Docket: 2016-207(IT)I

BETWEEN:

KHANH THI LE,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on common evidence with the appeal of *Khanh Thi Le* 2016-1006(GST)I on September 12, 2017, at Vancouver, British Columbia

Before: The Honourable Justice B. Russell

Appearances:

Counsel for the Appellant:	Frank W. Quo Vadis
Counsel for the Respondent:	Jamie Hansen

JUDGMENT

The appeal from the two director's liability assessments raised May 23, 2014 under section 227.1 of the *Income Tax Act* (Canada) for unremitted source deductions respecting the underlying corporate taxation years 2007, 2008 and 2009 is allowed, with costs to the Appellant in the fixed amount of $500. The appealed assessments are hereby vacated.

Signed at Toronto, Ontario, this 9th day of April 2018.

"B. Russell"

Russell J.

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Appeal heard on common evidence with the appeal of *Khanh Thi Le* 2016-207(IT)I on September 12, 2017, at Vancouver, British Columbia

Before: The Honourable Justice B. Russell

Appearances:

Counsel for the Appellant:	Frank W. Quo Vadis
Counsel for the Respondent:	Jamie Hansen

JUDGMENT

The appeal from the director's liability assessment raised May 23, 2014 under section 323 of the *Excise Tax Act* (Canada) for unremitted net GST for the underlying corporate reporting periods ending December 31, 2007, 2008, 2009, 2010 and 2011 is allowed, with costs to the Appellant in the fixed amount of $500. The appealed assessment is hereby vacated.

Signed at Toronto, Ontario, this 9th day of April 2018.

"B. Russell"

Russell J.

Citation: 2018TCC65
Date: 20180409
Docket: 2016-207(IT)I
2016-1006(GST)I

BETWEEN:

KHANH THI LE,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Russell J.

Introduction:

[1] These are reasons for judgment in two appeals brought by the Appellant of three directors' liability assessments, which appeals were heard on common evidence. One assessment was raised May 23, 2014 under section 323 of the *Excise Tax Act* (Canada) (ETA) for unremitted net GST for annual reporting periods ending December 31, 2007, 2008, 2009, 2010 and 2011, totaling with interest $35,659. The other two assessments were each also raised May 23, 2014, under section 227.1 of the *Income Tax Act* (Canada) (ITA), for unremitted source deductions respecting the corporate taxation years 2007, 2008 and 2009, totaling with interest and penalties $15,675.

[2] The Appellant's position is that she was not a director (neither *de jure* nor *de facto*) of the pertinent corporation, 0780221 B.C. Ltd. (Corporation); and these three director's liability assessments are invalid.

Evidence:

[3] The Appellant, fluent in Vietnamese and less so in English, testified that in 2006 she lived in North Vancouver where she owned and operated several beauty salons (hair, hands, nails). That year she decided to acquire and transform a

tanning salon in Langley into another of her beauty salons. One of her long-time salon employees, Ms. Dang Thanh Landry, who also was fluent in Vietnamese, was moving to Surrey, putting her much closer than the Appellant to the new Langley beauty salon location. The Appellant testified that Ms. Landry proposed to her that they partner in the operation of this new salon.

[4] The Appellant was agreeable to this. The Appellant's testimony was that Ms. Landry's husband, E. Landry, a non-lawyer, said he would prepare necessary paperwork. He wanted to be in the partnership too, and advised the Appellant they needed to set up a corporation. The Appellant testified she told him she wished simply a partnership arrangement. Nevertheless, in intended compliance with the *Business Corporations Act* (B.C.) (BCA), Mr. Landry prepared articles of incorporation for a new corporation, and he and the Appellant signed these articles, each as "incorporator", in early January 2007. The Appellant acknowledged her signature but testified she did not recall the document itself.

[5] The Appellant testified that also Mr. Landry prepared a 10 page agreement entitled, "Partnership Agreement of 0780221 B.C. Ltd., a British Columbia Corporation", which the Appellant was asked to sign and she did so. This document made no mention of the Corporation throughout its 10 pages other than in the aforesaid title of the document and in clause 1.03 (immediately below), and it essentially was a re-worked partnership agreement. Its preamble stated that the Appellant was in partnership with Mr. Landry's existing corporation, named EKO Consulting and Appraisal Services Ltd. (EKO).

[6] At clause 1.03 under the heading "Name of Partnership" was written, "The name of the Corporation shall be 0780221 BC Ltd." As that provision and its heading bluntly demonstrate, the document conflated the concepts of corporation and partnership. The Appellant, referred to as "Partner" throughout the document, signed it (as did Mr. Landry) on page 10 above the typed-in term, "Director", although absent any indication or explanation of the meaning or relevance of that term as used in this so-called partnership agreement.

[7] This agreement at clause 1.05 further provided that: "The Operating Business name shall be 'Select Hair, Nails and Esthetics' and is the sole ownership of partner Khanh Le [*i.e.*, the Appellant] and is permitted by her to be used for the sole purpose of this Partnership with no remuneration." And, at clause 2.01 the agreement provided that each of the two partners (the Appellant and EKO) would make an, "initial capital contribution to the Partnership" of $20,000. Clause 2.13

states that, "The Partnership's profits and losses shall be shared among the Partners…[50/50 between the two of them]."

[8] The Appellant testified that she was unaware from this that there had been any incorporation. She thought she owned 100% of the business and that she was in partnership with Mr. Landry who with his wife was to run the business on a day-by-day basis, she being available for advice. Her $20,000 contribution was "in kind", through stocking the Langley premises with various and sundry beauty salon products sourced by her several North Vancouver beauty salon operations.

[9] The Langley salon commenced operating in 2007. Mr. Landry took upon himself the handling of the payroll and receivables of the business which I understand included remitting source deductions and GST, while Ms. Landry worked in the salon itself. The Appellant rarely attended at the Langley premises. She testified that she considered herself to be a "silent partner", thinking (perhaps mistakenly) she owned the business and splitting profit/losses evenly with Mr. Landry and Ms. Landry who operated the business. In the first year the business lost money. In the second year it basically broke even.

[10] Subsequently, in or about early 2009, a rent payment cheque for the Langley premises "bounced". The landlord was a client of the Appellant. The Appellant went to speak to Mr. Landry about this and found Mr. Landry with a tradesperson changing some aspect of the decor of the Langley salon. The Appellant thereupon decided she did not want to continue in partnership with Mr. Landry (technically, his corporation, EKO). She advised Mr. Landry that either she would buy his (EKO's) interest or he (or EKO) could buy hers. They agreed that EKO would buy her interest, for $15,000. This transition of her interest in the business was completed in or about May 2009, involving transfer to EKO of her 50 common shares of the Corporation.

[11] In late 2013 the Appellant received correspondence from Canada Revenue Agency (CRA) that the Corporation was delinquent in remittances of source deductions and net GST. The Appellant spoke to a CRA officer and advised she was not associated with the business, having parted ways in 2009. The CRA officer advised that nevertheless she still was shown as a director of the Corporation. The Appellant testified that it was at this time that she first understood she was considered a director of the Corporation, otherwise she would have had herself removed as a director in 2009 when she sold her interest in the business to EKO. The CRA officer advised her to submit a director's resignation letter to B.C. Registry Services. She promptly did so on December 23, 2013, expressing the

resignation as being effective May 4, 2009. B.C. Registry Services accordingly reflected this information in its public listing of directors and changes in directors. Several months later, on May 23, 2014 as noted above, the Appellant was assessed under each of the ITA and ETA for director's liabilities.

[12] Mr. F. Desai, a CRA Collections officer was called by the Respondent. He testified as to steps he took in raising the director's liability assessments.

[13] Also Mr. Landry was called by the Respondent. He is a real estate appraiser, operating through his corporation EKO. His testimony differed from the Appellant's in some respects, none crucial to the ultimate issues herein. He testified that the Appellant had approached his wife about managing the new salon in Langley. In late 2006 or early 2007 the three of them plus a gentleman, perhaps a friend of the Appellant, named "Gerry", met to discuss. Mr. Landry testified that they all agreed that a newly incorporated company should be involved and also that they should have a partnership agreement. He testified that it was Gerry who drafted the above-referenced partnership agreement.

[14] He testified that the Appellant's intended role was to help Ms. Landry operate the business by advising as to proper methods of operation, *e.g.* regarding human resources, and other aspects of running a beauty salon. He was to handle payroll and receivables. He said Ms. Landry was not part of the agreement because she then was on maternity leave. He and the Appellant spoke only on three occasions to each other. The Appellant spoke much more with Ms. Landry, and they would both speak in Vietnamese, which Mr. Landry did not understand.

[15] Mr. Landry testified he thought the statutorily required "incorporation agreement" under the BCA was constituted by the above-referenced partnership agreement. He testified that he did not push incorporation upon the Appellant. He said the Appellant never asked him about timeliness of CRA remittances and he never brought that up with her. He noted that the Appellant did not resign as director in 2009 when EKO bought her shares in the Corporation. She did, however, when in 2013 she heard from CRA.

[16] In cross-examination Mr. Landry agreed there was nothing in the articles of the Corporation that he prepared and that she signed that identified who the directors would be. He testified that he was under the impression an incorporation agreement per the BCA "was something similar to a partnership agreement". He acknowledged the partnership agreement was executed after incorporation. He acknowledged there never were directors meetings, and the Appellant never signed

anything as a director (other than on the partnership agreement itself as noted above). She did not actually provide managerial services. The Appellant did provide support earlier on, but then she stopped - likely as she was overseas. She would call to ask how business was going, and would suggest they, "try this or try that." Mr. Landry did not want to speak with her anymore after she expressed dislike of a decor change he made at the Langley salon to reduce air temperature in the salon.

Issue:

[17] As stated the issue is, was the Appellant a director of the Corporation at any of the relevant times (2007 through 2011)?

Submissions:

[18] The Appellant submits she was neither a *de jure* nor *de facto* director at any time. The basis for claiming she was not a *de jure* director is that her purported appointment as a director did not meet all the legal requirements specified in the BCA. In particular she did not sign any "incorporation agreement"; thus she was not an "incorporator"; and thus she was not validly designated a "first director".

[19] The Appellant submits that neither was she a *de facto* director as, with reference to the informal procedure decision of *MacDonald v. R.*, 2014 TCC 308, she did not hold herself out as a director and did not engage in management activities. Her counsel asserted that, "[s]he did what is woefully short of being a *de facto* director." There were no meetings, no cheques signed by her, and she was not involved to any great extent. Nothing of any "director matters" was discussed in any of her three or fewer meetings with Mr. Landry. Appellant's counsel stated he had no submissions regarding the statutory defence of due diligence.

[20] The Respondent submits that the Appellant signed all she needed to sign when the Corporation was incorporated to make her fully a *de jure* director. She signed the articles for the new Corporation and also the agreement entitled "Partnership Agreement of 0780221 B.C. Ltd., a British Columbia Corporation" The Respondent submits also that section 413 of the BCA cures any technical deficiencies in the Appellant's appointment as a director.

Analysis:

A. *De Jure* Director?

[21] Subsections 227.1(1) of the ITA and 323(1) of the ETA each provide for liability of directors for corporate non-remittances, as follows:

> Liability of directors for failure to deduct
>
> 227.1 (1) Where a corporation has failed to deduct or withhold an amount as required by subsection 135(3) or 135.1(7) or section 153 or 215, has failed to remit such an amount or has failed to pay an amount of tax for a taxation year as required under Part VII or VIII, the directors of the corporation at the time the corporation was required to deduct, withhold, remit or pay the amount are jointly and severally, or solidarily, liable, together with the corporation, to pay that amount and any interest or penalties relating to it.
>
> ….
>
> Liability of directors
>
> 323 (1) If a corporation fails to remit an amount of net tax as required under subsection 228(2) or (2.3) or to pay an amount as required under section 230.1 that was paid to, or was applied to the liability of, the corporation as a net tax refund, the directors of the corporation at the time the corporation was required to remit or pay, as the case may be, the amount are jointly and severally, or solidarily, liable, together with the corporation, to pay the amount and any interest on, or penalties relating to, the amount.

[22] Regarding whether the Appellant was a *de jure* director, relevant provisions of the BCA, set out here for convenience of reference, are sections 10, 121 and 413, subsection 123(1) and the section 1 definitions of "first director", "incorporation agreement" and "incorporator":

> **Formation of company**
>
> **10** (1) One or more persons may form a company by
>
> (a) entering into an incorporation agreement,
>
> (b) filing with the registrar an incorporation application, and
>
> (c) complying with this Part.
>
> (2) An incorporation agreement must

(a) contain the agreement of each incorporation to take, in that incorporator's name, one or more shares of the company,

(b) for each incorporator,

(i) have a signature line with the full name of that incorporator set out legibly under the signature line, and

(ii) set out legibly opposite the signature line of that incorporator,

(A) the date of signing by that incorporator, and

(B) the number of shares of each class and series of shares being taken by that incorporator, and

(c) be signed on the applicable signature line by each incorporator.

(3) An incorporation application referred to in subsection (1)(b) must

(a) be in the form established by the registrar,

(b) contain a completing party statement referred to in section 15,

(c) set out the full names and mailing addresses of the incorporators,

(d) set out

(i) the name reserved for the company under section 22, and the reservation number given for it, or

(ii) if a name is not reserved, a statement that the name by which the company is to be incorporated is the name created,

(A) in the case of limited company, by adding "B.C. Ltd." or, if the company is a community contribution company, "B.C. Community Contribution Company Ltd.", after the incorporation number of the company, or

(B) in the case of an unlimited liability company, by adding "B.C. Unlimited Liability Company" after the incorporation number of the company, and

(e) contain a notice of articles that reflects the information that will apply to the company on its incorporation.

First Directors

121 (1) Subject to subsection (2), the first directors of a company hold office as directors from the recognition of the company until they cease to hold office under section 128(1).

(2) No designation of an individual as a first director of a company is valid unless,

(a) in the case of company incorporated under this Act, the designated individual

(i) is an incorporator who has signed the articles, or

(ii) consents in accordance with section 123 to be a director of the company,

(b) in the case of a company recognized under this Act in the manner contemplated by section 3(1)(c), the designated individual

(i) has signed the articles for the amalgamated company,

(ii) in the case of an amalgamation under section 273, was, immediately before the recognition of the amalgamated company, a director of the holding corporation,

(iii) in the case of an amalgamation under section 274, was, immediately before the recognition of the amalgamated company, a director of the amalgamating company the shares of which were not cancelled in the amalgamation, or

(iv) consents in accordance with section 123 to be a director of the amalgamated company, or

(c) in the case of a company recognized under this Act in the manner contemplated by section 3(1)(b) or (d), the designated individual

(i) was, immediately before the recognition of the company, a director of the corporation or of the foreign corporation, as the case may be, or

(ii) consents in accordance with section 123 to be a director of the company.

Consent

123(1) An individual from whom a consent is required under section 121 or 122 may consent

(a) by providing a written consent, before or after the individual's designation, election or appointment,

(i) in the case of a director referred to in section 121(2)(a)(ii) or 122(4)(a), to the company,

(ii) in the case of a director referred to in section 121(2)(b)(iv), to one of the amalgamating companies or to the amalgamated company, or

(iii) in the case of a director referred to in section 121(2)(c)(ii), to the corporation or foreign corporation, as the case may be, or to the company or

(b) by performing functions of, or realizing benefits exclusively available to, a director of the company,

(i) in the case of a director referred to in section 121, after the individual knew or ought to have known of the individual's designation as a director, or

(ii) in the case of a director referred to in section 122(4)(a), after the individual knew or ought to have known of the individual's election or appointment as a director.

Deficient filings

413 If a record in respect of which this Act or any other enactment imposes certain requirements is filed with the registrar in relation to a corporation or a limited liability company and that record does not meet all of those requirements,

(a) the record takes effect in accordance with its terms as if it did meet all of those requirements, and

(b) the corporation or limited liability company, on receiving an order of the registrar to do so, must

(i) file with the registrar any records necessary to rectify or replace the deficient filing, and

(ii) return any records required by the registrar that were furnished to the corporation or limited liability company by the registrar in relation to the deficient filing.

Definitions

> 1 **"first director"** means an individual designated as a director of a company on the notice of articles that applies to the company when it is recognized under this Act;
>
> **"incorporation agreement"** means an agreement referred to in section 10;
>
> **"incorporator"** means each person who, before an incorporation application is submitted to the registrar for filing, signs the incorporation agreement respecting the company under section 10;

[23] The Appellant was identified by Mr. Landry as a director of the Corporation in the "notices of articles" being part of incorporation application required by section 10 of the BCA that Mr. Landry as the "completing party" had prepared and submitted on January 18, 2007 to the B.C. Corporate and Personal Property Registries. But the "notice of articles" required no signature of any director named therein, and the articles, which the Appellant did sign (as an "incorporator") did not identify directors. There was no submission by either party that the Appellant had ever seen the "notice of articles". Upon receipt of this incorporation application the Corporation was recognized at that same date and time as incorporated. As well there was issued a Certificate of Incorporation to that same effect.

[24] A "first director" is defined in section 1 of the BCA essentially as an individual designated as a director in the notice of articles that applies upon the new corporation being recognized under the BCA. The Appellant was so designated in the notice of articles. However, paragraph 121(2)(a) of the BCA provides, in relevant part, that no such designation is valid unless the designated individual is an incorporator who signed the articles or has consented per section 123 to be a director. There was no section 123 consent. So, was the Appellant "an incorporator who signed the articles"? She did sign the articles, and was identified on the signature line as an "incorporator". But was she?

[25] An "incorporator" is defined at section 1 as meaning, "each person who, before an incorporation application is submitted to the registrar for filing, signs the incorporation agreement respecting the company under section 10". An "incorporation agreement" is defined at section 1 as meaning "an agreement referred to in section 10". Subsection 10(2) provides that an incorporation agreement, "must… contain the agreement of each incorporator to take, in that incorporator's name, one or more shares of the company" and each incorporator

must have signed and dated it and have, "set out…the number of shares of each class and series of shares being taken by that incorporator".

[26] And therein lies the problem. From the evidence adduced at the hearing including essentially his own admission it appears that what Mr. Landry considered as being the "incorporation agreement" is the agreement entitled "Partnership Agreement of 0780221 B.C. Ltd., a British Columbia Corporation".

[27] The beginning of that agreement reads precisely as follows:

> EKO Consulting and Appraisal Services Ltd. & Khanh (Kim) Le, herein referred to as (the Partners), voluntarily associate themselves together as Limited partners, pursuant to the terms and conditions set forth in the Partnership agreement.

[28] The major element the BCA requires in an "incorporation agreement" is, per subsection 10(2), a statement as to "the number of shares of each class and series of shares being taken by that incorporator." But, there is no reference whatsoever in this so-called partnership agreement to that requirement. Indeed there are no references in it even to shares or shareholders.

[29] That agreement is undated apart from reference to the month of January 2007. It is signed by the Appellant and Mr. Landry respectively, each shown as "Director", without any context given to that reference, at all.

[30] In noting this I am aware of the Appellant's testimony that she had expressed to Mr. Landry and his wife that she wished a partnership arrangement. She did not seek a corporate arrangement, however that is what Mr. Landry arranged. This seems confirmed by the fact Mr. Landry prepared the incorporation application and he or Gerry prepared what was called a "partnership agreement" for the Appellant and Mr. Landry to sign.

[31] Therefore, it seems that there was no actual "incorporation agreement" in this situation, which statutorily and unavoidably leads to the conclusion that the Appellant was not an "incorporator" as defined in section 1 of the BCA. This in turn leads, per paragraph 121(2)(a) of the BCA set out above, to invalidity of any designation that she was a director.

[32] The fact that at the end of the lengthy partnership agreement the Appellant signed her name over the designation of "Director" does nothing to alter these conclusions. There was no context provided for this designation appearing at the

end of the lengthy agreement which dealt with partnership and only briefly mentioned the Corporation at the beginning of the agreement. The parties were referred to as "partners" throughout the agreement. Further, signing over the title "Director" in this agreement did not constitute any third party representation. The document was a private document, not to be, and in fact not, filed or available in any public way.

[33] At the hearing, the Respondent raised section 413 of the BCA to submit that a technical issue should not invalidate the appointment of the Appellant as director. Section 413, set out above, basically provides that if a record filed with the registrar does not meet all statutory requirements, it still takes effect as if it had met all statutory requirements with an obligation to rectify the particular record.

[34] However, in my view this provision would not apply, for the simple reason that an "incorporation agreement" actually is not a record that is to be filed with the registrar. An "incorporation application" does not include the "incorporation agreement", nor does the articles for the nascent Corporation. Therefore section 413 does not assist the Respondent. Additionally, as already noted, paragraph 121(2)(a) of the BCA actually specifies that a designation as director is not valid where an "incorporator" has not executed an "incorporation agreement"; as found to have been the case here.

[35] On the basis of the foregoing I conclude that the Appellant was not a *de jure* director of the Corporation at any time.

B. *De Facto* Director?

[36] Nevertheless, was the Appellant a *de facto* director of the Corporation?

[37] In *Wheeliker v. R.*, [1999] 2 C.T.C. 395 (F.C.A.) the potential for directors' liability under the ITA for *de facto* directors was recognized. The Federal Court of Appeal stated (per Létourneau J.A., para.5),

> …by using the word 'directors' without qualification in subsection 227.1(1), Parliament intended the word to cover all types of directors known to the law in company law, including, amongst others, *de jure* and *de facto* directors.

[38] Jurisprudence reflects that the concept of *de facto* director should be limited to persons who hold themselves out as directors (*MacDonald v. R.*, *supra*, para.

39). As well, in *Perricelli v. R.*, 2002 GTC 244 (TCC), Justice C. Miller observed that a person could not be considered a *de facto* director where the person,

> …did not believe he was a director and he never thought he had any authority to advise, influence or control, the management or direction of the company.

[39] The authority for this principle comes from a general procedure decision of Bowman, C.J. in *Scavuzzo v. R.*, [2005] G.S.T.C. 199. At para. 27 he wrote:

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

[40] In this case the Appellant manifestly did not at any time hold herself out as a director of the Corporation. Further, it is doubtful that, at least until she sold her interest in the business to Mr. Landry for $15,000 in May 2009, to what extent she even was aware of the existence of the Corporation. But accepting that she was, she engaged in no acts of management, as Mr. Landry acknowledged, noted above, let alone any actions specific to a director. Her own evidence, uncontradicted, was that it was not until CRA made contact with her in 2013 that she learned she was considered a director of the Corporation. Also, the fact that she was publicly listed as a director, albeit not to her knowledge, does not require that she be a *de facto* director (*Macdonald*, *supra*, para. 49). Again, she herself at no time conducted or held herself out as a director. Accordingly, I find that the Appellant was not a *de facto* director of the Corporation.

[41] I note the Respondent argued that if the Appellant were not a director, then likewise neither was Mr. Landry, yet per section 120 of the BCA the Corporation had to have at least one director, with the Respondent suggesting that the one director should be the Appellant. I disagree. The person who logically and obviously would be that one director is Mr. Landry, who prepared the incorporation application and described himself therein as the "completing party" of the incorporation application. Furthermore, and in any event it seems likely (but I make no finding) that he would have been a *de facto* director on the basis of holding himself out as a director of the Corporation.

Conclusion:

[42] The Appellant having been neither a *de jure* nor *de facto* director of the Corporation, I conclude that the three directors' liability assessments that the Appellant has appealed are invalid. Accordingly, each of the two appeals heard on common evidence will be allowed, with costs to the Appellant of $500 fixed for each ($1,000 in total), and each of these three assessments will be vacated.

Signed at Toronto, Ontario, this 9th day of April 2018.

"B. Russell"

Russell J.

CITATION:	2018TCC65
COURT FILE NO.:	2016-207(IT)I 2016-1006(GST)I
STYLE OF CAUSE:	KHANH THI LE AND HER MAJESTY THE QUEEN
PLACE OF HEARING:	Vancouver, British Columbia
DATE OF HEARING:	September 12, 2017
REASONS FOR JUDGMENT BY:	The Honourable Justice B. Russell
DATE OF JUDGMENT:	April 9, 2018

APPEARANCES:

Counsel for the Appellant:	Frank W. Quo Vadis
Counsel for the Respondent:	Jamie Hansen

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