Docket: 2005-4517(IT)G

BETWEEN:

DENNIS BONOTTO,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on February 25, 2008, at Toronto, Ontario

Before: The Honourable Justice J.E. Hershfield

Appearances:

Counsel for the Appellant: Joseph D'Alimonte

Counsel for the Respondent: Shatru Ghan

JUDGMENT

The appeal from the assessment made under the *Income Tax Act* with respect to Notice of Assessment 21450 dated January 12, 2005, is dismissed, with costs in the cause to go to the Respondent, in accordance with and for the attached Reasons for Judgment.

Signed at Ottawa, Canada, this 2nd day of May, 2008.

"J.E. Hershfield"

Hershfield J.

Citation: 2008TCC221
Date: 20080502
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BETWEEN:

DENNIS BONOTTO,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Hershfield J.

The Issues

[1] The issue in this appeal is whether the Appellant is liable under subsection 227.1(1) of the *Income Tax Act* (the "*Act*") for the failure of Belmont Drywall Systems Ltd. (the "Corporation") to remit $88,778.38 federal income tax plus certain interest amounts to the Receiver General as required by section 153 of the *Act*.

[2] The liability of the Appellant under subsection 227.1(1) depends on a finding that at relevant times he was either a *de jure* or a *de facto* director of the Corporation and that as such was not relieved of liability under subsection 227.1(3). That subsection is relieving where the director exercised the degree of care, diligence and skill that a reasonably prudent person would have exercised in comparable circumstances to prevent the failure of the Corporation to remit the amounts in issue. Accordingly, the underlying issues are the status of the Appellant as a director of the Corporation and the applicability of the due diligence defence.

[3] In dealing with the due diligence defence the Appellant has noted that this is not a case of total remittance failures by the Corporation. There have been some timely remittances and some late remittances. An argument was made that the due

diligence defence in this case might have to be considered in respect of two distinct periods even though the assessments cover one continuous period, namely January 1, 2001 through December 31, 2003. This has given rise to a further issue; namely, how should late payments be applied if applying them to the oldest arrears first (as done by the Respondent) has the effect of increasing the Appellant's liability for a period where he was liable, compared to his liability for that period had the late payments been applied to current remittance obligations in respect of that period.

Factual Background

[4] The Appellant worked as a tradesman in his father's drywall business since 1982. When his father died in 1993, the Appellant took over the business.

[5] The lawyer for the father's estate was a Mr. Fiksel. One of his employees was a woman by the name of Colleen Fitzpatrick with whom the Appellant became romantically linked.

[6] The Appellant testified that he thought Ms. Fitzpatrick had some good ideas one of which, apparently, was that they should start a new drywall business. The idea it seems was that it should be her business.

[7] A new company was formed in February of 1996 in the name of Belmont Drywall (Concord) Ltd. ("Belmont Concord"). Companies Branch profile reports show the director of this company as being Margaret Stroud who the Appellant testified was a friend of Ms. Fitzpatrick. The incorporator was Mr. Fiksel. His name and signature were on the certified Articles of Incorporation.

[8] Little evidence was led as to the activities of Belmont Concord other than the Appellant's testimony that it was Ms. Fitzpatrick that owned the company and that he simply worked for the company as a tradesperson. Documents provided at the hearing that corroborate that she was at least the President of Belmont Concord are the Companies Branch profile report referred to above, a Statutory Declaration dated August 2000 and a Business Banking Agreement with the Toronto-Dominion Bank executed by her as President having sole signing authority and dated April 1996.

[9] While Respondent's counsel tried to suggest that Belmont Concord was just a continuance of the Appellant's father's business and that Ms. Fitzpatrick could not have been its directing mind, the Appellant's testimony was that it was her company and that she worked at generating new and good customers for it and that he simply acted as an employee in charge of the field work.

[10] By 1999, the romance between the Appellant and Ms. Fitzpatrick ended. They were not getting along personally. She was suing his mother on a mortgage secured loan where, according to the Appellant, no funds had actually been advanced. The mortgage security signed by his mother was, according to the Appellant, suggested by Ms. Fitzpatrick as a way to creditor proof his mother. As well, there had been earlier issues with unions. Ms. Fitzpatrick had apparently been accused of converting union funds to her own use. Still, the business arrangement between them continued in terms of the operation of Belmont Concord at least until June 2000 when the Corporation (i.e. Belmont Systems) was incorporated.

[11] Notwithstanding denials, it appears to me that, in effect, the Appellant sought to take back the business for his own account at that time which is much earlier than he wanted me to believe. He wanted me to accept that he, in effect, usurped her interests and authority in 2002 when, as will be elaborated on later in these Reasons, she was gone from the scene and he let the Corporation's accountant document his interests and authority. I am not satisfied, however, that Ms. Fitzpatrick was ever intended to have an ownership interest in the business of, or a shareholder interest in, the Corporation. In my view, the erosion of the Appellant's relationship with Ms. Fitzpatrick prior to the formation of the Corporation and the Appellant's subsequent actions only tend to betray his assertions. Furthermore, as will be noted later in these Reasons, her abandonment from the scene occurred shortly after the formation of the Corporation – not in 2002.

[12] Mr. Fiksel was shown as the incorporator and first director of the new company; i.e. the Corporation. However, Mr. Fiksel gave evidence at the trial to indicate that he was not the incorporator and that his signature had been forged on the Articles of Incorporation. He testified that he believed that Ms. Fitzpatrick was the person who forged his signature.

[13] Mr. Fiksel became aware of the forgery when he was sent copies of the Articles of Incorporation in October of 2000 by the Appellant's lawyers. Mr. Fiksel took immediate action to have the records at the Companies Branch rectified and Ms. Fitzpatrick was then shown as first director.[1] Ms. Fitzpatrick signed an

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[1] The reason for the initial inquiry in October 2000 concerning the forged signature was never explained. One explanation would be that the Appellant and new lawyers were seeking at that time to confirm the status of ***his*** new company. Still, there was no explanation as to why Ms. Fitzpatrick was named as the first director once the forgery was acknowledged.

indemnity that Mr. Fiksel required of her given his concern about any liability that he might have relative to his being shown as the incorporating director of this company. That Ms. Fitzpatrick signed the indemnity leads me to believe that she did in fact take responsibility for the forgery and that she had earned Mr. Fiksel's distrust.

[14] At this point, I note that an employee of the Corporation, Ms. Kondrashev, gave evidence that when she was hired in about April 2000 she was initially interviewed by Ms. Fitzpatrick and was told that she, Ms. Fitzpatrick, and the Appellant were partners in business together and that if he too approved of her hiring, then she would have the job.

[15] Ms. Kondrashev testified that Ms. Fitzpatrick was the person attending to corporate business on a regular basis in the first four or five months of her employment and that as far as she knew Ms. Fitzpatrick was working for both the Corporation (i.e. Belmont Systems) and for Belmont Concord. She seemed to have no knowledge that Belmont Concord had, purportedly at least, ceased to carry on business once the Corporation had been formed. This testimony together with the Statutory Declaration for Belmont Concord (referred to above) being signed in August of 2000 evidences that Belmont Concord may still have been carrying on some activities in its name after the incorporation of the Corporation in June. This in turn might suggest that Ms. Fitzpatrick's interest in the business, reflected through Belmont Concord, was not being yielded so readily at this time. A new form of alliance or association might have been in the works.

[16] Ms. Kondrashev also testified that four or five months after being hired, Ms. Fitzpatrick's regular attendance at the office stopped. She testified that Ms. Fitzpatrick went away on extended trips and did not spend that much time in the office. During such long absences it was the Appellant who attended to corporate business on a regular basis. She testified that by July 2001 things got ugly between Ms. Fitzpatrick and the Appellant and after that Ms. Fitzpatrick was essentially barred from the office. Exchanges were abusive. The police were brought in and arrests were made. The import of the testimony was that it was Ms. Fitzpatrick that was causing the trouble even though it was the Appellant that was initially arrested. Ms. Fitzpatrick was apparently not someone you wanted to alienate.

[17] As well, Ms. Kondrashev testified that in about September 2001 she took all of the Corporation's records over to the accountant's office for the preparation of Financial Statements. The year end of the Corporation was June 30. Its first year's

Financial Statements for the year ending June 30, 2001 had not yet been prepared. The accountant was Mr. Scambellone. He testified at the hearing as well.

[18] Mr. Scambellone testified that in the course of preparing the Financial Statements he discovered that there were no Minute Books. This led to his discovery on March 7, 2002 that Ms. Fitzpatrick was still on record as the first director so he prepared a document for the Appellant making him the director replacing Ms. Fitzpatrick. He acknowledged that he back-dated the appointment date to June 6, 2000. This was filed with the Companies Branch at some point after the accountant's discovery that Ms. Fitzpatrick was the director of record. Nonetheless, the amended corporate records reflect this back-dated appointment and is the basis for the Respondent's position that the Appellant was a *de jure* director since June 2000 and continued as such throughout the assessment period.

[19] Mr. Scambellone testified that he spoke to the Appellant about all this at the time he was preparing the Financial Statements.[2] The Appellant was the person in charge who confirmed, at that time at least, the content of documents that needed to be prepared. The back-dated appointment reflected the information reported to him by the Appellant. Nonetheless, the Appellant asserts that his appointment as *de jure* director was not a representation made by him until early 2002 when the 2001 Financial Statements were being finalized and these questions were being addressed.

[20] Mr. Scambellone also testified as to the financial condition of the Corporation by reference to the Financial Statements for 2001 and 2002 where the Corporation reported losses of $58,034 and $235,665 respectively. The Appellant spoke of financial strains as well. Corporate obligations to suppliers in the construction field were demanding and onerous. In spite of this, Mr. Scambellone testified that while the Corporation was in arrears in remittances at the end of the 2000 calendar year, it had actually remitted an excess amount for the 2001 calendar year. I was given nothing to corroborate this evidence which does not reconcile with the assessments. Accordingly, it is of limited value.[3]

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[2] The Financial Statements were signed on February 28, 2002 by the Appellant as director even though Ms. Fitzpatrick's status was discovered or confirmed a week later. Recalling that Ms. Fitzpatrick was not to be found at this time, Mr. Scambellone said he relied on the Appellant, as the person in charge, for instructions.

[3] Mr. Scambellone testified that according to his notes there was a $19,000 remittance shortfall at the end of the 2000 calendar year and a remittance overpayment of $2,300 at the end of the 2001 calendar year. These figures are irreconcilable with the assessments and the balance due records

[21] I note here as well that in June 2000 the Appellant signed the banking documents for the Corporation with the Toronto-Dominion Bank. He is shown on these documents as President with signing authority but they do not show who the directors were. No Director's Resolutions were apparently requested. That the Appellant signed these documents indicates that he was in fact representing himself to the bank as the appropriate officer of the Corporation. Further, while he wavered somewhat on the point, I find that the evidence, indeed his own testimony, confirms that he was the sole signing officer of the Corporation from the time these documents were signed by him.

[22] I note here, as well, that although there were no corporate Minute Book records put in evidence (and it is likely that none exist), the Respondent did not take issue with the testimony of the Appellant that he owned 90% of the shares of the Corporation and his brother owned 10%.[4] While under corporate law, directors are appointed at shareholders' meetings or by written shareholder resolutions (or by a quorum of directors acting to fill a vacancy), I have little doubt that although no minutes or signed resolutions seem to exist, that the Appellant had effectively, without interference, taken on the role of the directing mind of the Corporation. As discussed below, this weighs heavily in the analysis of his status as a director.

The Remittance Record

[23] The spot audit that commenced at the beginning of May resulted in a series of assessments. The first assessment on May 25, 2000 was for some $29,600 for the period January 1, 2001 through to the end of March 2001. The second assessment was in October 2001 for the period April through August 2001. It was the

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of the Respondent. The Respondent's records do not include any information regarding the 2000 calendar year and show a $67,000 remittance shortfall in respect of the 2001 calendar year. The latter records were entered as an exhibit in a Joint Book of Documents and their accuracy was not challenged. The accountant's testimony on this point was not reliable.

[4] Given the absence of corporate records it is possible, if not likely, that shares were never issued and that the ownership of the Corporation was in limbo throughout the period under appeal. Nonetheless, the Appellant asserts a 90% ownership interest and purports to have exercised that degree of ownership and control from the day of incorporation. The Respondent does not take issue with this assertion so, factually, I must accept that such ownership is not an issue in this appeal. Had the majority ownership of shares been an issue, it would still be open to this Court to treat him as the majority shareholder even without the proper share issuances having been completed on the basis that he had the status of a *de facto* shareholder following the principles laid down in *Cooper v. Cayzor Athabaska Mines Ltd.* (1960), 24 D.L.R. (2d) 544 (Ont. C.A.).

largest single assessment for some $67,700.[5] A series of subsequent assessments followed for subsequent periods, the last period assessed ending December 2003. The Appellant responded to the first of these assessments promptly by delivering a series of post-dated cheques. There were as many as 6 post-dated cheques a month. They were each for $1,444 until the end of September 2001 and after that they were for varying larger amounts with only one 4 week gap in July 2003. The Respondent treated all of these payments as *payments* of arrears on a first-incurred first-paid basis.[6] That is, they were not treated as *remittances* on account of current remittance liabilities arising at the time the post-dated cheques were cashed.

[24] In addition to these payments, there were some current remittances after the spot audit but some were late. The Appellant relies on the post audit aggregate of the post-dated instalment type payments and the current remittances as being an important factor to take into account in my considerations of the due diligence defence. It was admitted by the Respondent that there were some current remittances after the spot audit, some late or insufficient, and the Respondent also noted that there were periods where no remittances were made at all. These deficiencies generated additional assessments which generated more arrears. However, that record is difficult to reconstruct as the only exhibit showing payments, shows only the instalment type payments that were applied to arrears on a first-incurred first paid basis. The Respondent's witness did not explain the process in a way that cast any light on the problem. He did say, however, that if there was no assessment relating to a particular month, then I could assume that there were current timely remittances made in that month for the full amount required to be remitted.

[25] The record reveals there were three such months: October 2001, November 2001, and June 2002. As well, it appears that there were months (for example December 2001) where there was a current remittance that was less than the full amount required to be remitted. The assessments (on March 1, 2002 and June 5, 2002) for that month (December 2001) suggest that timely remittances were only sufficient to fully discharge remittance liabilities for UI and the CPP.

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[5] These assessed amounts were for remittance failures during those periods for UI, CPP, Provincial tax and Federal tax and included interest and penalties in respect of each such failure.

[6] After applying payments to interest and penalties, payments were applied in the following order: UI, CPP, Provincial tax and Federal tax. This ordering applied as well to the manner in which the interest and penalties were credited.

[26] There also appear to be assessments for a number of months (for example January and February 2002) where there may have been timely remittances in respect of some liabilities and/or late remittances that were all credited against liabilities in those months as opposed to being applied to arrears. This is suggested by the fact that in those months the only penalty assessed is in respect of Federal tax.

[27] Still, while such anomalies are troublesome to me, the assessment records clearly demonstrate that there were no current remittances (or payments credited as such) for most of the months in the period under appeal. That is the case for the months January 2001 through August 2001, April 2002, August 2002 through May 2003 and July 2003 to December 2003. As noted there were payments during these periods (the post-dated instalments) but they were treated as payments for arrears. Over the three year period the assessments totalled $226,451. This is net of the remittances applied currently. The balance owing at the end of that period, after taking into account payments credited against arrears (including a few last instalment payments in January 2004), was $88,778 plus some accrued interest. That underlines the extent of the overall remittance failure problem.[7]

[28] I must say, however, that the evidence of the manner in which remittances were made and treated was poorly dealt with by the parties. If a due diligence defence is being relied on, and tracing payments is relevant in respect of that defence, the Court has to be given better evidence and the onus does not simply rest with the Appellant in this case. The Respondent is the best party to explain, if not the only party that can explain, exact particulars of how the assessments have treated remittances and payments. The schedules relied on by the Respondent to quantify the Appellant's liability essentially bury information that is potentially relevant to a due diligence defence.

[29] Another example of this is the absence of reliable evidence as to what happened between June 1, 2000 and December 31, 2000. According to the Respondent's witness I should assume that remittances were made as required during that period since there were no assessments for these months. Does this mean we have a history of compliance that should be taken into account in applying the due diligence defence?

[7] The remittance failures *per se* actually totalled some $35,000 less than $88,778 since that shortfall includes interest and penalties. Still, the remittance failures are significant.

[30] On the other hand, as noted above, the Appellant's accountant testified that according to his records there were remittance shortfalls at the end of 2000. Does this mean the shortfall was remitted late but credited as paid prior to the first assessment dated May 25, 2001? Is this more tenable because in cross-examination the Appellant did not expressly deny remittance failures in 2000? On balance, I find that the evidence suggests that remittances were made on a timely basis in 2000. That there were late remittances does not seem tenable since even if the Respondent applied late payments to remittance failures in 2000 there would have been assessments for interest and penalties. There is no record of such assessments in evidence and the Respondent's own witness testified that if there is no assessment in respect of a period, I must assume that remittances were made on a timely basis. The accountant's evidence to the contrary is not reliable.

Director Arguments

[31] The Appellant puts at issue whether he was ever a director, *de jure* or *de facto* and if he was, it would be at some point in early 2002 when he presumed to present himself to the world as a director. Should I find that the Appellant was a director before that time, the argument was that I should not find him to be a director before the spot audit started, that being the first time it could be argued that he acted as and held himself out as a *de facto* director. Quantification of his liability, subject to the due diligence defence, should begin at either of these times and be calculated in a manner that would not make him effectively liable for earlier remittance failures.

[32] The Respondent argues that the record of the Appellant's *de jure* appointment can be relied on, that his actions in early 2002 confirmed he was willing to hold himself out as being a director since June 2000 and, in any event, he was, by January 1, 2001 or earlier, the sole person acting as and holding himself out to be a director.

Due Diligence Argument

[33] The Appellant's principle argument puts reliance on this Court's decision in *Franck v. R.*[8] which is asserted to be authority for allowing the instant appeal in the event I find that the Appellant was a director. In that case, like this one, the director in spite of serious financial difficulty continuously put his mind to and attempted to deal with and pay large remittance requirements. The Court found that, in the

[8] 2005 DTC 994.

circumstances of that case, not turning a blind eye to the problem constituted sufficient diligence and reasonable care to prevent the remittance failures and on that basis the director was not found personally liable for shortfalls. This speaks primarily to the period after the Appellant became aware of the remittance failures.

[34] Appellant's counsel also referred me to the *Construction Lien Act (Ontario)* and argued that construction receipts were statutorily encumbered and held in trust for workers so that the Corporation's ability to fund remittances was impaired. While acknowledging that the Crown's charge was preferential, Appellant's counsel suggested that these encumbrances helped explain the financial difficulties of the Corporation and further evidenced the Appellant's diligence to see that remittances were made.

[35] Appellant's counsel also argued that the Canada Revenue Agency ("CRA") contributed to the situation by not seeking to enforce its collection rights at the outset. The Appellant as a responsible person relied on the apparent satisfaction of the CRA with the Corporation's efforts to meet its remittance obligations. By not acting on garnishment rights under the *Act,* the CRA was on the one hand saying at that time: "you are acting prudently", and on the other hand, are now saying: "you didn't act prudently".

[36] Suffice to say the Respondent did not have much to say about the *Franck* case or any of these arguments. The Respondent simply relied on the fact that it was apparent that the Appellant purposefully used trust funds to finance a failing business and that in such a case the due diligence defence could not, in reason, be applied.

[37] The Appellant's alternative argument, as noted earlier, looked at the assessment period in two segments. The Appellant essentially argued that if there are no remittance problems for the 2000 year, then it should not be presumed that he was responsible for the change from compliance to non-compliance until the beginning of May when he was confronted by the spot audit. Arguably, that was the first time that he acted imprudently by not addressing the problems that he suggests he was only made aware of when the auditor spoke to him about it in early May 2000. Further, up until that time, there is the suggestion that it was Ms. Fitzpatrick, a director, who was responsible for this part of the business and he could rely on her to have things done properly as evidenced by the Corporation's compliance throughout 2000. If that is the case, quantification of his liability should begin after April 2000 and be calculated in a manner that would not make him effectively liable for earlier remittance failures. Applying payments on a first-

incurred first-paid basis increases the later remittance shortfalls which, effectively, makes him liable for earlier remittance failures.

[38] The Respondent argues that the evidence falls short of establishing that Ms. Fitzpatrick was ever in charge of anything and that the Appellant deliberately used trust funds to finance his failing business.

Analysis

Ms. Fitzpatrick

[39] I will first consider whether, or the extent to which, the Corporation was managed or directed by Ms. Fitzpatrick. The evidence is clear that by 1999, the couple was fighting in a serious way. Ms. Fitzpatrick is actually suing the Appellant's mother on what the Appellant suggested at the hearing to be a fraudulent credit proofing scheme initiated by Ms. Fitzpatrick. Still, somehow, this business partnership was being tolerated to some extent. Interestingly, in May of 1999 Ms. Fitzpatrick gave the Appellant a General Power of Attorney to deal with her interests in Belmont Concord and other activities. This might suggest that he was seeking or she was giving up *de facto* control over Belmont Concord. Nonetheless, her continuing presence and activities in relation to at least Belmont Concord are evident in the testimony of Ms. Kondrashev and the Statutory Declaration signed in August of 2000. None of this, however, shows that she was serving as an active director of, or carrying out any duties on behalf of, the Corporation and even if she did, it seems likely to have ended by September of 2000 according to the testimony of Ms. Kondrashev.[9]

[40] That does not mean that Ms. Fitzpatrick did not set up, and was the person seeing to, remittance procedures in the summer and fall of 2000. She was doing office work then and there were no remittance failures until later. If the Appellant worked primarily in the drywalling part of the business, the inference is that she was responsible for the office and he had no reason to believe that the systems or practices of the Corporation would result in the remittance failures discovered in May 2001. The Appellant seeks to hide behind his apparent ignorance of

[9] The Appellant testified that there were instances where Ms. Fitzpatrick did act in a way that reflected her authority. She struck a lien that the Appellant filed on behalf of the Corporation for example. However, this is the only example cited. It occurred in the fall of 2000 and does not distract from the evidence that she was gone from the scene by January 2001. As well, the example demonstrates that while Ms. Fitzpatrick might have been able to flex her *de jure* position, that does not mean that the Appellant was not holding himself out as having authority.

remittance failures until the beginning of May 2001 when there is the suggestion that that is when he first learned of such failures.

[41] I do not believe the "suggestions" and inferences here are sufficient to warrant a finding that favours the Appellant. I accept the evidence that it was the Appellant, not Ms. Fitzpatrick, who was in the office by the fall of 2000 and that the Appellant as the person who wrote the cheques would have known in January 2001 that the remittances were being missed. In my view, it is simply undeniable that the Appellant was aware of remittance requirements, was in a position to dictate remittance compliance and, as a means to finance the business, failed to make timely remittances. I make this finding in respect of the entire period under appeal; namely January 1, 2001 to December 2003.

[42] I note here that I would come to the same conclusion even if I accepted a different version of the relationship between the Appellant and Ms. Fitzpatrick. In spite of all the reasons to distrust Ms. Fitzpatrick there may well still have been a business partnership in June 2000 and beyond. Ms. Kondrashev's testimony supports the scenario that the Corporation might simply have been formed to replace Belmont Concord as a means of escaping Concord's problems. This would explain why Ms. Fitzpatrick was never removed as the first director until 2002. It might even have been intended that she be the shareholder of and have stewardship over the affairs of the Corporation to mirror the situation in Belmont Concord. In many respects, in spite of all the personal issues going on between the Appellant and Ms. Fitzpatrick that seem to betray this version of the facts, it does "fit" and I do not reject the possibility that the Appellant could not, or did not want, to escape from this unholy business association. However, the nature of the association did change. The Appellant became the President and sole signing officer of the Corporation while Ms. Fitzpatrick was the President and sole signing officer of Belmont Concord. As things stood, by the fall of 2000, the Appellant was the directing mind of the Corporation. The ongoing association scenario changes nothing. It remains undeniable that he was aware throughout the assessment period of remittance requirements, was the only person in a position to dictate remittance compliance and, as a means to finance the business, he failed to cause the Corporation to make timely remittances.

De Jure Director

[43] There is no doubt that section 227.1 imposes a liability on a *de jure* director. Without necessarily suggesting that there is doubt as to that imposition in respect of a *de facto* director, the first determination required in a case like this is,

generally, whether that person is a *de jure* director. Having said that, I find I must deviate from that route somewhat in this particular case. The only reason for my suggesting such deviation is that, in this case, it is clear to me that the Appellant was a *de facto* director of the Corporation at all relevant times and, subject to a due diligence defence, is, in this case, liable as such under section 227.1. That makes the enquiry into his *de jure* status academic.

[44] Still, it is worth noting that the Appellant's *de jure* status is less than clear. Since there was an assumption made by the Respondent that he was a director, there is a burden on the Appellant to establish that he was not a *de jure* director. That being the case, the uncertainty may simply be resolved by finding that the Appellant did not meet the burden of proof imposed on him. I am, however, reluctant to make that finding. To the contrary, if put upon to make a finding on the point, I would have to give the Appellant the benefit of any doubts at least regarding his status before February 2002.

[45] The Respondent seems to rely entirely on the back-dated records of the Appellant's apparent *de jure* appointment. The appointment however must have been made in accordance with corporate law for him to be a *de jure* director. The uncontradicted evidence is that the first director properly named in the Articles of Incorporation was Ms. Fitzpatrick. There is no evidence of her retirement and there is no evidence of a shareholders' meeting or written resolution appointing replacement directors. There is no evidence of an express consent in writing of the Appellant acting as a director. The Respondent has not effectively challenged the Appellant's position that none of these necessary formalities have been met.[10] While I am not entirely convinced that there was no undocumented shareholders' meeting that approved the appointment of the Appellant as the sole director in the stead of the first director, I would be hard pressed to find that such an appointment had been made before February 2002. Regardless, as stated, the question is academic.

De Facto Director

[46] I have little hesitation in finding that the Appellant was a *de facto* director by January, 2001 which is the beginning of the first assessment period under appeal.

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[10] Sections 115 to 119 *Business Corporations Act* (*Ontario*).

[47] As well, there is no question that a *de facto* director is or at least *can be* a "director" for the purposes of being held liable under section 227.1 for remittance failures. The "*can be*" qualification merits further comment.

[48] A good discussion of a *de facto* director's liability under section 227.1 is found in *Wheeliker v. R.*, [1999] 2 C.T.C. 395 (Fed. C.A.), reversing [1998] 1 C.T.C. 2021 (T.C.C.). The appellants in that case were not *de jure* directors as the Articles of Incorporation of the subject company required that each director own at least one share of the company. None of the directors at the relevant time owned any shares. Also, there were nine directors at the relevant time, even though the Articles of Incorporation limited the board of directors to seven members. It was not challenged that at all relevant times the Appellants acted as directors. The question was whether the failure to meet the appointment qualifications was fatal to assessments under section 227.1.

[49] The majority decision of the Federal Court of Appeal delivered by Noël J.A. first noted at paragraph 9 that the proper question was whether the word "director" as used in section 227.1 only connotes a person *qualified* to act as such under the applicable corporate statutory regime. The majority held, at paragraphs 13, 14 and 15, that the provisions of the particular statutory regime under consideration acknowledged that persons may act as directors without being qualified and may be liable as directors where they purport to act as such. The majority went on however at paragraph 18 to conclude that statutory provisions recognizing consequences for acting as a director did not constitute an unqualified person as a director. Still, they found the appellants liable under section 227.1 applying common law principles. More specifically, to protect persons who relied on persons acting or purportedly acting as directors, the majority decision of the Court confirmed that common law afforded such persons protection under the principle that a man cannot take advantage of his own wrong. A person then who acts as a director, who is held out as if he was a director, has no defence to an assessment under section 227.1. That is, while nothing in the statute operates to make the Appellants "directors" of the Corporation, the Appellants could not exculpate themselves from liability.

[50] It is interesting to note that this reasoning does not use the concept, nor is it necessarily the same as the concept, of *de facto* directors being liable under section 227.1. It is also interesting that at the Tax Court of Canada, the appellants in *Wheeliker* were found to be *de facto* directors who, based on the decision in *Kalef v. R.*, [1996] 2 C.T.C. 1 (Fed. C.A.), were said not to be "directors" for the purposes of section 227.1 and not liable for remittance failures of the Corporation.

[51] Létourneau J.A. wrote a dissenting judgment in *Wheeliker* [11] that agrees with the majority judgment in reversing the Tax Court of Canada decision but he does so on a different basis. Firstly, he found that *Kalef* should not be taken as authority that only *de jure* directors are liable under section 227.1. Secondly, he found that the correct analysis required a finding that the term "director" in section 227.1 meant any type of director, *de jure* or *de facto*. In reaching this conclusion he relied on a series of corporate law authorities that held "director" includes a *de facto* director.

[52] While Létourneau J.A. was dissenting in his reasons in *Wheeliker,* it seems he ultimately succeeded in elevating his views in *McDougall v. R.*, [2002] G.S.T.C. 127 (Fed. C.A.). In brief reasons, it was stated that Beaubier J.T.C.C. made no error of law in relying upon *Wheeliker* to find that liability attached to the appellant in that case for acting as a *de facto* director. Various decisions of the Tax Court of Canada have since relied on *Wheeliker* for the proposition that *de facto* directors are liable under section 227.1 of the *Act* and section 323 of the *Excise Tax Act*, such as *Hartrell v. R.*, [2007] 1 C.T.C. 2109 (T.C.C.), aff'd 2008 FCA 59, *Bremner v. R.*, [2007] G.S.T.C. 113 (T.C.C. [Inf.]), and *Thibeault c. R.*, [2006] G.S.T.C. 165 (T.C.C. [Inf.]).[12]

[53] While this principle, that *de facto* directors are directors for the purposes of section 227.1, now seems well established, it has qualifications in terms of making a determination that a person has been acting as a *de facto* director for the purposes of section 227.1. One such limitation suggested in a decision of Bowman C.J. applies the reasoning espoused by Noël J.A speaking for the majority of the Court of Appeal in *Wheeliker*; namely, for a non *de jure* director to be liable under section 227.1 there must be a holding out that the authority and management responsibilities exercised are being carried out *qua* director.

[54] In *Scavuzzo* a former director had properly resigned from that office. He remained as general manager of the Corporation and exercised authority consistent with the job. The CRA assessed the Appellant as a *de facto* director of the

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[11] Létourneau J.A.'s "dissenting" decision concurs with the majority decision in result but disagrees with the reasons.

[12] In *Scavuzzo v. R.*, [2006] 2 C.T.C. 2429 (T.C.C.) and *Parisien c. R.*, [2005] G.S.T.C. 59 (T.C.C. [Inf.]), Bowman C.J. and Lamarre J. respectively each cited Létourneau J.A.'s dissent in *Wheeliker* regarding the *de facto* director issue.

Corporation. In allowing the Appellant's appeal, Chief Justice Bowman stated as follows:

> 27 I think it will be apparent that one must be careful about the use of the expression *de facto* director. It does not cover as broad a field as is sometimes ascribed to it. It does not, for example, at least for the purposes of the derivative liability of directors under the *ITA* and the *ETA* cover everyone who exercises authority in the corporation. It may cover persons who although elected as directors may not be because of some technical requirement. It may also include persons who hold themselves out as directors so that third parties rely upon their authority as directors. That is essentially the principle upon which Noël J.A. based his conclusion in paragraph 20 of the Wheeliker judgment.

[55] While this suggests that persons who manage corporations as a function of their office may not be liable under section 227.1 (whether labeled a *de facto* director or not) unless there is a holding out that the exercise of the management function is qua director, the principle can also be expressed by finding such persons are not *de facto* directors for the purposes of section 227.1. The distinction between the two appears to me to be the red herring referred to by Létourneau J.A. in his reasons in *Wheeliker.*[13] However, for the purposes of this analysis I choose to formulate the principle as latterly expressed; namely, a person carrying out director-like management duties may not be a *de facto* director for the purposes of section 227.1 unless there has been a holding out that those duties are being carried out in the capacity of a director or there are other related factors that point to that conclusion.

[56] I believe it is fair to say that Chief Justice Bowman of this Court (as he is now) expressed the principle in similar terms in *Mosier v. R.*, [2001] G.S.T.C. 124 (T.C.C.). In that case the CRA assessed the former CEO and President of a bankrupt corporation. He had been hired by the three directors of the corporation. He exercised extensive powers over the corporation's operations and attempted to turn the company around, ultimately failing. In determining on the facts that the Appellant was not a *de facto* director, the current Chief Justice noted:

> 27 Was the appellant a *de facto* director? He was not elected as a director, he held no shares of TRS and he never held himself out as a director. Indeed the directors, the Esposito brothers, never represented to anyone that he was a director. He was subject to the legal control of the duly elected directors, Tony, Sam and Rocco Esposito. I do not accept that they ever abdicated their position as directors. They did the sort of thing directors are expected to do -- they appointed

[13] At paragraph 25, he said: "As is often the case with a red herring, it gives rise to most stimulating but generally irrelevant discussions".

> senior management such as the appellant, and they passed a resolution to put the company into bankruptcy. These are acts of directors in which the appellant did not participate. Indeed he could not have participated or even purported to participate in these purely directorial acts. One can conceive of a situation where the controlling shareholder of a corporation makes all the corporate decisions and installs puppets as directors. Such a person was the uncle in *Dirienzo* and he would have had great difficulty in resisting liability as a director.

[57] I am attracted to this passage not only because it reflects the principle that where there is no holding out of director status, one's powers and management position do not inevitably create a *de facto* directorship, but because it touches on other related factors that support a finding of the existence of a *de facto* directorship. One such factor derives from the observation that a controlling shareholder who appoints a puppet director can be found liable as a director.

[58] What then of the case where a controlling shareholder allows an untrustworthy, hostile, conflicted, absentee director to stay on, in a *de jure* sense only, as a director while at the same time announcing to the world that that person was never intended to be a director but rather it was he, whose actions fall nothing short of holding himself out as having been the sole director from day one, who was meant to be the *de jure* director all along? These are the circumstances of the case at bar. The Appellant acknowledged in discussions with Mr. Scambellone that the reported first director was never intended to be the director. Even if her *de jure* appointment subsisted until the later change in the Corporate records, that acknowledgement cements the above scenario that concludes he had to have been the self-appointed *de facto* director long before the *de jure* situation was rectified. Surely there can be no doubt that the Appellant, in these circumstances, was at all relevant times a *de facto* director for the purposes of section 227.1. As such he is liable under section 227.1 subject to the due diligence defence raised.

[59] Before concluding this part of the analysis it is, I believe, relevant to note that subsection 115(1) of the *Business Corporations Act (Ontario)* provides that the duties of a director are to manage or to supervise the management of the business and affairs of a corporation. Given this statutory provision, it strikes me as axiomatic that a self-supervised sole manager of a corporation (the sole officer in this case is the Appellant: President and signing officer) who answers to, is directed by, no one and who also is, or without challenge professes to be, the controlling shareholder, is a *de facto* director for the purposes of section 227.1. In such case the management duties performed by the Appellant are not just director-like duties, they are duties performed, by definition, by the Appellant qua director. In these circumstances, it hardly seems necessary to make an express finding that

the Appellant held himself out or that the Corporation held him out as a director. These circumstances relate to, indeed virtually define, the substantive elements of a *de facto* directorship. While not expressed in this way a similar finding was made in *Hartrell*.

[60] In that case the Appellant was not formally appointed a director of the corporation at any point. The only director of record was the incorporating lawyer, who was apparently unaware that he remained as a director and never participated in the business. When the business began to perform poorly, the Appellant began to take a more active role in managing the franchise. In holding the Appellant to be a *de facto* director, Paris J. made the following comments:

> 27 However, in circumstances such as those in this case, where a corporation operates without having been properly organized and the only director of record plays no part in running the corporation, those persons who take it upon themselves to direct the affairs of the company may be held to be *de facto* directors, whether or not they have explicitly represented themselves as directors to any third party. The essential question is whether those individuals have, in fact, taken on the role of director of the corporation.

[61] Since the departure of Ms. Fitzpartick from the scene in the fall of 2000, if not from inception, the Appellant appointed himself - took it upon himself – to direct the affairs of the Corporation and carry out the responsibilities of a director. If there is another director, Ms. Fitzpatrick, the evidence suggests that she played no role in running the Corporation at least after essentially abandoning the scene as early as September 2000. Even if her presence before that supports the view that the formation of the Corporation was not intended to change the structure of the business from that which it was under Belmont Concord, the Appellant effectively, voluntarily or otherwise, had assumed total charge over the Corporation and the management of its affairs by the end of 2000.

The Due Diligence Defence Applied in Segments

[62] As noted, the Appellant argued that if I found that the Appellant was a director then the due diligence defence, if not a complete defence, should apply in a manner that did not cause him to be responsible for remittance failures during a period that he was acting diligently. As noted, the argument was to encourage a finding that there were, in this case, two distinct periods in respect of which the due diligence defence could be applied, namely: that part of the assessment period before the spot audit (January 2001 to April 30, 2001); and, the subsequent period (May 1, 2001 to December 31, 2003). Some emphasis was placed on the period

prior to the spot audit on the basis that a large part of the assessed liability was said to relate to that earlier period.[14]

[63] I agree that the due diligence defence can and should be applied in respect of particular periods where the application of the due diligence defence to a particular period could give a different result in respect of each period. This conclusion follows naturally from the charging language of subsection 227.1(1). A person is not liable under that provision unless that person was a director "at the time the corporation was required to deduct, withhold, remit or pay" the amounts in issue. For ease of reference I will refer to this as the "director's liability period" which is distinct from the period in respect of which the Corporation failed to make remittances which I will refer to as the "corporation's liability period".

[64] If a corporation's liability period was a calendar year and the director assessed was a director in that year only for the first 4 months of that year, the director's liability period would be those first four months. That director could only be assessed for that period. A good example of this is found in a case cited by the Appellant, *Farrell v. R.*, [1997] 2 C.T.C. 2934 (T.C.C.) where a director resigned part way through a corporation's liability period. Associate Chief Justice Rip (as he is now) naturally concluded that the director was not liable for the portion of the amount assessed that the corporation failed to remit after the date of his resignation. An identical finding would have to be made if, instead of resigning, the director after the fourth month of the subject year started doing everything he could to remedy the remittance failures to the point that, from there on, the circumstances warranted a finding that he had exercised the necessary degree of care, diligence and skill to relieve him of liability for the last 8 months of the subject year. Again, the director's liability period is less than the corporation's liability period. Similarly, where a new director comes on board at a time that there are arrears, partial remittances made during *his* term must be credited against his director's liability regardless how the corporate liability is dealt with.

[65] Respondent's counsel's argument suggests that the two liabilities must be calculated in a similar manner. However, the authority he relies on cannot, in my view, support this position. Respondent's counsel relies on *464734 Ontario Inc. v. R.*, 90 D.T.C. 6206 (F.C.T.D.) where Cullen J. relying on debtor/creditor law

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[14] The basis for emphasizing a particular period is of course irrelevant. Nonetheless, I note that the assertion that the bulk of the assessed liability relates to the period prior to the spot audit has not been established. Indeed, as will be noted later in these Reasons, the likelihood is that a good portion of the assessed liability may well relate to the period after the spot audit.

principles, concluded that a creditor such as the Respondent can apply payments to any amounts owing and, further, in the case of late remittance payments, the debtor has no right to even designate which debt is being paid since the funds owed are not the debtor's funds in the first place. They are trust funds held for the Crown.

[66] That case, however, does not fully canvass the concerns and arguments raised in the instant appeal. A director's liability under section 227.1 cannot be governed by ordinary principles of debtor/creditor law. The debtor/creditor analysis applies only to the corporation and the Crown. How the CRA applies payments on account of the corporate debt, according to whatever legal rights or principles it might assert, cannot make a director liable for more than the charging provision of the *Act* expressly allows. That is the principle on which the Appellant relies.

[67] The Appellant argues that if he was a director who merits the protection of the due diligence defence for the first 4 months of the assessment period, the arrears in that period are not his responsibility. If, in turn, he is *not* protected by the due diligence defence during the later period, he can only be liable for unremitted amounts relating to that later period and those have to be calculated net of actual remittances *and payments* made in that later period. Applying those remittances and payments to arrears in the first 4 months to calculate the Corporation's liability is fine *vis-à-vis* the Corporation. However, applying them to arrears in the first 4 months to calculate his director's liability under section 227.1 for the later period is another matter. To do that in respect of his personal liability, in effect, artificially decreases a liability in a period for which he is not responsible with the result that he is being held liable for a period for which he is responsible for an amount greater than that expressly imposed under the *Act*.

[68] I agree with the Appellant. The issue of a director's liability cannot be analyzed in the context of debtor/creditor law. The context requires a different focus. The focus must be on the responsibility of a watch dog to perform that function prudently. That focus is better given effect by recognizing that remittances and other payments made during a period when a director is acting responsibly are credited firstly against his liabilities that would otherwise arise during that period. Only excess amounts should be credited to arrears relating to the corporate remittance failures arising before the director became responsible to be a watch dog on a going forward basis. With that in mind, it may be appropriate if not necessary to look at remittance failures in segments or distinct time periods and, depending on the findings of fact, to apply payments either on a first-incurred first-paid basis or on a last-incurred first-paid basis in respect of each segment as the circumstances require.

[69] Accordingly, I will comment on the application of the due diligence defence in each of the two segments suggested by the Appellant's alterative argument.

The Due Diligence Defence – after the May 2001 Spot Audit

[70] The Appellant asserts that from the time of the commencement of the spot audit he acted responsibly and prudently to ensure that the remittance shortfalls revealed by that audit were being addressed and on that basis I should find that he was acting diligently and should not be held personally liable for any shortfalls in required remittances during this period. He wants me to treat his instalment payments as on account of post April 2000 remittance requirements and rely on his efforts to see that ongoing remittance obligations were met which he asserts were largely sufficient to take care of the problem going forward.

[71] The evidence does not support the Appellant's contention. There are notable remittance failures after April 30, 2001. The Appellant has consistently used trust funds to finance the Corporation's business. While the record is inadequate and the Respondent bears some responsibility for this, there is sufficient evidence in my view to support this conclusion.

[72] The inadequacy of the record stems from the fact that there is no break down of the remittance failures at the end of April 2001.

[73] The first assessment on May 25, 2001 was for some $27,000 (excluding penalties and interest) for the period January through March 2001. The second assessment on October 12, 2001 was for some $61,000 (excluding penalties and interest) for the period April through August 2001. That is, in the first 8 months of the 2001 calendar year, the remittance shortfalls approached some $88,000 while the instalment payments that started at the end of May 2001 totalled some $23,000 at the end of August 2001. That amounts to a $65,000 shortfall for the first 8 months of 2001 applying the payments against arrears.

[74] The Appellant in argument suggested that the $65,000 shortfall was the remittance failure for the 4 pre-audit months January through to the beginning of May 2001.[15] This appears unlikely. The failure for the first three months was

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[15] Including May in the post-audit period is justified given the audit started at the beginning of the month. Without suggesting that the Appellant already knew of the remittance failures, he was at least personally alerted to a problem at the beginning of May.

$27,000 and the failure for the next 5 months was $38,000. All of that could not have been for the month of April. If 20% of it was in respect of April, (i.e. some $7,600) the pre-audit shortfall for the first 4 months would be some $34,600.[16] The remittance shortfall would then be some $29,000 for the 4 month post-audit period to the end of August 2001. Against those assessed shortfalls there was some $23,000 in payments made from the end of May to the end of August 2001. If we apply these payments forward into this 4 month period there is a $6,000 remittance failure for this period following the spot audit. This is not a large gap but taken together with the balance of the post audit period the picture does not improve.

[75] The aggregate of all the assessments was $226,451. Assuming again that the pre-audit short fall was some $34,600, the post audit assessments would be some $192,000. Total payments were approximately $137,600. Even taking out penalties and interest for the post audit period of some $30,000[17] it is apparent that the Appellant was not keeping current after the spot audit even assuming the instalment payments should be credited, from his personal liability perspective, as on account of current obligations. He was using the remittance amounts as a source of financing. I see no basis then for the application of the due diligence defence to apply after the spot audit.

[76] Perhaps more important than the determination of how close the Corporation was in keeping remittances current, is the assessment of the conduct of the Appellant. Did the Appellant exercise the degree of care that a reasonably prudent person would have exercised? The care he should have demonstrated would have reflected his respect for what was required of him, namely, to help ensure that the Corporation treated amounts withheld, set aside and held for the Crown in trust, as the Crowns' money. The Appellant, in my view, was resistant to this duty imposed on persons in his position. Even after the spot audit, he did nothing more than keep collections at bay. Yes, it can be said that he caused significant amounts to be paid on account of remittance obligations. However, it is clear he was making instalment type remittances as seemed to satisfy the CRA, while knowingly continuing to use withheld amounts to finance operations. Can he argue that that is

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[16] The nature of the business suggests that as we go into summer, work and remittances increase so taking 20% or straight line remittances favours the Appellant.

[17] It is not possible to calculate the actual interest and penalties for the post audit period since the first assessment overlaps both periods. $30,000 is a rough calculation using straight line allocation of interest and penalties during that first period.

what a reasonably prudent business person in comparable circumstances would do? If the answer to that question is "yes", the entire scheme of the trust provisions of the *Act* will be totally undermined.

[77] While this may seem harsh in respect of a lay person who has no professional or legal training in the fine points of 'remittance' law, and while I am aware that there is a subjective element in applying the due diligence defence[18], I am not satisfied that even a totally subjective analysis would assist the Appellant. The Appellant had been involved in the family business for some nineteen years prior to the assessed period and had run the business for several years prior to the arrival of Ms. Fitzpatrick. In the fall of 2000 he had his lawyer check with Mr. Fiksel regarding the incorporation of the Corporation. That is, he had professionals available to assist him. He knew of and seemed ready to comply with other statutory obligations to other parties in the construction industry. That his knowledge of the law extends to certain obligations but not others might be considered rather convenient. In any event, in my view, finding that the Appellant did not act in a manner consistent with the degree of diligence, skill and care expected of him, in the position he occupied, to fulfill remittance requirements is inescapable.

[78] Further, it is difficult to accept that the Appellant as a tradesman is a person in respect of whom the liability bar should be lowered. The Appellant was the only person who could make remittances and he was in fact making them. He had sufficient experience to execute that role and must accept responsibility for the manner in which he carried it out. In this regard I note that I have found no reason to adopt the *Franck* approach in this case. The Appellant here is somewhat irreverent as to the trust imposed on remittable funds. They are simply not funds that can be used to finance a failing business. The CRA's indulgences and accommodations that avoid forcing companies into bankruptcy cannot be grounds for estopping it from resorting to subsequent lawful collections. I am, in effect, suggesting that the principle in *Franck* relied on by the Appellant, which was arguably not the *ratio decedendi* of that decision[19], must be applied with caution. As well, and in any event, I am not satisfied in this case that the Appellant has met the bar of earnestness, genuineness and sacrifice set in *Franck.* The Appellant caused the Corporation to pay out material sums to Ms. Fitzpartick in the summer and fall of 2000. Large management fees were paid out of the Corporation in its

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[18] *Soper v. R.*, [1997] 3 C.T.C. 242 (Fed. C.A.).

[19] There is a finding that the assessment was statute barred so that the appeal would have been allowed irrespective of the due diligence defence.

fiscal 2002 year. Such actions, unexplained, are not consistent with the application of the principle laid down in *Franck.* The remittances and payments made after the spot audit, even if applied together to current remittance obligations, were knowingly, intentionally, deficient. The Appellant knowingly misused government trust funds.

The Due Diligence Defence – before the May 2001 Spot Audit

[79] I have already concluded that the Appellant was in charge during this period. He has no better defence here than he has for the later period. Indeed the suggestion that he could rely on past compliance based largely on relying on Ms. Fitzpatrick's role and responsibility offends my overall impression of the evidence. The Appellant had every reason in the world to distrust everything Ms. Fitzpatrick did. The Appellant tried to portray himself as a simple tradesman but that is clearly not the person who took over his father's company and went along with Ms. Fitzpatrick's schemes - under her spell or not. The Appellant presented himself to me as a businessman quite capable of taking care of the office just as Ms. Kondrashev said he did since the fall of 2000. At that time he was aware of yet another piece of Ms. Fitzpatrick's handy work – her forging Mr. Fiksel's signature. Any further reliance on her would be the antithesis of exercising the care of a reasonably prudent person in comparable circumstances. By his account, giving her rope would be giving her the tools to hang someone – including in this case the Appellant himself. While he may have believed he had limitations (perceived or real) and that he could rely on her to compliment his own skills, I cannot accept that a reasonably prudent person in this very circumstance would have relied on her to comply with any regulatory regime. To do so would be turning a blind eye to her potential to ignore any such regime as it suited her interests.

[80] A reasonably prudent person in this or a comparable circumstance would have engaged someone to put him on the right path from the outset, if in fact he was concerned about the right path and herein lies one of problems faced by the Appellant, namely, I am not satisfied that the Appellant was concerned about the right path. Indeed, it seems he may well have been attracted to Ms. Fitzpatrick in the first place because of her scheming ways. In these circumstances, it should be clear to any observer that the Appellant was happy to turn a blind eye to any compliance issue including one concerning remittance obligations. That is not what a prudent person in his position would do.

Conclusion

[81] Accordingly, the analysis of the assessment period in two segments has not assisted the Appellant. The due diligence defence cannot apply in either segment.

[82] For all these reasons, the appeal must be dismissed. Costs in the cause go to the Respondent.

Signed at Ottawa, Canada, this 2nd day of May, 2008.

"J.E. Hershfield"

Hershfield J.

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APPEARANCES:

Counsel for the Appellant:	Joseph D'Alimonte
Counsel for the Respondent:	Shatru Ghan

COUNSEL OF RECORD:

For the Appellant:

Name:	Joseph D'Alimonte
Firm:	Faga & D'Alimonte

For the Respondent: John H. Sims, Q.C.
Deputy Attorney General of Canada
Ottawa, Canada