Docket: 2008-2663(GST)G

BETWEEN:

STEPHEN SAVOY,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on May 18, 2010 at Toronto, Ontario

Before: The Honourable Justice J.E. Hershfield

Appearances:

Counsel for the Appellant: Jeffrey Radnoff

Counsel for the Respondent: Shatru Ghan

JUDGMENT

The appeal with respect to an assessment made under the *Excise Tax Act* (GST Portion), notice of which is dated July 24, 2007 and numbered 05CP868700089, for the reporting period from July 1, 2000 to March 31, 2001, is allowed, with costs, and the assessment is referred back to the Minister of National Revenue for reconsideration and reassessment in accordance with the reasons set out in the attached Reasons for Judgment.

Signed at Calgary, Alberta this 27th day of January 2011.

"J.E. Hershfield"

Hershfield J.

Citation: 2011 TCC 35
Date: 20110127
Docket: 2008-2663(GST)G

BETWEEN:

STEPHEN SAVOY,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Hershfield J.

[1] The Appellant appeals an assessment for unpaid GST for the period from July 1, 2000 to March 31, 2001 (hereinafter, the "Period") which was made on the basis that he was a director of Savoy Glass Ltd. (hereinafter, the "company") during that Period and was liable for the remittance failures of the company pursuant to section 323 of the *Excise Tax Act* (GST Portion) (the "*Act*").

[2] Section 323, which imposes liability for the remittance failures of a corporation on directors, provides as follows:

> **(1) Liability of directors --** Where a corporation fails to remit an amount of net tax as required under subsection 228(2) or (2.3), the directors of the corporation at the time the corporation was required to remit the amount are jointly and severally liable, together with the corporation, to pay that amount and any interest thereon or penalties relating thereto.[1]

[3] The Appellant asserts that he was not a director at the time the company failed to remit amounts required under the *Act* to be remitted. Hence, no liability arises under section 323. He further asserts that the conditions for the application

[1] Subsequently amended by S.C. 2005, c. 30, s.24 applicable as of June 29, 2005.

of that provision as set out in subsection 323(2) have not been met and that, in any event, the defenses afforded in subsections 323(3) and 323(5) apply in the circumstances of his case. Those subsections provide as follows:

> **(2) Limitations --** A director of a corporation is not liable under subsection (1) unless
>
> (a) a certificate for the amount of the corporation's liability referred to in that subsection has been registered in the Federal Court under section 316 and execution for that amount has been returned unsatisfied in whole or in part;
>
> (b) the corporation has commenced liquidation or dissolution proceedings or has been dissolved and a claim for the amount of the corporation's liability referred to in subsection (1) has been proved within six months after the earlier of the date of commencement of the proceedings and the date of dissolution; or
>
> (c) the corporation has made an assignment or a receiving order has been made against it under the *Bankruptcy and Insolvency Act* and a claim for the amount of the corporation's liability referred to in subsection (1) has been proved within six months after the date of the assignment or receiving order.
>
> **(3) Diligence --** A director of a corporation is not liable for a failure under subsection (1) where the director exercised the degree of care, diligence and skill to prevent the failure that a reasonably prudent person would have exercised in comparable circumstances.
>
> . . .
>
> **(5) Time limit** -- An assessment under subsection (4) of any amount payable by a person who is a director of a corporation shall not be made more than two years after the person last ceased to be a director of the corporation.

Factual background

[4] After finishing grade 11, the Appellant started an apprenticeship program in glass and glazing, worked as an installer for 25 years and then started his own business incorporating the company in April 1998. He testified that this business wound-up some time after June 2000 when he tendered his resignation from the company as a director and officer.

[5] The Appellant was the incorporator of the company and prior to his resignation was the president, treasurer, secretary, and manager. According to the Articles of Incorporation, he was also the first director.

[6] The company employed a bookkeeper to handle the GST reporting and a chartered accountant to prepare its financial statements and tax returns. The Appellant admitted he went over the numbers with his bookkeeper but relied on her for reporting.

[7] The company experienced difficulties with cash flows and receivables early on. He only drew $500/month, relying primarily on his wife's income to support his family.

[8] In about June 2000, the chartered accountant he had been working with referred him to another chartered accountant for advice concerning the company's financial difficulties. His new accountant, Mr. Bill Malisch, who did not testify at the hearing, recommended that he resign his positions. On June 30, 2000, he signed a resignation as a director and officer of the company taking effect on the same date. The Companies Branch records confirm that the resignation was filed on that date. Indeed, the provincial Ministry of Government Services point in time report shows that the Appellant ceased to be a director and officer on June 30, 2000.

[9] The Appellant testified that after he resigned he believed that he had no power or authority to manage the affairs of the company. He testified that he took on the more menial tasks of preparing and installing glass to complete a few contracts that the company had been engaged in and collected monies in respect of such engagements. He admitted that he collected $25,000 on a school project that had been billed at $125,000. He also testified that he collected some $5,000 - $6,000 on other accounts. He testified that he did this over a period of some 3 months after he resigned from his various positions with the company. On cross-examination, however, he admitted work could have continued into early 2001. He became employed by another glass company by April 2001.

[10] The Appellant accepted that GST returns were filed for the Period. However, he testified that he had no specific recollection of this and that he was relying on his bookkeeper. He did acknowledge that no remittances were made. He admitted the company did not pay any amounts that the filed reports showed as remittable.

[11] The Appellant received letters dated December 11, 2000 and August 21, 2001 from the Ministry of Consumer and Commercial Relations informing him of the pending cancellation of the certificate of incorporation of the company if no measures were taken in the next 30 days. However, the company was not dissolved until March 13, 2006.

[12] The Appellant received a letter in November 2004, from the Canada Revenue Agency (the "CRA") reminding him that he had been sent a letter in August 2001 that advised him that he may be liable for the company's unremitted GST. However, a notice of assessment was not mailed until July 24, 2007.

[13] A timely objection was filed but the assessment was confirmed on July 17, 2008. An appeal was filed and after the close of pleadings, examinations for discovery were held.

[14] At the hearing of the Appeal, Respondent's counsel tendered as an exhibit portions of the examination for discovery of the Appellant which I took as read-in to the evidence presented at the hearing. During the discovery, the Appellant said he continued to look after the business after he resigned and that it did not cease operations until early 2001. Although he stated that he believed his bookkeeper filed quarterly GST returns, there is no evidence that he checked to see if the returns in issue were filed. There is no suggestion that returns for prior periods were not filed as required although there were admissions of prior remittance failures.

[15] The transcript of the examination for discovery of the CRA representative was also put in evidence. During that examination it became apparent that there were no corporate profile records available. When asked for an undertaking to produce records of activity on the file as well as the original returns, the officer said to bring a "pick-up truck". In fact nothing was ever produced. As will be noted, there is evidence that records were destroyed by the CRA in the ordinary course of business.

[16] A CRA officer's sworn affidavit was also tendered at the hearing. It stated that a search of computer records with respect to the reporting periods ending September 30, 2000, December 31, 2000 and March 31, 2001 showed that returns were filed. Computer generated printouts showed the "receive" dates for all three returns as January 24, 2002. As well, they showed total sales, total GST, total ITCs and net tax for each of these periods. The affidavit also describes the CRA's policy for the destruction of records. The Appellant's counsel objected to the admission of this affidavit. I will deal with this objection later in these Reasons.

[17] The Respondent has provided the Court proof of a certificate registered on April 4, 2007 in the Federal Court pursuant to section 316 of the *Act* which reflects the amount of the company's liability. The Respondent also provided a letter dated July 6, 2007 from the Ministry of the Attorney General of Ontario that a Writ of

Seizure and Sale was returned *nulla bona*. Appellant's counsel objected to this letter going in as evidence. I reserved my decision on the objection.

[18] As well, the Respondent called a CRA resource officer to give evidence at the hearing. His evidence was based on another person's file notes.[2] He had no direct personal involvement with any of the matters about which he testified. He testified that in November of 2001, a trust examination was conducted by the CRA at the company's business location and that the bookkeeper and the Appellant were there. The GST returns were then prepared by the bookkeeper and later picked up by the examiner. The CRA officer involved at the time was said to be retired but no attempt was made to contact her. The CRA witness testified that an audit report existed but he did not know why it was not produced. He had only briefed himself on the file two weeks prior to the trial.

Evidenciary and Related Issues

1. **Nulla Bona Evidence**
2. **The Destruction of Documents and the Underlying Corporate Assessment**

1. Nulla Bona Evidence

[19] The Appellant has objected to the admission of the letter confirming the Writ of Seizure and Sale was returned *nulla bona*. He then asserts that the requirements of paragraph 323(2)(a) have then not been met.

> **(2) Limitations --** A director of a corporation is not liable under subsection (1) unless
> (a) a certificate for the amount of the corporation's liability referred to in that subsection has been registered in the Federal Court under section 316 and execution for that amount has been returned unsatisfied in whole or in part;

[20] If the letter from the Ministry of the Attorney General of Ontario that the Writ was returned *nulla bona* is not admissible then it appears that the Crown's assessment is in serious jeopardy. Indeed, the Appellant relies on the case of *Walsh v.*

---

[2] Appellant's counsel again noted the failure of the Respondent to produce documents requested at discovery. Second hand reference to notes that were not produced after an undertaking to produce was requested, was again objected to.

Canada.[3] The facts of that case are virtually indistinguishable on this point. There, the Respondent did not include this same type of letter in the List of Documents and did not call a witness to attest to the contents of the letter and to submit to cross-examination.

[21] Justice Sheridan goes on at length in her decision in that case as to her inclination to allow the letter but she ultimately concluded at paragraph 25 that she saw no justification to deviate from the general rule of excluding documents from evidence that were not referred to in the list of documents. She acknowledged, as in the case at bar, that there was an assumption in the Reply that the Writ of Seizure was returned unsatisfied but she found that making that assumption cannot in this situation place the burden of proof on the appellant. It is something only the Crown could prove. That is, whether the Writ was returned unsatisfied was not something the appellant could or was required to disprove.[4]

[22] In concluding that the *nulla bona* letter in *Walsh* was not admissible and that the resultant failure to prove that the requirements of section 227.1 (2) of the *Income Tax Act*[5] had been met was fatal, Justice Sheridan found as follows at paragraph 28:

> **28** … the language of paragraph 227.1(2)(*a*) places the onus on the Minister but does not specify how he is to prove his compliance with its conditions. Thus, it is for the Court to decide whether the Minister has met his evidentiary burden. While I have some sympathy for counsel for the Respondent's characterization of the omission of the Sheriff's letter from the Respondent's List of Documents as "an irregularity", it seems to me that proof of the Minister's fulfillment of the conditions in paragraph 227.1(2)(*a*) is so fundamental to his power to assess under subsection 227(10) that any doubt on that score must be resolved in favour of the taxpayer. Here, the Minister has produced no evidence to show that the execution of the Writ of Seizure and Sale was returned unsatisfied. Absent proof that the Minister has satisfied the requirements of paragraph 227.1(2)(*a*), no liability attaches under subsection 227.1(1) and the assessment upon which it was based cannot stand.

---

[3] 2009 TCC 557, 2009 DTC 1372.

[4] Although Justice Sheridan cited no authority for this, there was no need to do so. It is commonly understood and if an authority were required, reference might be made to *Anchor Pointe Energy Ltd. v. The Queen*, 2006 TCC 424 at paragraph 21, reversed on other grounds 2007 FCA 188.

[5] *Walsh* dealt with director's liability under section 227.1 of the *Income Tax Act*. The sections are identical to those under consideration in the case at bar.

[23] My initial inclination is not to depart from this authority. Aside from having no witness to attest to the contents of the letter and respond to questions as to the actions taken in making the *nulla bona* determination, the letter was not on the Respondent's list of documents. There is a common and commendable practice of entering common books of documents. It puts issues like this front and centre. When documents are not agreed to in advance, evidentiary requirements relating to them should not readily be ignored. The letter is not admissible.[6]

[24] Having said that, there is one other matter of evidentiary concern that needs to be mentioned. After the cross-examination of the Respondent's witness, I asked Respondent's counsel if he had any re-direct examination questions. He advised that he had forgotten to attach a letter to the *nulla bona* letter that should have been part of the exhibit. I was informed that the second letter was written by Appellant's counsel, Mr. Radnoff. It was a letter to the Sheriff (enforcement officer) advising that the company had no assets. Mr. Radnoff acknowledged that he wrote the letter but he objected to its admission at this stage of the proceedings. He reminded the Court that the only questions arising from cross-examination were allowed on re-examination and since the *nulla bona* issue had not been raised in cross-examination, the second letter could not be allowed now and he continued to rely on *Walsh*.

[25] Since no mention of the *nulla bona* letter was made in the cross-examination of the witness and since it seemed likely that the *nulla bona* letter was not going to be allowed in evidence in any event, based on *Walsh*, I ruled against the admission of yet another letter. However, counsel for the Appellant, acting honestly, has admitted the basis for the issuance of the *nulla bona* letter. That, in itself, may well serve to satisfy the requirements of paragraph 323(2)(a). To say the least, I find it difficult to turn a blind eye to such a relevant admission that is distinct from the document I refused to admit into evidence.

[26] In *Walsh* at paragraph 24, Justice Sheridan did not find the disclosure at trial that the company had no assets, or an acknowledgement at discovery that that was

---

[6] The letter has not been proven by oath or affidavit and it was not properly disclosed as being relied on. Nothing in section 89 of the *Tax Court of Canada Rules (General Procedure)* dealing with the admission of documents is permissive of an undisclosed document being allowed short of a direction of the Court to allow it. As to the issue of there being no witness to attest to the contents of the letter, there are no exceptions to the hearsay rule in either the *Act* or the *Canada Evidence Act*, R.S.C. 1985, c. C-5 that would allow it. It is not a judicial or public document or a business record.

not at issue, as assisting her in admitting the letter. I would distinguish the case at bar on the basis that the disclosure of there being no assets was admitted to have been made *to the sheriff before the letter was issued*. But for that distinction, following *Walsh*, the Appellant would succeed in his appeal *if* paragraph 323(2)(a) is the applicable paragraph in this case.

[27] However, there is another issue respecting the application of paragraph 323(2)(a). The company ceased to exist on March 13, 2006. The Writ of Seizure and Sale issued under the certificate registered with the Federal Court is dated April 4, 2007. The letter from the Ministry of the Attorney General of Ontario stating that it was returned *nulla bona*, is dated July 6, 2007.

[28] It appears to me, notwithstanding Appellant's counsel's reliance on *Walsh*, that the argument he first raised at the hearing, that it is the requirement of paragraph 323(2)(b) that must be met, has merit. Given that the company ceased to exist before the certificate requirement in paragraph 323(2)(a) had been met, it appears that the Minister of National Revenue (the "Minister") must in this case, meet the requirements of paragraph 323(2)(b) in order to proceed against the Appellant.

[29] Subsection 323(2) provides as follows:

> **(2) Limitations --** A director of a corporation is not liable under subsection (1) unless
>
> (a) a certificate for the amount of the corporation's liability referred to in that subsection has been registered in the Federal Court under section 316 and execution for that amount has been returned unsatisfied in whole or in part;
>
> (b) the corporation has commenced liquidation or dissolution proceedings or has been dissolved and a claim for the amount of the corporation's liability referred to in subsection (1) has been proved within six months after the earlier of the date of commencement of the proceedings and the date of dissolution; or
>
> (c) the corporation has made an assignment or a receiving order has been made against it under the *Bankruptcy and Insolvency Act* and a claim for the amount of the corporation's liability referred to in subsection (1) has been proved within six months after the date of the assignment or receiving order.

[30] While the "or" in this subsection indicates that the Minister need only satisfy one of the three requirements set out in paragraphs (a), (b) *or* (c), the subsection

does not suggest the Minster has a choice as to how to proceed in different circumstances. The circumstances dictate how the Minister must proceed.

[31] In the circumstances of this case, the applicable requirement imposed on the Minister appears to be that imposed by paragraph 323(2)(b). It is the requirement that fits the circumstances of this case. When the circumstances contemplated by one paragraph match the circumstances of a particular case by virtue of the status of the corporation at the relevant time, it is that paragraph, the one that best fits the circumstances, that dictates the requirement that should be met. In this context, the requirements appear to be essentially mutually exclusive. This construction of the subject provision might be taken as well from the decision of the late Chief Justice Garon in *Schuster v. R.*.[7]

[32] Respondent's counsel argues that paragraph 323(2)(b) cannot apply to this type of dissolution since no action was taken to commence liquidation or dissolution proceedings. The dissolution occurred by operation of a provision of the *Ontario Business Corporations Act* ("*OBCA*") not by any action taken by the company. That argument has no merit in my view. The provision speaks of a corporation which has commenced such proceedings "*or* has been dissolved". The dissolution itself triggers the application of this paragraph. How the dissolution occurred is of no import.

[33] Although Respondent's counsel made no mention of it, Christie A.C.J. of this Court considered a similar argument in *Kennedy v. M.N.R.*.[8] His view was that the Crown should not be forced to prove a claim where the company had involuntarily commenced liquidation/dissolution proceedings and therefore no liquidator existed against whom the Crown could make a claim.[9] With respect, I do not find that reasoning compelling based on the following analysis.

[34] There is evidence here of the proof of the claim. *There is no need for a liquidator to prove the claim*. The proof of the Minister's claim is the registration of the section 316 certificate with the Federal Court which in turn is evidenced by the Writ of Seizure and Sale. That, in my view, is sufficient. Subsection 316(2)

---

[7] [2001] GSTC 91, [2001] TCJ No. 453 at paragraph 20.

[8] 91 DTC 1037.

[9] The Federal Court of Appeal confirmed the trial court's decision in *Kennedy* in a very brief judgment simply agreeing with the reasoning of the trial judge. See 92 DTC 6380. *Kennedy* was also followed in *Pozzebon v. The Queen*, 98 DTC 1940. Still, further analysis is warranted.

provides that the registration of the Minister's certificate with the Federal Court has the effect as if the certificate were a judgment of the Court against the debtor for the amount certified. However, even accepting the operation of section 316 as proof of the claim, *it was obtained far too late*. The company had been dissolved more than one year earlier. That is not within the time frame that the *Act* requires the Minister to act.

[35] This reading of the subsection 323(2) makes it necessary to make a further observation. Prior to dissolution a requirement of paragraph (a) is that execution of the section 316 "judgment" of the Federal Court must be proven to have been returned unsatisfied. That proof was intended to be established in this case by the *nulla bona* letter. No such proof is required in respect of a dissolved company. It is the liability that needs to be proved. In the case at bar, the section 316 "judgment" was sufficient to meet the requirements of paragraph (b).

[36] Here, I note as well, that subsection 242(1) of the *OBCA* allows actions to be commenced against dissolved corporations. That would support the finding that the registration of the certificate with the Federal Court, the judgment against the company, is properly before the Court as proof of the claim. Further, the Federal Court of Appeal in *Moriyama v. Canada*,[10] suggests that the requirements of subsection 323(2) are not mandatory but in that case one might argue that there was substantial compliance with the requirement in question. That too would suggest that the Crown must be given some latitude which, in this case, would include accepting the certificate of the Federal Court as proof of the debt for the purposes of paragraph 323(2)(b). More importantly, I do not take the decision in *Moriyama* as suggesting that adherence to the limitation periods in any part of section 323 is not mandatory.

[37] *Moriyama* dealt with a proof of loss filed with the trustee in bankruptcy in a timely fashion but the amount of the claim for two months was not submitted until over a year after the bankruptcy took place. The trial judge in *Moriyama* followed the decision *Kyte v. The Queen*.[11] In *Kyte*, a certificate registered against the corporation was challenged on the basis that it was not in the correct amount. The argument was rejected on the grounds that the provision was directory and not mandatory. Both the trial judge and Federal Court of Appeal in *Moriyama* agreed with the reasoning in *Kyte* in finding that the late filing of an amended proof of

[10] 2005 FCA 207.

[11] (1996), 97 DTC 5022 (Fed. C.A.).

loss was not fatal. However, the consensus, in my view, must be taken as being to that aspect of paragraph 323(2)(b) that deals with proving the amount of the claim. Both authorities are forgiving in the sense of allowing adjustments to the amounts. This is particularly relevant given that directors can challenge the amount of the underlying assessment. That being the case, it is almost essential to read that part of the proof of the claim as not preventing corrections beyond the period that the claim has to be proven should the Minister become aware that the correction is necessary.

[38] While my conclusions in this appeal will rely on the foregoing analysis, there were other issues raised and arguments made that should be dealt with.

2. **The Destruction of Documents and the Underlying Corporate Assessment**

[39] The Notice of Appeal, as an alternative position, denies the underlying liability of the company for any GST amounts. The Appellant asserts that the quantum of the underlying tax being in issue requires the Respondent to produce evidence of how it was arrived at and that the pursuit of this alternative, to deny the quantum of the underlying tax owed, has been frustrated by the Respondent's premature destruction of documents relevant to that issue and by the refusal to produce documents requested on discovery of the Respondent's representative.

[40] I acknowledge that the Appellant has the right to challenge the underlying assessment[12] and with that it follows that he must have the right to discover documents relating to it.

[41] The Respondent has a number of answers to the Appellant's position on this issue. One concerns the question as to whether the evidence relating to the failure to produce documents requested at discovery was properly before the Court. The Appellant did not provide prior notice his intention to read into evidence portions of a discovery as required by Practice Note No. 8 issued by the Court. Although no objection to the read-in was raised at the hearing, it was raised in written submissions tendered after the hearing. I note, however, that it appears to me that the Respondent was well aware of the issue. Respondent's counsel was aware of the destruction of documents that the Appellant asked to see and I see no prejudice in allowing the read-in in these circumstances.

---

[12] See *Scavuzzo v. The Queen*, 2005 TCC 772, 2006 DTC 2136 which followed the Federal Court of Appeal in *Gaucher v. Canada*, 2000 DTC 6678 where at paragraph 6 the Court imported a rule of natural justice that a person who is not a party to litigation cannot be bound by a judgment between other partries. See also *Vrsic v. The Queen*, 2010 TCC 127.

[42] Another response to the Respondent's failure to produce documents was they could not be helpful in attacking the underlying assessments since they were based on the returns filed. That is no answer. "As filed" assessments are as open to attack as any other. They are all the more open to attack given that the underlying assessment was never challenged by the company. Directors being held liable under section 323 require this forum to have that assessment reviewed.

[43] Another response was that the request for documents was vague and related to collection activity. That is not accurate, in my view. The questions sought answers to why the assessment was so late and why the last Corporate Profile Report was dated 1998. Subsequent reports, if they existed, were promised. What was asked for was everything on file since the meeting with the trust examiner and "everything that the CRA has in their file about the GST issue" and that request was refused.

[44] Another response to the Respondent's failure to produce documents was they had been destroyed. That explanation was set out in the affidavit of the CRA officer who did not appear as a witness at the hearing. The introduction of the affidavit was objected to on that basis. However, the portion of it that Appellant's counsel wanted to exclude was the portion relating to the calculation of the underlying tax. As noted above, a computer record of certain return information was maintained and a printout of same was attached to the affidavit. The printout shows that the tax liability was the amount assessed as set out in the Reply to the Notice of Appeal. Generally speaking, such business records are admissible.[13] Further, I do not see their admission as being the real source of any prejudice here. This record if produced at discovery or included on the Respondent's list of documents would have left the Appellant in the same predicament as he finds himself now. I am satisfied that the amount assessed as owing was based on returns filed. However, that does not make them unassailable. The issue for the Appellant is the destruction and non-production of documents that might have assisted him in attacking that liability.

[45] As well, the portion of the affidavit relating to the destruction of documents concerns a departmental practice that the Appellant effectively condemns. Reliance on this type of condemnation precludes its exclusion. It was talked about openly by

[13] Both sections 26 and 30 of the *Canada Evidence Act* and subsection 335(5) of the *Act* are permissive of allowing this part of the affidavit and its computer generated attachments.

Respondent's counsel and I accept aspects of the information described by him and as set out in the affidavit.

[46] The affidavit states that in the usual and ordinary course of business of the CRA, returns and related assessments are stored for 5 years and are then destroyed. This strikes me as an unacceptable practice and one that is, potentially, highly prejudicial to directors of companies.

[47] Further, I am left with no insight as to what was destroyed and what was held back. The read-ins of the examination for discovery of the CRA representative suggest that more than the returns and assessment may have been destroyed and, in any event, documents not destroyed were not made available to the Appellant. The Respondent's witness referred to a substantial file during his testimony none of which had been made available to the Appellant.

[48] Where returns and assessments reveal remittance failures, documents relating to potential disputes cannot be destroyed until those disputes are disposed of or limitation periods to deal with them have expired. The Appellant's exhibits show that correspondence was sent to him as early as August 2001 advising that he may be personally assessed for prior remittance failures of the company.[14] Still, it took more than 5 years to issue the assessment that is under appeal in this case.

[49] This 5 year delay raises serious concerns over the application of subsection 323(5). If the Respondent's position is that first directors in the circumstances of the Appellant are not afforded the benefit of this limitation period protection, then all files relating to the underlying assessments and reasons for delays must be preserved and disclosed.

[50] While I do not condone the Appellant's disregard of the statutory obligations that he so boldly sought to avoid, he is not without credibility as a witness. He was frank about the reason for his resignation and that remittances were not made as the filed returns may well have required. He was also credible when he testified that a $150,000 project only collected $25,000. Such evidence could well require adjustments to the company's liability. Were the subject bad debts discussed during the trust examination? Whether the preservation of documents and better

[14] These would presumably be prior remittance failures since the remittance failures in the subject appeals are in respect of returns filed in January of 2002. That, of course, assumes the input record on the computer printouts is accurate. Nonetheless, I have allowed that business record in spite of the challenge to its admissibility.

disclosure would, in this case, have been helpful to the Appellant will never be known.

[51] Admittedly, the Appellant bears responsibility here, as well. No records were maintained by him. No objections were filed by the company. His testimony falls short of asserting that the numbers could not possibly be right. The mere fact that documents are not available cannot result in wiping out the underlying assessment unless there is some reason, supported by some evidence, to believe that they would assist the Appellant in some way. Perhaps then he has made his bed, but there is here a matter of systemic and procedural concern that might inform how subsection 323(5) might be applied in this case. The destruction of records in 5 years underlines the necessity for the CRA to proceed under section 323 without an unexplained delay of more than 5 years between the time of filing the reports and issuing the section 323 assessment. The delay seems egregious and could paint a different picture in respect of the application of subsection 323(5) on the facts of this case.

Director Issues, the Resignation and Subsection 323(5)

[52] The Respondent relies on the Appellant being a *de jure* director even after his resignation. The Notice of Appeal clearly raises the issue as to whether the resignation prevents the Appellant from being liable. The Reply to the Notice of Appeal states that the resignation was not effective due to subsection 119(2) of the *OBCA*. Section 119 read as follows at the relevant time:

> **First directors**
> 119(1) Each director named in the articles shall hold office from the date of endorsement of the certificate of incorporation until the first meeting of shareholders.
>
> **Resignation**
> (2) Until the first meeting of shareholders, the resignation of a director named in the articles shall not be effective unless at the time the resignation is to become effective a successor has been elected or appointed.
>
> **Idem**
> (3) The first directors of a corporation named in the articles have all the powers and duties and are subject to all the liabilities of directors.

[53] The Reply then goes on to assume that the Appellant was the first and only director of the company and that no successor or director was ever elected or

appointed after the Appellant's purported resignation. That assumption was never refuted. There is, however, a conspicuous absence of an assumption that the Appellant never had a shareholders' meeting prior to July 24, 2005 being 2 years prior to the assessment.[15] It is a pivotal fact since the suspension of a resignation is only applicable "until the first meeting of shareholders".

[54] Respondent's counsel did not question the Appellant on this point. On the other hand, the Appellant made no claim that any such meeting had ever taken place. Indeed, counsel for the Appellant acknowledged in oral argument that there was no evidence of a meeting and when I suggested that meant there was no record of the company ever having been organized, his response was: "Yes, precisely."

[55] Consistent with this general understanding, I note that the Reply to the Notice of Appeal does not assume that the Appellant was a shareholder of the company. Indeed, nothing in the pleadings or evidence presented at the trial suggests that. Accordingly, I accept what the parties have clearly accepted; namely, that no shares were ever issued and no shareholders' meeting was ever held. That obviates the need to determine the requirements for establishing when a shareholders' meeting occurs for the limited purposes of fixing the liability of a first director. If it had been established or even asserted that the Appellant was a sole shareholder, there may have been a very challenging point of law to consider; namely, what constitutes a sole shareholder meeting.[16] I also note that the *OBCA* obligates the first director(s) to hold a first shareholders' meeting at which an election of directors is required.[17] By failing to meet these obligations, the

---

[15] The Notice of Appeal relies on the two year limitation period although no express mention of subsection 323(5) is made and there were no closing submissions on that subsection *per se*. However, the closing submissions implicitly relied on it and at the start of the cross-examination of the Appellant, Respondent's counsel wanted to make it clear that one of the issues was the effectiveness of the resignation which has particular relevance under section 323(5).

[16] See Bruce Welling, *Corporate Law in Canada: The Governing Principles*, 3rd edition, 2006, at p. 474: "By definition, a meeting means the coming together of two or more persons. One person can't meet unless the relevant Act or corporate constitution makes it possible." Section 101(4) of the *OBCA* provides that: "If a corporation has only one shareholder, or only one holder of any class or series of shares, the shareholder present in person or by proxy constitutes a meeting." This strikes me as providing little guidance particularly as it relates to the liability of a first director who may have been "replaced" by a *de facto* director.

[17] *OBCA*, ss. 94 and 119(4).

Appellant effectively rendered himself unable to resign as a director of the company.

[56] In any event, it is clear that a resignation is only valid and effective when the requirements of the law are fulfilled. As pointed out by Justice Campbell in the recent case of *Campbell v. The Queen*:[18]

> It is clear from the jurisprudence that a sole director can resign by giving written notice of resignation to the corporation. In addition, other requirements arising under the provincial corporate legislation may need to be addressed in order for a resignation to become validly effective.
> […]
> Taxpayers, who have not strictly adhered to specific requirements for resignation as a director under the provincial corporate legislation, have nevertheless been held to be personally liable because they did not validly resign. (Zwierschke v. M.N.R., [1991] 2 C.T.C. 2783, 92 D.T.C. 1003 and Shepherd v. The Queen, 2008 D.T.C. 4284.)

[57] As well, in *Zwierschke v. M.N.R.*[19] the Court confirmed that the resignation process in subsection 119(2) of the *OBCA* was mandatory for the purpose of the director's liability provisions.

[58] This takes me to consider the relevance, if any, of a finding that the Appellant was also a *de facto* director. There is one reason to consider it: namely, whether the cessation of liability as a *de facto* director impacts one's liability as a *de jure* director. The issue there will again bear on the application of subsection 323(5). If I conclude that the Appellant was a *de facto* director and liable as such, that liability would end early in 2003 or 2004, 2 years after the company ceased to carry on any business.[20] Since the assessment was not made within that time, the Appellant would not be liable.

---

[18] 2010 TCC 100, 2010 DTC 1090, paragraphs 20 and 22.

[19] [1991] 2 C.T.C. 2783, 92 DTC 1003.

[20] Having allowed the CRA officer's affidavit in evidence, I note that the returns filed in January 2002, could well keep the *de facto* directorship alive until that time. See paragraph 8 of the Federal Court of Appeal decision in *Bremner v. Canada* cited later in these Reasons. In that decision Justice Ryer makes it clear that any act, including a letter to the CRA, keeps a deemed (*de facto*) directorship alive. In the case at bar, the Appellant did not respond to any correspondence from the CRA or from the Corporations branch of the Ontario government. The filing of returns in January 2002 is, on the evidence, the latest act that might be attributed to the Appellant.

[59] Although Appellant's counsel argued against my finding that the Appellant was a *de facto* director, there is little doubt that he was. In support of that finding, it is helpful to refer to *Bremner v. Canada*.[21]

[60] In that case, Chief Justice Rip (as he is now) dealt with whether a *de facto* director had ceased to be a director. In finding that the appellant in that case continued to be a director he made the following observations:

> **26** **…** In the appeal at bar, the following facts, for example, favour a finding that Mr. Bremner continued to be a *de facto* director after September 1 and into October, 2000: he was the sole shareholder of Excel and the only person who has ever managed and supervised Excel; there is no evidence that he informed third parties, creditors or others, except perhaps his son, who did not testify, that he was no longer holding himself out as a director of Excel; and he continued acting for Excel after September 2000; for example, payments were made on behalf of Excel against its GST arrears.
> […]
>
> **28** Mr. Bremner held himself out as director of Excel, even if not called director, and continued to be a *de facto* director after September 30, 2000. The fact that Excel ceased to carry on business in August is not really relevant. Directors of corporations have duties that survive the cessation of the business previously carried on. Mr. Bremner took it upon himself to arrange for the orderly winding-up of the company's business and its affairs that continued into October 2000.
> [Emphasis added.]

[61] As in that case, the Appellant in the case at bar had a continuing presence in the company during the wind-up process. He was the only person who had ever managed and supervised it. While his accountant knew he had tendered his resignation, there is no evidence that others, with whom the company continued to deal, such as creditors or customers, knew of his resignation. He took it upon himself to wind-down the affairs of the company by completing work it had started and to collect monies owing in respect of its completed projects. There was no one else there managing the wind-up process. He was a *de facto* director as a matter of common law.

---

[21] 2007 TCC 509, aff'd: 2009 FCA 146.

[62] Interestingly, he might, for the same reason, be deemed to be a *de jure* director as well under the *OBCA* regardless of his status as a first director. Subsection 115(4) of the *OBCA* provides as follows:

> Where all of the directors have resigned or have been removed by the shareholders without replacement, any person who manages or supervises the management of the business and affairs of the corporation shall be deemed to be a director for the purposes of this *Act*.

[63] One might have thought that a first director, as a director there to initialize the first steps of a corporation's life, might be relieved of liability when a replacement director is put in place by the statute that governs the case where someone else has actually taken over to undertake corporate life beyond those first steps. A strict reading of the *OBCA*, however, does not give way to that result. The statutory creation of a replacement director, a subsection 115(4) deemed *de jure* director, only applies when a director has *resigned* and a first director cannot resign unless the successor has been "elected or appointed". A subsection 115(4) deemed *de jure* director awaits a vacancy and is neither "appointed" or "elected".

Subsection 323(3) – the Due Diligence Defence

[64] A director of a corporation is not liable for failure to remit GST where he exercised the degree of care, diligence and skill to prevent the failure that a reasonably prudent person would have exercised in comparable circumstances. The Appellant relies mainly on *Cybulski v. Minister of National Revenue*[22] and other judgments citing *Cybulski*, where the Court held after noting that ignorance of the law not excusing culpability has no application in the context of subsection 227.1(3) of the *Income Tax Act*:

> In enacting subsection 227.1(3) Parliament established an exonerating standard of conduct the presence of which is to be determined in particular cases by the actual relevant facts and not by fixing to a taxpayer knowledge of a somewhat esoteric point of corporation law that in reality is probably not within the actual knowledge of a good number of legal practitioners. While at first blush subsection 227.1(3) suggests a requirement for positive assertion on the part of a taxpayer in order to bring himself within its ambit, this is not necessarily so in all situations. It may well be that a taxpayer would not take positive steps in some circumstances and still be

[22] 88 DTC 1531, [1988] 2 C.T.C. 2180. This case also makes reference, as did Appellant's counsel, to paragraph 121(1)(a) of the *OBCA* dealing with resignations. However, it is clearly subject to subsection 119(2) of that enactment. Accordingly it has no bearing on this appeal.

> correctly regarded as having 'exercised' that degree of care, diligence and skill expected of a reasonably prudent person that creates the protection from liability afforded by the subsection. That obtains in respect of this appeal. I am satisfied that reasonable grounds existed for the appellant's belief that he had severed his connection with the Company as director and secretary-treasurer and concomitantly his responsibility for it when he placed his resignation in the hands of the Company's president and it was accepted by him. This relieves him of vicarious liability for the Company's default in remitting the deductions at source and this is so a fortiori where, as here, the appellant was effectively barred from exercising influence over the management of the company by the person in de facto control of its affairs after the resignation was submitted.[23] [Emphasis added.]

[65] In *Cybulski*, the facts were that the taxpayer was completely out of the corporation after his resignation. The Court was satisfied not only that he had reasonable grounds to believe that he severed his connection to the corporation, that is that he had reasonable grounds to believe that he was no longer a director, but that in fact, he gave up all his responsibilities, leaving them in the hands of the president of the corporation, Skuce, who eliminated any possibility of him having any role in the affairs of the corporation:

> After 1 May 1984 the appellant played no role in the affairs of the Company because he believed that he had effectively terminated his responsibility in relation to it and, further, Skuce eliminated any possibility of this. Their friendship was at an end and the appellant became the 'outsider'. Any conversations he had with Skuce boiled down to threats being made by the latter. When he attempted to elicit general information about the Company he was unsuccessful. He spoke to the bookkeeper on two occasions, but she simply referred him to Skuce.[24] [Emphasis added.]

[66] In that case, the appellant taxpayer, while an officer and director had seen that remittances were paid but was barred from having any responsibility from the moment he attempted to resign as a director. In the case at bar, the Appellant was there at every relevant moment in time after his attempted resignation. His belief that he had no authority is not consistent with his actions which were to continue to complete work the company had started and to collect monies owing in respect of company projects. As well, GST returns were filed for the Period. This evidences a degree of corporate activity that is being managed. The affairs of the company were being managed, albeit in the wind-up stage and the Appellant is the only one who was performing that role. He was not only not barred from control, as was the

---

[23] At page 1535.

[24] Page 1533.

taxpayer in *Cybulski*, but his control is evidenced by his presence and interest in winding down the affairs of the company. He was in a position to take positive steps to ensure that the remittance obligations were being addressed. He certainly has not proven otherwise. I am not satisfied that he exercised that degree of care, diligence and skill expected of a reasonably prudent person of his knowledge and background.

[67] Indeed, as I have already said, the Appellant did not care about the importance of remittances to the CRA. He admitted the company's failures to remit could well have been as high as reported. He seized on his belief that he had no responsibility but, nonetheless, proceeded to manage the company during its wind-down for its or his benefit without regard to its statutory obligations. That he did not know he had legal authority to address those issues and that others in his position and circumstances would not have known it either, does not wrap him in the veil of innocence that a due diligence defense requires. Relying on an attempted resignation, an attempt that would in his mind leave an operating entity without any responsible person at the helm, and at the same take ownership of winding down its affairs is to knowingly and intentionally turn a blind eye to obligations he knew existed. He knew the company's remittance obligations were not being met and did nothing. *Cybulski* cannot be taken as authority for assisting him in such circumstances.

Conclusions

[68] The Respondent's reliance on the ongoing tenure and liability of the Appellant as a first director of a dissolved company, does not sit well in this case where the CRA waited over 5 years to assess the Appellant for the company's remittance failures. Still, there are two possible applicable limitation periods in this case. When the company dissolved in 2006, the Appellant's directorship ended and the limitation period in subsection 323(5) will be 2 years after the date of dissolution.[25] The assessment was within that 2 year period. The second limitation period is 6 months from dissolution as prescribed in paragraph 323(2)(b). That limitation period, in my view, has not been met.

[69] I am of the view that the 3 requirements in paragraph 323(2) must be read as being mutually exclusive. That is, in my view, subsection 323(2) sets out three mutually exclusive scenarios. Depending on the facts of each case, the Minister is required to act accordingly. In the case of a dissolved corporation, which is the

[25] See *Aujla v. R*, 2007 TCC 764 at paragraph 10, affirmed 2008 FCA 304.

case at bar, the action must take place within the prescribed time set out in paragraph 323(2)(b).

[70] As noted above, I am aware of the authorities that respond to a perceived problem that the Minister would have proving the underlying corporate liability in the case of a voluntary dissolution. However, in my view, the problem is not real and the requirement of the provision is quite clear. Although section 316 of the *Act* is specifically mentioned in paragraph 323(2)(a), that section, 316, is not limited in its application to the circumstances contemplated in paragraph 323(2)(a). Section 316 is as good a method to prove a debt in a case of a voluntary dissolution as having it proven by other means in the case of an involuntary dissolution. The Minister was in substantial compliance with paragraph 323(2)(b) except he was too late. Paragraph 323(2)(b) speaks directly to the circumstances of the case at hand and its limitation period should not be ignored. I have dealt earlier in these Reasons with cases that suggest otherwise and suggest that those cases must be limited to their facts for the reasons I set out earlier.

[71] Imposing that limitation period in this case obviates the need for me to deal with, but does not address, the problem here relating to CRA's departmental record keeping practices and the Respondent's disclosure failures. It is potentially highly prejudicial to destroy records before disputes over liabilities have been finally resolved. Indeed, in this case, it appears that files were destroyed prior to the assessment. That is, returns filed on January 24, 2002 would have been destroyed by January 24, 2007 some 6 months prior to the assessment made against the Appellant. Amongst other things, that creates problems relating to establishing the assumptions made in making the underlying corporate assessments. In one matter before this Court, a motion was made to allow an appeal for that reason.[26] While suggesting such matters might best be left to the trial judge, Justice Paris denied the motion after giving consideration to whether the destruction of records violated the Respondent's duty of fairness and whether there was evidence to suggest that the documents destroyed would assist the taxpayer. While that case did not deal with the systemic destruction of documents, it does suggest that this Court might well have grounds, in appropriate circumstances, to allow an appeal where the CRA has failed to maintain potentially relevant records where litigation possibilities to which they pertained, were still alive. However, seeking a judgment on that basis would require a thorough review of relevant authorities by counsel. In the case at bar, I was offered little more than a complaint. In any event, I note that while there was no deliberate destruction of documents in this case and no intent to

[26] *White v. The Queen*, 2009 TCC 539.

frustrate the Appellant's appeal, it seems appropriate for me to express concern over the CRA's record keeping practices. In these circumstances, records must be kept longer or the CRA must act faster.

[72] As to the disclosure failures, I believe the Appellant should have been given prior access to files in the CRA's possession. They may have given rise to a basis to attack the underlying assessment. That the Appellant may be barred from raising the issue now due to his failure to seek an Order for the production of documents prior to the trial, does not strike me as a reason not to raise concern over such refusals by the Crown.

[73] In any event, the appeal is allowed, with costs, on the basis that the time requirement imposed on the Minister by paragraph 323(2)(b) for the assessment to be made, has not been met.

Signed at Calgary, Alberta this 27th day of January 2011.

"J.E. Hershfield"

Hershfield J.

CITATION:	2011 TCC 35
COURT FILE NO.:	2008-2663(GST)G
STYLE OF CAUSE:	STEPHEN SAVOY AND HER MAJESTY THE QUEEN
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	May 18, 2010
REASONS FOR JUDGMENT BY:	The Honourable Justice J.E. Hershfield
DATE OF JUDGMENT:	January 27, 2011

APPEARANCES:

Counsel for the Appellant:	Jeffrey Radnoff
Counsel for the Respondent:	Shatru Ghan

COUNSEL OF RECORD:

For the Appellant:

Name:	Jeffrey Radnoff
Firm:	Radnoff Law Offices Barristers & Solicitors 375 University Avenue, Suite 701 Toronto, Ontario, M5G 2J5
For the Respondent:	Myles J. Kirvan Deputy Attorney General of Canada Ottawa, Canada