wouldn't – the fact that he may have taken funds and done that, he never kept his promise – you know, his promise to us, to CRA, to keep current, so it would not have been considered.

[87] Mr. Clark was also tasked with responding to a complaint from Mr. Hennessey to the CRA in 2008. Mr. Clark's answering letter (Exhibit D-21) stated, in part, the following:

> I am unable to respond to your allegation that funding delays from Eastern Health for more than a decade prevented you from keeping remittances current. The Canada Revenue Agency does not have full details of the contractual arrangements you had with Eastern Health. Therefore, the alleged funding delays will have to be addressed by them directly.
>
> Our records indicate on August 15, 2007 you telephoned Aubrey Pope and advised him you could not pay the July 2007 remittance due on August 15, 2007 in the amount of $100,368.53. He questioned you how much you were short and you said the full amount. Mr. Pope explained that CRA did not put the Requirement to Pay in place until August 8, 2007 so you should have already had the payroll deductions in your account for July. When you said that you didn't he asked you specifically what you did with the money. You replied that you had to use the money to pay credit cards and personal lines of credit. Mr. Pope pointed out to you that payroll deductions are trust funds and not to be used for anything else.
>
> Communication between Mr. Pope and officials of Eastern Health pertained to their obligations under the afore-mentioned Requirement to Pay dated August 8, 2008. The only disclosure I can find in our records pertaining to how you used funds received from Eastern Health is in a letter you personally wrote to Eastern Health on March 31, 2007 (copy attached).
>
> As previously noted, the issue of funding delays will have to be addressed by Eastern Health. As for paying client balances in 2006 in order for them to receive their tax refunds, this was a decision you personally made on behalf of your clients. Canada Revenue Agency did not force you to take this action. As Mr. Pope informed you on August 15, 2007, the funding you received for payroll deductions were trust funds that you had no authority to use for any reason other than current year remittances.

[88] Mr. Clark responded to an additional complaint from Mr. Hennessey in a letter dated October 9, 2008 (Exhibit D-22). That letter characterized many of Mr. Hennessey's points as inaccurate or untrue. Mr. Clark also made the point that, except for a few instances for which

Mr. Ennis had made adjustments, Mr. Hennessey had not established from his own records that he had, in fact, paid money on behalf of clients beyond what he was legally obliged to pay. When asked about the problem of verification, Mr. Clark testified:

> Q. Mr. Ennis described that as collaborative arrangement with Mr. Hennessey that Mr. Hennessey would bring them information, Mr. Ennis would review records and they would go back and forth and exchange information during the year and a half that Mr. Ennis was reviewing the accounts. Is that your recollection?
>
> A. That's my recollection, yeah.
>
> Q. And so Canada Revenue Agency did not, to your recollection, without input from Mr. Hennessey, have the ability to resolve these issues on its own because some of the information would have been in the possession of Mr. Hennessey. Is that correct?
>
> A. That's correct. We would not be aware of him paying, for example, a pre-existing balance on an account when he took it over. We would not necessarily – the collector would not necessarily be aware of that, so that's information that he would have and have to point out to us.
>
> Q. And similarly then, would it be true that if Mr. Hennessey made a payment on an account in order to have a keep code lifted that Canada Revenue Agency would not necessarily know that he had made the payment on that account?
>
> A. That's correct. I should say that the collector would not necessarily be aware. Of course, Mr. Hennessey is issuing a cheque to CRA to pay that balance and it has his name on the cheque, so I guess technically CRA is aware of it, but the collector certainly is not aware of it because that cheque is run through a processing centre.
>
> Q. Correct, so there's no way to identify from your system where the funds came from unless you've seen the cheque that was deposited?
>
> A. No, no, exactly.

Dr. David Hart

[89] Dr. Hart is Mr. Hennessey's family physician. In a medical report dated October 28, 2011 (Exhibit P-56), Dr. Hart stated that he first diagnosed Mr. Hennessey with anxiety and sleep disturbances on September 30, 2010. These problems were reported by Mr. Hennessey to be related to his ongoing legal difficulties with the CRA. Dr. Hart has continued to prescribe a valium-type medication to control Mr. Hennessey's symptoms and no specialist referral has since been made.

Gary Hennessey

[90] Mr. Hennessey testified over a period of three days. He said that when he closed his business on August 20, 2007 he was looking after the payroll for more than 950 home care workers on behalf of over 500 clients.

[91] Mr. Hennessey was asked to respond to Mr. Taylor's and Mr. Clark's evidence that less than $150,000.00 had been shown to be contributed by Mr. Hennessey to pre-existing client remittance arrears. Mr. Hennessey disputed that figure and claimed that "it would be ridiculous amounts of money in millions". He also distanced himself from his own earlier estimate of $700,000.00 to $800,000.00 and claimed that: "In my own mind it would be $1.5 million (pages 61-62, Volume 8 of the trial transcript). He also acknowledged that he had "no way to get exact numbers just like everybody else involved".

[92] Mr. Hennessey claimed that, until 2005, he had no knowledge of the CRA's practice of applying remittances to the oldest outstanding account balance. According to Mr. Hennessey, when a current remittance was applied by the CRA in this way to a client's pre-existing arrears balance,

he was personally entitled to recoup that payment either from the CRA or from later payroll funding from Eastern Health.

[93] When Mr. Hennessey was asked how and why he continued to cover unfunded home care payrolls, he provided the following lengthy response:

> A. Well, in the earlier years, stepping back a few years from '06, '07—in the earlier years I was dealing with funding issues from Eastern Health, and no doubt that was a contributing factor to this problem, and I think the court has heard enough evidence on that, but it was a lesser problem when there was lesser accounts, obviously; and even when the accounts grew, had it been the only problem—I'll get to your answer, Mr. Anstey. I'm just trying to set up the foundation to understand the answer. I was able to borrow money, and I think there's a certain expectation in business to do that, but I didn't sign on to be the banker. It turned out that there was hundreds of thousands of dollars, and I was just one little guy on the corner of Bennett Avenue with an office. I wasn't a powerful entity provincially or federally or such, so I didn't know where this was going. I didn't know how many accounts were involved. I didn't know how much it was going to entail. As time went on, it grew. So in the beginning stages I could borrow money on credit, and I did have a good credit rating. I could stand corrected, but I believe it was the best rating you could have, which afforded me a chance to—or an opportunity or—the ability, I should say, is the proper word to—if so chose, to put these amounts on credit, but I'd just like to qualify that, your honour, by saying this. I don't think words really can articulate the pressures involved when you're paying these people, and I know that people can say, "Yeah, okay, you might've been under pressure but you didn't have to pay," and that's fine to say at a distance, but you're not just giving these people a pay cheque. You're giving them food; you're giving them their rent and they deserve this payment. Could I send them to Eastern Health? Well, a lot of times Eastern Health closed their doors at 4:30. People come to me 8:00, 9:00, 10:00 in the night, weekends. I lived upstairs. So then they got to go find a social worker. There's 50 social workers. They're working. Where are they to? Which office are they in? Basically, I was the frontline. If they didn't get their money

> from me, they weren't getting their money. I've had three occasions over the years where the police were called. I had two windows broken in. I had a door beat down. Not to brush everybody with—like I said, paint everybody with the one brush; but when you're dealing with this many people, you're going to have people that are upset and you're going to have some that are very, very upset, so I had issues of safety and security. I had a 2-year-old child. I had my wife living upstairs. I had significant problems beyond the obvious, so when you asked the question about borrowing money to pay these people and somebody is saying, "Well, you didn't have to," it's a lot more complicated than that, and so, yes, I borrowed money; in the early days, credit cards; in latter days, massive credit cards. We're talking in excess of 100,000 to maybe somewhere between 100 and 120, 150,000. I had investments over the years in stocks. I cashed in some of those. I had other income from other years. I was involved in a program from the Waterford Hospital, which allowed—afforded me tax-free money which I included, which afforded me the chance to pay some of this so—and then I refinanced my house, which I didn't want to have to do. Once again, we could argue the point, "You didn't have to," but given the circumstances that had—this had grown to, the problems that had compiled, I did. So to answer your question, Mr. Anstey, there's no one place. There's several places. There were loans from family members. There were, obviously, the credit cards. We're talking in excess of 200,000 for sure.

[94] Mr. Hennessey acknowledged that to mollify demanding or threatening clients whose tax refunds were frozen by the CRA he applied current remittances to certain arrears balances totalling about $320,000.00. These actions he said resulted from "major duress" deliberately enacted by the CRA to collect pre-2006 remittance arrears. Despite his ongoing contact with several CRA officials, he complained that he was not appropriately consulted before matters got "out of control in June of 2007" (pages 87-88, Volume 8 of the trial transcript).

[95] Mr. Hennessey acknowledged the arrangement he made with the CRA to manage his clients' payroll through a single account after January 1, 2006. His explanation for not staying current thereafter was that he continued to apply current funding to payroll arrears in response to complaints from clients that their tax refunds had been frozen.

[96] Mr. Hennessey said that in 2003 and 2004 he was receiving payroll advances from the Province of about $100,000.00 to address the issue of delayed home care funding. This is consistent with a letter written by Mr. Hennessey to the Province on February 3, 2003 seeking an advance of one week's payroll of $75,000.00 (Exhibit P-35).

[97] In direct examination Mr. Hennessey responded to Mr. Taylor's evidence that only $150,000.00 was shown to have been personally contributed to pre-existing client balances. He gave the following answer:

> A. Well, your honour, it's--I have bank receipts, deposits--I have them here with me, actually, that is about $2.9 million that I deposited personally to the business during '04 and '05 and this was the result of being short of funds. When you're paying 20+ thousand per night and you have issues such as I had, there was a constant need to either have cheques bounce, try to get these people paid, deal with the issues and pressures from CRA, and this money that I talk about, this $2.9 million, is the result of several deposits reciprocated, in and out, just to facilitate as best I could the problem at hand.
>
> Q. You say that you only have records for 2004 and 2005. Can you explain why you only have records for 2004 and 2005?
>
> A. Sure. The bank records now allow you to go back six years. So when I made this request to the bank, they had I think about three months left in that term, so that's as far back as they could go--to give me.

[98] When asked about his payroll contributions before 2004, he gave the following evidence:

> Q. So can you go back before 2004 personally and just give the indication of what you believe--the estimate of the amounts that you paid previous to 2004?
>
> A. Well, the issue didn't change. The issue was constant. From about 2001/2002, and your honour I would expect that so many accounts had been transferred over with delinquent balances, that the problem became very serious, and regarding the issue of me having to find ways to facilitate or deal with this problem--was constant from there on in. And I don't have a total, nor can I obtain one, but I can tell you that the problem was there and it was there for several years. So -
>
> Q. So previous to 2004, I guess your lordship needs to know a number.
>
> A. Yeah.
>
> Q. If you can give an estimate of what you believe -
>
> A. Well, it would have been hundreds of thousands of dollars involved. And I just want to reflect, if I could, Mr. Anstey, on another matter that Mr. Clark had brought up yesterday -

[99] Mr. Hennessey was also questioned about how much money he contributed to client arrears in 2006 and 2007. His lengthy response was as follows:

> Q. So if you could estimate to the Court what in fact that you believe the amounts that you had paid personally for these arrears in 2006 and 2007?
>
> A. It's a little more difficult at that particular time because I was dealing with the issue of keep codes, your honour. That issue was devastating to me at that particular time. CRA takes the position that I had a zero/zero balance and a clean start. Well, my answer to that was--would be that CRA had a clean start. For me, the debt that I incurred didn't go to zero on January 1st, 2006 and the cost that I would incur, pressures--I know that CRA will view it as a voluntary payment, I certainly do not. The keep codes that were put in place without my knowledge, and Mr. Clark referred to one or two

> or three at the time, I suspect there's a disconnect with people at CRA, obviously from the various testimonies that have been given, but if you place keep codes on 541+ accounts and you start getting dozens and dozens of people at your door threatening you and your family and you call that a voluntary payment? I'm sorry, but I don't. So how much cost to me? That was a cost which should have been, in my opinion, addressed long before July of 2007. To call me in and say listen, we got a problem here--not eighteen months later--if you said you were going to keep your remittances current and I would say yes, but I'm dealing with all these keep codes, and we can discuss it and try to work it out. But if you look at the timeline, your honour, you'll see that talks broke down, rulings didn't come back the way they wanted them, the only person left is me. That's my view, but I believe the evidence shows it. And CRA to state that they disregard, so to speak, Mr. Brown's ruling, is unfair. So I went into 2006/2007 with the expectations that, okay, I have a clean start, that's great after all these years. However, that wasn't the case, and if I paid $320,000 in keep codes, why not call me in and say bring in your receipts, let's have a look, maybe we can do something about the keep codes, maybe we can't, but at least not have me there on that very last day, have the action already taken, have me sign a form, have the money transferred over to my sole proprietorship account, Administrative Services, which I think is unfair because it was a legitimate corporate account that they deemed to be legitimate just prior to doing it, then put a 30% demand on, which gave me little or no options. So as far as a clean start goes, I don't consider that a clean start, your honour.

[100] In a letter written by Mr. Hennessey to the CRA on April 6, 2009, he attributed the 2006-2007 remittance shortfall to being "pressured to pay in excess of $300,000.00 in response to keep codes placed against certain client tax accounts (Exhibit P-41). This problem was also the subject of the following testimony:

> Q. Okay. I'm going to ask you to go back to the keep codes and much evidence was given about the keep codes. Can you explain how the keep codes had an effect on you personally?

> A. Well, it's not just a money issue, your honour. As I stated earlier, you're living where you're working. You have four or five offices downstairs, you live upstairs. So people don't care that it's 4:30 or 5:00, they're coming to get their money. Or they're coming, in this case, to get their tax refund back and the only way to do that is to have pressure put on me to pay off these balances. If I have a person at my door, am I supposed to explain to them what occurred over the last ten years, and even if I could, would it matter? It didn't matter to CRA and it's very upsetting to me to hear somebody, anybody, at CRA to call this a voluntary payment. Outside of putting a gun to my head, there wasn't much more pressure that could be put on me, and I asked CRA to consider removing these and they said no--blatantly, no…

[101] Mr. Hennessey testified that the size of his business grew substantially between 1998 and 2001. He said that he first became aware of the problem of delinquent accounts in 1998 when he took on a new client who owed $30,000.00 to the CRA. When asked why he continued to accept new files with the same risk, he gave the following non-responsive answer:

> Q. Right. So what did you do at that time to address the risk? Because you knew then that there was a risk here. What did you do to address this risk with Eastern Health or with the CRA?
>
> A. With the CRA, because the money was owed to CRA. I had phoned this particular client. This particular client told me it was none of my business. I then went to CRA. I talked to a man, his name was Murphy. It was my first initial contact. Mr. Murphy said to me we will crucify you if you don't pay the money. There was no talk about, let's sit down, let's go through it, which I would have expected. So that was one account in 1998.

[102] When Mr. Hennessey was asked where he found the money to contribute to client payroll remittances, he gave the following response:

> A. Well, that money was not a lump sum amount of money. That money would have been reciprocated many times over. My credit cards, at the time I had good credit. I believe it's Triple AAAs, whatever the ratings go, I think that was the highest. So, it allowed me to borrow funds and I did so, I believe in the range of--my credit cards would have been in the range of $100,000/$120,000+. I refinanced my house twice. I had loans from family and friends. A lot of times these loans--obviously I can't just take them and forget about them, so you got to pay them back, and because of the circumstances, they, for lack of a better analogy, your honour, would have been Band-aids because I was having to cover so much money each night. When you're dealing with 956 staff and excess of $100,000 a week and you have the three or four day delay, you can imagine. So in the overall picture, the money in question that we're talking about here was reciprocated many times over. There could be $20,000-$30,000 per week on loan, returned, loan, returned, etcetera, and that's where the total comes from.

[103] Among other sources, Mr. Hennessey said he would frequently accept short-term loans from family and from employees. These obligations might have totalled $100,000.00 (page 48, Volume 10 of the trial transcript). On one occasion, he sustained personal losses from equity investments (page 29, Volume 10 of the trial transcript).

[104] When asked if the CRA knew about his personal contributions to client payroll remittances, Mr. Hennessey answered in the affirmative. He also said: "Nobody could come up with a total, and nobody can tell you or me or anyone else a total today but I didn't have the capability of coming up with a total". According to Mr. Hennessey it was the CRA's responsibility to determine what he had put into the business from a review of its records (page 51, Volume 10 of the trial transcript).

[105] Mr. Hennessey was critical of the CRA's failure to pursue his clients for the money they owed. When it was pointed out to him that that was essentially the purpose of the CRA's keep codes, he gave the following long response:

> Q. Yes, but isn't that what the keep codes were intended to accomplish, essentially? In other words, to go after the clients for any credits that they may have received in the way of income tax refunds?
>
> A. Absolutely, your honour, but I would ask you to consider this. Why would they wait until '06 to put 541--Mr. Clark, who was Assistant Director, and who Mr. Pope had reported to, indicated yesterday they thought it might have been just a few and there was a few over the years that you would probably count on one hand. But in January '06 or soon after when 541+ were placed on it, you would have to ask yourself, I would hope, why didn't this occur earlier? If these balances, which--having accrued over many years, why did CRA not put keep codes in place? But it's not--your honour, if you allow me, it's not just the keep code that would have allowed them to collect the money from these people. In my opinion, they would have had to make a ruling and requirement to pay issued on these people, because a keep code just allows CRA to hold the tax refund whereas a requirement to pay would say--this is my understanding, is pay your money that's owed on your account, home care account. So the refund, for example, could be $100 while the balance outstanding on a home care account could be $800. So they would probably forgo the tax refund then have to pay the $800, you know? You understand--if I'm making my point clear. I believe that CRA should have taken the steps necessary to be able to collect the money from these clients, and I think those steps included making the rulings, be it through somebody like Mr. Brown or through Trust, as talked about by Mr. Pope, whatever it took to put the requirement to pay out there and I think it's--there's evidence to the Court as to why they didn't want to do that, from my perspective.
>
> [Pages 52-53, Volume 10 of the trial transcript]

[106] Mr. Hennessey explained that because of privacy issues "there was no way for me to obtain the information [pre-existing arrears balances] before I signed up as the agent for these clients and when I did, I didn't get the response or the cooperation that I needed, or I felt I needed, to resolve the issues" (page 61, Volume 10 of the trial transcript). He gave no explanation for why he did not require each client to sign a privacy waiver as a condition of taking on a new account. From other evidence before me, the use of client authorizations is common where third-parties are required to deal with the CRA on their behalf.

[107] Mr. Hennessey said that he had approached the police in St. John's asserting in a written complaint that the CRA had defrauded him by withholding refunds that were due to him (Exhibit P-57). This complaint has not been pursued in the face of the ongoing criminal prosecution against Mr. Hennessey for fraud and tax evasion.

[108] Mr. Hennessey was asked several times about his claim to recover from the CRA the amounts he had personally paid on client accounts. According to this legal theory of entitlement, Mr. Hennessey expected the CRA to reimburse him for money that he had paid on his clients' payroll arrears (page 56, Volume 10 of the trial transcript). He said that at no time had he released the CRA from returning those funds to him and that had the money been returned to him it would have been sufficient to pay the outstanding current remittances that he had failed to pay (page 17, Volume 11 of the trial transcript).

[109] Under cross-examination Mr. Hennessey acknowledged that in about 1997 or 1998 he became aware from a CRA statement of account that one of his newly acquired clients had a large

arrears balance. Mr. Hennessey said that he called the client to enquire and was told in colourful language that "it was none of my business" (pages 59-60, Volume 11 of the trial transcript). Mr. Hennessey then approached a Mr. Murphy at the CRA and was told to pay "the money or they would crucify me and those were his words" (page 60, Volume 11 of the trial transcript). When he asked why he continued to act on that account, he answered:

> A. Well, it was my business to do this work. I had no knowledge of what was to come or what was to follow. As you can see, I believe, from all the evidence presented that I continued my efforts right up to the minister's level to get this issue resolved, and to have all accounts reviewed for accuracy and clarity—right up to '06—'07, so even if that issue had not been resolved, or many others, I still had that expectation as far—right up to Mr. Ennis's review.

[110] Mr. Hennessey was then asked about his knowledge of other accounts with arrears balances. He said that the situation was a "mixed bag" but he did acknowledge awareness of other accounts with outstanding balances (page 61, Volume 11 of the trial transcript). According to Mr. Hennessey, when he called the CRA about another account with $15,000.00 in arrears he was again told that he was "responsible for these balances" (page 61, Volume 11 of the trial transcript). Nevertheless, he continued to take on new accounts without any apparent regard to the risk or to the CRA's ostensible position that he was somehow responsible to pay.

[111] Mr. Hennessey was asked about a 2004 letter from the CRA responding to his complaint earlier that year (Exhibit D-24). That letter referred to Mr. Hennessey's practice of making bulk remittances without clear direction as to how the funds were to be applied and to his unwillingness to approach his clients to initiate the process for obtaining fairness relief. In response to the latter

issue, Mr. Hennessey said that his clients would not understand the problem (pages 66-67, Volume 11 of the trial transcript).

[112] Mr. Hennessey said that when a client withdrew his payroll account from Administrative Services he took no steps to inform the CRA in the expectation that the client might return (page 69, Volume 11 of trial transcript).

[113] Mr. Hennessey was taken to his own correspondence and worksheets from 2004 where he identified accounts with both pre-existing arrears balances and arrears that had arisen during his management (Exhibit D-25). Although Mr. Hennessey said that the accounts he identified represented only a fraction of those in arrears, it was apparent that he was responsible for most of the accounts with remittance shortages.

[114] In cross-examination, Mr. Hennessey was shown a CRA spreadsheet listing over 500 of his client payroll accounts setting out the arrears history between early 1998 and January 9, 2006 (Exhibit D-29). This history was based on information Mr. Hennessey had provided about when he had taken over each account. That evidence indicated that the pre-existing arrears balances for Mr. Hennessey's clients including interest and penalties had been assessed at $175,918.00. The arrears balances that arose during Mr. Hennessey's management including interest and penalties were assessed at $442,268.62. Ms. Ward suggested to Mr. Hennessey that this CRA history indicated that the problem of client arrears only became serious in about 2003 and that most of the accounts were actually in good standing. Mr. Hennessey agreed that this was what was indicated, but he did not necessarily agree (pages 87-88, Volume 11 of the trial transcript).

[115] According to Mr. Hennessey, his problem only became acute in March of 2006 when the CRA keep codes increased dramatically (page 99, Volume 11 of the trial transcript). He also said that the CRA had placed "keep codes on all 550 plus accounts" (pages 99-100, Volume 11 of the trial transcript).

[116] Mr. Hennessey described his operation in the early part of 2006 as "crisis management" where he was frequently borrowing substantial amounts of money from employees and repaying the loans with incoming money from Eastern Health. His record keeping of those transactions was minimal at best (pages 100 to 112, Volume 11 of trial transcript). It is apparent from this testimony that there was insufficient money to pay the remittances and to repay the loans. Given the choice Mr. Hennessey repaid his obligations and shorted the payroll remittances. Notwithstanding this situation Mr. Hennessey continued to open new accounts including 68 in the first half of 2007 (Exhibit D-39) (page 125, Volume 11 of trial transcript).

[117] Mr. Hennessey acknowledged, as well, that in 2005 he was actively trading in stocks, not always with success (Exhibit D-36).

[118] Mr. Hennessey was questioned in some detail about his letter of July 23, 2007 to the CRA (Exhibit D-14) and about the shortfall of $300,000.00 that he had not accounted for in his earlier testimony. He ultimately admitted that much of the remittance shortfall went to repay his own debts (pages 136-138, Volume 11 of trial transcript).

[119] Mr. Hennessey filed for personal bankruptcy on May 23, 2008 (Exhibit D-44). In his Statement of Affairs, he listed a liability to the CRA of $650,000.00 along with other unsecured liabilities totalling $42,800.00. He was discharged from bankruptcy on February 24, 2009 (Exhibit D-45).

Analysis of the Evidence and the Law

[120] Mr. Hennessey's principal liability theory is based on the tort of misfeasance in public office. An alternative claim to damages is said to arise from the CRA's alleged failure to fulfill its statutory ATIP obligations.

[121] Despite the attempts by Mr. Hennessey's counsel to elicit evidence relevant to the CRA's involvement in the pending criminal prosecution of Mr. Hennessey, it was acknowledged that a claim for malicious prosecution cannot be advanced in this proceeding. As I said in my decision to dismiss Mr. Hennessey's pre-trial motion to amend his Statement of Claim, the termination of a criminal prosecution in favour of the accused is a foundational prerequisite to a claim of malicious prosecution: *Hennessey v Canada*, 2013 FC 878 (unreported decision). Because the prosecution of Mr. Hennessey has not been concluded, no cause of action for malicious prosecution is presently available to him. Similarly, no evidence was presented and no argument was advanced to support the pleading of defamation.

[122] I can also dispose summarily with Mr. Hennessey's ATIP allegations. Mr. Hennessey's ATIP request was not handled by the CRA with reasonable dispatch and it is apparent that initially the CRA's ATIP directorate in Ottawa was unduly aggressive in redacting the documents it was

required to disclose. Nevertheless, through the work of the Commissioner, the CRA eventually complied with its disclosure obligations to Mr. Hennessey. There is absolutely nothing in the evidence to suggest that the CRA deliberately mishandled Mr. Hennessey's ATIP request and, in fact, the evidence from all of the CRA witnesses called by Mr. Hennessey was to the contrary. In particular, there is nothing to suggest that CRA officials in Newfoundland withheld information from Mr. Hennessey to cover up their actions. The few notations that appear not to have been disclosed on the face of documents initially produced are not material to any of Mr. Hennessey's liability allegations; in other words, there are no "smoking guns" contained in any documents that were belatedly produced. Furthermore, any initial failure by the CRA ATIP directorate to comply with the applicable legislative provisions was ultimately overcome and Mr. Hennessey has suffered no identifiable loss. In the face of the decision of the Supreme Court of Canada in *Canada v Saskatchewan Wheat Pool*, [1983] 1 SCR 205, 143 DLR (3d) 9, and in the absence of any correlative common law obligation to disclose documents, one would also be hard pressed to identify a cause of action from a simple breach of the ATIP legislation.

[123] A helpful outline of the elements of the tort of misfeasance in public office can be found in the following lengthy passage from the Supreme Court of Canada decision in *Odhavji Estate v Woodhouse*, 2003 SCC 69, [2003] SCJ No 74:

> (1) The Defining Elements of the Tort
>
> 18 The origins of the tort of misfeasance in a public office can be traced to *Ashby v. White* (1703), 2 Ld. Raym. 938, 92 E.R. 126, in which Holt C.J. found that a cause of action lay against an elections officer who maliciously and fraudulently deprived Mr. White of the right to vote. Although the defendant possessed the power to deprive certain persons from participating in the election, he did not have the power to do so for an improper purpose. Although the original judgment suggests that he was simply applying the principle *ubi jus*

ibi remedium, Holt C.J. produced a revised form of the judgment in which he stated that it was because fraud and malice were proven that the action lay: J. W. Smith, *A Selection of Leading Cases on Various Branches of the Law* (13th ed. 1929), at p. 282. Thus, in its earliest form it is arguable that misfeasance in a public office was limited to circumstances in which a public officer abused a power actually possessed.

19 Subsequent cases, however, have made clear that the ambit of the tort is not restricted in this manner. In *Roncarelli v. Duplessis*, [1959] S.C.R. 121, this Court found the defendant Premier of Quebec liable for directing the manager of the Quebec Liquor Commission to revoke the plaintiff's liquor licence. Although *Roncarelli* was decided at least in part on the basis of the Quebec civil law of delictual responsibility, it is widely regarded as having established that misfeasance in a public office is a recognized tort in Canada. See for example *Powder Mountain Resorts Ltd. v. British Columbia* (2001), 94 B.C.L.R. (3d) 14, 2001 BCCA 619; and *Alberta (Minister of Public Works, Supply and Services) v. Nilsson* (2002), 220 D.L.R. (4th) 474, 2002 ABCA 283. In *Roncarelli*, the Premier was authorized to give advice to the Commission in respect of any legal questions that might arise, but had no authority to involve himself in a decision to revoke a particular licence. As Abbott J. observed, at p. 184, Mr. Duplessis "was given no statutory power to interfere in the administration or direction of the Quebec Liquor Commission". Martland J. made a similar observation, at p. 158, stating that Mr. Duplessis' conduct involved "the exercise of powers which, in law, he did not possess at all". From this, it is clear that the tort is not restricted to the abuse of a statutory or prerogative power actually held. If that were the case, there would have been no grounds on which to find Mr. Duplessis liable.

20 This understanding of the tort is consistent with the widespread consensus in other common law jurisdictions that there is a broad range of misconduct that can found an action for misfeasance in a public office. For example, in *Northern Territory of Australia v. Mengel* (1995), 129 A.L.R. 1 (H.C.), Brennan J. wrote as follows, at p. 25:

> The tort is not limited to an abuse of office by exercise of a statutory power. *Henly v. Mayor of Lyme* [(1828), 5 Bing. 91, 130 E.R. 995] was not a case arising from an impugned exercise of a statutory power. It arose from an alleged failure to maintain a sea wall or bank, the maintenance of which was a condition of the grant to the corporation of Lyme of

> the sea wall or bank and the appurtenant right to tolls. Any act or omission done or made by a public official in the purported performance of the functions of the office can found an action for misfeasance in public office. [Emphasis added.]

In *Garrett v. Attorney-General*, [1997] 2 N.Z.L.R. 332, the Court of Appeal for New Zealand considered an allegation that a sergeant failed to investigate properly the plaintiff's claim that she had been sexually assaulted by a police constable. Blanchard J. concluded, at p. 344, that the tort can be committed "by an official who acts or omits to act in breach of duty knowing about the breach and also knowing harm or loss is thereby likely to be occasioned to the plaintiff".

21 The House of Lords reached the same conclusion in *Three Rivers District Council v. Bank of England (No. 3)*, [2000] 2 W.L.R. 1220. In *Three Rivers*, the plaintiffs alleged that officers with the Bank of England improperly issued a licence to the Bank of Credit and Commerce International and then failed to close the bank once it became evident that such action was necessary. Forced to consider whether the tort could apply in the case of omissions, the House of Lords concluded that "the tort can be constituted by an omission by a public officer as well as by acts on his part" (*per* Lord Hutton, at p. 1267). In Australia, New Zealand and the United Kingdom, it is equally clear that the tort of misfeasance is not limited to the unlawful exercise of a statutory or prerogative power actually held.

22 What then are the essential ingredients of the tort, at least insofar as it is necessary to determine the issues that arise on the pleadings in this case? In *Three Rivers*, the House of Lords held that the tort of misfeasance in a public office can arise in one of two ways, what I shall call Category A and Category B. Category A involves conduct that is specifically intended to injure a person or class of persons. Category B involves a public officer who acts with knowledge both that she or he has no power to do the act complained of and that the act is likely to injure the plaintiff. This understanding of the tort has been endorsed by a number of Canadian courts: see for example *Powder Mountain Resorts, supra; Alberta (Minister of Public Works, Supply and Services)* (C.A.), *supra*; and *Granite Power Corp. v. Ontario*, [2002] O.J. No. 2188 (QL) (S.C.J.). It is important, however, to recall that the two categories merely represent two different ways in which a public officer can commit the tort; in each instance, the plaintiff must prove each of the tort's constituent elements. It is thus necessary to consider the elements that are common to each form of the tort.

23 In my view, there are two such elements. First, the public officer must have engaged in deliberate and unlawful conduct in his or her capacity as a public officer. Second, the public officer must have been aware both that his or her conduct was unlawful and that it was likely to harm the plaintiff. What distinguishes one form of misfeasance in a public office from the other is the manner in which the plaintiff proves each ingredient of the tort. In Category B, the plaintiff must prove the two ingredients of the tort independently of one another. In Category A, the fact that the public officer has acted for the express purpose of harming the plaintiff is sufficient to satisfy each ingredient of the tort, owing to the fact that a public officer does not have the authority to exercise his or her powers for an improper purpose, such as deliberately harming a member of the public. In each instance, the tort involves deliberate disregard of official duty coupled with knowledge that the misconduct is likely to injure the plaintiff.

24 Insofar as the nature of the misconduct is concerned, the essential question to be determined is not whether the officer has unlawfully exercised a power actually possessed, but whether the alleged misconduct is deliberate and unlawful. As Lord Hobhouse wrote in *Three Rivers*, *supra*, at p. 1269:

> The relevant act (or omission, in the sense described) must be unlawful. This may arise from a straightforward breach of the relevant statutory provisions or from acting in excess of the powers granted or for an improper purpose.

Lord Millett reached a similar conclusion, namely, that a failure to act can amount to misfeasance in a public office, but only in those circumstances in which the public officer is under a legal obligation to act. Lord Hobhouse stated the principle in the following terms, at p. 1269: "If there is a legal duty to act and the decision not to act amounts to an unlawful breach of that legal duty, the omission can amount to misfeasance [in a public office]." See also *R. v. Dytham*, [1979] Q.B. 722 (C.A.). So, in the United Kingdom, a failure to act can constitute misfeasance in a public office, but only if the failure to act constitutes a deliberate breach of official duty.

25 Canadian courts also have made a deliberate unlawful act a focal point of the inquiry. In *Alberta (Minister of Public Works, Supply and Services) v. Nilsson* (1999), 70 Alta. L.R. (3d) 267, 1999 ABQB 440, at para. 108, the Court of Queen's Bench stated that the essential question to be determined is whether there has been

deliberate misconduct on the part of a public official. Deliberate misconduct, on this view, consists of: (i) an intentional illegal act; and (ii) an intent to harm an individual or class of individuals. See also *Uni-Jet Industrial Pipe Ltd. v. Canada (Attorney General)* (2001), 156 Man. R. (2d) 14, 2001 MBCA 40, in which Kroft J.A. adopted the same test. In *Powder Mountain Resorts, supra*, Newbury J.A. described the tort in similar terms, at para. 7:

> ... it may, I think, now be accepted that the tort of abuse of public office will be made out in Canada where a public official is shown either to have exercised power for the specific purpose of injuring the plaintiff (i.e., to have acted in "bad faith in the sense of the exercise of public power for an improper or ulterior motive") or to have acted "unlawfully with a mind of reckless indifference to the illegality of his act" and to the probability of injury to the plaintiff. (See Lord Steyn in *Three Rivers*, at [1231].) Thus there remains what in theory at least is a clear line between this tort on the one hand, and what on the other hand may be called negligent excess of power -- i.e., an act committed without knowledge of (or subjective recklessness as to) its unlawfulness and the probable consequences for the plaintiff. [Emphasis in original.]

Under this view, the ambit of the tort is limited not by the requirement that the defendant must have been engaged in a particular type of unlawful conduct, but by the requirement that the unlawful conduct must have been deliberate and the defendant must have been aware that the unlawful conduct was likely to harm the plaintiff.

26 As is often the case, there are a number of phrases that might be used to describe the essence of the tort. In *Garrett, supra*, Blanchard J. stated, at p. 350, that "[t]he purpose behind the imposition of this form of tortious liability is to prevent the deliberate injuring of members of the public by deliberate disregard of official duty." In *Three Rivers*, supra, Lord Steyn stated, at p. 1230, that "[t]he rationale of the tort is that in a legal system based on the rule of law executive or administrative power 'may be exercised only for the public good' and not for ulterior and improper purposes." As each passage makes clear, misfeasance in a public office is not directed at a public officer who inadvertently or negligently fails adequately to discharge the obligations of his or her office: see *Three Rivers*, at p. 1273, per Lord Millett. Nor is the tort directed at a public officer who

fails adequately to discharge the obligations of the office as a consequence of budgetary constraints or other factors beyond his or her control. A public officer who cannot adequately discharge his or her duties because of budgetary constraints has not deliberately disregarded his or her official duties. The tort is not directed at a public officer who is unable to discharge his or her obligations because of factors beyond his or her control but, rather, at a public officer who could have discharged his or her public obligations, yet wilfully chose to do otherwise.

27 Another factor that may remove an official's conduct from the scope of the tort of misfeasance in a public office is a conflict with the officer's statutory obligations and his or her constitutionally protected rights, such as the right against self-incrimination. Should such circumstances arise, a public officer's decision not to comply with his or her statutory obligation may not amount to misfeasance in a public office. I need not decide that question here except that it could be argued. A public officer who properly insists on asserting his or her constitutional rights cannot accurately be said to have deliberately disregarded the legal obligations of his or her office. Under this argument, an obligation inconsistent with the officer's constitutional rights is not itself lawful.

28 As a matter of policy, I do not believe that it is necessary to place any further restrictions on the ambit of the tort. The requirement that the defendant must have been aware that his or her conduct was unlawful reflects the well-established principle that misfeasance in a public office requires an element of "bad faith" or "dishonesty". In a democracy, public officers must retain the authority to make decisions that, where appropriate, are adverse to the interests of certain citizens. Knowledge of harm is thus an insufficient basis on which to conclude that the defendant has acted in bad faith or dishonestly. A public officer may in good faith make a decision that she or he knows to be adverse to interests of certain members of the public. In order for the conduct to fall within the scope of the tort, the officer must deliberately engage in conduct that he or she knows to be inconsistent with the obligations of the office.

29 The requirement that the defendant must have been aware that his or her unlawful conduct would harm the plaintiff further restricts the ambit of the tort. Liability does not attach to each officer who blatantly disregards his or her official duty, but only to a public officer who, in addition, demonstrates a conscious disregard for the interests of those who will be affected by the misconduct in question. This requirement establishes the required nexus between the parties. Unlawful conduct in the exercise of public functions is a public

wrong, but absent some awareness of harm there is no basis on which to conclude that the defendant has breached an obligation that she or he owes to the plaintiff, as an individual. And absent the breach of an obligation that the defendant owes to the plaintiff, there can be no liability in tort.

30 In sum, I believe that the underlying purpose of the tort is to protect each citizen's reasonable expectation that a public officer will not intentionally injure a member of the public through deliberate and unlawful conduct in the exercise of public functions. Once these requirements have been satisfied, it is unclear why the tort would be restricted to a public officer who engaged in the unlawful exercise of a statutory power that she or he actually possesses. If the tort were restricted in this manner, the tort would not extend to a public officer, such as Mr. Duplessis, who intentionally exceeded his powers for the express purpose of interfering with a citizen's economic interests. Nor would it extend to a public officer who breached a statutory obligation for the same purpose. But there is no principled reason, in my view, why a public officer who wilfully injures a member of the public through intentional abuse of a statutory power would be liable, but not a public officer who wilfully injures a member of the public through an intentional excess of power or a deliberate failure to discharge a statutory duty. In each instance, the alleged misconduct is equally inconsistent with the obligation of a public officer not to intentionally injure a member of the public through deliberate and unlawful conduct in the exercise of public functions.

31 I wish to stress that this conclusion is not inconsistent with *R. v. Saskatchewan Wheat Pool*, [1983] 1 S.C.R. 205, in which the Court established that the nominate tort of statutory breach does not exist. *Saskatchewan Wheat Pool* states only that it is insufficient that the defendant has breached the statute. It does not, however, establish that the breach of a statute cannot give rise to liability if the constituent elements of tortious responsibility have been satisfied. Put a different way, the mere fact that the alleged misconduct also constitutes a breach of statute is insufficient to exempt the officer from civil liability. Just as a public officer who breaches a statute might be liable for negligence, so too might a public officer who breaches a statute be liable for misfeasance in a public office. *Saskatchewan Wheat Pool* would only be relevant to this motion if the appellants had pleaded no more than a failure to discharge a statutory obligation. This, however, is not the case. The principle established in *Saskatchewan Wheat Pool* has no bearing on the outcome of the motion on this appeal.

> 32 To summarize, I am of the opinion that the tort of misfeasance in a public office is an intentional tort whose distinguishing elements are twofold: (i) deliberate unlawful conduct in the exercise of public functions; and (ii) awareness that the conduct is unlawful and likely to injure the plaintiff. Alongside deliberate unlawful conduct and the requisite knowledge, a plaintiff must also prove the other requirements common to all torts. More specifically, the plaintiff must prove that the tortious conduct was the legal cause of his or her injuries, and that the injuries suffered are compensable in tort law.

These, then, are the principles that must be applied to the evidence to determine if the Defendant is liable to Mr. Hennessey in damages.

[124] Mr. Hennessey presented himself as a victim of circumstances brought down by his own generosity and by the actions of the CRA. That is not a valid characterization of what actually happened. Instead, what emerged from the evidence was a picture of a badly designed system for managing provincial home care payroll accounts and a virtually complete failure of oversight by Eastern Health[1]. It was also evident that Mr. Hennessey was inept at the task of managing and accounting for the payroll disbursements that he was required to handle on behalf of his several hundred clients.

[125] Mr. Hennessey's evidence was rambling and convoluted. He failed to address in any meaningful way the shortcomings of his own business practices. He was not a credible witness. On difficult points he was non-responsive or contradictory. He unfairly blamed the CRA for matters

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[1] While several Eastern Health witnesses testified that Mr. Hennessey was not authorized to co-mingle payroll funding, Eastern Health failed to limit Mr. Hennessey's discretion with any form of contract or to otherwise define the nature of the financial relationships among the various parties. Eastern Health also failed to audit his accounts or to otherwise ensure that Mr. Hennessey was following rudimentary accounting practices. Indeed, to some extent, Eastern Health seems to have taken advantage of Mr. Hennessey's misguided generosity. On the one hand it expected him to cover unfunded payroll and on the other hand it contended that the proceeds it was paying to Mr. Hennessey were impressed with a trust. These positions are inconsistent.

for which he was responsible. He repeatedly attributed his cash flow problems to delays in funding by Eastern Health and to the need to allocate current remittances to the pre-existing payroll arrears of his home care clients. Nevertheless, he continued to take on self-administered clients even after 1998 when he became aware of at least of one new client who had accumulated payroll arrears of approximately $30,000.00. He would also have been well aware that the growth of his business was the immediate result of the failure of the clients to stay current with the CRA. Despite that he continued to take on these new clients without taking any steps to quantify and to isolate their pre-existing arrears balances or to obtain assurances from Eastern Health or the CRA that he would be held harmless for those pre-existing amounts. Procedures were available to Mr. Hennessey to ensure that any current remittances would not be allocated to payroll arrears that predated his involvement, but he appears to have been unaware of them and certainly he did not make use of them. The simplest available step would have involved the opening of a new payroll account for each new client taken on.

[126] There is no doubt that Mr. Hennessey assumed some responsibilities that were not his, partly at the behest of Eastern Health and partly to fulfil the expectations or, in some cases, the demands of his clients. But the responsibility for those decisions was his alone. He was not obliged to cover unfunded payroll accounts on behalf of Eastern Health and a number of other payroll providers refused to do so. He was similarly not responsible for attending to pre-existing payroll remittance arrears on behalf of his clients and, indeed, the CRA did not contend otherwise.

[127] Mr. Hennessey's cash flow problem was exacerbated by his co-mingling of funds received from Eastern Health. Essentially, Mr. Hennessey took the Eastern Health funding and allocated it to

those arrears accounts that he considered to be the most pressing. This had the effect of benefiting certain client payroll accounts to the prejudice of others. This conduct was imprudent and it created potential unwarranted liabilities for certain clients and benefited others who were not so entitled. This was a serious problem for some clients who may have lost tax refunds to offset payroll arrears that had been unjustifiably attributed to their payroll accounts by Mr. Hennessey's failure to remit. The problem was aggravated by Mr. Hennessey's failure to document what he had done. In short, Mr. Hennessey was a bookkeeper who failed to keep the books.

[128] Mr. Hennessey is apparently of the view that any payments he made on the payroll accounts of his clients for arrears that pre-existed his involvement or that were initially unfunded gave him some direct entitlement to his clients' payroll credits or to their tax refunds. That was an invalid assumption. If through his goodwill, expediency or neglect, he assumed the remittance obligations of his clients, the problem of reimbursement was between Mr. Hennessey and his clients and, perhaps, Eastern Health. It was not the responsibility of the CRA to identify the amounts that Mr. Hennessey had personally paid to the credit of his clients or to refund such amounts to Mr. Hennessey. Indeed, the CRA had no means to know the source of the remittance monies it was receiving from Mr. Hennessey and it simply applied the funds to a stipulated account. In the absence of a specific direction from Mr. Hennessey, it was also not wrong for the CRA to apply a remittance to the oldest indebtedness on an account. As far as the CRA was concerned, the accounts belonged to the clients and were appropriately managed throughout from that perspective.

[129] Mr. Hennessey made a mess of the payroll accounts of his clients. He complains about the placement of keep codes on the tax accounts of some of his clients which had the effect of

intercepting tax refunds payable to those clients. Those intercepts were placed when a particular payroll account was in arrears. Needless to say, many of these clients complained to Mr. Hennessey when their tax refunds were intercepted. Mr. Hennessey did not have the records to show if a client's arrears pre-existed his involvement or if it was created by his own remittance shortages, but he, nevertheless, paid off the arrears on some of those payroll accounts to release the tax refunds to his clients. This is the type of *ad hoc* conduct that led to Mr. Hennessey's cash flow problems in the beginning and which ultimately led to the demise of his business.

[130] Mr. Hennessey has no reason to complain about the CRA's use of keep codes to freeze GST or tax refunds payable to clients who carried remittance arrears balances. If a balance was created before Mr. Hennessey took over the management of a client's payroll account, the client could not reasonably expect to receive a refund. If an arrears balance arose because Mr. Hennessey failed to remit, the problem belonged to Mr. Hennessey and not to the CRA. It was not the obligation of the CRA to forego lawful collection action because Mr. Hennessey felt some personal obligation to hold his clients harmless for shortages that he had caused.

[131] The further suggestion by Mr. Hennessey that the CRA ought to have aggressively pursued his clients for their arrears is inconsistent with his recurring complaint that he could not stay current with payroll remittances because of the pressure of the CRA keep codes on his clients' tax accounts. By the end of 2005, Mr. Hennessey's accounts and the accounting were in such disarray that it was next to impossible to reconstruct payment histories or to sort out whether any particular arrears balance pre-dated or post-dated Mr. Hennessey's involvement. The CRA's reluctance to

aggressively pursue the clients is completely understandable in the face of the mess that was created by Mr. Hennessey and by his inability to clearly account for what had happened.

[132] Mr. Hennessey could have protected himself by maintaining a strict segregation of his client accounts from one another but he failed to do so. Instead he assumed effective control over the payroll obligations by allocating funds received from Eastern Health in a manner that suited his purposes and ultimately by diverting to himself substantial sums that he apparently believed were reimbursable to him. This is the kind of control over payroll obligations that attracts liability under sections 227 and 153 of the *Income Tax Act*, RSC 1985, c 1 (5th Supp): see *Marché Lambert et Frères Inc. v Canada*, 2007 TCCI 466, [2007] TCJ No 301 at para 33; *Cana Construction Co. v Canada*, [1994] TCJ No 809 at para 27, 95 DTC 127 (TCC) aff'd on appeal [1996] 3 CTC 11, [1996] FCJ No 827 (FCA); and, *Roll v Canada*, [2000] FCJ No 2048, 2001 DTC 5055 (FCA),. Even if Mr. Hennessey had no personal liability, the CRA was fully entitled to issue a Requirement to Pay to Eastern Health to intercept payroll remittances that were due on a going forward basis for arrears accruing after January 1, 2006. That money, after all, did not belong to Mr. Hennessey.

[133] By Mr. Hennessey's own calculations the remittance arrears that had accumulated between January 1, 2006 and June 2007 came to $803,191.00. Mr. Hennessey offered no plausible explanation to account for the accrual of such a sizable arrears balance over a period of only 18 months not to mention the substantial arrears that had accrued before 2006. Even a generous calculation of amounts Mr. Hennessey claims to have paid on the pre-existing arrears would not come close to matching the proven remittance shortfalls that arose during Mr. Hennessey's management of his clients' payroll accounts.

[134] It is impossible on the record before me to determine exactly how much of the payroll arrears owed by home care clients predated Mr. Hennessey's management of those accounts. The best estimate of those arrears is found in the evidence of Mr. Clark and Mr. Taylor. Mr. Taylor gave an estimate of between $100,000.00 to $150,000.00 and Mr. Clark said the figure was closer to $139,000.00. Mr. Hennessey testified that he had no way to ascertain the amounts that he had personally paid on the arrears accounts of his clients that had arisen prior to his involvement. This is an astounding admission from a person who claims to have paid more than $1 million of his own money on behalf of his clients and whose job it was to carefully account for the receipt and disbursement of hundreds of thousands of dollars in public funds every year on behalf of several hundred clients. I do not accept Mr. Hennessey's estimate of the amounts he personally contributed to his clients' remittance obligations. The idea that he had invested upwards of $1 million of his own money to the benefit of his clients without any form of financial verification is unbelievable. In my view, his estimate is nothing more than a colourable and unsubstantiated attempt to offset the remittance arrears calculated by the CRA to be owing on his clients' accounts. In any event, whatever the amounts may have been, the CRA had no obligation to make Mr. Hennessey whole.

[135] Counsel for Mr. Hennessey placed considerable emphasis throughout the trial on the question of whether Mr. Hennessey was the employer of home care workers. It is apparent to me, as it was to the CRA, that Mr. Hennessey was not the *de facto* employer. The relevant question, however, is whether the CRA was lawfully entitled to take collection action by way of the placement of keep codes on client tax accounts and a Requirement to Pay on Eastern Health to recoup the remittance shortfalls.

[136] In my view, the CRA's conduct was fair, responsible and reasonable throughout. It was also lawful. The CRA was sensitive to the concern that its actions not disrupt the provision of respite care to those who needed it. It effectively "parked" the pre-2006 remittance arrears and allowed Mr. Hennessey to open a single zero balance payroll account for all of his clients to better manage payroll remittances going forward. The idea was to allow Mr. Hennessey a fresh start free of any of the accounting issues that had plagued the accounts up to that time. The expectation was that from January 1st, 2006 onward Mr. Hennessey would keep the remittances current and that discussions with provincial officials would possibly resolve the pre-2006 arrears problem. This new arrangement required changes to Mr. Hennessey's approach including a refusal to meet unfunded respite care payroll. Mr. Hennessey was unable to keep the payroll accounts current and by mid-2007 the total arrears balance had increased substantially. This eventually led to a Requirement to Pay being issued to Eastern Health in the amount of 30%. This garnishee was intended to attach sufficient of the funds emanating from Eastern Health to cover current payroll remittances going forward. It did not include any amount for payroll nor was it intended to capture any portion of the administration fee earned. The CRA simply did not want the remittance arrears to continue to escalate.

[137] According to Mr. Hennessey's legal theory the CRA was impotent to act because his "claim" to continued funding from Eastern Health took priority over what was owing to the CRA – at least until he was fully reimbursed for his largely unsubstantiated personal contributions. This argument is transparently specious. Mr. Hennessey's personal contributions to the credit of client payroll accounts gave him no priority to the CRA's right to collect arrears on those accounts either

directly from the clients or from Eastern Health. To the extent that Mr. Hennessey's actions may have unduly enriched some clients, that was an issue between Mr. Hennessey and his clients and possibly Eastern Health. Mr. Hennessey was certainly not entitled to demand credits or refunds from the CRA for amounts that he claimed to have personally paid on behalf of his clients. If a refund was owing or if a credit arose on an account, it was lawfully due to the client and not to Mr. Hennessey. The absurdity of Mr. Hennessey's argument is all the more patent considering his inability to account for amounts he claims to have contributed. Even if there was such an entitlement, Mr. Hennessey had no way to verify it. Although the CRA attempted to accommodate Mr. Hennessey's various concerns it had no legal obligation to protect him financially from the consequences of his conduct or that of Eastern Health. Its only duty was to collect the remittance shortfall. It was in no position to forego lawful collection action because Mr. Hennessey felt some personal need to hold his clients harmless for shortages he had either inherited or was largely responsible for creating. Indeed, the CRA had no other option. The only source of money available to cover Mr. Hennessey's chronic under-remitting was the stream of income coming from Eastern Health. Left to his own devices, there is no doubt that Mr. Hennessey would have continued to default on his monthly obligations and the arrears balance would have continued to grow. It is clear from the evidence that Mr. Hennessey was insolvent long before the CRA took this form of collection action and the resulting closure of his business was both inevitable and fortuitous. Indeed, I am only left to wonder why it took the CRA as long as it did to effectively bring an end to Mr. Hennessey's disastrous business practices.

Conclusion

[138] Mr. Hennessey wholly failed to establish any of the elements of the tort of misfeasance in public office or any of the other causes of action he pleaded. His action is dismissed with costs payable to the Defendant at the middle of Column IV.

JUDGMENT

THIS COURT'S JUDGMENT is that this action is dismissed with costs payable the Defendant at the middle of Column IV.

"R.L. Barnes"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET: T-953-10

STYLE OF CAUSE: GARY HENNESSEY
v
HER MAJESTY THE QUEEN

PLACE OF HEARING: ST. JOHN'S, NEWFOUNDLAND AND LABRADOR

DATE OF HEARING: OCTOBER 21 TO NOVEMBER 7, 2013

REASONS FOR JUDGMENT AND JUDGMENT: BARNES J.

DATED: MARCH 24, 2014

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