Dockets: 2013-2648(IT)G
2013-2649(GST)G

BETWEEN:

WALTER LESLIE THISTLE,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on February 19 and 20, 2015,
at St. John's, Newfoundland and Labrador

Before: The Honourable Justice John R. Owen

Appearances:

Counsel for the Appellant:	Keith S. Morgan
Counsel for the Respondent:	Amy Kendell

JUDGMENT

In accordance with the attached Reasons for Judgment the appeal from the assessment made under section 227.1 of the *Income Tax Act*, section 83 of the *Employment Insurance Act* and section 21.1 of the *Canada Pension Plan* for the 2008, 2009, 2010 and 2011 taxation years, by notice number 1629837 dated January 11, 2012, is allowed, with costs to the Appellant, and the assessment is vacated.

In accordance with the attached Reasons for Judgment the appeal from the assessment made under section 323 of the *Excise Tax Act* for the reporting period from July 1, 2010 to September 30, 2010, by notice number 1632439 dated

January 11, 2012, is allowed, with costs to the Appellant, and the assessment is vacated.

Signed at Ottawa, Canada, this 16th day of June 2015.

"J.R. Owen"

Owen J.

Citation: 2015 TCC 149
Date: 20150616
Dockets: 2013-2648(IT)G
2013-2649(GST)G

BETWEEN:

WALTER LESLIE THISTLE,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Owen J.

I. Introduction

[1] These reasons address the appeals by Mr. Walter Leslie Thistle from an assessment (by notice number 1629837 dated January 11, 2012) under section 227.1 of the *Income Tax Act* (the "ITA") and other applicable Acts[1] for unremitted payroll deductions for the 2008, 2009, 2010 and 2011 taxation years (the "Payroll Assessment") and from an assessment (by notice number 1632439 dated January 11, 2012) under section 323 of the *Excise Tax Act* (the "ETA") for unremitted net tax for the reporting period from July 1, 2010 to September 30, 2010 (the "HST Assessment"). The court file numbers are 2013-2648(IT)G and 2013-2649(GST)G respectively.

[1] The other applicable Acts under the jurisdiction of this Court are the *Employment Insurance Act* and the *Canada Pension Plan*. The relevant sections of those statutes are section 83 of the *Employment Insurance Act* and section 21.1 of the *Canada Pension Plan*. Those sections adopt by reference subsections 227.1(2) through (7) of the ITA, so the analysis of subsection 227.1(3) of the ITA in these reasons applies to both of those other statutes.

II. The Facts

[2] The total amount for which the Appellant was assessed under the Payroll Assessment is $664,301.94. The breakdown by year of the amounts for which the Appellant was assessed under the Payroll Assessment is as follows:

Taxation Year	Amount Assessed in Respect of the Year Including Penalties and Interest[2]
2008	$3,418.76[3]
2009	$1,095.64
2010	$510,675.45
2011	$121,916.83

[3] The total amount for which the Appellant was assessed under the HST Assessment is $108,377.91.

[4] The Appellant and Ms. Tina Singleton testified on behalf of the Appellant. Ms. Singleton was the bookkeeper of NL RV Enterprises Inc. ("Enterprises") from April 2010 to March 2011. Enterprises is the corporation that failed to remit the amounts in issue in these appeals.

[5] Mr. Robert McGrath and Mr. Gregory Peddle testified on behalf of the Respondent. Mr. McGrath is a resource officer, complex case officer and collections officer with the Canada Revenue Agency (the "CRA") who is currently an acting team leader with Taxpayer Services, Debt Management Branch. Mr. Peddle is a team leader at the Employer Compliance Section of the CRA.

[6] Ms. Singleton testified first. Ms. Singleton was hired by Enterprises as a bookkeeper at the end of April 2010, shortly after obtaining a Business Management Diploma from the College of the North Atlantic. Ms. Singleton was interviewed by Robert Aymont, whose title was General Manager and who offered her the job with Enterprises. The individuals employed in the office at the time were Ian Fitzgerald, Robert Aymont and Mitchell Kennedy. Enterprises hired one

---

[2] These amounts are the amounts for which Enterprises was assessed. In addition, there is further interest up to the time of the Payroll Assessment of $27,195.26, which brings the total to $664,301.94.

[3] The Respondent conceded that the amount assessed in respect of 2008 was assessed in error and should be removed from the total.

other employee (a service technician) in June 2010, for a total at that time of five employees.[4]

[7] Ms. Singleton's duties involved "data entry, reconciliations, things like that".[5] In cross-examination, she stated that she would print out, monthly, financial statements such as income statements, accounts payable, accounts receivable and balance sheets from Simply Accounting, a software program that Enterprises used to keep its financial records.[6] She would provide these printouts to Mr. Aymont, but nobody else would ask for them.[7]

[8] At the time she was hired, Ms. Singleton understood that her duties related to the activities of Enterprises, which activities involved the sale of recreational vehicles (RVs) and the construction of mobile homes.[8] She subsequently became aware of another corporation, NL RV Resorts Limited ("Resorts"), through casual conversation with others in the office. However, she had no involvement with that corporation. According to Ms. Singleton, all of the employees in the office worked for Enterprises.[9]

[9] Ms. Singleton testified that the Appellant had no involvement in her hiring and that she was not in fact aware of the Appellant in April of 2010. She also stated that the Appellant was not involved in the operation of the office when she was hired.[10] Until the Appellant was identified to her as an owner in August 2010, Ms. Singleton believed that Ian Fitzgerald was the sole owner of Enterprises.[11]

[10] Ms. Singleton testified that, when she started, the accounts of Enterprise were a mess. She clarified that she had difficulty reconciling the entries for January 2010 in Simply Accounting and expressed her concerns to Mr. Aymont. She was unable to do anything further until he corrected the entries. In cross-examination, Ms. Singleton stated that she believed that the issue with the accounts related to the transition from Resorts to Enterprises. The accounts had not been entered correctly, but that was rectified when a new entry system was implemented

---

4 Lines 27 and 28 of page 18 and lines 1 to 5 of page 19 of the transcript of the hearing in St. John's, Newfoundland and Labrador held on February 19, 2015 (the "Transcript").
5 Lines 6 to 7 of page 7 of the Transcript.
6 Lines 24 to 28 of page 44 and lines 1 to 6 of page 45 of the Transcript.
7 Lines 7 to 10 of page 45 of the Transcript.
8 Lines 21 to 27 of page 7 of the Transcript.
9 Lines 3 to 6 of page 10 of the Transcript.
10 Lines 17 to 22 of page 10 of the Transcript.
11 Lines 19 to 21 of page 13 and lines 12 to 27 of page 47 of the Transcript.

by Mr. Aymont that corrected the entries for the period commencing in either December 2009 or January 2010.[12]

[11] Ms. Singleton testified that Enterprises did not use accountants to prepare its books and that she believed that, prior to her being hired as the corporation's bookkeeper the bookkeeping function may have been performed by Mr. Fitzgerald's wife.[13]

[12] Ms. Singleton had access to the monthly bank statements for Enterprises for the purpose of reconciling the amounts in the company's bank accounts, but she did not have day-to-day access to the bank balances and she did not have signing authority on Enterprises' Bank accounts.[14] The process for paying the amounts owing by Enterprises involved her completing a form setting out the accounts payable using information drawn from Simply Accounting and presenting the form to Mr. Fitzgerald for approval.[15] Once an amount was approved for payment, she would print a company cheque and, after it was signed by Mr. Fitzgerald, she would send it to the payee.

[13] Only Ms. Singleton and Mr. Fitzgerald were involved in the cheque-issuing process. As far as she knew, all of the cheques issued through this process were honoured.[16] If she had questions about how to enter something in Enterprises' books relating to the banking of Enterprises she would consult with Mr. Aymont.[17]

[14] A copy of a remittance summary for the period from January 1, 2010 to December 31, 2010 prepared by Ms. Singleton was entered into evidence as Exhibit A-1.[18] In cross-examination, Ms. Singleton stated that she would prepare the remittance summaries but that Mr. Fitzgerald handled the actual remittance of amounts to the CRA through online banking.[19] She believed that she filed the remittance information with the CRA but she was not certain. She also suggested that Enterprises may have been behind on remittances in the summer of 2010, but

---

12 The entries for December or January forward were corrected. It appears the actual corrections were made by Mr. Aymont after Ms. Singleton started with Enterprises in late April 2010.

13 Lines 14 to 22 of page 11 of the Transcript.

14 Lines 27 to 28 of page 11 and lines 1 to 4 and 17 to 24 of page 12 of the Transcript.

15 Lines 8 to 16 of page 12 of the Transcript.

16 Lines 25 to 27 of page 12 of the Transcript.

17 Lines 3 to 13 of page 13 of the Transcript.

18 The Exhibit states on the first page that it is for the period from 01/01/2010 to 31/01/2010. When asked about this, Ms. Singleton testified that the remittance summary was in fact for the period from 01/01/2010 to 31/12/2010 (lines 1 to 17 of page 21 of the Transcript), which is consistent with the information in the body of the summary.

19 Lines 25 to 28 of page 45 and lines 1 to 12 of page 46 of the Transcript.

when pressed for clarification, it became clear that she did not have any actual knowledge of what Mr. Fitzgerald was paying to the CRA on behalf of Enterprises at that time.[20]

[15] Ms. Singleton identified an e-mail from an employee of a contractor in Nunavut dated January 18, 2011, which was addressed to her and Mr. Fitzgerald (Exhibit A-2). The e-mail related to contracts entered into by Enterprises with a company called NCC Dowland (the "Contractor") to provide labour to build modular homes in Nunavut. The e-mail included below it an e-mail from Mr. Fitzgerald dated January 17, 2011 in which he identified issues with the Contractor. In particular, the e-mail states that only 50% had been paid on invoices issued by Enterprises from November 25, 2010 and that payment had ceased altogether after December 9, 2010. It is clear from the evidence reviewed below that this statement was false.

[16] In June 2010, Enterprises had bid on contracts to provide labour to build modular homes in Nunavut. Ms. Singleton was not involved in submitting the bids for these contracts and she did not discuss that project with anyone until after the contracts were secured.[21] She did, however, prepare the cheques for the five percent deposits that had to be submitted with the bids made by Enterprises for the contracts.[22]

[17] Ms. Singleton testified that the bid process was run by Mr. Fitzgerald and Mr. Aymont.[23] After the contracts were secured, Mr. Fitzgerald and Mr. Aymont hired the employees needed by Enterprises to fulfill the contracts.[24] Ms. Singleton testified that the Appellant was not involved in the hiring process but said "I'm not sure if he was involved in the bids".[25] She also stated that the Appellant had no involvement with the office during the fall of 2010.[26]

[18] Ms. Singleton believed the Nunavut business of Enterprises commenced around August 2010. Until that time, the payroll for Enterprises consisted of a total of five employees. As a result of the new contracts, she believed that the payroll increased from five employees to approximately 70. Exhibit A-1 indicates that the first significant increase in the payroll was in September 2010, when the total gross

---

20 Lines 20 to 28 of page 46 and lines 1 to 11 of page 47 of the Transcript.
21 Lines 8 to 16 of page 16 of the Transcript.
22 Lines 11 to 18 of page 17 of the Transcript.
23 Lines 10 to 12 of page 16 of the Transcript.
24 Lines 21 to 26 of page 16 of the Transcript.
25 Lines 1 and 2 of page 17 of the Transcript.
26 Lines 14 to 16 of page 25 of the Transcript.

payroll of Enterprises increased to $77,373.60 from $20,848.60 in August 2010 and $20,219.10 in July 2010. The gross payroll jumped again in October 2010 to $363,620.48. The November and December 2010 gross payrolls are stated to be $341,898.34 and $439,661.14 respectively.

[19] Ms. Singleton was responsible for issuing Enterprises' invoices to the Contractor. She would send invoices for payroll bi-weekly and invoices for other costs monthly.[27] She stated that at first things went well and the Contractor would provide a schedule showing when it would be making payments to Enterprises.[28] However, in December 2010, the Contractor started holding back on the payments such that the payments received covered only the net payroll and not the payroll remittances.[29] She confirmed that the January 18, 2011 e-mail (Exhibit A-2) related to the Contractor's purported failure to make payments. In cross-examination, Ms. Singleton said that she was not aware of material financial problems until November or December of 2010 and that to her recollection there were no indications of financial difficulties prior to that time.[30]

[20] Ms. Singleton testified that prior to the receipt of the January 18, 2011 e-mail (Exhibit A-2) she had become aware of the Contractor payment issue because it showed up on her payroll reconciliation, which compared the payroll and remittances to the amounts actually being received by Enterprises. She discussed the issue with Mr. Fitzgerald, who appears to have given her the impression that he was pursuing payment of the shortfall with the Contractor.[31] In other words, he was blaming the Contractor for the shortfall.

[21] Ms. Singleton identified a schedule of receipts dated March 7, 2011 (Exhibit A-3) that she had printed from the Simply Accounting software program and confirmed that the schedule showed the amounts received by Enterprises from the Contractor to the date of the schedule. Exhibit A-3 shows that a total of $1,724,579.94 was paid by the Contractor to Enterprises from September 29, 2010 to January 14, 2011 and that the total amount held back by the Contractor over the same period was $190,065.38. The amount held back is approximately 10% of the total of the amount paid and the amount held back.

---

27 Lines 21 to 25 of page 19 of the Transcript.
28 Lines 26 to 28 of page 19 of the Transcript.
29 Lines 3 to 19 of page 22 of the Transcript.
30 Lines 8 to 20 of page 50 of the Transcript.
31 Lines 2 to 5 of page 23 of the Transcript.

[22] The monthly payments received by Enterprises from the Contractor in the last four months of 2010 and in January 2011 net of the holdback were as follows (from Exhibit A-3):

September	October	November	December	January
$238,140	$316,482	$631,786	$262,332	$275,838

[23] The gross payroll of Enterprises for those same months was as follows (from Exhibit A-1 and Exhibit A-9):

September	October	November	December	January
$77,373	$363,620	$341,898	$439,661	$152,786

[24] The shortfall or surplus in each month and the cumulative shortfall or surplus to the end of January 2011 was as follows:

	September	October	November	December	January
(Shortfall)/Surplus	$160,766	($47,138)	$289,888	($177,329)	$123,052
Cumulative (Shortfall)/Surplus	$160,766	$113,629	$403,517	$226,188	$349,240

[25] Ms. Singleton testified that the Appellant had no involvement in the Nunavut housing projects or the payroll of Enterprises except that on one occasion he was asked to sign payroll cheques because Mr. Fitzgerald was in Nunavut. According to Ms. Singleton, the cheques were taken to the Appellant for his signature in the fall of 2010.

[26] Around the same time, Ms. Singleton says, she had a conversation with Mr. Fitzgerald regarding the fact that the payroll of Enterprises was taking up all of her time. At the suggestion of the Appellant, a payroll system was set up with an outside payroll company called ADP.[32] Ms. Singleton identified a copy of a contract titled "ADP CANADA CO. EMPLOYER SERVICES Master Services Agreement" that was filled in by Ms. Singleton and executed on October 19, 2010 (Exhibit A-5). Ms. Singleton testified that the payroll system was to be implemented to achieve efficiency.[33]

---

[32] Line 28 of page 25 and lines 1 to 8 of page 26 of the Transcript.

[33] Lines 12 to 19 of page 26 of the Transcript.

[27] In order to use the payroll system, Enterprises had to submit to ADP all of the details regarding hours and pay as well as the money to fund the payroll. If this was done by Tuesday night at the latest then the payroll (and associated remittances) would be paid by ADP on Friday of the same week. Ms. Singleton testified that she attempted to use the payroll system every week after it was set up but that the funds for payment were never available by Tuesday night so the system went unused. The situation is described by Ms. Singleton as follows:

> Q. Okay, so just going back to what your evidence was in relation to the cheque process that you had with Mr. Fitzgerald, my understanding of your previous evidence was that you would go to him with the amount that was required to run through the payroll?
>
> A. Yes.
>
> Q. Or run through the various cheques, the payables, and he would either indicate to you that you could write the cheques or not?
>
> A. Yes.
>
> Q. So is this the process that you would have followed on each week then in relation to the payroll amounts?
>
> A. Well, I would look up to see how much we had to pay and then I would contact Ian to let him know and to see if there was enough money in the account.
>
> Q. And from what I understand your evidence to be, you would be told that there was not sufficient to cover, is that right?
>
> A. Yes.
>
> Q. This circumstance, was anybody else aware of the fact that there was not sufficient money to cover those cheques other than yourself and Ian Fitzgerald?
>
> A. Most of the employees.
>
> Q. Okay.
>
> A. Because there was times when our payroll was late as well.
>
> Q. I see. So they knew that the system itself – I guess, they would have known that the system was established, the ADP System was established, is that right?

A. They wouldn't have known – well, yes, they knew we were in the process of setting it up, but they also were aware that we couldn't go through with it because, you know, when it came Friday and if we were able to pay the employees, then we would have to go to the actual bank and deposit the cheques.

Q. I see, okay. So was Mr. Thistle aware of the fact that this process was ongoing after October?

A. Yes. Oh, Mr. Thistle?

Q. Yes.

A. No.

Q. I take it that this situation essentially came to a head then in January of 2011, is that right?

A. Yes.[34]

[28] Ms. Singleton identified a remittance form relating to the *Payroll Tax Act* of the Northwest Territories (Exhibit A-6). The form indicated that the required remittance of $21,915.34 was not being made. The form was signed by Ian Fitzgerald. Ms. Singleton testified that, other than herself and Mr. Fitzgerald, to her knowledge no one else was aware of this failure to remit.[35]

[29] Ms. Singleton identified a T4 Summary of Remuneration Paid dated February 28, 2011 that she had prepared (Exhibit A-7). Box 76 of the form identifies Ian Fitzgerald as the person to contact about the return. The form indicates a shortfall in the payroll remittances made by Enterprises of $462,989.66. Ms. Singleton confirmed that Mr. Fitzgerald was aware of the shortfall but when asked whether anyone else was aware, Ms. Singleton stated, "I'm not sure. I don't think so."[36]

[30] Ms. Singleton testified that around February 2011, Enterprises was being audited by the CRA for outstanding payroll and GST remittances.[37] Ms. Singleton testified as follows:

Q. What was the nature of the issue that had come to the company?

---

34 Lines 22 to 28 of page 29, page 30, and lines 1 to 8 of page 31 of the Transcript.
35 Lines 8 to 11 of page 32 of the Transcript.
36 Lines 4 to 22 of page 34 of the Transcript.
37 Lines 1 to 12 of page 35 of the Transcript.

A. Well, they had outstanding balances for their payroll remittance and their GST remittance.

Q. Okay. Was there an audit being conducted of the company's books at that stage as well?

A. Yes.

Q. Were you involved in that audit or assisting CRA in that process?

A. Yes, CRA sent in – I believe his name was Glen Lannon.

Q. Uh-hm.

A. And he would tell me the documents that was [*sic*] required, so I'd print them off for him.

Q. Okay, and who else within the company would have been involved in that process other than yourself?

A. It was mostly me in the office giving him information, but he was also dealing with Ian Fitzgerald.

Q. Was Mr. Thistle involved in that process at any time, do you recall?

A. Not to my knowledge.[38]

[31] Ms. Singleton identified two GST/HST returns that she had faxed to the CRA on March 3, 2011 (Exhibit A-8), one for the period from July 1, 2010 to September 30, 2010 and the other for the period from October 1, 2010 to December 31, 2010. Ms. Singleton confirmed that these returns were sent to the CRA at the request of the CRA auditor.[39] Ms. Singleton also identified a summary of the payroll and payroll remittances of Enterprises for the period from January 1, 2010 to February 28, 2011 (Exhibit A-9). The information in Exhibit A-9 for the period from January 1, 2010 to December 31, 2010 is the same as that in Exhibit A-1.

[32] Ms. Singleton identified an e-mail dated January 18, 2012 that she had sent to the Appellant asking about T4s for the employees of Enterprises (Exhibit A-10). Ms. Singleton described the interchange as follows:

---

[38] Lines 9 to 28 of page 35 of the Transcript.

[39] Lines 21 to 28 of page 37 of the Transcript.

Q. Ms. Singleton, what was the purpose of this particular communication?

A. Well, I had a lot of employees contacting me looking for their T4s, and I no longer worked with the company. I contacted Ian Fitzgerald through Facebook, actually, and I asked him if the company would be sending out T4s to their employees and he told me he didn't have any records, that I had to contact Les Thistle. I emailed Les Thistle and I asked him, you know, what they were doing about T4s, and he said that he didn't have anything to do with the accounting.

Q. Up to that point in time, had you had any involvement with Mr. Thistle relating to the accounting?

A. No.

Q. You indicated in your email back to Mr. Thistle that you understood that he had nothing to do with the accounting?

A. Yes.

Q. And you also indicated that the plan was to set everything up in ADP, and you indicated to him that it could never be put in place?

A. Yes.

Q. Is this the first time you would have indicated that to Mr. Thistle?

A. Quite possibly. I had only spoken to Mr. Thistle, like, two or three times.

Q. Okay. So is it fair to say that when he says, "I thought everything was set up for ADP to do the payroll", that that could well have been the case?

A. I was expecting that answer.

Q. Okay. This was January 18th, 2012, so this is well after the whole circumstance occurred that there was an assessment made and these sorts of things?

A. Yes.[40]

[33] Finally, Ms. Singleton testified that in January 2011 Mr. Fitzgerald used one of the payments from the Contractor to pay his personal Amex card.[41] However, she was not certain how much was paid to Amex and indicated that Mr. Fitzgerald would have had some travel expenses.

---

40 Lines 26 to 28 of page 40, page 41, and lines 1 and 2 of page 42 of the Transcript.

41 Lines 22 to 27 of page 43 of the Transcript.

[34] The Appellant testified that he is a lawyer who was called to the bar in 1995 and who practices as a sole practitioner. Apart from his investments in Resorts and Enterprises, he has not been involved in any business enterprise other than his law practice. In cross-examination, he stated that he currently employs six individuals and that in 2008 he employed nine or ten individuals. He is involved in the bookkeeping and cheque writing and does the bank reconciliations for his law practice, which focuses on real estate law. Only 2% to 3% of his practice involves corporate or commercial law. He retains an accountant to prepare his tax returns. The payroll for his law practice has been administered by ADP since the spring or summer of 2005.

[35] The Appellant met Ian Fitzgerald in 2005 when he became a client of the Appellant. In January 2007, Mr. Fitzgerald was pursuing the purchase from an individual (the "Landlord") of the remaining term of a 50-year lease of an RV park in Newfoundland and Labrador. The purchase was to be made by Resorts. The provincial government was holding up the purchase so it was abandoned in favour of a sublease. The Appellant did the legal work for Mr. Fitzgerald and Resorts

[36] Around March 2007, Mr. Fitzgerald asked the Appellant to invest in Resorts. The idea was that Resorts would sell long-term memberships to individuals that allowed the individuals to use the park for their RVs. After a proposal was made to him by Mr. Fitzgerald, the Appellant invested $150,000 in Resorts in August or September 2007. The funds were advanced as a loan to Resorts and the Appellant also received 25% of the equity in Resorts. The Appellant did not do the incorporation of Resorts and was not, and did not become, a director or officer of Resorts.

[37] In the spring of 2008, Mr. Fitzgerald approached the Appellant with a proposal to have Resorts sell RVs. The Appellant testified that Mr. Fitzgerald appeared to have significant knowledge of the business and that the concept fit well with the park business. As well, by that time some personality issues had arisen between Mr. Fitzgerald and the Landlord, so the Appellant viewed this as both a new business opportunity and a means to supplement the activities of Resorts in case there were any issues with Resort's RV park business.

[38] A $1 million line of credit was established with Textron to fund Resorts' new RV sales business. Resorts used the line of credit to purchase an inventory of RV trailers and sold the trailers from a lot on Commonwealth Avenue in Mount Pearl, NL.

[39] The Appellant testified that he was not involved in the day-to-day business of Resorts. From time to time, he would "pop in" to see how trailer sales were going and Mr. Fitzgerald would update him on those occasions.[42]

[40] In the fall of 2008, after further clashes between Mr. Fitzgerald and the Landlord, Mr. Fitzgerald asked the Appellant to incorporate a new corporation (Enterprises) so that the park business and the trailer business could be separated. The Appellant understood that the trailers were to be transferred to Enterprises and that the debt owed to him by Resorts would be assumed by Enterprises. He stated that he received an e-mail in the fall of 2008 from Mr. Fitzgerald indicating that the trailers had been transferred to Enterprises. The Appellant determined in May of 2011 that in fact the trailers had not been transferred to Enterprises but had remained with Resorts.

[41] The Appellant incorporated Enterprises on November 18, 2008 and listed the registered office as the address of his law firm in Mount Pearl, NL. The Appellant and Mr. Fitzgerald were both appointed as directors of Enterprises. The Appellant held 25% of the equity and Mr. Fitzgerald held the balance of 75%. In cross-examination, the Appellant identified a copy of the Certificate of Incorporation, the Notice of Directors and the Notice of Registered Office. The second of these confirmed that he was a director of Enterprises (Exhibit R-2). He also confirmed that he remained a director of Enterprises until March 2011.

[42] In early 2009, at the suggestion of Mr. Fitzgerald, Enterprises added a new business that involved the construction and sale of modular mobile homes. The company sold a total of three such homes and the Appellant was involved in addressing a post-sale issue with one of the homes in January 2010.[43]

[43] In May 2009, the Appellant was advised by Mr. Fitzgerald that Textron was concerned about some of the older trailer inventory and had stated that either the corporation had to buy the trailers or Textron would take them away.[44] Mr. Fitzgerald advised the Appellant that if he funded the purchase of the trailers,

---

42 Lines 5 to 12 of page 67 of the Transcript.

43 The issue is raised in an e-mail of January 9, 2010 entered into evidence as Exhibit R-5. The Appellant addressed a deficiency in the construction of the home (lines 18 to 28 of page 132 and lines 1 to 4 of page 133 of the Transcript).

44 The Appellant identifies the corporation as Resorts, which does not fit with his timeline for the transfer of the trailer business to Enterprises but does fit with the fact that the trailers were never in fact transferred by Mr. Fitzgerald to Enterprises. In cross-examination, the Appellant adopts statements in his notice of objection that indicate that the additional financing was in fact given to Enterprises: Lines 14 to 28 of page 110 and lines 1 to 20 of page 111 of the Transcript. I do not attribute any significance to this minor discrepancy.

he would be repaid as the trailers were sold. Given this and the fact that the Appellant was concerned that a loss of inventory would put the RV business in financial difficulties, he agreed to lend an additional $188,000 for a total of $424,000 to that point in time.[45] In cross-examination, the Appellant stated that he would have been concerned about the business operations of Enterprises if he had not contributed the extra funds but that the contribution meant that the company had "a bunch of trailers that were free and clear".[46]

[44] Mr. Fitzgerald asked the Appellant to remove him as a director of Enterprises in July 2010. This action was precipitated by the fact that Resorts had stopped paying for the sublease of the RV park and the sublease had reverted to the Landlord. Mr. Fitzgerald had expressed concern about claims by individuals who had purchased memberships in the RV park, and he had stated that he did not want any connection with Enterprises. The Appellant was instructed by an e-mail dated October 7, 2010 to reinstate Mr. Fitzgerald as a director, but that did not occur until March 2011. The Appellant stated that Mr. Fitzgerald always ran the businesses of Enterprises even when he was not a *de jure* director.[47] The Appellant was not an employee of, and did not receive any salary from, Enterprises.[48]

[45] In the spring of 2010, Mr. Fitzgerald approached the Appellant regarding the construction of modular mobile homes in Nunavut. Mr. Aymont had had experience with such projects when they were being run by the Nunavut Housing Authority (the "NHA"). The Appellant was told that the NHA had run into substantial budget overruns in the past and wanted to contract out the work to the private sector. This was presented to the Appellant as a lucrative business opportunity for Enterprises.

[46] The Appellant performed some research on the Internet to confirm the facts presented to him. He stated that in the spring of 2010 Enterprises had a lot of assets in the form of inventory, but the trailer business was slow and the modular home construction business was not meeting expectations. Although the company was asset rich, he was concerned about its long-term prospects and believed a new line of business was needed to generate income for the company. The Appellant stated:

---

45 In cross-examination, the Appellant stated that the exact amount of the loan was $188,608.11, for a total of $424,008.11: lines 1 to 8 of page 111 of the Transcript. The Appellant did not provide any details regarding the investment of approximately $86,000 that had increased his initial investment from $150,000 to $236,000 prior to the last loan for the RV business of $188,000.

46 Lines 2 to 3 of page 112 of the Transcript.

47 Lines 14 to 19 of page 70 and lines 3 to 7 of page 73 of the Transcript.

48 Lines 19 to 21 of page 70 of the Transcript.

> I wasn't concerned as much about the short term, it was more the long term, and I had sunk a fair amount of money in, I wanted to try to make sure that I got back out the money that I had put into the company.[49]

[47] In order to bid for a contract to construct homes in Nunavut, a bidder had to provide a deposit equal to 5% of the tender amount. Mr. Fitzgerald approached the Appellant to have him provide a total of $500,000 to Enterprises to fund the deposits for bids on four contracts in exchange for a percentage of the profits from the contracts. Mr. Fitzgerald provided a payment schedule that indicated that the principal would be repaid in bimonthly installments in October, November and December 2010 (Exhibit A-12). The Appellant was to receive 30% of the profits, Mr. Fitzgerald and Mr. Aymont were each to receive 10% and the balance of 50% was to remain in Enterprises. The 50% to Enterprises would allow Enterprises to pay its existing debt to the Appellant.

[48] On June 10, 2010, the Appellant loaned $430,455.18 to Enterprises to be used for four bids by Enterprises.[50] A further $69,544.82 was advanced in the fall of 2010, for a total of $500,000.[51] Enterprises succeeded on two of the bids. When the Appellant asked Mr. Fitzgerald about the funds freed up by the two unsuccessful bids he was asked to leave those funds in Enterprises for other bids, and he agreed to do so.[52]

[49] In August 2010, the Appellant was advised by Mr. Fitzgerald that the process relating to the Nunavut housing projects had changed. Rather than securing contracts directly with the NHA, Enterprises was to be hired as a subcontractor by the Contractor and only the Contractor would deal with the NHA. The Appellant did not know the reason for this change but speculated that the NHA may have wanted to deal with a single contractor rather than a number of contractors. With respect to his involvement in this process, the Appellant stated:

> Other than Ian [Fitzgerald] telling me in August of 2010 that this is the way that the arrangement was going to work, I didn't have any other involvement other than periodically we'd touch base as to the progress of how things were going. He signed off on all the individual contracts, the hiring and managed the operations for the Nunavut Housing Project.[53]

---

49 Lines 8 to 12 of page 77 of the Transcript.
50 Lines 17 to 27 of page 80 of the Transcript.
51 Lines 12 to 28 of page 116 and lines 1 and 2 of page 117 of the Transcript.
52 Lines 8 to 22 of page 81 of the Transcript.
53 Lines 1 to 7 of page 84 of the Transcript.

[50] To the Appellant's knowledge, the cheques issued for the deposits on the bids were not cashed by the NHA and the money remained in Enterprises. In cross-examination, the Appellant testified that he checked Enterprises' bank account in late August and found there to be only $140,000. He then questioned Mr. Fitzgerald, who advised him that the money had been used to buy additional trailers and to pay the ongoing expenses of Enterprises.[54] He went to the trailer lot and confirmed that there were a number of new trailers on the lot.[55] He admitted to being uneasy about the fact that he was not consulted about the use of the money, but he also said that he drew comfort from the fact that there were still significant funds in Enterprises' bank account ($140,000) and that there were new assets in the form of additional trailer inventory.[56]

[51] The Appellant acknowledged that he was not provided with financial statements for Enterprises although he had seen statements for Resorts. He stated that he had two conversations with an individual at Grant Thornton in which he was questioned about Resorts. The Appellant testified that he had periodically requested statements for Enterprises but was told by Mr. Fitzgerald either that the accountants were behind in producing the statements or that the statements that were produced had to be sent back for revision because of errors.[57]

[52] In cross-examination, the Appellant confirmed that Mr. Fitzgerald had told him that Grant Thornton was doing the accounting work for Enterprises.[58] With respect to the situation at the time of the June 2010 loan, he stated:

> Q. In June, 2010, did the company have an accountant, an external accountant?
>
> A. I was under the understanding that Grant Thornton was the accountant for the company.
>
> Q. And did you ask for financial statements around this time?
>
> A. I was asking periodically for financial statements. It was always the same – I'd ask Mr. Fitzgerald, because really I had minimal contact with the other staff, it was through Ian, Mr. Fitzgerald, and the response was usually about the same,

---

54 Lines 17 to 26 of page 123 and lines 21 to 22 of page 125 of the Transcript.
55 Lines 26 to 28 of page 123 and lines 1 to 3 of page 124 of the Transcript.
56 Lines 4 to 16 of page 124 of the Transcript.
57 Lines 13 to 28 of page 77 and lines 1 to 7 of page 78 of the Transcript.
58 Lines 1 to 9 of page 118 of the Transcript.

> that the accountants are behind on it or they made some mistakes and he sent it back for them to correct it.[59]

[53] The Appellant admitted that he had not contacted Grant Thornton directly to ask for financial statements.[60] He explained that, as he was not dealing with that firm personally, it was not in his personality to call them up to say that they were behind in preparing the statements. When asked if he had contacted the CRA or Ms. Singleton in June 2010, the Appellant stated that he had not contacted the CRA, that he did not know that Ms. Singleton was employed by Enterprises at that time, and that he understood that Grant Thornton was doing the accounting work.[61]

[54] The Appellant acknowledged that the contracts in Nunavut would result in an increase in the number of employees, but maintained that he did not know exactly how many employees had to be hired until October 2010 when he was asked to sign the payroll cheques.[62] He also acknowledged that a document titled "Nunavut Housing Summary" (Exhibit R-4) prepared around June 8, 2010 indicated a labour cost in the $620,664 to $664,300 range for each contract, but noted that the incurrence of this cost was dependent on securing the contracts.[63] With respect to the time that at which contracts were executed, he stated:

> Q. And to go back to Tab 14, and we're going to move along a little bit to paragraph 19, and paragraph 19, "In August, 2010, I was informed by Mr. Fitzgerald that it looked like the contracts in Nunavut were going to proceed differently than originally thought. It looked like we were now going to supply labour. Only a major contractor who would handle a large amount of contracts. In late August, 2010, Mr. Fitzgerald signed the contracts with the said contractor, NCC Dowland, but I did not see them until several months later". Is that an accurate description of the situation in August of 2010?
>
> A. Yes. In actual fact, I never saw the contracts themselves until when things started to go awry with NCC Dowland in probably – I think probably February of 2011 might have been the first time I saw the actual contracts themselves.
>
> Q. Okay.
>
> A. I was aware he had signed contracts, though.
>
> Q. But you were aware that it was with regards to supplying labour?

---

59 Lines 14 to 26 of page 117 of the Transcript.
60 Lines 10 to 15 of page 118 of the Transcript.
61 Lines 20 to 28 of page 118 and lines 1 to 10 of page 119 of the Transcript.
62 Lines 26 to 28 of page 119 and lines 1 to 8 of page 120 of the Transcript.
63 Lines 9 to 28 of page 120 and lines 1 to 22 of page 121 of the Transcript.

> A. Yes.
>
> Q. At this time in August of 2010, did you take any steps to ensure that a suitable payroll process was in place to take care of this increased labour force?
>
> A. In August, 2010, no. Well, at that time I didn't know the volume of staff that we were going to have. I hadn't seen the contracts, I didn't know how many contracts we had or how many staff we had. It wasn't until October of 2010 that I started to appreciate the number of employees that were actually being hired or had been hired.[64]

[55] The Appellant recalled signing payroll cheques in October 2010 but thought the number was closer to 30 than the 70 recalled by Ms. Singleton. The cheques prompted him to have a discussion with Mr. Fitzgerald about the use of a payroll company to handle Enterprises' payroll. Regarding the use of ADP, he testified:

> So I had suggested to Mr. Fitzgerald that would be a much more efficient system to be using, and he appeared to agree. So we went to work with – appeared to instruct Ms. Singleton to set up the ADP system. I know that she had contacted me with regards to setting up the ADP system, and I can recall in October – I'm not sure if it was via telephone or not, but I do recall talking to somebody up there and them indicating – I can recall asking is ADP set up now and they said, yes, it's ready to go for the next payroll. I thought that it was ready to go for the next payroll.[65]

[56] The Appellant identified an e-mail from Mr. Fitzgerald to him dated October 7, 2010 (Exhibit A-14). The e-mail included a second e-mail, dated October 6, 2010, from Mr. Fitzgerald to himself (with a cc to several others) that indicates on page 2 that there had been some issues with the payroll but that the auto pay system would be ready soon. The Appellant testified that he was advised by someone in the office that the payroll system was ready to go for the next payroll, and that after that he did not follow up to ensure it was actually being used:

> Q. Okay. So as far as – you recall following up to confirm that the ADP system had been set up?
>
> A. Yes.
>
> Q. Did you make any inquiries to see whether it was being used?

---

64 Lines 23 to 28 of page 121 and lines 1 to 24 of page 122 of the Transcript.

65 Lines 6 to 17 of page 86 of the Transcript.

> A. Once I was told that it was set to go for the next payroll, I didn't follow up after the fact to say, oh, did you enter it in this week.
>
> Q. Okay.
>
> A. I knew that nobody was coming to me to get cheques signed and nobody was raising any issues with me with regards to payroll, and it appeared to be running.[66]

[57] In addition to commenting on the payroll system, the second e-mail in Exhibit A-14, from Mr. Fitzgerald to himself and other employees of Enterprises, dated October 6, 2010, also states, in the first paragraph:

> I have decided to oversee the remainder of this project myself and implementing some changes effective immediately. I will still have assistance from Garland and Bob, but I am the lead project manager from here on in. Tina has move [*sic*] in my office so we can make sure the needs of the project are met as well as the requests of our staff.

[58] In cross-examination, the Appellant was asked if he had contacted the CRA in October 2010 after seeing the large number of payroll cheques:

> Q. At this point in time in October, 2010, when you saw the large number of cheques and you suggested that the ADP payment process be set up, did you contact the Revenue Agency to inquire about remittances?
>
> A. No. In August of 2010, again we had a fair amount of money sitting - $140,000.00 sitting in the account. A large amount had been used or some money had been used certainly to settle up the outstanding bills of NLRV, which is what Mr. Fitzgerald told me, and then the balance went to buy the trailers. So I had no reason to believe that there was any outstanding amounts coming into, say, September, and then we were setting up with ADP, so I thought that – I had been using that system for five or six years at that point in time and I knew that they automatically send in the remittance, so I had no reason to contact CRA. At the time, I had no reason to contact CRA. At the time, I had no reason to contact CRA because I believed we had a system in place that took care of that.[67]

[59] The Appellant testified that in the fall of 2010 he periodically checked the balance in Enterprises' bank account toward the end of the week using his company bank card. He stated that there always seemed to be a fair amount of

---

66 Lines 12 to 23 of page 87 of the Transcript.

67 Lines 17 to 28 of page 125 and lines 1 to 7 of page 126 of the Transcript.

money in the account.[68] He also periodically touched base with Mr. Fitzgerald about the company's financial situation, primarily because the repayment schedule he had been given with regard to his loan was not being met. He described the conversations as follows:

> A. Yes, that's correct. So I did periodically touch base with Mr. Fitzgerald because I was looking for repayment of the initial $500,000.00 that was put into the company.
>
> Q. Right.
>
> A. And Mr. Fitzgerald was telling me at that point in time that we needed to leave the money in there a little bit longer, it would be coming shortly, you know, because we're just waiting for the next payment to come in. I know that coming into certainly November and definitely through December, I had several conversations with him with regards to the money because, you know, at this point in time I'm supposed to have the majority, if not all of it back, and he said to me that Dowland was slow on getting the money back to us, that we're owed in the neighbourhood of a million dollars, and I specifically asked him – I said, you know, what has to come out of that, and he said there's nothing has to come out of that, that represents our profit, and I said to him, so we're up to date on everything and he said to me, yes, absolutely we're up to date, that's all profit for us.
>
> Q. When were you given this understanding?
>
> A. In November and at least a couple of times in December as well.
>
> Q. Did you have any discussion regarding the payment of accounts from Dowland in December with Mr. Fitzgerald?
>
> A. I knew in December that there was a fair amount of money outstanding that was owed to NLRV Enterprises from Dowland. Like I said, you know, in the neighbourhood of a million dollars is what Mr. Fitzgerald was representing to me. There was [*sic*] also some discussions about additional money coming in because of the fact that the project was delayed up north and that we would receive some additional compensation for the extra time it was going to take us to complete the project due to late starts from Dowland and Nunavut Housing not having tools and materials in place. So we did have some discussions about some additional funds coming in. It appeared that – I can remember seeing an email, and Mr. Fitzgerald was also telling me as well, that Dowland was saying that once we came back in the new year, that they'd straighten away the arrears on the contract, that they were closing down over Christmas holidays, so we wouldn't be able to get it back and straightened away until January, but that once January came in, then we

[68] This is consistent with Exhibit A-3, which shows payments from the Contractor to Enterprises totalling $1,448,741.52 from September 29, 2010 to December 9, 2010.

> would receive the arrears, but Mr. Fitzgerald was telling me that this was all profit money to us and not any money that we had to owe. I can remember being down to Florida in January and I was even looking at maybe getting a sports car because I thought worse [*sic*] case scenario when we get this million dollars, I'm going to get my $500,000.00 out, there's probably going to be some that I put there, there's going to be some extra money coming around, so I thought I was going to have lots of money flowing from that.[69]

[60] The e-mail from Mr. Fitzgerald to the Appellant dated January 24, 2011 (Exhibit R-1) confirms that Mr. Fitzgerald was telling the Appellant that over $1 million was owed to Enterprises.[70] The Appellant testified that this e-mail was the first indication to him that there were issues with payment by the Contractor.[71] However, on the basis of his understanding that the $1 million was profit to Enterprises, he did not believe the situation had any impact on the financial stability of Enterprises, but thought it affected only his ability to recover his investment.

[61] The Appellant testified that Mr. Fitzgerald continued to handle the negotiations with the Contractor until the first week of February when he asked the Appellant to draft a letter. The Appellant prepared a letter addressed to the NHA to advise them of the situation, and a telephone conversation was held later in February in which the Appellant and a lawyer for the Contractor participated in the background.

[62] The Appellant testified that by the end of February or the beginning of March 2011 it was clear that it would be more difficult than first thought to recover any more money from the Contractor. Steps were taken to hire a lawyer in Nunavut but the lawyer advised that he had a conflict of interest and instead suggested mediation. When it appeared the mediation was not progressing, Enterprises retained local counsel to file a statement of claim and to make a claim under the performance bond put in place by the Contractor.

[63] The Appellant testified that he first became aware of Enterprises' remittance issues in mid- to late February 2011 when he received a call from a person at the

---

69 Lines 11 to 28 of page 88, page 89, and lines 1 to 7 of page 90 of the Transcript.

70 The amount Mr. Fitzgerald says was owed to Enterprises is contradicted by Exhibit A-3 prepared by Ms. Singleton in March 2011, which indicates that the total amount held back by the Contractor was in fact $190,065.38.

71 The Appellant also testified that he was aware of the shortfall in payments by the Contractor by the end of November 2010. I understand his statement in relation to Exhibit R-1 to mean that this was the first indication to him that the shortfall was more than a timing issue and that the Contractor might not pay the $1 million.

CRA.[72] He was advised in the call that Enterprises owed remittances in the amount of more than $500,000 and that as a director of the company he was potentially liable. He called Mr. Fitzgerald, who assured him matters were being dealt with, but by this point the Appellant recognized that there were serious problems.[73] Subsequently, Mr. Fitzgerald asked him to contribute an additional $25,000 but the Appellant refused, citing the failure to provide financial statements notwithstanding his numerous requests.[74]

[64] The Appellant testified that he met with Mr. Fitzgerald for lunch in St. John's in March 2011. Mr. Fitzgerald suggested that they liquidate the inventory of trailers and the modular mobile home and use the funds to pay down the debts of Enterprise. An e-mail dated March 28, 2011 from Mr. Fitzgerald to the Appellant (Exhibit A-15) suggests that Mr. Fitzgerald wanted to liquidate the RV inventory to pay bills like rent and to keep the inventory moving. At the end of the e-mail, Mr. Fitzgerald states: "I can not be a part of it any longer. I do not know what to do but I know my heart can't take another round of working with nothing and the phone ringing off the hook." In the balance of the e-mail, Mr. Fitzgerald talks about his own financial difficulties, including assertions that he had not been paid for 6 weeks and that Enterprises owed him $300,000, and suggests that the Appellant may want to get a new partner to run the RV business.

[65] By May 2011, the Appellant had discovered that some of the trailers had been sold but that the money from the sales was not credited to Enterprises. The same month, the CRA advised the Appellant that the remaining trailers would be seized but that the money would be applied to the obligations of Resorts because that corporation still owned the trailers. The Appellant subsequently determined that the sales of trailers following the transfer of the RV business to Enterprises had been executed using back-to-back sales. Specifically, Resorts would sell the trailer to Enterprises so that Enterprises could sell the trailer to the customer. The sale to Enterprises would occur the day of the sale to the customer.

[66] In May 2011, the Appellant let himself into the offices of Enterprises with a key he had obtained from Mr. Fitzgerald. He was not able to secure the records of Enterprises and the lack of records made it impossible to establish the debt owed to Enterprises by the Contractor. The Appellant described the circumstances as follows:

---

72 Lines 18 to 28 of page 96 and lines 1 to 6 of page 97 of the Transcript.
73 Lines 7 to 17 of page 97 of the Transcript.
74 Lines 18 to 28 of page 97 and lines 1 to 8 of page 98 of the Transcript.

> In May of 2011, I went up – now Mr. Fitzgerald had given me a key to go in, and I took whatever records were left at the Enterprises office. There were two old computers, but one of them you didn't even have to sign in it was so outdated, they had no accounting records on them or any financial information. So the three main computers for the office were missing. I did give all the records that I had to an accountant to try to piece together the accounting for the corporation because part of what we were trying to do in the negotiations between yourself and myself, and Dowland and their lawyer, was see if we can come to some type of arrangement where we could come up with how much each party had put into the project and maybe still come to some type of arrangement. I was probably waiting for – and I gave all the materials to a CA firm. After probably a year, year and a half of this going back and forth, so we're into 2012 now, we basically came to the conclusion that we don't have all the records.[75]

[67] The Appellant testified that the financial records that he did recover indicated that a $150,000 payment from the Contractor to Enterprises in January 2011 had been used by Mr. Fitzgerald to pay down debt on his credit cards instead of meeting the payroll.[76] The failure to meet payroll has resulted in a lien against the Appellant for $130,000.

[68] Finally, the Appellant testified that he was owed almost $1 million dollars by Resorts and Enterprises but that he had no prospect for any recovery of these funds.

[69] The first witness for the Respondent, Mr. Robert McGrath, testified to the following:

> 1. The GST/HST returns of Enterprises for the periods from July 1 to September 30, 2010 (the "First 2010 Period") and from October 1 to December 31, 2010 (the "Second 2010 Period") were each filed late, on March 3, 2011.
>
> 2. The return for the First 2010 Period showed net tax owing of $119,241.32 and the return for the Second 2010 Period showed a credit of $17,434.86.
>
> 3. The two periods were assessed as filed by notice dated March 22, 2011. The net tax owing was $101,806.46.
>
> 4. By notice dated January 11, 2012, the Minister assessed the Appellant under section 323 of the ETA for the amount of $108,377.91, which represented the net tax of $101,806.46 plus interest of $6,571.45.

---

[75] Lines 23 to 28 of page 94 and lines 1 to 13 of page 95 of the Transcript.

[76] Exhibit A-3 indicates that Enterprises received two payments in January 2011, one for $149,411.60 on January 5, 2011 and one for $126,426.82 on January 14, 2011.

> 5. By notice dated January 11, 2012 (Exhibit R-9), the Minister assessed the Appellant in respect of unremitted payroll deductions in the aggregate amount of $664,301.94. The notice of assessment set out on the third page a breakdown of the amounts being assessed because of Enterprises' failure to remit federal tax, provincial tax, Canada Pension Plan contributions and Employment Insurance premiums. The total amount assessed included penalties for the failure to remit and interest to the time of the assessment.
>
> 6. Mr. McGrath stated in cross-examination that the assessment in the amount of $3,418.76 for Enterprises' failure to remit during 2008 was issued in error. He further indicated in cross-examination that the amount relating to Enterprises' failure to remit during 2009 was only $1,095.64, that the $510,675.45 assessed for Enterprises' failure to remit during 2010 represented the bulk of the assessment under section 227.1 of the ITA and that the bulk of that arose in the fall of 2010.

[70] The Respondent's second witness, Mr. Peddle, testified that the amount of $1,028.47 assessed in respect of 2009 represented the difference between the income tax withheld and remitted for that year and the amount of income tax that should have been withheld and remitted according to the T4s filed for the year. For the period after 2009, the first failure by Enterprises to remit payroll deductions occurred in March 2010, and in respect of each month after March 2010 until the end of March 2011, there was either a total or partial failure by Enterprises to remit the monthly payroll deductions. Mr. Peddle also referred to the fact that a letter had been issued by the CRA to Enterprises in June 2010 with regard to outstanding remittances for March, April and May 2010. It appears that the CRA did not follow up on this failure until January of 2011.

[71] The details of Enterprises' failures to remit are set out in Exhibit R-10. The printout shows that the amount that should have been, but was not, remitted by Enterprises was a total of $32,712.99 for the months of March, April, May, June, July and August 2010;[77] a total of $427,048.78 for the months of September, October, November and December 2010;[78] and, a total of $183,793.95 for the months of January, February and March 2011.[79] At the time the summary was prepared, on March 22, 2011, the amount for March 2011 was not due and therefore was only an estimate.[80] According to Mr. Peddle, the amount shown on

---

77 First page of Exhibit R-10.
78 First page of Exhibit R-10.
79 Third page of Exhibit R-10.
80 Lines 2 to 14 of page 152 of the Transcript.

the third page of Exhibit R-10 as remitted for January 2011 was a balancing entry that reflected the fact that the amount had been assessed rather than remitted.[81]

A. Statutory Provisions

[72] The relevant provisions are section 227.1 of the ITA, section 323 of the ETA, section 83 of the *Employment Insurance Act* and section 21.1 of the *Canada Pension Plan*. The latter two statutes adopt subsections 227.1(2) through (7) of the ITA, with any necessary modifications, and so I shall not reproduce them here.[82] Section 227.1 of the ITA states:

> 227.1 (1) Liability of directors for failure to deduct — Where a corporation has failed to deduct or withhold an amount as required by subsection 135(3) or 135.1(7) or section 153 or 215, has failed to remit such an amount or has failed to pay an amount of tax for a taxation year as required under Part VII or VIII, the directors of the corporation at the time the corporation was required to deduct, withhold, remit or pay the amount are jointly and severally, or solidarily, liable, together with the corporation, to pay that amount and any interest or penalties relating to it.
>
> (2) Limitations on liability — A director is not liable under subsection (1), unless
>
> > (*a*) a certificate for the amount of the corporation's liability referred to in that subsection has been registered in the Federal Court under section 223 and execution for that amount has been returned unsatisfied in whole or in part;
> >
> > (*b*) the corporation has commenced liquidation or dissolution proceedings or has been dissolved and a claim for the amount of the corporation's liability referred to in that subsection has been proved within six months after the earlier of the date of commencement of the proceedings and the date of dissolution; or
> >
> > (*c*) the corporation has made an assignment or a bankruptcy order has been made against it under the *Bankruptcy and Insolvency Act* and a claim for the amount of the corporation's liability referred to in that subsection has been proved within six months after the date of the assignment or bankruptcy order.

---

81 Lines 16 to 28 of page 152 of the Transcript.

82 See subsection 83(2) of the *Employment Insurance Act* and subsection 21.1(2) of the *Canada Pension Plan*.

(3) Idem [due diligence defence] — A director is not liable for a failure under subsection (1) where the director exercised the degree of care, diligence and skill to prevent the failure that a reasonably prudent person would have exercised in comparable circumstances.

(4) Limitation period — No action or proceedings to recover any amount payable by a director of a corporation under subsection (1) shall be commenced more than two years after the director last ceased to be a director of that corporation.

(5) Amount recoverable — Where execution referred to in paragraph (2)(*a*) has issued, the amount recoverable from a director is the amount remaining unsatisfied after execution.

(6) Preference — Where a director pays an amount in respect of a corporation's liability referred to in subsection (1) that is proved in liquidation, dissolution or bankruptcy proceedings, the director is entitled to any preference that Her Majesty in right of Canada would have been entitled to had that amount not been so paid and, where a certificate that relates to that amount has been registered, the director is entitled to an assignment of the certificate to the extent of the director's payment, which assignment the Minister is hereby empowered to make.

(7) Contribution — A director who has satisfied a claim under this section is entitled to contribution from the other directors who were liable for the claim.

[73] Section 323 of the ETA states:

323. (1) Liability of directors — If a corporation fails to remit an amount of net tax as required under subsection 228(2) or (2.3) or to pay an amount as required under section 230.1 that was paid to, or was applied to the liability of, the corporation as a net tax refund, the directors of the corporation at the time the corporation was required to remit or pay, as the case may be, the amount are jointly and severally, or solidarily, liable, together with the corporation, to pay the amount and any interest on, or penalties relating to, the amount.

(2) Limitations — A director of a corporation is not liable under subsection (1) unless

> (*a*) a certificate for the amount of the corporation's liability referred to in that subsection has been registered in the Federal Court under section 316 and execution for that amount has been returned unsatisfied in whole or in part;
>
> (*b*) the corporation has commenced liquidation or dissolution proceedings or has been dissolved and a claim for the amount of the corporation's liability referred to in subsection (1) has been

> proved within six months after the earlier of the date of commencement of the proceedings and the date of dissolution; or
>
> (*c*) the corporation has made an assignment or a bankruptcy order has been made against it under the *Bankruptcy and Insolvency Act* and a claim for the amount of the corporation's liability referred to in subsection (1) has been proved within six months after the date of the assignment or bankruptcy order.

(3) Diligence [due diligence defence] — A director of a corporation is not liable for a failure under subsection (1) where the director exercised the degree of care, diligence and skill to prevent the failure that a reasonably prudent person would have exercised in comparable circumstances.

(4) Assessment — The Minister may assess any person for any amount payable by the person under this section and, where the Minister sends a notice of assessment, sections 296 to 311 apply, with such modifications as the circumstances require.

(5) Time limit — An assessment under subsection (4) of any amount payable by a person who is a director of a corporation shall not be made more than two years after the person last ceased to be a director of the corporation.

(6) Amount recoverable — Where execution referred to in paragraph (2)(*a*) has issued, the amount recoverable from a director is the amount remaining unsatisfied after execution.

(7) Preference — Where a director of a corporation pays an amount in respect of a corporation's liability referred to in subsection (1) that is proved in liquidation, dissolution or bankruptcy proceedings, the director is entitled to any preference that Her Majesty in right of Canada would have been entitled to had the amount not been so paid and, where a certificate that relates to the amount has been registered, the director is entitled to an assignment of the certificate to the extent of the director's payment, which assignment the Minister is empowered to make.

(8) Contribution — A director who satisfies a claim under this section is entitled to contribution from the other directors who were liable for the claim.

B. The Position of the Appellant

[74] Counsel for the Appellant argued that Mr. Thistle had been drawn into an elaborate web designed to entice him into investing almost $1 million in the businesses carried on first by Resorts and then by Enterprises. Like any good web, there was an air of truth to it which resulted from the presentation of viable business opportunities, including the sale of RVs and the construction of modular

homes in Nunavut, from a business plan holding out the prospect of significant profits from the businesses if a significant investment was made, from the involvement of an accounting firm that contacted Mr. Thistle about Resorts, and from the hiring of a bookkeeper for Enterprises and the establishment with ADP of a payroll system for Enterprises. The trappings were illusory, however, as the accounting firm did not act for Enterprises, the bookkeeper was fresh out of school and had no real-world experience, and the payroll system was never used.

[75] Counsel submitted that, given the objective circumstances, including the existence of a company bookkeeper and the arrangements with an outside payroll company, a reasonable person would assume that there was financial oversight of Enterprises' operations and that the payroll system that was set up was being used, particularly since there was no indication it was not being used until February 2011.

[76] Counsel submitted that Mr. Thistle was unaware of the financial circumstances of Enterprises until February 2011 when he was contacted by the CRA. He was aware by late November 2010 that invoices issued by Enterprises to the Contractor were not being paid in full but he was also told that these unpaid amounts represented the profit of Enterprises, which amounted to $1 million. Mr. Thistle did express concern that the amounts owed to him were not being repaid in the fall of 2010 but he did not equate that failure with financial difficulty as he believed Enterprises was asset rich and there was no indication of any claims other than his own. As well, the schedule of customer payments (Exhibit A-3) showed significant cash payments to Enterprises from September 29, 2010 to January 14, 2011 and the restriction on payment only really occurred after the December hiatus, which came out in the e-mail of January 18, 2011 from the Contractor to Enterprises (Exhibit A-2).

[77] When he became aware of the fact that Enterprises in fact had a deficit of some $700,000, and not a profit of $1 million, Mr. Thistle immediately took steps to address the situation by recalling work crews from the projects in Nunavut as quickly as practicable and by pursuing the Contractor for the amounts owed to Enterprises.

[78] With respect to whether Mr. Thistle ought to have known that Enterprises had remittance issues prior to February 2011, counsel submitted that the circumstances were such that a reasonable person would have had no reason to suspect that there were such issues. In particular, Mr. Thistle was an outside director who was not involved in the day-to-day activities of Enterprises; he had

recently invested $500,000 in Enterprises and he believed there was substantial equity in the corporation; he was aware that Enterprises had contracts to build modular homes in Nunavut and was receiving payments on those contracts; he was told a payroll system was established in October 2010; and during the fall of 2010 he was provided by the individual running Enterprises with periodic updates that disclosed no material issues.

C. The Position of the Respondent

[79] Counsel for the Respondent submitted that the law regarding the due diligence defence in subsection 227.1(3) of the ITA and subsection 323(3) of the ETA is as set out in the decision of the Federal Court of Appeal in *Buckingham v. Canada*, 2011 FCA 142, [2013] 1 F.C.R. 86. That being so, it is clear that the onus is on the director to prove that he has met the conditions required in order to successfully rely on that defence. The standard is an objective standard and while the circumstances surrounding the actions of the director are important, the subjective motivations of the director are not.

[80] Counsel submitted that the standard of care for an outside director is no different than for an inside director. While an inside director may have earlier knowledge of an issue than an outside director, that is merely an issue of timing and it does not alter the standard that is imposed on both. Where an outside director knew or ought to have known that that the company was entering a period of financial difficulty, the standard of care and the objectively prudent person test come into play in assessing the actions taken by the director at the point in time at which the director had or ought to have had that knowledge.

[81] Counsel submitted that Mr. Thistle knew or ought to have known that Enterprises was in financial difficulty in June of 2010 when he lent the corporation an additional $430,455.18. At that time, Enterprises' trailer sales were slow, there were no modular home sales and Enterprises had no third party financing to pursue new opportunities. As well, Mr. Thistle had been in business with Mr. Fitzgerald for several years but had not received any payment on his loans and had not received financial statements. Counsel referred to the decision of this Court in *D'Amore v. The Queen*, 2012 TCC 373 in support of the position that a reasonably prudent person would have reviewed these circumstances and would have taken steps to verify the state of Enterprises' finances in June 2010 before putting additional money into Enterprises.

[82] With respect to subsequent events, at the end of August 2010 Mr. Thistle was alarmed by Enterprises' bank balance and was uneasy about not being consulted; in September 2010 Mr. Thistle knew that the contracts had been delayed; in October Mr. Thistle was advised that there was a problem with the payroll, and although he took steps to put a system in place, he did not follow through to ensure it was being used; also, Mr. Thistle did not receive the first repayment amount, due in October, on the June loan, and by December Mr. Thistle was told that Enterprises was owed $1 million. In December 2010, Mr. Thistle did not inquire as to whether Enterprises' payroll remittances were up to date even though by that time it was clear to the employees of Enterprises, in particular Ms. Singleton, that the remittances were not being made.

III. Analysis

[83] The Appellant relies on the due diligence defence provided in subsection 227.1(3) of the ITA and subsection 323(3) of the ETA. This defence is incorporated by reference into the director liability provisions of the *Employment Insurance Act* and the *Canada Pension Plan*.

[84] In *Buckingham*, the Federal Court of Appeal described at paragraph 52 what is required in order to rely on this due diligence defence:

> [52] Parliament did not require that directors be subject to an absolute liability for the remittances of their corporations. Consequently, Parliament has accepted that a corporation may, in certain circumstances, fail to effect remittances without its directors incurring liability. What is required is that the directors establish that they were specifically concerned with the tax remittances and that they exercised their duty of care, diligence and skill with a view to preventing a failure by the corporation to remit the concerned amounts.[83]

[85] The Court held that the standard imposed by subsection 227.1(3) of the ITA and subsection 323(3) of the ETA is an objective standard that takes into consideration the context in which the remittance issue arises:

> [37] Consequently, I conclude that the standard of care, skill and diligence required under subsection 227.1(3) of the *Income Tax Act* and subsection 323(3) of the *Excise Tax Act* is an objective standard as set out by the Supreme Court of Canada in *Peoples Department Stores*.
>
> . . .

---

83 *Buckingham, supra*, paragraph 52.

> [39] An objective standard does not however entail that the particular circumstances of a director are to be ignored. These circumstances must be taken into account, but must be considered against an objective "reasonably prudent person" standard. As noted in *Peoples Department Stores*, at paragraph 62:
>
> > The statutory duty of care in s. 122(1)(*b*) of the CBCA emulates but does not replicate the language proposed by the Dickerson Report. The main difference is that the enacted version includes the words "in comparable circumstances", which modifies the statutory standard by requiring the context in which a given decision was made to be taken into account. This is not the introduction of a subjective element relating to the competence of the director, but rather the introduction of a contextual element into the statutory standard of care. It is clear that s. 122(1)(*b*) requires more of directors and officers than the traditional common law duty of care outlined in, for example, *Re City Equitable Fire Insurance*, *supra* [[1925] 1 Ch. 407].
>
> [40] The focus of the inquiry under subsections 227.1(3) of the *Income Tax Act* and 323(3) of the *Excise Tax Act* will however be different than that under 122(1)(*b*) of the CBCA, since the former require that the director's duty of care, diligence and skill be exercised to prevent failures to remit. In order to rely on these defences, a director must thus establish that he turned his attention to the required remittances and that he exercised his duty of care, diligence and skill with a view to preventing a failure by the corporation to remit the concerned amounts.

[86] The Court also held that the assessment of the director's conduct begins when it becomes apparent to the director, acting reasonably and with due care, diligence and skill, that the corporation is entering a period of financial difficulties.[84] In support of this proposition, the Court cites its earlier judgment in *Soper v. The Queen*, [1998] 1 F.C. 124, in which the Court said at paragraph 53:

> In my view, the positive duty to act arises where a director obtains information, or becomes aware of facts, which might lead one to conclude that there is, or could reasonably be, a potential problem with remittances. Put differently, it is indeed incumbent upon an outside director to take positive steps if he or she knew, or ought to have known, that the corporation could be experiencing a remittance problem. The typical situation in which a director is, or ought to have been, apprised of the possibility of such a problem is where the company is having financial difficulties. [. . .]

---

84 *Buckingham, supra*, paragraph 46.

[87] In determining whether the due diligence defence applies, it is also important to keep in mind three general propositions. First, the reasonably prudent person standard is not a standard of perfection but of reasonableness.[85] This recognizes that even a person who is reasonably prudent may be prone to human error. The standard founded on the notion of reasonableness has been helpfully described in the context of tort law as follows:

> The standard of care of the reasonable person is an objective standard. It focuses on the defendant's conduct and its sufficiency with reference to that of a reasonable person. No consideration is given to the defendant's thought process or his subjective awareness of the danger that his conduct poses to others. Therefore, it is not necessary to show that the defendant was a conscious risk taker. Indeed, the test of the reasonable person excludes all the psychological and physical traits that make each person different. A person's ability to apprehend and avoid danger may well depend, in part, on his intelligence, reaction time, strength, courage, memory, coordination, maturity, wisdom, temperament, confidence, dexterity, and many other personal attributes. The objective test excludes all of these individual characteristics in its determination of reasonable care.[86]

[88] Second, the standard judges conduct against that of a "reasonably prudent person", not a "reasonable person". The *Canadian Oxford Dictionary* (2nd ed.) defines "prudent" as "1 careful to provide for the future. 2 discreet or cautious; circumspect. 3 having or exercising good judgment." Accordingly, the focus is on whether, in the circumstances, the person has exercised reasonable care for the future, caution and good judgment. Third, the circumstances that are being judged against the reasonably prudent person standard are the circumstances that existed at the relevant points in time and not the circumstances as they are currently known with the benefit of hindsight.[87]

[89] I accept the Appellant's testimony that he did not know that Enterprises had an issue with the remittance of payroll deductions and net tax under the ETA until he was contacted by the CRA in mid- to late February 2011. I also accept the Appellant's testimony that he did not believe that Enterprises was in financial difficulty until mid- to late February 2011 when it became clear that Enterprises owed almost $700,000 because of its failures to remit. In particular, I found the Appellant to be a straightforward and credible witness who honestly believed until February 2011 that Enterprises was solvent and up-to-date on its various obligations in light of the information he was given by Mr. Fitzgerald (the

---

85 *Smith v. The Queen*, 2001 FCA 84 at paragraph 14 and *Roitelman v. The Queen*, 2014 TCC 139 at paragraph 31.

86 Philip H. Osborne, *The Law of Torts*, (4th ed., Toronto: Irwin Law, 2011) at page 28.

87 *Roitelman, supra*, at paragraph 32.

individual running the businesses of Enterprises) and the significant amount of capital he had loaned to the corporation.

[90] The Appellant did not participate in the business operations of Enterprises, as confirmed by Ms. Singleton. He was aware of issues faced by Enterprises from time to time, such as the call on the loan by Textron in 2009, the slowing down of the RV business and the underperformance of the modular home business. These issues were promptly addressed by the provision of significant additional capital to Enterprises. Because of his loans to Enterprises, in the Appellant's mind, the corporation was asset rich and not in any financial difficulty.

[91] Certainly, in August 2010 the Appellant had no reason to believe that Enterprises was not making its remittances on time given the modest number of employees and the level of capitalization of the corporation. In particular, according to Exhibit R-10, the amount that should have remitted by Enterprises from the end of March 2010 to the end of August 2010 totaled $32,712.99, which is a small fraction of the $430,455.18 the Appellant had lent to Enterprises in June 2010.

[92] The Appellant was aware by the end of November or in early December 2010 that the Contractor was withholding on payments to Enterprises, although it appears that the degree of withholding may have been grossly exaggerated by Mr. Fitzgerald to explain why the Appellant was not being repaid in accordance with the terms of the Appellant's June 2010 loan to Enterprises.[88] In any event, the Appellant testified that he was advised by Mr. Fitzgerald that the amounts being withheld were pure profit to Enterprises and that Enterprises was current on its obligations. Given the pattern of behavior of Mr. Fitzgerald, I have no doubt that that was the case.

[93] The Appellant was aware in October 2010 that there were payroll efficiency issues arising from the significant increase in the number of individuals employed by Enterprises. The Appellant addressed these issues by suggesting the use of a third party payroll company to manage the payroll of Enterprises. He advised Ms. Singleton with regard to setting up the relationship with that company, and it is

---

[88] Exhibit A-3 suggests that the Contractor was withholding about 10% of the contract price, which may simply reflect its compliance with a statutory construction lien type obligation. Although the December payments were less than the payroll for that month, the November payments more than made up for that shortfall and the January payments also exceeded the payroll for that month. By the end of January 2011, Enterprises had received from the Contractor $349,240 more than its gross payroll for the period from September 1, 2010 to January 31, 2011. When combined with the $500,000 lent by the Appellant in 2010, this does not suggest that Enterprises was having financial difficulties.

clear that the contract was signed with the payroll company and that the Appellant was under the impression that the system would be used. The Appellant did not follow up to confirm this, but neither did he receive any indication that the payroll system was not being used. In any event, given the testimony of Ms. Singleton[89] and the comments under the heading "Payroll" in Exhibit A-14, the payroll issues were described as efficiency-related and as such were not a direct indicator of financial difficulty or of a failure by Enterprises to remit.

[94] The Appellant admitted that he had not seen financial statements for Enterprises even though he had requested such statements from Mr. Fitzgerald on a number of occasions. However, the absence of financial statements is not, in and of itself, an indication that Enterprises was in financial difficulty or was failing to make remittances. It only indicates that the Appellant accepted Mr. Fitzgerald's excuses for not having financial statements. The Appellant instead relied on direct communication with Mr. Fitzgerald regarding the status of the businesses of Enterprises. In any event, any financial statements for 2008 and 2009 would not have disclosed the remittance issues that arose after February 2010, and financial statements for 2010 could not have been prepared until early 2011, by which time the Appellant had been alerted to the issues by the CRA.

[95] The Appellant also admitted that he was concerned when he determined at the end of August 2010 that Enterprises had $140,000 in its bank account. However, he confronted Mr. Fitzgerald and was told the balance of the loan made in June had been used to purchase additional RVs and to pay other expenses of Enterprises. The Appellant stated that he confirmed that there were new RVs on the lot. He also stated that he took comfort in the fact that, along with the inventory of RVs, there was still $140,000 in the bank account after Enterprises' expenses had been paid. He periodically checked the bank account after that and confirmed that Enterprises had significant funds in its account. Throughout the balance of 2010, he was not provided with information by any employee of Enterprises that would have suggested that Enterprises was in financial difficulty.

[96] The Appellant stated that he was told in late November or in December 2010 about issues with payment by the Contractor, but he was also told by Mr. Fitzgerald that the amount owed to Enterprises represented pure profit to the company. Exhibit R-1 confirms that Mr. Fitzgerald was telling the Appellant that the Contractor owed Enterprises over $1 million.

---

[89] See, for example, lines 12 to 19 of page 26 of the Transcript.

[97] Finally, Ms. Singleton confirmed that she provided no information to the Appellant that would have alerted him to the fact that Enterprises was in arrears on its remittance obligations. The evidence indicates that Mr. Fitzgerald and, by December 2010, Ms. Singleton were the only people aware of the remittance issue until the Appellant was called directly by the CRA in mid- to late February 2011. Neither advised the Appellant of the issue and Ms. Singleton, the bookkeeper for Enterprises, accepted Mr. Fitzgerald's assertion that the failure to remit was the fault of the Contractor.[90]

[98] In the circumstances, I accept the Appellant's position that he did not believe Enterprises was in financial difficulty or behind in its remittances and that he had no information to suggest it was in financial difficulty or behind in its remittances until he received the call from the CRA in mid- to late February 2011.

[99] The question that must still be answered, however, is whether, prior to the phone call from the CRA in mid- to late February 2011, the Appellant ought to have known that Enterprises was in financial difficulty and had failed to make its payroll and GST/HST remittances as early as March 2010.[91] In view of the standard described in paragraph 46 of the Federal Court of Appeal decision in *Buckingham*, *supra*, this in turn requires a determination of whether a hypothetical individual, acting reasonably and with due care, diligence and skill, would have known that Enterprises was facing financial difficulty if confronted with circumstances comparable to those faced by the Appellant. This is not to ask whether the Appellant was willfully blind to the possibility of difficulties faced by Enterprises but rather to ask whether a reasonable individual, faced with comparable circumstances, would have suspected that Enterprises was in financial difficulty or was failing to make the required remittances.

[100] The Appellant had known Mr. Fitzgerald since 2005 and it is clear that he trusted Mr. Fitzgerald enough to invest almost $1 million in businesses run by him. The Appellant periodically sought updates directly from Mr. Fitzgerald about the business and operations of Enterprises and he was obviously satisfied with what he was told by Mr. Fitzgerald. It appears in hindsight that any negative information given to the Appellant, such as the call by Textron on its line of credit or the need to move into new lines of business to improve cash flow, was aimed at soliciting more capital from him. In any event, the Appellant addressed the negative

---

90 Lines 14 to 28 of page 22 and lines 1 to 5 of page 23 of the Transcript.

91 The subsection 227.1(1) assessment for 2008 was issued in error and the amount assessed for 2009 of $1,028.47 (plus penalties and interest) was the result of a discrepancy between the amount of income tax withheld and remitted and the amount finally determined to be owing.

information by lending more money to Enterprises, thereby assuaging any concerns he may otherwise have had about the financial condition of the corporation. In short, the Appellant did not have concerns about the short term and he addressed any concerns he may have had about the long term through additional financing.

[101] In these circumstances, I can see no reason to believe that an individual acting reasonably and with due care, diligence and skill would have viewed the financial condition of Enterprises any differently than the Appellant given the fact that the corporation was on its face asset rich at all material times, if one ignores the debt to the Appellant. I also note that by June 2010 Enterprises had four core employees in addition to Mr. Fitzgerald, none of whom raised any financial or other issues with the Appellant in 2010. Under the circumstances, I believe that any objective observer would have been given the impression that the businesses of Enterprises were being looked after and that the corporation was not in financial difficulty.

[102] It appears, in fact, that Mr. Fitzgerald was able to conceal his failure to pay Enterprises' remittances, over which he had exclusive control, not only from the Appellant but also from the other employees of Enterprises, at least until December 2010. Even after Ms. Singleton became aware of the remittance issue in December 2010, she accepted that this issue was attributable to the Contractor's purported failure to pay its accounts in full rather than any failure by Mr. Fitzgerald to make the remittances.[92] In my view, the failure of Enterprises to make the remittances can only be attributed to a deliberate decision not to pay the remittances on the part of Mr. Fitzgerald and not to any financial difficulty of Enterprises.

[103] There were, however, two red flags indicating possible trouble not so much with regard to the financial condition of Enterprises but with regard to the veracity of Mr. Fitzgerald. These red flags are the undisclosed use of the Appellant's June 2010 loan to Enterprises for a purpose other than the Nunavut housing project and the absence of financial statements for Enterprises.

[104] As already stated, the Appellant did challenge Mr. Fitzgerald regarding the use of the June 2010 loan and he took steps to confirm what he was told. He also took steps after that to periodically check the bank account of Enterprises and was

---

[92] Ms. Singleton's testimony at lines 3 to 28 of page 22, page 23, and lines 1 to 19 of page 24 of the Transcript. Ms. Singleton did not have a clear understanding of what Mr. Fitzgerald was in fact doing with respect to remittances even though she prepared the forms: lines 19 to 28 of page 45, page 46, and lines 1 to 11 of page 47 of the Transcript. If she did know that there were issues, this information was not communicated to the Appellant.

satisfied that the corporation had a significant amount of cash on hand. I am of the view that his conduct met the standard of an individual acting reasonably and with due care, diligence and skill. Although in hindsight Mr. Fitzgerald's actions with respect to the June 2010 loan to Enterprises may be viewed differently, the test is whether the Appellant's conduct at the time was that of an individual acting reasonably and with due care, diligence and skill. I find that it was and that Mr. Fitzgerald's use of the June 2010 loan does not mean that the Appellant ought to have known that Enterprises was in financial difficulty or was not making its remittances when due. In addition, given the amount of the loan to Enterprises ($430,455.18) versus the accumulated remittance obligation to August 31, 2010 ($32,712.99), objectively Enterprises was not in financial difficulty at that time and could easily have paid its outstanding remittance obligation if Mr. Fitzgerald had chosen to do so.

[105] The Appellant stated that he had asked for financial statements for Enterprises on a number of occasions but Mr. Fitzgerald always had an excuse as to why such statements were not available. It appears that the Appellant did not challenge the excuses or seek the information elsewhere. However, the connection between obtaining financial statements and discovering either financial difficulty or a failure to remit is a tenuous one, particularly since a private corporation such as Enterprises is not required to have audited financial statements[93] and unaudited financial statements can be manipulated by the person providing the information on which the statements are based.

[106] I am unable to conclude that the Appellant's failure to obtain financial statements of Enterprises indicates that he ought to have known that Enterprises was in financial difficulty when all of the other objective circumstances at the time suggested otherwise. Rather than relying on the point-in-time information found in annual financial statements, the Appellant chose to rely on regular direct communication with the individual running the businesses of Enterprises.

[107] The Appellant was not being unreasonable or careless by seeking information directly from Mr. Fitzgerald, as he was the individual running Enterprises' businesses on a day-to-day basis and he was in the best position to provide real-time information about those businesses and the status of the corporation generally. In any event, as already noted, the only financial statements that would have been available until early 2011 would have been those for 2008 and 2009. Financial statements for 2008 and 2009, no doubt prepared with

---

93 Section 266 of the *Corporations Act*, RSNL 1990 c. C-36.

information provided by Mr. Fitzgerald, would not have revealed what was going on in Enterprises from March 2010 to February 2011.[94] As well, considering the loans by the Appellant totaling $500,000 in 2010 and the information in Exhibits A-1, A-3 and A-9, it is far from clear that Enterprises was in financial difficulty in the conventional sense up until the end of January 2011[95] – it is only clear that Mr. Fitzgerald, for reasons known only to him, deliberately chose not to make the payroll and GST/HST remittances of Enterprises. As Mr. Fitzgerald removed all the financial records from the office of Enterprise, it was impossible for the Appellant to piece together exactly what had happened in Enterprises in 2010 and early 2011.

[108] The Appellant conceded that he was made aware of Enterprises' remittance issues when he was contacted by the CRA in mid- to late February 2011. At that time, he took immediate steps to mitigate any further remittance issues by withdrawing the work force hired for the Nunavut project and by seeking payment of what he believed (on the basis of representations by Mr. Fitzgerald) was owed by the Contractor. Unfortunately, by that time, Enterprises had no money to pay the remittances that accrued in February and March 2011. I do not attribute this to any fault of, or lack of diligence by, the Appellant.

[109] The Appellant did not benefit from Enterprises' failure to make its payroll remittances for February 2011 and March 2011, and he did not decide against payment of these remittances in favour of some other use. For reasons that may never be fully known, Enterprises had no money to make the payroll remittances by the time the Appellant became aware of the remittance issue in mid- to late February 2011. In fact, Enterprises could not even make payroll, which resulted in a lien against the Appellant of $130,000. The only action available to the Appellant was to shut down the business as quickly as possible and to pursue recovery of any amounts owed to the corporation, which he did.

[110] For the foregoing reasons, I find that the Appellant did exercise the degree of care, diligence and skill to prevent Enterprise's failure to remit payroll deductions and net tax that a reasonably prudent person would have exercised in comparable circumstances. In a nutshell, the Appellant was materially misled by an individual whom he trusted to run the businesses of Enterprises. Even a reasonably prudent person cannot be expected to ferret out intentional deceit when the objective

---

[94] The HST Assessment relates to the period from July 1 to September 31, 2010, and all but $1,095.64 of the Payroll Assessment relates to the period after February 2010.

[95] Between September 2010 and January 2011, Enterprises had cash receipts in excess of its gross payroll of $349,240 - see paragraph 24 above.

circumstances at the time do not disclose that deceit and the individual has taken positive steps to ensure the financial health of the corporation and to ensure that a mechanism is in place to administer the rapidly expanded payroll of the corporation.

[111] Accordingly, the appeals are allowed with costs to the Appellant and the Payroll Assessment and the HST Assessment are vacated.

Signed at Ottawa, Canada, this 16th day of June 2015.

"J.R. Owen"

Owen J.

CITATION:	2015 TCC 149
COURT FILE NOS.:	2013-2648(IT)G and 2013-2649(GST)G
STYLE OF CAUSE:	WALTER LESLIE THISTLE v. HER MAJESTY THE QUEEN
PLACE OF HEARING:	St.John's, Newfoundland and Labrador
DATES OF HEARING:	February 19 and 20, 2015
REASONS FOR JUDGMENT BY:	The Honourable Justice John R. Owen
DATE OF JUDGMENT:	June 16, 2015

APPEARANCES:

Counsel for the Appellant:	Keith S. Morgan
Counsel for the Respondent:	Amy Kendell

COUNSEL OF RECORD:

For the Appellant:

Name:	Keith S. Morgan
Firm:	Browne Fitzgerald Morgan & Avis St. John's, Newfoundland and Labrador

For the Respondent: William F. Pentney
Deputy Attorney General of Canada
Ottawa, Canada