PROVINCIAL COURT OF NOVA SCOTIA
Citation : *R. v. MacDonnell*, 2021 NSPC 22

Date: 20210518
Docket: 8266201-8266201
Registry: Halifax

Between:

Her Majesty the Queen

v.

Ralston MacDonnell
MacDonnell Security Risk Management Limited
MacDonnell Group of Canada Limited
3182552 Nova Scotia Limited

Judge:	The Honourable Judge Paul Scovil, JPC
Heard:	January 18, 19, 21, 22, 26, 27, 28, 2021; February 2, 3, 4, 5, 9, 10, 2021; March12, 2021 in Halifax, Nova Scotia
Decision	May 18, 2021
Charge:	380(1)(a) of the **Criminal Code of Canada** x 7 327(1)(c) of the **Excise Tax Act** x 4
Counsel:	Scott Millar, Counsel for Her Majesty the Queen Brian Casey, Q.C., Counsel for the Accused

By the Court:

[1] Ralston MacDonnell is an engineer who operated an engineering firm in Halifax in early 2009. Incorporated in 2003, the company went by the name MacDonnell Group Consulting Limited (MGCL). This company splintered into MacDonnell Security Risk Management Ltd. (MSRM) and MacDonnell Group of Canada Ltd. (MGOC) Later, 3182552 Nova Scotia Limited was formed.

[2] Mr. MacDonnell had other business ventures during this period of time including Bowood Corporation, which consisted of the property in Shelburne that at one time housed the Youth Correctional Facility known locally as the 'boy's school'. This housed a recycling center but was purchased by Mr. MacDonnell in the hopes of turning it into a permanent training facility.

[3] During the period from January 1, 2009 to December 31, 2014, Mr. MacDonnell and the subject companies, MSRM, MGOC and 3182552, were in arrears of monies owing to the Canada Revenue Agency (CRA) for HST and Payroll Source Deductions. These arrears ultimately led to the charges before this court.

[4] Ralston MacDonnell is charged with two counts under s. 380(1)(a) for fraud relating to unremitted HST and payroll source deductions. MacDonnell Security Risk Management Limited faces two counts under s. 380(1)(a) again for failure to remit HST and payroll source deductions. MacDonnell Group of Canada Limited faces two counts of fraud for relating to HST and Payroll Source deductions. As well, the numbered company is charged with one count of fraud.

[5] Each of the above entities also are charged with one count of tax evasion under s. 327(1)(c) of the **Excise Tax Act**.

Overview:

[6] As indicated above, Ralston MacDonnell was an engineer during his career. He began work in Halifax with Vaughn Engineering. Vaughn Engineering was a well-known engineering firm and from all accounts was successful.

[7] In 1988, the owner of Vaughn Construction retired and sold the firm to Mr. MacDonnell. In 1999, Mr. MacDonnell began operating several companies under the banner of MacDonnell Group Consulting Ltd.

[8] Over the years, Mr. MacDonnell bought several personal properties which will become important in this matter, they included his family home on Park Street in Halifax, a separate residence in Chester Basin, Nova Scotia and in 2008 a condominium in the area of Tampa, Florida.

[9] Mr. MacDonnell also became involved in an attempt to lure a professional hockey team to conduct their spring training in Halifax.

[10] In the recession of 2008, Ralston MacDonnell's businesses began to see significant reductions in revenue. While revenues decreased, Mr. MacDonnell continued to strip cash from the businesses to prop up his expenditures for personal uses, which included mortgages, car leases, life insurance and personal spending. At the same time there were occasions where payroll cheques bounced and virtually no payments were made on CRA, HST and Payroll Source Deduction accounts.

[11] CRA argues that fraudulent activity by Mr. MacDonnell led to deprivation of money owed to tax-payers through HST and payroll source deductions which ultimately led to the charges before the court.

[12] The trial in the matter spanned 16 days. Crown evidence consisted of the CRA employees, Resource Officer / Complex Case Officers (ROCCOs), Trust Examiners, the lead CRA investigator, as well as employees of Mr. MacDonnell. The accused took the witness stand on his own behalf.

[13] Most evidence in this matter was entered by an Agreed Statement of Facts provided electronically and through paper exhibits. Some exhibits overlapped but at the end of the day they were substantial.

Kristina Dobson

[14] Kristina Dobson was employed for the Canada Revenue Agency (CRA) since January of 2012. She was shown in CRA records by her maiden name, Kristina Walsh. During the period that she was involved in this matter she was a Resource Officer in the Complex Case Office for CRA. They are referred to, literally, as ROCCOs. Files end up in the hands of ROCCOs when accounts of taxpayers have been extremely delinquent and present difficulties in collection.

[15] Ms. Dobson testified that HST and Payroll Source Deduction are deemed trust funds over which the Government has a trust interest.

[16] Ms. Dobson, as well, was examined regarding entries she had made in the Automated Collection and Source Deductions Enforcement System (ACSES) Diaries. These diaries contained in Exhibit 4 are required by CRA to be kept when any actions happen on a file. They are accurate summaries of actions involving CRA employees and formed the records that CRA witnesses, including Ms. Dobson, referred to when giving evidence with regards to their dealings with Mr. MacDonnell.

[17] A large portion of Ms. Dobson's evidence as well as other Crown witnesses was spent in reviewing the ACSES diaries. Ms. Dobson's review of these diaries when she took over the file for the MacDonnell Group showed a complex system due to the numerous businesses Mr. MacDonnell was operating and their intertwining.

[18] Her review also showed a long history of Mr. MacDonnell and his companies of non-compliance in both filing returns for HST and payroll source deductions and remittance of the same. These difficulties led to Ms. Dobson being unclear as to which were operating businesses, and which were closed.

[19] Ms. Dobson explained that companies remit HST on a regular basis with amounts being determined based on revenues containing HST amounts less input tax-credits calculated on the HST the company itself payed on goods and services included. Payroll source deductions are due monthly on the 15th of each month based on tax deductions taken from employees pay. Filing requisite forms with CRA showing amounts of HST were due yearly and payroll source deductions, monthly on the 15th of each month.

[20] Ms. Dobson, as well, was quite clear that all ROCCOs relied heavily on what clients told them and therefore the accuracy there of. She also outlined that employers were required to deduct the correct amount of income tax from an employee's payroll, remit the same and pay on schedule and finally to file an accurate T4 summary.

[21] Ms. Dobson reviewed ACSES's diary entry for August 13, 2013 (Exhibit 4, Tab 2, pg. 17) which outlined that Mr. MacDonnell continued to put forward security arrangements to stave off CRA activity of putting requirements to pay on bank accounts. The arrangement Mr. MacDonnell attempted to broker that day involved using his South Park Street home as security. As Ms. Dobson pointed out, the home was already heavily encumbered and would provide no security at all.

[22] The above followed conversations that Mr. MacDonnell and Ms. Dobson had on August 9, 2013 where Mr. MacDonnell offered personal guarantees which were unacceptable to CRA as he personally had nothing to back the guarantees. When Mr. MacDonnell asked what other action CRA might take, Dobson advised that ERTP's and RTP's (requirement to pay) were all ready to go. Shortly after that Ms. Dobson became aware that accounts at the Royal Bank had been closed. In fact, on August 8, she had been advised that bank accounts held by Mr. MacDonnell at the Bank of Nova Scotia were not attachable, as they had been closed.

[23] It should be noted, in the month of August when it would have been clear that RTPs were being placed on accounts known to CRA, Mr. MacDonnell opened accounts at the Toronto Dominion Bank which CRA was not aware of.

[24] Ms. Dobson also reviewed efforts in August 2012 by Mr. MacDonnell to have proposals accepted by CRA. On August 13, 2013, Mr. MacDonnell wrote offering 30% of gross income on a forward going basis. Despite Ms. Dobson's efforts to have Mr. MacDonnell keep his filings of HST and payroll obligations up to date, not only did Mr. MacDonnell not make any payment he also failed to file as required.

[25] On August 16, 2013, Mr. MacDonnell again made a proposal including paying 30% of gross income of the companies to CRA. At page 2 of that letter he stated, "we are requesting this arrangement to allow the monies and RBC banking accounts to be released as soon as possible so as to operate in a normal fashion". As noted above, Mr. MacDonnell had previously opened an account with TD Bank in the name of a numbered company through which he operated businesses. The TD account was not disclosed to CRA.

[26] Mr. MacDonnell wrote to Ms. Dobson again on August 20, 2013 with another proposal. He indicated all filings would be kept current and that a minimum of $20,000 per month with, presumably, $5,000.00 deposited weekly to go to arrears. He also was clear that only the RBC bank accounts would be maintained. Again, while putting this forward, he was operating out of the TD account which was undisclosed to CRA. While the proposal was not accepted due to lack of prior follow-through on proposals, nothing would have prevented him on doing exactly what he proposed. The last voluntary payments made by Mr. MacDonnell were a year prior in May of 2012.

[27] The proposal was again put to CRA on August 23, 2013 when Mr. MacDonnell wrote to the Acting Assistant Director, Ms. Dave. In that correspondence, Mr. MacDonnell blamed failure to maintain filing due to a "loss of

the financial and accounting management team staff" and that there had been a replacement by a 'highly qualified team". He stated that 2011 filings were completed and filing for 2012 would come forward shortly. Neither of these things were forthcoming (See Exhibit 17) bar charts, filings).

[28] The same nature of proposal was forwarded to Ms. Dobson on September 6, 2013.

[29] In cross-examination, Ms. Dobson indicated why Mr. MacDonnell's proposals were rejected. They included that the securities offered had nothing tangible that backed them up, it was against CRA policy to accept assignment of potential life insurance proceeds and the fact that Mr. MacDonnell had a lengthy history of non-compliance with proposal and obligations to CRA.

[30] It was also clear through Ms. Dobson's testimony as well as every other CRA employee called as witnesses, that while a proposal may have been rejected, CRA would accept any payment on accounts.

Jennifer Levy

[31] Jennifer Levy also interacted with Mr. MacDonnell and his companies. In reviewing her entries in ACSES Diaries, she testified that on the 28th of July, 2011, CRA had agreed to release the requirement to pay on Mr. MacDonnell's account at the Credit Union Atlantic for all three active corporations on the understanding that current year filings and payments would be maintained on a current and up-to-date basis.

[32] In September of 2011, Ms. Levy noted that no payments had been received and only the filing for June.

[33] Later, it was agreed to release requirement to pay on the basis of $5,000 a month being remitted to the CRA. The $5,000 per month never materialized.

Trust Examiners

Mark Wolfe

[34] Mark Wolfe was employed by CRA for 28 years. During the period in question, Mr. Wolfe was a Trust Examiner and conducted Trust examinations. Trust examinations were conducted to verify that HST and payroll remittances were being

withheld and property accounted for. It also included an educational component when working with taxpayers.

[35] Mr. Wolfe conducted several trust exams on Mr. MacDonnell and his companies. These exams were triggered by requests from collection officers due to lack of filing or failure to pay remittances.

[36] Mr. Wolfe reviewed an example of his trust exams at Tab 10 of Exhibit 8. That exam showed arears during the examination consisted of $70,790.35 with prior arrears of $116,233.01 with a total arrears of $188,819.36 relating to payroll tax deductions.

[37] Mr. Wolfe testified to a failed visit to the businesses on February 25, 2013. During a meeting with Pari Bamonia, one of Mr. MacDonnell's bookkeepers, he provided a list of records that were required. She listed what was needed and agreed to call Mr. Wolfe later. Mr. Wolfe testified he never received the records and felt he was given no cooperation.

William Chisholm

[38] Mr. Chisholm was another Trust Examiner at CRA who conducted trust exams on the accused. Mr. Chisholm completed trust exams on April 12, 2011 on MacDonnell Security Risk Management and MacDonnell Group of Canada Limited. Similar to issues which challenged a number of Trust examiners, Mr. Chisholm lacked access to accurate and current information. This was reflected in ACSES diary entries. (See for example entry for 2011-06-07 at page 81 of Tab 2, Exhibit 4)

Michael McDonah

[39] Mr. McDonah was a 28-year employee at CRA and conducted trust examinations related to payroll source deductions for MacDonnell Group of Canada Limited and 7128789 Canada Inc. for the periods January 1, 2009 to October 31, 2009. The only bank records that were revealed to Mr. McDonah was from The Royal Bank of Canada on George Street in Halifax. What was later determined was that MacDonnell Group was also operating out of a bank account at the Credit Union of the Atlantic.

William Thoms

[40] Mr. Thoms had 24 years experience with CRA. He conducted four trust exams in total of Mr. MacDonnell's group of companies. Mr. Thoms also confirmed that it was important that CRA was made aware of bank accounts that were in existence for companies as it would allow for garnishee if necessary. Operating a bank account without CRA knowing of its existence would avoid garnishment and thereby keep monies due and owing to CRA out of reach of the agency.

[41] Mr. Thoms also outlined that where some trust exams on the MacDonnell companies were conducted there was no underlying documentation available to complete an exam. This would lead to a "notional assessment" based on prior known financial interactions.

John Skelton

[42] The final trust examiner testifying was John Skelton, who conducted the trust exam for the subject companies for 2014 and 2015. Like other trust examiners, he outlined that his ability to conduct the trust exam was hampered by a lack of banking records, pay-cheque copies, and other lack of data.

MacDonnell's Employees

Paula Walker

[43] Paula Walker was employed by the MacDonnell Group as an accountant from 2009 to 2011. In addition to a university background, she had obtained a partial certificate as a Certified General Accountant.

[44] She was originally with the Group for three months then due to finances was laid off but worked part time for Mr. MacDonnell before being hired back as the Chief Financial Officer. She is currently employed with Saint Mary's University in their accounting office.

[45] She described the banking and inter-financial dealings between the three companies under Mr. MacDonnell. She was also able to describe Mr. MacDonnell's personal financial activity with the companies. Mr. MacDonnell would remove money from the companies for items like personal mortgages and expenses. These amounts would be taken as company loans. This was a regular occurrence.

[46] It was clear from the evidence that Ralston MacDonnell was the primary manager of the companies. As Ms. Walker stated, "Mr. MacDonnell made the decisions on where the money was to go ".

[47] Ms. Walker outlined that Mr. MacDonnell's directing of where funds were moved made it difficult to keep accounting straight. Reviewing Exhibit 9, Tab 2, Ms. Walker exampled an invoice from MacDonnell Security Risk Management to Industrial Security Ltd. for a security training program. The check from Industrial Security came in made out to MacDonnell Security Risk Management but was directed by Mr. MacDonnell to be deposited to MacDonnell Group of Canada Limited.

[48] Mr. MacDonnell's personal expenses would be the first place where money would be directed to go. Exhibit 9, tab 3, contained an email from Mr. MacDonnell to Ms. Walker directing her to pay his life insurance, mortgages, personal power bills for his Halifax and Chester residences as well as mortgage payments on Mr. MacDonnell's Florida condominium.

[49] Ms. Walker indicated that there were regular meetings almost daily between her and Mr. MacDonnell as to where cash was to flow. She was clear that priority was on Mr. MacDonnell's debts ahead of payroll and CRA payments. She noted he had three personal mortgages, credit cards, BMW car payments and spending money which claimed first-priority on company funds.

[50] This led to Ms. Walker describing the business as engaging in the worst instances of NSF cheques she had ever seen. If there were insufficient funds to cover the entire payroll, Mr. MacDonnell would direct who would get paid on the payroll and if money would be diverted to his own account, leading to NSF paycheques.

[51] At one point, Mr. MacDonnell had his home power cut off and had Ms. Walker pay the arrears from her own credit card to have his power turned back on.

[52] She testified it was a practice that if bank accounts had liens on them the result would be the opening of a new account at another bank. This is corroborated throughout the evidence tendered by the Crown.

[53] The final straw with Ms. Walker was December 24, 2010. Pay cheques for employees were to go out, were signed and had just enough money in the account to cover them. Shortly after the office closed, Mr. MacDonnell called Ms. Walker and directed her to forward a large sum to him in Florida. She did so but it caused payroll cheques to be NSF. She left several weeks later and was owed $22,000.00 for back pay and expenses she had covered on her personal credit cards. The amount had to be recovered through the Nova Scotia Labour Standards Board.

[54] The evidence of Ms. Walker was clear that Mr. MacDonnell himself made all major financial decision across all companies.

Robert Johnson

[55] Robert Johnson was hired as a controller by Mr. MacDonnell for a two-month period in 2012. He was told he was hired to bring the books up to date. Mr. Johnson recalled that the cash flow of the companies was "not that great". He recalled that his first payroll at the company he was instructed not to give out pay cheques until 5:00 pm sharp.

[56] Mr. Johnson specifically recalled an incident where Mr. MacDonnell had signed a cheque to the Receiver General for HST remittance. Mr. Johnson advised Mr. MacDonnell that there were insufficient funds to cover the cheque. In direct examination, Mr. Johnson testified that Mr. MacDonnell said, "that's okay, if it bounces it will buy us some time". In cross, he agreed that Mr. MacDonnell could have said, "there should be money in the account but if it bounces it will give us some time".

[57] Mr. Johnson saw money going in and out of the companies in rapid succession. He stated money would be transferred out right after coming in. Like others, Mr. Johnson had to resort to going through the Labour Board to recover income after his pay cheques were returned NSF.

Irene Green

[58] Irene Green is a self-employed bookkeeper who worked with Mr. MacDonnell regarding his companies from December 2011 until July of 2012. She advised that she worked mainly from home but ceased as Mr. MacDonnell had no money to pay her. In addition to work done on the MacDonnell Group she was also involved with some work regarding Mr. MacDonnell's hockey efforts.

[59] She reviewed a number of filings she prepared for CRA purposes and confirmed that her payroll calculations were accurate.

[60] In cross-examination she indicated the business records were in terrible shape when she took over.

Janna Warren

[61] Jenna Warren is the current owner of a Maritime training company. Her background is an undergraduate degree in accounting, together with accounting work with a marine company. She was employed by the MacDonnell Group from November 24, 2014 to January 31, 2015. She was very clear on the date she was hired and when she could no longer continue to work for Mr. MacDonnell and felt she had to leave.

[62] Her employment was specific to help with what Mr. MacDonnell termed "the project". Ms. Warren was told by Mr. MacDonnell that a previous accountant got the companies into trouble with CRA and he wanted her help to get them out of the problem. Mr. MacDonnell told her if he owed CRA anything he would pay but he didn't believe he owed anything. It became very clear to Ms. Warren very quickly that this was not the case.

[63] Ms. Warren described what was clear from all the evidence that the companies were all extensively intertwined. Having said that, she also said that payroll came out of the numbered company, 3182552 Nova Scotia Limited.

[64] She described her efforts to put salary data in the online CRA employee calculator which would automatically calculate remittances owed.

[65] She described her first occasion doing payroll and her interactions with Mr. MacDonnell concerning the same, Mr. MacDonnell clearly forbid her to file the remittances with CRA. She could not confirm which employee worked for which company. It was very clear to Ms. Warren that all employees worked for the same company. This all led to many angry exchanges between Ms. Warren and Mr. MacDonnell.

[66] Ms. Warren described the Trust exam conducted by Trust Examiner, Mr. Skelton. Mr. MacDonnell was insistent that she push the audit to a further date. Ms. Warren told Mr. MacDonnell that the trust exam had to be done and advised him of exactly what material she would be providing. This again led to a heated exchange between her and Mr. MacDonnell. Ms. Warren told him that if he wanted it done differently, he would have to meet with the trust examiner himself. Mr. MacDonnell refused to do that.

[67] Working in the MacDonnell companies quickly took a toll on Janna Warren. She described the consistent bouncing of cheques recalling only one time that payroll didn't bounce. She described from the beginning of her employment coming home and crying in her driveway due to the stress. She had just purchased a home and

needed the income but simply could no longer continue in that environment and consequently left at the end of January 2015.

CRA Employees

Allison Brown

[68] Allison Brown (maiden name Allison Williams) was an acting Senior Investigator with CRA at the time covered by these offences. She was approached in the winter of 2012 to assist with the investigation of these charges. She was able to examine all relevant documents from CRA together with documents obtained through judicial authorization.

[69] Before the Court, she reviewed how she calculated total HST collected by the accounts together with computing input tax credits. Her analysis found that the recording by Mr. MacDonnell of gross sales were accurate and that the records provided to her were fairly complete. She completed a summary which was entered as working paper #108 Summary of HST owing from 2010 to 2014 for the companies involved based on when the companies were operating.

[70] Ms. Brown's summary shows HST collected for the three accused corporate entities together with HST remitted and the final accounts outstanding and owed to CRA. These covered those years the companies were operating from 2010 to 2014. 3182552 N.S. Ltd. Owed $52,067.18, MacDonnell Security Risk Management Ltd. owed $185,584.83 and MacDonnell Group of Canada Ltd. Owed $63,859.24.

[71] While a great deal of Allison Brown's testimony dealt with her overall methodology in determining what significant accounts were outstanding, she was also able to outline amounts that were taken from payments owed to MacDonnell Security Risk Management but paid directly to Mr. MacDonnell's personal account thereby resulting in HST being siphoned off to Mr. MacDonnell personally.

[72] Allison Brown reviewed her Working Paper Number 1 showing eight separate transactions where corporate accounts were by-passed. These sales amounts were not recorded anywhere in corporate ledgers in 2011. These sales all included HST payments which were owed CRA.

[73] Working Paper 104-2 was shown in Exhibit 13 at tab 2. This analysis showed where invoice sales were paid to a Pay Pal account and then withdrawn directly into Ralston MacDonnell's personal Scotia Bank account.

[74] Ms. Brown also testified to the methodology used in in creating Working Paper 105-2. This evidence again showed sales to MacDonnell Security Risk Management in 2011 where invoices to customers were paid and the proceeds were directed into Ralston MacDonnell's personal bank account. These sums covered HST payments which were never shown in the company books nor were they paid to CRA. This included both the depositing of cheques made out to MacDonnell Security Risk Management directly to his personal account as well as the direct payments from Pay Pal account that were directly deposited into his account.

[75] Her final calculation showed $66,707.89 worth of sales from MacDonnell companies went into Mr. MacDonnell's personal account. This included $7,591.28 of HST deductions that were not shown in the corporate bookkeeping.

[76] In cross-examination, Ms. Brown confirmed that HST collected in 2011 is only due and payable in 2012. She also confirmed that monies from clients of Mr. MacDonnell, that were subject to requirements to pay, would be paid directly to CRA. Also, she confirmed that once CRA had the results of a Requirement to Pay then Mr. MacDonnell did not control which account that money was paid to. Other evidence directly contradicted this.

Stephen Tucker

[77] Stephen Tucker is a senior investigator with CRA. He has a lengthy background in accounting with a designation of a Certified Public Accountant in both the UK and Canada. He was the lead investigator relating to the charges before the Court.

[78] He was assigned the MacDonnell file and reviewed the same. He had initial discussions regarding the matter with Kristina Dobson at the end of which it was recommended that there be a full-scale investigation.

[79] The investigation led to a series of judicially authorized searches of both Mr. MacDonnell's business and home. Production Orders were also obtained relating to a number of financial institutions. These orders also included credit card companies, Merchant Service companies, Pay Pal as well as others. Mr. Tucker as well, interviewed a number of individuals.

[80] Mr. Tucker created a number of Working Papers taking data from evidence. These numbered in excess of 110 and were for the most part contained on Excel spread sheets. Several other exhibits were also created by Mr. Tucker. Exhibit 15,

Working Paper 92A was a key document outlining banking activity as well as a graphic representation of that activity.

[81] It also showed visually Mr. MacDonnell's responses to both requirements to pay and Trust Exams.

[82] Mr. Tucker also testified that the exhibit showed that the companies had sufficient funds to pay both HST and Payroll Source deductions that were due to CRA.

[83] Exhibit 15 contained 13 columns representing 12 known bank accounts attributable to companies under Mr. MacDonnell's control and a final column showing total bank deposits. Also, displayed were records from each month from January 2009 to December of 2014. Bank accounts that were unknown to CRA were provided with a pink background. If there was a month where a requirement to pay was placed on a bank account it was given a green background and if there was a month where a trust exam had been conducted there was a separate row for the month in yellow. The name of the Trust Examiner was placed in the yellow row directly under bank accounts which became known to the examiner while conducting the trust exam.

[84] Mr. Tucker also introduced Exhibit 16 which was a binder containing monthly overview data for 2009 to 2014. Each contained a chart for the year looking at each month with columns containing business bank accounts, significant uses and trust fund activity, for example PSD's due each month, net HST collected, annual HST obligations, voluntary payments and total trust liability.

[85] Through Mr. Tupper, the Crown also introduced Exhibit 17, which showed by way of bar graphs, MacDonnell Security Risk Management and MacDonnell Group of Canada unassessed payroll taxes from February 2009 to December 2014, requirements to pay by the two companies for same period, assessed payroll tax for these periods, payments made both voluntary and through RTP's, voluntary payments that were made for current payments and arrears payments, monthly business cash, outflow and RP payments These charts showed how Mr. MacDonnell's debts to CRA increased uniformly through persistent non-compliance.

[86] Mr. Tucker reviewed CRA's detailed transaction statement, dated March 30, 2015. This document showed both current arrears payments and other information. It also showed a large number of payments by Mr. MacDonnell which were returned

as NSF cheques. The charts showed that Mr. MacDonnell made a few voluntary payments between August 2009 and May 2010 and very little thereafter. Exhibit 17 also demonstrated visually the appropriation by Mr. MacDonnell of company funds for personal use and how these uses stood up against continued obligations by the companies to CRA that went unmet.

[87] Mr. Tucker's investigation also showed that while Mr. MacDonnell advised Ms. Walsh that when MSRM and MGCL were created all monies were flowing through MGCL, quite the opposite was true. These companies were all utilizing the Bank account 69060-10-6 at CUA to operate and had done so since at least January 2009.

[88] Again, Mr. Tucker's evidence in reviewing this matter canvassed that in August 14, 2009, Mr. MacDonnell directed the company which processed credit card payments to his corporation, Moneris, to deposit any funds due to restructuring to RBC account 1042738. August 27, 2009 was the date that Mr. MacDonnell responded to Ms. Walsh that the two new companies were banking using only the same old bank account used by MGCL.

[89] Further evidence from Mr. Tucker showed bank accounts where cheques were not covered and were returned NSF, and another account which was used for personal expenses to Mr. MacDonnell.

[90] Mr. Tucker also reviewed the Trust Exam conducted by Michael McDonah. That trust exam was conducted on the two new MacDonnell companies. He was provided one bank account for the companies. However, there was another bank account being used at the Credit Union of the Atlantic the upshot of this being that the Credit Union account was undisclosed to the trust examiner.

[91] Further examination showed that in early 2010 Mr. MacDonnell made a payment proposal to Kelly Walsh. That proposed a weekly payment to CRA by way of certified cheques over a number of weeks. Exhibit 5, Tab 3 was the letter from February 8, 2010 setting out the schedule of cheques. Mr. MacDonnell indicated only core business expenses would be paid during this period. The period covered from February 12, 2010 to April 2, 2010.

[92] This proposal did not happen and in fact substantial personal expenses of Mr. MacDonnell were paid out of company funds. What did go towards funding went for CRA arrears of $47,697.98 for payroll source deductions $32,596.18 for HST

was a voluntary payment of $6,043.89. A number of other cheques were written by Mr. MacDonnell to CRA during this period which were returned NSF.

[93] It was further shown in Exhibit 18, Tab 5 that when an RTP was placed on February 9, 2010 on RBC account, Mr. MacDonnell wrote a cheque for $10,995.00 to MacDonnell Group Consulting Ltd.'s CUA account, thereby evading the RTP. This left very little cash in the RBC account. On the 15th of February 2010, Mr. MacDonnell then wrote a cheque for $17,977.65 to the Receiver General which, of course, bounced. Likewise, the RBC account of MacDonnell Security Risk Management showed activity to defund the account in anticipation of the RTP. This involved e-transfers and cheques out of the account into the Credit Union Account which was unknown to CRA. Evidence disclosed a total of $823,931.29 went through this Credit Union Atlantic account up until its discovery by CRA in May 2010.

[94] Mr. Tucker also reviewed in 2010 where funds were moved by Mr. MacDonnell from the Credit Union Atlantic account to the account for Bowood and then stripped for Mr. MacDonnell's own personal uses.

[95] From 2011, Mr. Tucker showed a large invoice to the Department of National Defence for $15,820.00. Of that amount, $1,820 was HST. Tab 10 of Exhibit 13 contains the invoice and the cheque issued by DND to pay the invoice. The back of the cheque shows the money being directly deposited into Ralston MacDonnell's personal account at Scotia Bank, Scotia Square. This includes the $1,820.00 of HST. Tab 9 of Exhibit 18 shows the deposit of the cheque and a transfer out of Mr. MacDonnell's account on February 10, 2011 to a Florida bank by wire transfer. Likewise, the same occurred for an invoice to Parks Canada dated January 28, 2011 for $20,700.00 of which $2,700.00 was HST. The cheque paying this was deposited in Ralston MacDonnell's account at Scotia Square on March 24, 2011. $18,022.50 was then sent by wire transfer to Ralston MacDonnell in Florida.

[96] Mr. Tucker reviewed the change in interactions between Mr. MacDonnell's companies and CRA after July 2009. Up until August 2009, the Chief Financial Officer was a woman named Brenda King. After she left the company in 2009, CRA filings changed becoming less frequent and with a number of NSF cheques. This dwindled off to no filings or very infrequent and no cheques being forwarded. This evidence was visually demonstrated in Exhibit 17 charts for assessed payroll taxes for MSRM and MGOC.

[97] Steven Tucker also reviewed communications between Mr. MacDonnell and CRA of July 28, 2011 which set out a payment scheduled by Mr. MacDonnell to pay out arrears at CRA. This schedule was relied upon by CRA to cancel a RTP to CRA. Following that a further letter of August 12, 2011 to CRA, providing his banking information at CUA. That letter did not disclose the bank account at TD being utilized by Mr. MacDonnell and was unknown to CRA. The TD account was opened June 2, 2011.

[98] During the period from August to December 2011, significant sums were taken from the corporations and placed into Mr. MacDonnell's personal account for personal use.

[99] Mr. Tucker also reviewed the period that was previously covered by Robert Johnson. During that period, an agreement for payments being made had been reached by CRA and Mr. MacDonnell. Mr. Tucker showed where payments that were to be made pursuant to that agreement were subject to NSF cheques to CRA. This is where Mr. Johnson had pointed out to Mr. MacDonnell that there were insufficient funds to cover these cheques, but that Mr. MacDonnell said the money might be there and if not, it would buy some time. Again, during this period of time funds were syphoned off by Mr. MacDonnell to his personal accounts. During the period, $33,000.00 went to his personal account, the timing of which, caused four cheques to CRA to bounce.

[100] Mr. Tucker discussed Mr. MacDonnell opening a Bank of Nova Scotia account which was unknown to CRA. While this account was unknown to CRA, $842,516.46 was deposited to that Bank of Nova Scotia account. No voluntary payments to CRA were made through that account up to March 2013. From May 2011 to March 2013, the total deposits were $852,155.25 of which there were expenditures of $851,768.00. Of that, $422,000.00 went to Mr. MacDonnell's personal account. $45,059.59 was transferred back to the business.

[101] Mr. Tucker's evidence included a review of several letters from Mr. MacDonnell to CRA attempting to negotiate terms which would include removing RTPs on his RBC bank account and his Moneris credit card transaction company. These happened in late August and early September of 2013. Mr. MacDonnell had opened the account with TD Bank through which company transactions flowed through.

[102] With the RTP on the Moneris account, Mr. MacDonnell then opened a Pay-Pal account which would allow an end run around the Moneris account. He then

shifted to TD merchant services. The Pay Pal account was linked to Mr. MacDonnell's personal bank account and those funds never appeared in company books.

[103] In cross-examination of Mr. Tucker, three perceived problems with Exhibits 16 and 15 were brought out. The first problem was with Exhibit 16 on page 1 in the first column as it shows total deposits for each month of 2009. These deposits include deposits made to MacDonnell Group of Canada Limited, who is not an accused company. The second issue was that for the same year in the section for Trust Funds, there was no provisions for voluntary payments to CRA that would have come from MacDonnell Group of Canada Limited. The third identified issue through cross-examination of Mr. Tucker was the failure to reflect inter-company transfer of money in Exhibit 15. This would lead to double counting and inflating the total deposits listed in the final column of Exhibit 15. Mr. Tucker agreed that would be the case.

[104] Mr. Tucker was cross-examined in relation to the conversation of ROCCO Walsh with Mr. MacDonnell on August 27, 2009 where Mr. MacDonnell advised her that all business was still flowing through the MacDonnell Group of Canada Ltd. bank account. Mr. Tucker was directed to a cheque contained in Tab 3 of Exhibit 18, dated August 17, 2009 to the Receiver General for $3,024.56. Counsel pointed out that this cheque had the new bank account number and the new company name on it. The upshot of that portion of the cross-examination for the defence argument was that sending that cheque in, and that cheque alone would effectively cover the conversation that Mr. MacDonnell had with Ms. Walsh regarding running businesses through the one bank. In effect that, as counsel put it, it was not Mr. MacDonnell's fault that no one picked up on this and advised Ms. Walsh of the new account.

[105] It was pointed out by Mr. Tucker that the ROCCOs would not get to see those cheques.

Ralston MacDonnell

[106] Ralston MacDonnell reviewed his resume and background leading up to that period covered by the charges in question. His engineering firm of MacDonnell Group of Canada Ltd. morphed in mid 2009 into two companies, MacDonnell Security Risk Management and MacDonnell Group of Canada. MacDonnell Security Risk Management was created to handle the business of port security training and MacDonnell Group of Canada would conduct the traditional engineering work.

[107] At that time Mr. MacDonnell also was attempting to bring NHL hockey training to Nova Scotia. He also purchased a property in Shelburne County with the company name of Bowood. That property was what was known locally as the "old boy's school", which was a provincial Youth Correctional facility for many years. The intention was to upgrade the facilities to create a campus for port security training.

[108] Mr. MacDonnell used an interesting vernacular regarding his testimony surrounding his business. Often, he talked in terms of, "we". An example is, "we considered Florida an important part of our business development" or words to that effect. The evidence through out the entire trial was that there was no "we" but only Mr. MacDonnell himself, who was the management of the company.

[109] Mr. MacDonnell testified that in relation to the economic health of his businesses, the economy's downturn in 2008 and 2009 effect upon his businesses was not known until 2012. He then immediately after saying that outlined how they had to deal with an absence of cash and further business losses in 2009. Further, that the 2009 tax return showed over a $500.000.00 reduction of revenue from prior years.

[110] Counsel for Mr. MacDonnell spent some time throughout the trial on what appeared to be the contention that Mr. MacDonnell had no say over which arrears account with CRA would receive payments. The impression was that CRA arbitrarily assigned the accounts which would benefit on arrears payments. In his direct examination, Mr. MacDonnell testified that he never requested that arrears payment be directed to any specific company's account with CRA. His recollection was that on one occasion the collection officer that he was dealing with told him that payment would go to HST owing and not payroll source deduction.

[111] In relation to other evidence before the court, it showed in fact that there was ability for Mr. MacDonnell to direct what arrears payment went to. Automated Collections and Source Deductions Enforcement Systems (ACSES), being Exhibit 4 at Tab 2, page 76 has the entry that the CRA employee advised that Collection Officer Hubley would be in touch with Mr. MacDonnell to determine which account the first $48,000.00 in payments would be applied to. Exhibit 4 at tab 1, page 107 shows where requests were made by Ms. Walsh to transfer $13,245.60 from an arears payment of $55,000.00 to an account as specified by Mr. MacDonnell. Further, at page 100 of the same tab Ms. Walsh indicated she had contacted Mr. MacDonnell to see if payments that had been made were to be directed to arrears accounts. Exhibit 4 at tab 2, page 116 shows on January 22, 2010 shows Mr.

MacDonnell again contacting CRA to direct where payments should be posted. This same action took place on January 6, 2020 as evidenced again in Exhibit 4 at tab 2, page 118. The facts contradict Mr. MacDonnell's testimony.

[112] Mr. MacDonnell was questioned in direct-examination, concerning his comments to Ms. Walsh on August 27, 2009 about banking arrangements for the two new companies. His indication to Ms. Walsh was that all banking was to be conducted at that time through MGCL's account. When asked in direct, Mr. MacDonnell said, "Well, yeah, you know a couple of things are, I'm not sure that's the way, I'd disagree but…maybe a misunderstanding."

[113] Mr. MacDonnell did not address the discrepancy between telling Ms. Walsh that MGCL's bank account would be used and the fact that he did not disclose that as of July he had three other operating bank accounts for the new companies. Rather, Mr. MacDonnell stated that collections officers often did not understand what his companies did. This was again contrary to the evidence.

[114] Mr. MacDonnell outlined some of his business challenges but stated that they were always able to work through them. This testimony of having worked through things greatly conflicts with the evidence that was before this court.

[115] In describing his, 'average work-day', he described every other day or at least every third day he would get an update from his financial officers. He and his financial officers would make decisions regarding finances. Yet within one or two sentences later he testified that he "was not really calculating financial things".

[116] Mr. MacDonnell, in his evidence, discussed what he felt was the intransigence of CRA to make arrangements with him. Mr. MacDonnell stated he could not make any payments into bank accounts that were subject to CRA's requirements to pay as it would then go directly to CRA. That would cause the account to go into overdraft and the account would be closed.

[117] These explanations by Mr. MacDonnell did nothing to explain his contention that he could not make payments to CRA because they would only accept complete payments. There was nothing in the evidence to suggest that partial payments on accounts would not have been taken by CRA.

[118] When asked how he decided who to pay, Mr. MacDonnell answered he did not always decide who to pay. It was, he said, "some kind of team effort". Further, that the biggest priority for him was payroll. In truth, the evidence shows that Mr. MacDonnell was the sole final arbiter of payments that were made, and that making

sure payrolls were met was not, by far, his top priority. This despite him saying payroll was his number one priority.

[119] Mr. MacDonnell further stated if he did not have the ability to make a payroll his choice was to not write the cheques. Again, evidence suggested otherwise.

[120] When asked in direct-examination concerning his directions on Christmas Eve of 2010 to have his financial officer drain money from the business and forward it to him in Florida causing payroll cheques on Christmas Eve to bounce, Mr. MacDonnell stated it was necessary to pay the Florida mortgage and that it was made as he expected Credit Union Atlantic to honour the payroll cheques despite having no money in the account. This explanation simply has no credibility.

[121] Mr. MacDonnell was asked why his companies began using a Pay Pal account. He explained, "that something closed our merchant services account". He said, "with those closed you could not accept credit card payments". The evidence showed the merchant services accounts were at that time subject to RTP's. Mr. MacDonnell went on to say, "well, I think what happened there was we had a young person in accounting". Mr. MacDonnell said, "she said I can open up a Pay Pal account". The Pay Pal had to be tied to a personal account and a personal email account. Mr. MacDonnell said employee would track this method of payment and track them to the business. He stated the business records were very good.

[122] In relation to filings to be made to CRA, Mr. MacDonnell stated he was insistent that they be made on time. That would be the case even if the amounts owed would not be made. When things got behind, Mr. MacDonnell blamed it on staff. He stated, "we made CRA records a priority and Job 1".

[123] When asked if he knew that CRA was seeking payments from him, Mr. MacDonnell said he knew it from time to time. However, he said at any time he would not know the extent of it. Mr. MacDonnell also stated in his evidence that he was in contact with CRA fairly often and met with his financial officer every 2nd to 3rd day. Not knowing the extent of his arrears to CRA would seem to be in direct opposition to the bulk of the evidence and Mr. MacDonnell's own testimony.

[124] Mr. MacDonnell testified about Exhibit 18, Tab 6 which contained communication of Moneris and Amex regarding changes in banking. Of interest, specifically were two bank cheques. One had the company name of MSRM Ltd., while the other had MGCL. Both were cheque #601072 with the same banking identifiers on it. These were copies of the same cheque with MSRM Ltd. Being

overlayed in some fashion of MGC Ltd on one cheque and not the other. Mr. MacDonnell denied any knowledge of alteration being made.

[125] Mr. MacDonnell was asked about his conversation with Robert Johnson. Mr. Johnson reported that Mr. MacDonnell was advised there were insufficient funds to cover a cheque to CRA. MacDonnell replied, "the funds might be there but if they are not it will buy us some time". Mr. MacDonnell in his evidence said that Mr. Johnson was a young new employee. Mr. MacDonnell stated, "If one were to say that it would not be something you would say to a young employee". Mr. MacDonnell said Mr. Johnson may have thought he heard it, but it is not, " "something I re-collected", and "I would not imagine saying that". Further, "that we would never release cheques if they were not able to be covered. We would ask them to hold the cheque".

[126] Mr. MacDonnell was asked on the first question in cross-examination if his income up to 2009 came from MGCL, MGOC and MSRM. While the evidence of the trial, which was extensive, showed this clearly to be the case where reviewed, Mr. MacDonnell chose to respond that he could not say anything specific about that, "he would have to review the documents and that pretty much was the case". This type of answer that was vague, was typical of Mr. MacDonnell's evidence.

[127] Mr. MacDonnell was asked about MGCL's HST quarterly fillings for January and April of 2009 and that MGLC showed no HST received thereafter. This taken from the Agreed Statement of Facts. Mr. MacDonnell very quickly distanced himself of this fact by saying that he never personally filed HST as it was the companies responsibility. Further, that T2 returns for after 2009 showed no corporate activity after 2009. This would be in contradiction to his early statement in cross-examination that MGCL activity was potentially on going for a lengthy period after that creation of MGOC and MSRM.

[128] Mr. MacDonnell was reluctant to clearly answer the most basic of questions in his cross-examination. When Crown counsel asked about his growing frustration when dealing with ROCCO, Kristina Dobson, which was very clear from his direct examination and his evidence, Mr. MacDonnell stated that he would not call it "frustrated with Ms. Dobson".

[129] Mr. MacDonnell was cross-examined on whether he had the ability to contact CRA with requests on which account payments might be directed to. Crown counsel referred Mr. MacDonnell to the entry of Kristina Walsh in AECS diary of April 12, 2007 in which she stated that he had asked that $13,245.00 of a $55,000 payment be

directed to a T2 corporate tax account. This request was to be directed to the appropriate department of CRA. Mr. MacDonnell in cross categorically denied that was the case and that this was done at Ms. Walsh's request. His answers do not accord with the evidence. As with several aspects of his evidence, Mr. MacDonnell pushed back in his cross-examination by suggesting it was at CRA's request, not him.

[130] Mr. MacDonnell was cross-examined on his taking out a loan of $220,000 on his Chester Basin property. In direct, he stated he needed that money to put into the business. Twelve days later he placed $210,483 as a down payment for his Florida condominium. His answer was that it was unrelated. When asked why he bought a luxury condo if he needed $200,000 due to a cash crunch for your business, his answer was that at the time it seemed reasonable. There was some back and forth between the Crown and Mr. MacDonnell as to whether it could be classified as a 'luxury condo". Nothing turns on that, although to this Court, anywhere where you do not need snow tires and a shovel, is a luxury.

[131] The Crown cross-examined Mr. MacDonnell regarding his letter to Kelly Walsh dated February 8, 2010 which gave a schedule of certified cheques that would be sent to CRA. These would commence on the 12th of February 2010 with a cheque for $21,325.00. Mr. MacDonnell was asked why some four days later that did not happen. Mr. MacDonnell replied because the funds were not available. He then qualified that in that by saying, "there was not enough funds to do all he wanted to do". The Crown then pointed out, through Exhibit 15, that in March of 2010 there was a total of $228,827.48 deposited into the CUA account. His reply was, "it was due to inter-company transfers". MacDonnell also argued that the number in Exhibit 15 showing the deposits were incorrect. The Crown, of course, pointed out as an Agreed Statement of Fact that Exhibit 15 was correct. Again, when this period was canvassed by the Crown in Exhibit 16, Mr. MacDonnell stated that the figures were not accurate despite having the accuracy of Exhibit 16 being part of an Agreed Statement of Facts.

[132] The Crown went on to point out to Mr. MacDonnell that in March of 2010, $3,298.36 was paid towards his Halifax home mortgage; $3,191.88 towards the Chester cottage mortgage; $2,300 on the CUA loan; $8,058.38 towards the mortgage on the Florida condominium; $4,020.35 on his BMW lease and $3,591.41 on life insurance.

[133] In his evidence in cross, Mr. MacDonnell was asked about bank accounts not being revealed to trust examiners during trust examination. In three separate

occasions, trust exams were conducted with bank accounts being unknown to CRA, both before and after the trust exam. MacDonnell said that they were not produced to the trust examiner because the Examiner never asked for them. The evidence from the trust examiners was clear that they would ask for documentation from all corporate bank accounts.

LAW

[134] The Crown's case against Ralston MacDonnell and the three accused corporate entities rests on a complex extensive amount of seized documents, CRA documentation, witness testimony and circumstantial evidence. What is abundantly clear here like all cases before courts, proof of guilt must be found to be beyond any reasonable doubt before conviction can take place.

[135] Section 11(d) of the **Canadian Charter of Rights and Freedoms** provides that a person charged with an offence has the right "to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal". Ralston MacDonnell and the corporate accused are presumed innocent of the charges unless the Crown proves each element beyond a reasonable doubt.

[136] Justice Cory speaking for the majority in *R. v. Lifchus*, [1997] 3 S.C.R. 320, summarized the principles of reasonable doubt as follows:

> **36** Perhaps a brief summary of what the definition should and should not contain may be helpful. It should be explained that:
>
> - the standard of proof beyond a reasonable doubt is inextricably intertwined with that principle fundamental to all criminal trials, the presumption of innocence;
>
> - the burden of proof rests on the prosecution throughout the trial and never shifts to the accused;
>
> - a reasonable doubt is not a doubt based upon sympathy or prejudice;
>
> - rather, it is based upon reason and common sense;
>
> - it is logically connected to the evidence or absence of evidence;
>
> - it does not involve proof to an absolute certainty; it is not proof beyond any doubt nor is it an imaginary or frivolous doubt; and

- more is required than proof that the accused is probably guilty -- a jury which concludes only that the accused is probably guilty must acquit.

[137] Justice Iacobucci, of the **Supreme Court of Canada** for the majority, said in *R. v. Starr*, 2000 SCC 40 that "an effective way to define the reasonable doubt standard for a jury is to explain that it falls much closer to absolute certainty than to proof on a balance of probabilities". Mere probability of guilty is never enough in a criminal matter. The Crown must prove the guilty of an accused person beyond a reasonable doubt – which lies somewhere between probability and absolute certainty, but closer to absolute certainty.

[138] In this matter, given that the accused has testified, I must also apply the principles of *R. v. W.D.*, [1991] 1 S.C.R. If having heard all the evidence, I believe the accused, then I must acquit him. If I do not know whether to believe the accused and his testimony raises a reasonable doubt, I must acquit. If any of the evidence called by the accused raises a reasonable doubt on any of the elements of the offence, I must acquit. Even if I reject his evidence, before I can convict, I must ensure myself that on each and every element of the offence, there is proof beyond a reasonable doubt, if not then I must acquit.

[139] Credibility plays a crucial role in the matter before this court.

[140] While a trial judge must give reasons for how they resolved credibility issues the **Supreme Court of Canada** has recognized that it is difficult, "to articulate with precision the complex intermingling of the impressions that emerge after watching and listening to witnesses". It is not a "purely intellectual" exercise. See *R. v. R.E.M.*, [2008] 3 S.C.R. 3.

[141] Judges are entitled to accept all, some, or none of a witness's evidence.

[142] Trial judges must scrutinize and examine all of the evidence when considering the credibility of any single witness. In *R. v. D.D.S.*, [2006] NSJ No. 103 (NSCA), Justice Saunders of our **Court of Appeal** stated as follows:

> **77** Before leaving the subject and for the sake of future guidance it would be wise to consider what has been said about the trier's place and responsibility in the search for truth. Centuries of case law remind us that there is no formula with which to uncover deceit or rank credibility. There is no crucible for truth, as if pieces of evidence, a dash of procedure, and a measure of principle mixed together by seasoned judicial stirring will yield proof of veracity. Human nature, common sense and life's experience are indispensable when assessing creditworthiness, but they cannot be the only guide posts. Demeanour too can be a factor taken into account by the trier of fact when testing

> the evidence, but standing alone it is hardly determinative. Experience tells us that one of the best tools to determine credibility and reliability is the painstaking, careful and repeated testing of the evidence to see how it stacks up. How does the witness's account stand in harmony with the other evidence pertaining to it, while applying the appropriate standard of proof in a civil or a criminal case?

[143] Credibility cannot be determined by following some prescribed set of rules. Having said that, trial judges can and have assessed credibility by using a number of guideposts. While not exhaustive, Justice Mossip in *R. v. Filion***,** [2004] O.J. No. 3419 (Ont. SCJ) set out a series of factors which are instructive. He stated:

- In assessing the reliability and credibility of witnesses testimony, I have considered factors that judges invite juries to consider such as:

- does the witness seem honest? Is there any particular reason why the witness should not be telling the truth or that his/her evidence would not be reliable?

- Does the witness have an interest in the outcome of the case, or any reason to give evidence that is more favourable to one side than to the other?

- Does the witness seem to have a good memory? Does any inability or difficulty that the witness has and remembering events seem genuine, or does it seem made up as an excuse to avoid answering questions?

- Does the witness's testimony seem reasonable and consistent as she/he gives it? Is it similar to or different from what other witnesses say about the same event? Did the witness say or do something different on an earlier occasion?

- Do any inconsistencies in the witness's evidence make the main point of the testimony more or less believable and reliable? Is the inconsistency about something important, or minor detail? Does it seem like an honest mistake? Is it a deliberate lie? Is the inconsistency because the witness said something different, or because she/he failed to mention something? Is there any explanation for it? Does it make sense?

- The manner in which a witness testifies may be a factor, and it may not, depending on other variables with respect to a particular witness.

Deemed Trust Provisions

[144] This trial concerns two taxation aspects that all Canadians face under the tax provisions of our country. These are payroll source deductions for income tax and

a goods and services tax known as the Harmonized Sales Tax or HST, which applies to most goods and services transactions.

[145] The taxation scheme provides that HST is collected by the purveyor of the goods and services and then remitted to the government minus input tax credits for HST payed by that entity. Likewise, employers are obligated to collect income tax occurring on employee's income and then remit the same to the government. Payroll source deductions require the employer to file appropriate forms monthly by the 15th of each month together with the amounts owed. HST is filed yearly.

[146] The nature of the above amounts were part of arguments by both the Crown and Mr. MacDonnell. Section 222(1) of the **Excise Tax Act of Canada** sets out the statutory nature of funds collected by employer and HST recipients as follows:

> **222 (1)** Subject to subsection (1.1), every person who collects an amount as or on account of tax under Division II is deemed, for all purposes and despite any security interest in the amount, to hold the amount in trust for Her Majesty in right of Canada, separate and apart from the property of the person and from property held by any secured creditor of the person that, but for a security interest, would be property of the person, until the amount is remitted to the Receiver General or withdrawn under subsection (2).
>
> **Amounts collected before bankruptcy**
>
> **(1.1)** Subsection (1) does not apply, at or after the time a person becomes a bankrupt (within the meaning of the *Bankruptcy and Insolvency Act*), to any amounts that, before that time, were collected or became collectible by the person as or on account of tax under Division II.
>
> **Withdrawal from trust**
>
> **(2)** A person who holds tax or amounts in trust by reason of subsection (1) may withdraw from the aggregate of the moneys so held in trust
>
> > **(a)** the amount of any input tax credit claimed by the person in a return under this Division filed by the person in respect of a reporting period of the person, and
> >
> > **(b)** any amount that may be deducted by the person in determining the net tax of the person for a reporting period of the person,
>
> as and when the return under this Division for the reporting period in which the input tax credit is claimed or the deduction is made is filed with the Minister.

> **Extension of trust**
>
> **(3)** Despite any other provision of this Act (except subsection (4)), any other enactment of Canada (except the *Bankruptcy and Insolvency Act*), any enactment of a province or any other law, if at any time an amount deemed by subsection (1) to be held by a person in trust for Her Majesty is not remitted to the Receiver General or withdrawn in the manner and at the time provided under this Part, property of the person and property held by any secured creditor of the person that, but for a security interest, would be property of the person, equal in value to the amount so deemed to be held in trust, is deemed
>
> **(a)** to be held, from the time the amount was collected by the person, in trust for Her Majesty, separate and apart from the property of the person, whether or not the property is subject to a security interest, and
>
> **(b)** to form no part of the estate or property of the person from the time the amount was collected, whether or not the property has in fact been kept separate and apart from the estate or property of the person and whether or not the property is subject to a security interest
>
> and is property beneficially owned by Her Majesty in right of Canada despite any security interest in the property or in the proceeds thereof and the proceeds of the property shall be paid to the Receiver General in priority to all security interests.
>
> **Meaning of security interest**
>
> **(4)** For the purposes of subsections (1) and (3), a security interest does not include a prescribed security interest.

[147] Mr. MacDonnell argues that the case law regarding the deemed trust provisions deal primarily with situations of bankruptcy and receivership and the standing among creditors in those situations regarding HST and payroll deductions.

[148] This question was dealt with by Judge Derrick (as she then was) in *R. v. Spears*, 2017 *NSPC 53*, starting at paragraph 403 where she stated:

> **403** In its "trust funds" submission, the Crown points to the language of "deemed trust" in section 227(4) of the *Income Tax Act* and section 222(1) of the *Excise Tax Act.*
>
> **404** The *ITA* provides that,
>
> > **227 (4) Trust for moneys deducted -** Every person who deducts or withholds an amount under this Act is deemed, notwithstanding any security interest...in the amount so deducted or withheld, to hold the amount separate and apart from the property of the person and from property held by any secured creditor...of

> that person...in trust for Her Majesty and for payment to Her Majesty in the manner and at the time provided under this Act.

405 The *ETA* provides that:

> **222.(1) Trust for amounts collected** - ...every person who collects an amount as or on account of tax...is deemed, for all purposes and despite any security interest in the amount, to hold the amount in trust for Her Majesty in right of Canada, separate and apart from the property of the person and from property held by any secured creditor of the person...until the amount is remitted to the Receiver General...

406 The "in trust" language of these statutory provisions seems clear enough. Mr. Draghici-Vasilescu has described the source deductions obligations of employers as being governed by a "very tightly regulated system" under which the employer is collecting taxes from its employees on behalf of CRA and holding these funds in trust. Section 4.1 of the ETA extends the trust and creates a floating charge over the assets of the tax debtor.

407 But as I stated earlier, the failure to remit source deductions and HST does not, by itself, amount to fraud. The Defence made submissions on the trust funds issue with reference to jurisprudence from the Supreme Court of Canada. I do not find it necessary to address the arguments around what significance these cases could have to a case like this one. What the cases broadly acknowledge is that the deemed trust funds referred to under the *ITA* and *ETA* are not always remitted as directed by the legislation. Delinquency does not automatically amount to fraud. Commentary from two of the three cases provided by Mr. Casey illustrates this point. In *First Vancouver Finance v. Canada (Minister of National Revenue)* 2002 SCC 49 the Court said the following:

> **3** ... By virtue of s. 227(4), when source deductions are made, they are deemed to be held separate and apart from the property of the employer in trust for Her Majesty. If the source deductions are not remitted to the Receiver General by the due date, the deemed trust in s. 227(4.1) of the ITA becomes operative and attaches to property of the employer to the extent of the amount of the unremitted source deductions. As well, the trust is deemed to have existed from the moment the source deductions were made.
>
> **4** For the reasons set forth below, I find that the s. 227(4.1) deemed trust is similar in principle to a floating charge over all the tax debtor's assets in favour of Her Majesty. The trust arises the moment the tax debtor fails to remit source deductions by the specified due date, but is deemed to have been in existence from the moment the deductions were made. As long as the tax debtor continues to be in default, the trust continues to float over the tax debtor's

> property. Thus, at any given point in time, whatever property then belonging to the tax debtor is subject to the deemed trust.

408 In *Royal Bank v. Sparrow Electric Corp*., [1997] S.C.J. No. 25, Gonthier, J., in a dissenting judgment, described the "unfortunate" reality of non-remittance:

> **25** ...In a perfect world, these deductions would be made, a cash fund would be set aside by the employer, and the withheld amounts would be promptly remitted to the Receiver General when due. The deducted amounts, lawfully the property of the employee, would in this way be transferred to Her Majesty to be set against his overall tax payable.
>
> **26** As a practical reality, however, these deductions are often not remitted as required under the ITA. Instead, the withholdings are commonly made solely as a book entry, and therefore the deduction of taxes from wages becomes merely a notional transaction; no cash is actually set aside for remittance and, often, the deductions are not transferred to the Receiver General: see, e.g., Re Deslauriers Construction Products Ltd., [1970] 3 O.R. 599 (C.A.), at p. 601. It is at this point which a business becomes indebted to Her Majesty for the amount of moneys only fictionally deducted. I hasten to add, however, that while it can be said Her Majesty at this point becomes de facto, if not de jure, a creditor of the non-remitting employer, the arrangement is dissimilar to an ordinary debtor-creditor situation in two fundamental respects. First, in contrast to usual negotiated credit arrangements, this transaction is of manifestly a non-consensual nature. Second, by virtue of s. 153(3), the debtor can in law be considered to be utilizing an asset which is the property of its employees. In this sense, it is not inaccurate to characterize the non-remittance of payroll deductions as a "misappropriation" of the property of another. Indeed, the authorities, correctly in my view, commonly refer to the conduct of the tax debtor in this manner: Roynat, supra, at p. 646, per Twaddle J.A.; and Pembina on the Red Development Corp. Ltd. v. Triman Industries Ltd. (1991), 85 D.L.R. (4th) 29 (Man. C.A.), at p. 48, per Lyon J.A. dissenting.
>
> **27** The economic reality of this sort of misappropriation of statutory deductions is artificially to increase the working capital of the tax debtor. By foregoing a cash payment to Her Majesty in the amount of the payroll deductions, the tax debtor is able to utilize the freed resources elsewhere in its business...

409 My point in mentioning these cases is this: failure to remit to CRA and utilization of those funds in a taxpayer's business is not uncommon and, by itself, is not fraud.

410 The Crown has made the point that a taxpayer cannot simply decide to re-purpose monies owing for source deductions and HST and utilize them for other priorities. That appears to be what happened in *Dieckmann.* Here, Mr. Spears has

> said he would have paid what he owed if he could have but because his business was in difficult financial straits he worked at keeping his head above water with the expectation that he could turn the situation around. It was Mr. Spears' evidence that "there was always an attempt to make payments to CRA, not successfully maybe, but the intention was always to make it work."

[149] Mr. MacDonnell uses the above to argue that at no time were the funds collected for HST and payroll source deduction the property of CRA while the funds were in the hands of the MacDonnell companies. Mr. MacDonnell argues that therefore, he was simply in debt to the CRA for the amounts and failure to pay a debt is not in and of itself a criminal matter.

[150] The Crown argues that the sections of Federal Statues setting up the deemed trust regime and the requirements of taxes to be paid to the Government of Canada are fundamental and integral to the ongoing operation of our country.

[151] The Crown in its brief, stated the following:

> In *Canada Trustco Mortgage Corp. v. Port O'Call Hotel Inc.*, [1996] 1 S.C.R 963, the Supreme Court of Canada demonstrated just how important the garnishment powers is to the integrity of our system:
>
> > There can be no doubt of the importance of levying taxation. The ITA entrusts to employers the duty of deducting income tax from the wages of employees and remitting it on their behalf. Similarly the ETA imposes on those who provide goods and services to others the duty to collect and remit the GST which is payable. In essence, companies collect taxes which they hold in trust for the government.
>
> Citing an earlier decision of the Manitoba Court of Appeal, Justice Cory agreed with the following:
>
> > To determine the dominant characteristic of the legislation, it is important to know the governmental policy behind the section. The tax debtor's bank is in the best position to know its customer and to structure its business arrangements accordingly. Revenue Canada, on the other hand, does not have the same opportunity to become acquainted with the affairs of the tax debtor or its creditors. It must therefore rely solely on the provisions of the legislation to mandate the employer to remit the employee income tax deductions as required by the [Income Tax] Act . .
> >
> > One must always remember that the withholding tax or source deduction to which s. 224 applies is at the heart of the collection procedures for personal income taxation in Canada. Indeed, if one makes a calculation from the statistics reported in "Taxation Statistics, 1987," a publication of Revenue Canada Taxation, catalogue No. RV-1987, one finds that 87 per cent of all personal income taxes paid in Canada are collected by source deductions. It can thus be seen that Parliament in passing s. 224(1.2) made it as all-encompassing as it is in order to ensure its continued viability. No other system is so crucial to the overall collection procedure adopted by the Crown. Parliament clearly meant to protect this system. Using the employer as a tax collector requires

> such extra protection in cases such as the one at bar where the employer converts the withheld tax money to its own purposes. Understandably, that conversion cannot be countenanced if the integrity of that system is to be preserved. Parliament, therefore, acting within its constitutional authority, has taken this extraordinary remedy to protect a major collection source.
>
> This last sentence highlights an important distinction: the regime created by sections 224 and 231 of the *ITA* (and their sister sections in the *ETA*) is a regulatory regime, in place to "protect a major collection source" and ensure that taxpayer money gets where it belongs. But these sections are separate and distinct from the criminal law powers engaged by section 327 of the *ETA* and section 380 of the *Criminal Code*, which are enacted to sanction criminal wrongdoing.

[152] At the end of the day the deemed trust provisions make it quite clear that the money an entity receives through HST, charged and collected, and payroll tax deduction must be accounted for and must be paid to the government. To suggest that such funds in the hands of a business are able to be dealt with anyway that business want and then turn to CRA and say that the only interest you have in the accounting process is a debt that has to be payed could result in business delaying tax payment until collection action occurs.

[153] As was stated in *Sparrow*, this tax arrangement is dissimilar to ordinary debtor-creditor situations as it is a non-consensual and secondly, it is not inaccurate to characterize the non-remittance of HST and payroll deduction as a misappropriation of the property of another.

[154] The bottom line here is that this Court must look to whether Mr. MacDonnell and his companies committed fraud and tax evasion in dealing with CRA.

Fraud

[155] S. 380 (1) of the **Criminal Code** set out the offence of fraud as follows:

> **380 (1)** Every one who, by deceit, falsehood or other fraudulent means, whether or not it is a false pretense within the meaning of this Act, defrauds the public or any person, whether ascertained or not, of any property, money or valuable security or any service,
>
> > **(a)** is guilty of an indictable offence and liable to a term of imprisonment not exceeding fourteen years, where the subject-matter of the offence is a testamentary instrument or the value of the subject-matter of the offence exceeds five thousand dollars

[156] Fraud, not unlike almost all offences consists of two main components, the prohibited act or actus reus and the required state of mind, mens rea.

[157] Proof of fraud requires an act of deceit, a falsehood or some other fraudulent means and a deprivation caused by the prohibited act. That deprivation may consist in actual loss or placing of the victim's pecuniary interests at risk. (See *R. v. Riesberry*, [2015] 3 S.C.R. 1167, *R. v. Theroux*, [1993] 2 S.C.R, 5 and *R. v. Zlatic* [1993] 2 S.C.R.29)

[158] In *Riesberry*, Justice Cromwell stated at p. 23-24:

> 23 . . . Fraudulent conduct for the purposes of a fraud prosecution is not limited to deception, such as deception by misrepresentations of fact. Rather, fraud requires proof of "deceit, falsehood or *other fraudulent means*": s. 380(1). The term "other fraudulent means" encompasses "all other means which can properly be stigmatized as dishonest": R. v. Olan, [1978] 2 S.C.R. 1175, at p. 1180. The House of Lords [page1176] made the same point in Scott v. Metropolitan Police Commissioner, [1975] A.C. 819, a case approved by the Court in Olan (p. 1181). Fraud, according to Viscount Dilhorne in Scott, may consist of depriving "a person dishonestly of something which is his or of something to which he is or would or might but for the perpetration of the fraud be entitled": p. 839. And as Lord Diplock said, the fraudulent means "need not involve fraudulent misrepresentation such as is needed to constitute the civil tort of deceit": ibid., at p. 841.
>
> 24 It follows that where the alleged fraudulent act is not in the nature of deceit or falsehood, such as a misrepresentation of fact, the causal link between the dishonest conduct and the deprivation may not depend on showing that the victim relied on or was induced to act by the fraudulent act. This is such a case.

[159] The actus reus of the offence of fraud was examined in *R. v. Olam,* [1978] 2 S.C.R. 1178. The elements needed to prove the offence are dishonesty and deprivation. The wording in s. 380 of "other fraudulent means" include means which may not be in the nature of deceit or a falsehood and encompass all other means which can properly be stigmatized as dishonest. The element of deprivation can be satisfied on proof of detriment, prejudice, or risk of prejudice to the economic interests of the victim.

[160] In *Theroux*, Justice McLachlin stated:

> **24** Having ventured these general comments on mens rea, I return to the offence of fraud. The prohibited act is deceit, falsehood, or some other dishonest act. The prohibited consequence is depriving another of what is or should be his, which may, as we have seen, consist in merely placing another's property at risk. The mens rea

> would then consist in the subjective awareness that one was undertaking a prohibited act (the deceit, falsehood or other dishonest act) which could cause deprivation in the sense of depriving another of property or putting that property at risk. If this is shown, the crime is complete. The fact that the accused may have hoped the deprivation would not take place, or may have felt there was nothing wrong with what he or she was doing, provides no defence. To put it another way, following the traditional criminal law principle that the mental state necessary to the offence must be determined by reference to the external acts which constitute the actus of the offence (see Williams, supra, c. 3), the proper focus in determining the mens rea of fraud is to ask whether the accused intentionally committed the prohibited acts (deceit, falsehood, or other dishonest act) knowing or desiring the consequences proscribed by the offence (deprivation, including the risk of deprivation). The personal feeling of the accused about the morality or honesty of the act or its consequences is no more relevant to the analysis than is the accused's awareness that the particular acts undertaken constitute a criminal offence.
>
> **25** This applies as much to the third head of fraud, "other fraudulent means", as to lies and acts of deceit. Although other fraudulent means have been broadly defined as means which are "dishonest", it is not necessary that an accused personally consider these means to be dishonest in order that he or she be convicted of fraud for having undertaken them. The "dishonesty" of the means is relevant to the determination whether the conduct falls within the type of conduct caught by the offence of fraud; what reasonable people consider dishonest assists in the determination whether the actus reus of the offence can be made out on particular facts. That established, it need only be determined that an [page20] accused knowingly undertook the acts in question, aware that deprivation, or risk of deprivation, could follow as a likely consequence.
>
> **26** I have spoken of knowledge of the consequences of the fraudulent act. There appears to be no reason, however, why recklessness as to consequences might not also attract criminal responsibility. Recklessness presupposes knowledge of the likelihood of the prohibited consequences. It is established when it is shown that the accused, with such knowledge, commits acts which may bring about these prohibited consequences, while being reckless as to whether or not they ensue.

Tax Evasion

[161] The accused entities are charged each with one count under s. 327(1) of the **Excise Tax Act**. That section states:

> **327 (1)** Every person who has
>
> > **(a)** made, or participated in, assented to or acquiesced in the making of, false or deceptive statements in a return, application, certificate, statement, document or answer filed or made as required by or under this Part or the regulations made under this Part . .

> **(c)** willfully, in any manner, evaded or attempted to evade compliance with this Part or payment or remittance of tax or net tax imposed under this Part. .

[162] **The British Columbia Court of Appeal** in a recent matter dealt with the elements of this offence in *R. v. Schouw*, 2020 BCCA 232 at paragraph 22:

> **22** As the judge correctly noted, the essential elements of the offence of tax evasion are outlined in *Klundert*. To establish liability under s. 327(1)(c) of the *ETA*, the Crown was required to prove beyond a reasonable doubt that Mr. Schouw: i) did something or engaged in a course of conduct that avoided or attempted to avoid the payment of tax imposed by the *ETA*; ii) knew there was tax imposed by the *ETA*; and iii) engaged in the conduct for the purpose of avoiding or attempting to avoid the payment of tax imposed by the *ETA* or knowing that avoiding payment of tax imposed by the *Act* was a virtually certain consequence of his actions. The only live issue at trial was whether the third element of the offence was established beyond a reasonable doubt.

(Also, see *R. V. Klundert* [2004] O.J. No. 3515 (Ont. C.A.) and *Samaroev v. Canada Revenue Agency*, 2019 BCCA 113)

[163] Circumstantial evidence, unlike direct evidence, requires a Court to consider a number of pieces of evidence, which in and themselves do not prove guilt but when viewed together and as a whole, moves the factfinder to the conclusion of guilt beyond a reasonable doubt.

[164] In *R. v. Villaroman*, 2016 SCC 33, Justice Cromwell, for the Court, noted that "in a case in which proof of one or more elements of the offence depends exclusively or largely on circumstantial evidence, it will generally be helpful to the jury to be cautioned about too readily drawing inferences of guilty" (para.30). He went on to explain that the modern state of the law is that inferences consistent with innocence do no require proven facts:

> 35 At one time, it was said that in circumstantial cases, "conclusions alternative to the guilt of the accused must be rational conclusions based on inferences drawn from proven facts": see *R. v. McIver*, [1965] 2 O.R. 475 (C.A.), at p. 479, aff'd without discussion of this point [1966] S.C.R. 254. However, that view is no longer accepted. In assessing circumstantial evidence, inferences consistent with innocence do not have to arise from proven facts: *R. v. Khela*, 2009 SCC 4, [2009] 1 S.C.R. 104, at para. 58; see also *R. v. Defaveri*, 2014 BCCA 370, 361 B.C.A.C. 301, at para. 10; *R. v. Bui*, 2014 ONCA 614, 14 C.R. (7th) 149, at para. 28. Requiring proven facts to support explanations other than guilt wrongly puts an obligation on an accused to prove facts and is contrary to the rule that whether there is a reasonable doubt is assessed by considering all of the evidence. The issue with respect to circumstantial evidence is the range of reasonable inferences that can be drawn from it. If there are

> reasonable inferences other than guilt, the Crown's evidence does not meet the standard of proof beyond a reasonable doubt.
>
> 36 I agree with the respondent's position that a reasonable doubt, or theory alternative to guilt, is not rendered "speculative" by the mere fact that it arises from a lack of evidence. As stated by this Court in *Lifchus*, a reasonable doubt "is a doubt based on reason and common sense which must be logically based upon the evidence or lack of evidence": para. 30 (emphasis added). A certain gap in the evidence may result in inferences other than guilt. But those inferences must be reasonable given the evidence and the absence of evidence, assessed logically, and in light of human experience and common sense.
>
> 37 When assessing circumstantial evidence, the trier of fact should consider "other plausible [page1020] theor[ies]" and "other reasonable possibilities" which are inconsistent with guilt: *R. v. Comba*, [1938] O.R. 200 (C.A.), at pp. 205 and 211, per Middleton J.A., aff'd [1938] S.C.R. 396; *R. v. Baigent*, 2013 BCCA 28, 335 B.C.A.C. 11, at para. 20; *R. v. Mitchell*, [2008] QCA 394 (AustLII), at para. 35. I agree with the appellant that the Crown thus may need to negative these *reasonable* possibilities, but certainly does not need to "negative every possible conjecture, no matter how irrational or fanciful, which might be consistent with the innocence of the accused": *R. v. Bagshaw*, [1972] S.C.R. 2, at p. 8. "Other plausible theories" or "other reasonable possibilities" must be based on logic and experience applied to the evidence or the absence of evidence, not on speculation.

[165] Justice Cromwell went on to contrast the approach to exculpatory circumstantial evidence to that governing inculpatory evidence, citing *Martin v. Osborne* (1936), 55 C.L.R. 367 (H.C.), at p. 375, where the court stated that "[i] in the inculpation of an accused person the evidentiary circumstances must bear no other reasonable explanation" (emphasis in original). The Court explained that "according to the common course of human affairs, the degree of probability that the occurrence of the facts proved would be accompanied by the occurrence of the fact to be proved is so high that the contrary cannot reasonably be supposed" (emphasis omitted). Justice Cromwell commented that this "idea –"that to justify a conviction, the circumstantial evidence, assessed in light of human experience, should be such that it excludes any other reasonable alternative" – was a helpful way of describing the line between plausible theories and speculation" (para.41).

Defence Submissions:

[166] Mr. MacDonnell's defence position was broken down into three components. Mr. MacDonnell was honest in his dealings with CRA, that failure to pay CRA, HST

and payroll deductions was not a crime and that he had the ability to deal with revenues that flowed into his companies as he saw fit.

[167] In relation to Mr. MacDonnell's honesty, the defence pointed to the evidence of Allison Brown where in her evidence and diary extracts where indicated the records were all complete and correct. Mr. MacDonnell pointed out several ways that he could have cheated CRA. Examples include under reporting sales and other methods of hiding HST receipts.

[168] Mr. MacDonnell further argued his honesty based on his letter to Ms. Dobson of August 13, 2013 in which he set out the past five years income accurately and that he could have exaggerated the same. Mr. MacDonnell said that he could not have foreseen a CRA audit but was upfront with his reporting just the same.

[169] Mr. MacDonnell pointed out dramatic income loss over the period in question. During that period, he paid over $616,000.00 to CRA.

[170] Mr. MacDonnell claimed that because MGCL payed $324,701.91 in voluntary payments, showing that his honesty as paying the debt as he said he would.

[171] Mr. MacDonnell argued that the Crown was wrong in identifying that he had made lavish lifestyle expenditures, given that he paid $312,000 to CRA.

[172] It was argued that CRA had no understanding that in order to make good his debt to CRA Mr. MacDonnell had to keep his companies going. Further, that because in his conversation with Jennifer Hubley of February 16, 2012, Mr. Hubley suggested he use Bowood's bank account when he asked that they release his other banks so that he could continue to operate he was showing forthrightness and honesty.

[173] Mr. MacDonnell argued that the big hallmarks of fraud are under-reporting income and/or over-reporting expenses and that these are not present here.

[174] It was further put to the Court that Mr. MacDonnell's offer to CRA to give personal guaranties as well as assignment of life insurance policies were further evidence of his action being inconsistent with dishonesty. This is so given that it would take away corporate liability as a shield against Mr. MacDonnell being personally liable. He argued that his life insurance was worth at least a million dollars which would flow to CRA if he died and that showed honesty.

[175] Mr. MacDonnell questioned the accuracy of the ACSES diary entry of August 27, 2008 because he had given CRA a cheque with new bank account details a week before their meeting.

[176] Mr. MacDonnell pointed out that while the Crown suggested in relation to Mr. MacDonnell's ability to get the Labour Standards Board to release a cheque for $3332.84 the same was never paid as it was not sent and that is not true. The cheque number identified to the Labour Standards Board was number 0423. Mr. MacDonnell points to proof it was paid by examining MSRG's CUA statement for July 2011 which shows cheque 0423 being processed on September 27, 2011. The cheque bounced but Mr. MacDonnell argues there is no evidence to suggest that it was either Mr. MacDonnell who waited to send the cheque with insufficient funds in his account to cover it or if CRA simply waited a full month with the cheque in their hands before cashing it. Mr. MacDonnell says this is the evidence of his honesty.

[177] In his argument, Mr. MacDonnell took issue with the Crown's characterization of the use of the Pay Pal account as blatant tax evasion. Mr. MacDonnell's evidence was that his bookkeeper told him Pay Pal accounts had to be linked to a personal bank account and at the end of May 2011 it was switched to a business account. The amount which flowed through the Pay Pal account between February 8 and May 20, 2011 was a total of $80,196.14 of which $9,285.33 was HST. Mr. MacDonnell argues that it is not HST fraud as it was discoverable in the company books and reported in Allison Brown's assessment. Presumably therefore it is only fraud if the bookkeeping or lack thereof is undiscoverable.

[178] In countering the Crown's position that Mr. MacDonnell sat on filings for payroll returns for the period of April until December 2011 until September of that year, Mr. MacDonnell said this is false. Mr. MacDonnell had the returns provided to him by Ms. Green to file on time each month. The returns were faxed to Mr. MacDonnell by Ms. Green on November 21, 2011. The ACSES diary entry shows they were received on November 22, 2011.

[179] Mr. MacDonnell argued that his position vis-a-vie the deemed trust provision of the **Excise Tax Act** and CRA was that he could deal with HST monies received as he wished. Mr. MacDonnell pointed to *First Vancouver Finance v. Minister of National Revenue*, 2002 SCC 49.

[180] Mr. MacDonnell further argued that because CRA asked him which account he wished arrears to be payed on or to which account he wanted money payed proves

CRA recognized they had no authority over HST and payroll monies and therefore MacDonnell could use those funds anyway he wanted.

[181] Mr. MacDonnell also points to *R. v. Ming*, [1996] S.J. No. 418 (Sask. Q.B.) to argue that simply non-payment of HST to CRA is not wilful evasion as contemplated by the charges under s. 327(1)(c) of the **Excise Tax Act**.

[182] Mr. MacDonnell finally argued the HST charges are subject to the principle in *R. v. Keinapple* [1975] 1 S.C.R. 729.

Crown Position

[183] The Crown submits that at the core of this case is the simple fact that Mr. MacDonnell diverted funds that otherwise could have been used to pay CRA to pay for his own lifestyle that he could not otherwise afford.

[184] His conduct of misappropriation, lying, withholding from CRA relevant information, the evasion of requirements to pay, the hiding of HST payments, the number of intentionally bounced cheques shows a pattern of fraudulent conduct. That conduct was taken over the period of time set out in the information.

[185] The Crown put forward how it urged the court to deal with the law. First in relation to *First Vancouver* and accompanying cases that those are cases dealing with prioritizing involving HST and this case is a fraud case. That is an important distinguishing factor as to how those decision should be viewed in this matter.

[186] Emphasis, by the Crown, was placed on *R. v. Zlantic*, [1993] 2 S.C.R. 29. At issue there was a wholesaler who obtained T-shirts and sweatshirts for re-sale. These were payed for by either credit or postdated cheques. When Mr. Zlantic re-sold the goods, he gambled away the proceeds and was left unable to satisfy what he owed on the original purchase. **The Supreme Court** held that Mr. Zlantic did not have an unrestricted right to use these funds as he pleased and that by diverting these funds to a risky venture such as gambling it was a wrongful use. The same applies here and that Mr. MacDonnell nor his companies had unrestricted use of HST and Payroll source funds.

[187] The Crown further quoted from *Sparrow Electric* at paragraphs 25 and 26 where **The Supreme Court of Canada** stated that it is not inaccurate to characterize the non-remittance of payroll deductions as misappropriation of the property of another. On the reading of *Sparrow Electric*, *Zlantic* and others, the Crown submitted that is can not be argued that the Crown does not have a pecuniary interest

in both the HST and payroll deductions held by the accused. Further, that it can not be argued that the conduct of the accused in this case did not extinguish that interest or at least put it at risk.

[188] The Crown argues that *First Vancouver* is not a fraud case or a tax case but rather a civil case dealing with debtor/creditor priorities. That case has no relevance as to whether fraud was committed in this case. Here, the question is, was there a pecuniary interest in funds held by Mr. MacDonnell and were they extinguished or put at risk. Funds were clearly diverted from the company by MacDonnell for an improper purpose.

[189] The Crown argued that Mr. MacDonnell's use through company loans of monies that were impressed with a trust by virtue of statute to use for his own lifestyle expenditures is a clear indication of fraudulent activity. He could not treat taxpayer's money as a line of income which is what he did for five years. This is set out in Exhibit 16.

[190] In reviewing its case against Mr. MacDonnell, the Crown submitted that it had to prove that tax was owed, that the accused knew tax was owed and that they evaded that tax. Further, that conduct before, during and after non-filing may be relevant to determining of whether or not that conduct was wilful.

[191] In looking to *R. v. DeWolf*, [1982] B.C.J. No. 10 (BCCA) the Crown argued that when the accused was in funds sufficient to meet his liability and then made a choice to put those funds elsewhere he was were evading taxes.

[192] In relation to HST obligation, these remained consistent for the years in question. The accused knowing his obligation to pay this, diverted funds to Mr. MacDonnell's personal expenses. While Mr. MacDonnell may have occasionally missed payments on his home, cottage, condo, and automobile he would make them up while at the same time paying nothing on his CRA accounts.

[193] As to Mr. MacDonnell's pattern of conduct the Crown pointed to the depositing of company cheques into Mr. MacDonnell's personal account, these included Pay Pal and cheques that were made out to the company but were directly deposed into Mr. MacDonnell's personal account without them going through the company books. This the Crown submitted was clearly fraudulent activity.

[194] When a RTP was placed on Mr. MacDonnell's bank account it sealed the pecuniary interest of CRA. These RTPs were intentionally evaded by Mr. MacDonnell except for when RBC refused to take deposits.

[195] Mr. MacDonnell intentionally kept funds from flowing into bank accounts unknown to CRA which were not the subject of RTPs. In this regard, Exhibit 15 lays Mr. MacDonnell's intentions bare the occasioning of a Trust Exam or an RTP would trigger Mr. MacDonnell's opening of a bank account for which CRA had no knowledge. Further, in a number of letters negotiating a payment schedule and lifting of RTP's, Mr. MacDonnell gave number only from accounts which were known to CRA and withholding the information from those banks' unknown to CRA. This withholding of the information is a dishonest act.

[196] A number of times CRA lifted RTP's relying on Mr. MacDonnell's representation and thereby put their pecuniary interests at risk. Upon this happening, none or very little was paid by Mr. MacDonnell after this.

[197] The Crown also pointed to the more that 20 bounced cheques made out to CRA as fraudulent. This is so when examined in the light of Mr. MacDonnell's comment to Robert Johnson that while there were insufficient funds to cover the cheque the money might come in and, in any case, a bounced cheque will buy us time.

[198] According to the Crown, this pattern was also affirmed by Paula Walker whose evidence showed that Mr. MacDonnell would write or approve cheques and that after they were sent, would remove money for his own use leaving those cheques to bounce.

Analysis

R. v. W.D. and Credibility

[199] As indicated earlier, if I accept the evidence of the accused, I must acquit him. If I reject the evidence of the accused, I must still determine if it raises a reasonable doubt.

[200] In relation to the evidence presented to this Court by Ralston MacDonnell, where it conflicts with that evidence given by other witnesses and the Agreed Statement of Facts, I reject it. The Court also finds that evidence given by Ralston MacDonnell does not raise any reasonable doubt. As indicated by *R. v. W.D.*, this Court will conduct a review of the entire evidence to determine if the Crown has met its obligation to prove the charges before me beyond a reasonable doubt.

[201] A number of times during the course of the trial answers given by Mr. MacDonnell were at best troubling in relation to his honesty in testifying and at worst, outright variances with the truth.

[202] When confronted regarding the comments he made to Robert Johnson when he expressed concerns that there were insufficient funds to cover a cheque to CRA that "the funds might be there but if they are not, it will buy us some time". MacDonnell testified he could not imagine saying that. To be clear, I accept that Robert Johnson was forthright and accurate as the gist of the conversation. His demeaner before and his evidence showed he was surprised by Mr. MacDonnell's response.

[203] Mr. MacDonnell framed this as an issue with Mr. Johnson's memory of the event. Mr. Johnson, he said was a young employee and new to the business. The implication being as he was young you can not rely on that person's recollection. Mr. MacDonnell denied he would even say that.

[204] In this Court's opinion, Mr. Johnson's youth and inexperience was exactly why the comments made left such an impression on him. I find as a fact that those comments were made to Mr. Johnson by Mr. MacDonnell.

[205] Mr. MacDonnell went on to say in his evidence, that they would never release cheques if they were not able to be covered and that he would rather have held the cheques back. The evidence shows nothing could be further from the truth. Over the course of the period covered by the information, numerous cheques were provided to CRA which were returned for insufficient funds. The practise of bouncing cheques was not singular to CRA but extended to many other areas including payroll.

[206] More will be said about this later, but Ralston MacDonnell was the operating mind of all his companies without question. He testified that he met every second or third day with financial personnel and the evidence is clear that he would not hesitate to redirect funds and leave an insufficient balance in the bank to cover cheques.

[207] Mr. MacDonnell, in his evidence, said he knew from time to time that monies were owed to CRA but that he did not know the extent of it. Having said that, he almost immediately said he was in contact with CRA often and met with his financial officer every second to third day. Clearly the second part of that shows the first to be utterly false.

[208] Mr. MacDonnell referred at several points of either it being a team decision as to where monies went or that it was staff, and that he was not involved. This is contrary to the truth. Mr. MacDonnell was the arbiter and director of where money went.

[209] Mr. MacDonnell's hiding of a bank account when asked by CRA where his banking was being conducted, is another reason to not accept his evidence. Mr. MacDonnell advised the CRA collection officer, that all money was flowing through MGCL's RBC bank account when in truth he was utilizing a CUA bank account which was unknown to CRA. He intentionally misled the ROCCO. His attempt to say he had given them the new bank information which was imprinted on a cheque several days prior does not save his credibility but rather negatively impacts it. He had an opportunity to point out that information when he clearly would have known the collection's officer had no knowledge of the cheque.

[210] In short, Mr. MacDonnell's evidence lacks credibility.

Fraud

Did Mr. MacDonnell and his corporate entities engage in fraudulent behaviour?

[211] As had been said several times in this decision, Mr. MacDonnell was the operating mind in his companies and clearly made all major decision.

[212] Throughout the period covered by the informations before the Court, Mr. MacDonnell wove a fabric of false and deceptive dealings with CRA. This pattern of fraudulent behavior is outlined in the facts above.

[213] Mr. MacDonnell made numerous overtures to CRA to have them lift or not place RTPs. On August 13 of 2013 he offered Ms. Dobson security by giving a mortgage over his home when he would have known that there was no equity in the home. Further, Mr. MacDonnell made a proposal on August 13, 2013 (See Tab 13, Exhibit 5) to pay 30% of his gross income to repay his debt and faxed the same. No efforts were made to follow this up regardless of whether the proposal was accepted. If he could pay the monies promised one expects at least some payment to come forward. His lack of intention to do so shows the proposal to be fraudulent.

[214] Again, on August 16, 2017, Mr. MacDonnell wrote asking CRA to release the RBC and Monaris Accounts as he needed them to operate. At the same time he told CRA how much he needed these accounts he had opened a business account at

Toronto Dominion and was flowing business through that account depriving CRA of the ability to retrieve funds owed through a RTP. Again, this is fraudulent behaviour.

[215] It is important to examine the incident where Mr. MacDonnell had created MSRM and MGOC to take on the business that was formerly conducted through MGCL. ROCCO Dobson specifically asked where the bank accounts existed for the two new companies. I accept that Mr. MacDonnell represented to ROCCO Dobson that monies would flow through the account for MGLC. Mr. MacDonnell knew that he had opened a business account with CUA and was running business accounts for MGCL and MGOC through it. He misled Dobson for the purpose, of protecting the CUA account from attachment by CRA. This is fraud.

[216] Throughout the evidence, there was a clear pattern of Mr. MacDonnell and his failure to provide trust examiners crucial information which with the backdrop of a pattern of dishonesty makes out the offence of fraud.

[217] The above is demonstrated during the Trust Exam by Mr. McDonah. Mr. McDonah was only provided the information of the RBC account, which significant business activity was being conducted through the CUA account.

[218] Robert Johnson's reporting that he advised Mr. MacDonnell that the cheque to CRA was going to bounce and Mr. MacDonnell simply hoping money might appear but relying on the cheque to buy him time if it bounced, is again fraudulent behavior.

[219] Importantly, the creation of the Pay Pal account which flowed directly into Mr. MacDonnell's personal account by passing the company books removed money and records from the company with a direct deprivation to CRA regarding HST. The same can be said for other cheques which were deposited directly into Mr. MacDonall's personal account. This is another example of Mr. MacDonnell committing fraud.

[220] Mr. MacDonnell wrote to ROCCO, Kelly Walsh on July 28, 2011 with a payment forecast. Based on that, Ms. Walsh agreed to release the RTP on the CUA account. Further, the letter of August 21,2011 to Jennifer Hubley set out banking information for the companies. These did not disclose the existence of the TD account.

[221] Looking at Exhibit 15, there is a clear pattern of withholding banking information to CRA and creating new bank accounts to counter RPTs and also

responding to the completion of Trust Exams. These actions, I find, were to deprive CRA of the ability to attach funds.

[222] Through the period covered by the indictment, the accused at times wrote NSF cheques to the CRA and also failed to file required documentations. These are all facts which go to ground these fraud charges.

[223] Throughout the period, the company's arrears for HST and payroll source deductions continued to balloon. At the same time, there was a conscious and systematic draining of corporate funds to pay for personal mortgages on Mr. MacDonnell's home and two other residences, vehicle lease, personal life insurance and other personal lifestyle expenditures. Together, these deprived CRA and Canadian taxpayers of funds due and owing.

[224] There is no other rational conclusion at the end of this evidence that the accused before me conducted fraud as charged.

Tax Evasion

[225] As set out earlier, s. 327(1)(c) of the **Excise Tax Act** makes it an offence to wilfully evade or attempt to evade remittance of HST. The question here is did the accused engage in conduct that avoided or attempted to avoid payment of HST knowing the same was payable.

[226] Between February 8 and May 2017, Mr. MacDonnell diverted $80,196.14 into his personal accounts from payments received for his companies, of this $9,285.33 were HST payments. These payments were never recorded in the company accounts nor accounted to CRA. This was tax evasion.

[227] Throughout the periods in question, there was a systematic diversion of corporate funds to Mr. MacDonnell's personal accounts for his own lifestyle expenses. As well, the continued pattern of maintaining bank accounts, which were never made known to CRA allowed the accused to evade and avoid the actual payment of amounts owed to CRA.

[228] Again, looking at the evidence over the entire period, there is no other rational conclusion other than the accused committed the offences under s. 327(1)(c).

Distinguishing *R. v. Spears*

[229] Mr. MacDonnell put heavy emphasis on what was termed similarities between this matter and the changes in *R. v. Spears*. The distinction is between this matter and *Spears* is factual. In Spears there was not the clear evidence of fraud and tax evasion that was exhibited here. Additionally, here Mr. MacDonnell stripped funds from the corporations for lifestyle expenses. The extent of that behaviour as we see here was not present in *Spears*. The evidence in *Spears* was such that Judge Derrick had reached a level of suspicion that the accused had committed the offices before her but the facts did not allow the conclusion that the accused was guilty beyond a reasonable doubt. The facts before me are far more cogent then those in *Spears* and led this Court to the inescapable conclusion of guilt. As well, here the accused through shareholder loans stripped the company of proceeds that could have, and should have, been directed to its tax obligation to CRA.

Keinapple

[230] Mr. MacDonnell briefly put forward that the principle in *R. v. Keinapple* (Supra), applies in that it bars conviction for an accused for two offences where there are factual underpinnings for the offences that have identified elements of the offence. Here, tax evasion exists with failure to report HST and payroll tax deductions or efforts to avoid paying the same. That is separate from fraud. (See *R. v. Cameron*, 2020 A.B.C.A. 405 at paragraphs 27 and 28)

[231] In conclusion, I find all the accused before me guilty of all charges.

Paul Scovil, JPC