

IN THE PROVINCIAL COURT OF NOVA SCOTIA

R. v. Spears, 2016 NSPC 20

DATE: February 4, 2016

DOCKET: 2571965; 2571966;
2571967; 2571968; 2571969

REGISTRY: Halifax

BETWEEN:

Her Majesty the Queen

v.

Darrell Spears, Spears Framing Limited, Spears Concrete Formwork, Inc., and
SCF Services Incorporated

**DECISION ON THE ADMISSIBILITY OF CERTAIN COMMUNICATIONS WITH
THE CANADA REVENUE AGENCY**

JUDGE: The Honourable Judge Anne S. Derrick

HEARD: February 3, 2016

DECISION: February 4, 2016

CHARGES: Section 380(1)(a) of the *Criminal Code* (Darrell Spears);
section 327(1)(c) x 3 of the *Excise Tax Act* (Spears Framing
Limited and Darrell Spears as an officer, director or agent;
Spears Concrete Formwork Inc. and Darrell Spears as an
officer, director or agent; and SCF Services Incorporated and
Darrell Spears, as an officer, director or agent); and section
239(1)(d) of the *Income Tax Act* (Darrell Spears)

COUNSEL: Constantin Draghici-Vasilescu, for the Crown

David Bright, Q.C. and Edward Sawa, for the Defendants

By the Court:*Introduction*

[1] This decision concerns the admissibility of diary entries made by a Canada Revenue Agency (“CRA”) collections officer documenting communications with an accountant who was providing general accounting services to one of the corporate defendants.

[2] The Crown says the accountant was acting as the corporate defendant’s agent with the effect that the diary entries amount to admissions. The Defence argues that the accountant was nothing more than an independent contractor and the diary entries are inadmissible hearsay. The issue therefore is whether the diary entries can be admitted into evidence for the truth of their contents or not.

[3] This admissibility issue relates to the corporate defendant, Spears Framing Limited (“Spears Framing”) who is charged with committing an offence contrary to section 327(1)(c) of the Excise Tax Act by wilfully evading the remittance of HST in the period of July 31, 2006 and September 1, 2007.

Basic Facts

[4] In July 2006, Alex Grover was a collections officer with CRA. He was responsible for files that were sent to his inventory. On July 7, 2006, Spears Framing came into Alex Grover’s inventory of files as an HST file. There was an outstanding HST balance of \$210,000.

[5] The CRA trust examiner collected six post-dated cheques from Spears Framing in the amount of \$42,000 each to cover the HST indebtedness. Mr. Grover monitored the account to make sure the cheques were going through and the HST remittances were being paid. He also monitored the payroll account.

[6] Spears Framing was a client of Power Accounting Limited (“Power Accounting”). Glenda Power, a Certified General Accountant, owned Power Accounting and did the accounting work for Spears Framing. Mr. Grover testified that he spoke with Ms. Power about Spears Framing.

[7] Mr. Grover was able to speak on behalf of CRA to Ms. Power about Spears Framing because she was an “authorized representative.” Otherwise tax matters are confidential. Mr. Grover testified that the authorization for CRA to talk to a third party is provided by the company filing an RC59 form.

[8] Ms. Power testified that she spoke with CRA officials when they called about Spears Framing. She also cooperated with CRA officials when they came to her office, for example, to do a trust examination. Ms. Power had contact with CRA about Spears Framing in 2006 and those interactions continued in 2007. She testified that she saw that ongoing interaction with CRA as part of her services for the company.

[9] Mr. Grover's responsibilities as a CRA collections officer included making notes to an online CRA diary system. He made diary entries of conversations he had with Ms. Power about Spears Framing and noted when she had sent him something on the file.

Positions of the Parties

[10] The Crown submits that in her interactions with CRA on the Spears Framing file Ms. Power was acting as the agent of Spears Framing. As an agent, Ms. Power's communications with CRA reflected in Alex Grover's diary entries would be admissions against her principal, Spears Framing. In the Defence submission, Ms. Power cannot be characterized as an agent of Spears Framing. Her role was as an independent contractor only and anything she communicated to CRA about Spears Framing is hearsay.

[11] The onus is on the Crown to prove on a balance of probabilities that there was an agency relationship between Spears Framing and Glenda Power, and that, even if acting as an agent, Ms. Power was acting within the scope of her duties as the agent of Spears Framing when she made the statements recorded by Mr. Grover in the CRA diary.

The Applicable Law

[12] If it is established that Glenda Power was an agent of Spears Framing her statements as diarized by Alex Grover would be admissible against Spears Framing. For a statement to be admitted as a statement of the company, it must be proven that Glenda Power was an agent of Spears Framing at the time she made the statement and that the statement was made within the scope of her authority as agent. (*R. v. Strand Electric*, [1968] O.J. No. 1291 (C.A.), paragraph 31) As Laskin, J.A. explained in *Strand Electric*:

32 The concept of authority, taken literally, would exclude as against the principal any admission of an agent tending to show liability in tort or penal liability, unless the agent is shown to have been authorized to make admissions to charge his principal. It would be a rare case to find such

authority in any express sense; and, in the result, the admissions would be receivable only to impeach the agent, if, being called as a witness by the principal, he gave evidence with which the admissions were inconsistent. Authority as between agent and principal has in respect of vicarious liability of the principal to third parties, been translated into an issue of the scope of the agent's duties or employment, and I would apply the same test in relation to admissions by an agent which are tendered in evidence against the principal. The fact that penal liability is involved in the present case does not, in my view, make the test inapplicable here. The approach that I am supporting would still make it necessary to examine carefully the admissible evidence on the scope of an agent's duties or employment lest the principal be charged by an admission not properly receivable against him. Of course, the trier of fact would also have to determine whether the admission offered against a principal was made; and, as in other cases where evidence is formally admissible, weight would have to be assessed. I do not think, therefore, that the test of admissibility that I have indicated would unfairly prejudice a principal who is a party or an accused in a proceeding against him.

[13] Laskin, J.A. also stated his view that,

...there need not be evidence of express authority of an agent of the accused to make admissions to third persons importing liability, if what he says is connected with the scope of his employment or may reasonably be related to the discharge of his duties for his principal. (*Strand Electric*, paragraph 37)

[14] An example of statements of an employee being admitted into evidence is found in *R. v. Syncrude Canada Ltd*, [2010] A.J. No. 421 (P.C.), where a company employee was interviewed by Alberta Environment investigators. In *Syncrude*, the court in discussing the factors underpinning the determination of admissibility noted that the employee would have understood that it was a serious matter and that his comments could have consequences for his employer. (*Syncrude*, paragraph 40)

In Her Interactions with CRA Was Glenda Power an Agent of Spears Framing Limited?

[15] It is not disputed that Glenda Power was not an employee of Spears Framing. But as an independent contractor, did she have agency powers conferred by Spears Framing to deal on its behalf with CRA? The assessment of this question is a fact-driven exercise.

[16] I have found no bright lines around the role of independent contractors that precludes them being bestowed with agency powers by the principal who has engaged their services. I find that Ms. Power did not have to enjoy the broadest range of agency powers, e.g. the power to contract on behalf of Spears Framing or assume liability for its debts, powers she clearly did not have, in order for her to have acted as agent for Spears Framing in dealing with CRA.

[17] There is no evidence of an express authorization by Spears Framing for Ms. Power to act as its agent in relation to CRA, however I find that an express authorization is not required. Ms. Power was very well informed about Spears Framing and its financial circumstances and obligations and was comprehensively engaged in dealing with those obligations on the company's behalf. An experienced accountant she would have understood the significance of discussions with CRA about Spears Framing.

[18] The full menu of accounting services Ms. Power provided for Spears Framing included filing its HST returns. Exhibit 1, entitled HST Filing Affidavit, contains copies of the GST/HST filings for the Spears Framing account signed by Ms. Power on June 7, 2006, September 20, 2006, and April 4, 2007. These returns are stamped as having been received by CRA.

[19] As there is no direct evidence that Spears Framing expressly designated Ms. Power as its agent, I am entitled to draw reasonable inferences from the evidence about the scope of Ms. Power's remit as the accountant for Spears Framing. The only reasonable inference to be drawn from the evidence is that Ms. Power interacted with CRA on behalf of Spears Framing as part of her broad range of duties. She continued to discharge that role even once the company ceased active operations. She had agency powers to do so. She signed the HST returns on behalf of the company, discharging an agency role by doing so.

[20] As Laskin, J.A. said in *Strand Electric*, "...there need not be evidence of express authority of an agent of the accused to make admissions to third parties importing liability, if what he (sic) says...may reasonably be related to the discharge of his duties for his principal." (*R. v. Strand Electric*, paragraph 37)

[21] I am satisfied the evidence establishes that when Ms. Power made statements to Alex Grover, she had the authority to speak on behalf of Spears Framing. Her interactions with Alex Grover and what she said in the course of those interactions were related to the discharge of her duties for Spears Framing. I therefore have determined that Alex Grover's CRA diarizations of communications

with Ms. Power are admissible into evidence as statements of Spears Framing for the truth of their contents.