

IN THE PROVINCIAL COURT OF NOVA SCOTIA

R. v. Spears, 2017 NSPC 53

DATE: October 16, 2017

DOCKET: 2571965; 2571966;
2571967; 2571968; 2571969

REGISTRY: Halifax

BETWEEN:

Her Majesty the Queen

v.

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

TRIAL DECISION

JUDGE: The Honourable Justice Anne S. Derrick

HEARD: January 12, 13, 14, 15; 25, 26, 27, 28, 29; February 1, 2, 3, 4, 5;
July 18, 19, 20, 21; August 22, 23, 24, 25, 26, 2016 and April
18, 19, 24, 25, 26, 27, 28; May 15,16, 17; June 12 and 13, 2017;
August 25 and 31, 2017.

DECISION: October 16, 2017

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
(Trial)

Brian Casey, Q.C. and Edward Sawa, for the Defendants (Final
Submissions)

By the Court:*Introduction*

[1] This case is about unremitted employee source deductions and HST for Darrell Spears' business operations in the period of 2006 to 2008. The Crown accuses Mr. Spears of fraud, alleging that, by dishonest means, he sought to deprive the Receiver General of these funds, instead repurposing them to serve his own uses. Mr. Spears denies any fraudulent purpose and says his reason for not remitting was because he did not have the funds due to financial hardship.

[2] Mr. Spears is also charged with evading the payment of personal income tax for the 2007 taxation year, and he and his companies – Spears Framing Limited (“Framing”), Spears Concrete Formworks, Inc. (“Formwork”) and SCF Services Incorporated (“Services”) are alleged to have evaded the payment of HST. In short, the Crown accuses Mr. Spears of being a tax cheat and says that his conduct was dishonest and intended to deprive.

[3] Mr. Spears acknowledges that he and his companies did not remit employee source deductions and HST but he has vigorously contested the Crown's allegation that he acted dishonestly in his dealings with the Canada Revenue Agency. He says that he and his companies were simply trying to stay afloat in difficult financial circumstances so that the business could be viable and ultimately satisfy the tax obligations. He says he incorporated his businesses and organized his business affairs to stay in business not to dodge his tax obligations.

[4] The Information sworn against Mr. Spears and his companies contains five charges. Count 1 is a charge under the *Criminal Code* of fraud against Mr. Spears. Counts 2, 3 and 4 are charges under the *Excise Tax Act* against three companies controlled by Mr. Spears – Framing, Formwork, and Services. Count 5 charges Mr. Spears under the *Income Tax Act* for wilfully evading the payment of personal income tax for 2007.

[5] In the period of 2006 to 2008, Mr. Spears was first operating his concrete formwork business through Spears Framing, then Spears Concrete and then briefly, SCF Services, all companies of which he was the sole Director. He is alleged, in Count 1 of the Information, to have committed fraud between July 31, 2006 and June 1, 2008 in relation to unremitted employee source deductions and HST

totaling \$766,788.67. In the Crown's submission, Mr. Spears misappropriated payroll remittances in the amount of \$492,002.78 (*Exhibit 89*) and HST in the amount of \$264,321.52 (*Exhibit 90*). Those sums actually total \$756,324.30.

[6] Mr. Spears and Framing are alleged in Count 2 to have evaded payment of HST in the period of July 31, 2006 to September 1, 2007 in the amount of \$143,039.97. In Count 3, he and Formworks are alleged to have evaded payment of HST in the period of December 7, 2006 to May 1, 2008 in the amount of \$115,693.68. And he and Services are alleged in Count 4 to have evaded payment of HST in the period of August 8, 2007 to June 1, 2008 in the amount of \$15,925.50.

[7] Mr. Spears' companies came into existence sequentially. Framing was already in existence by July 31, 2006. It had been incorporated in 1991. Formwork was incorporated in December 2006 and Services was incorporated as a numbered company in August 2007 with a name change in October. (*Exhibit 2*)

[8] Mr. Spears incorporated another company – SCFS, Inc. and was the sole Director for a brief period – April 24, 2007 to June 19, 2007. On June 19, 2007, he transferred the company to his ex-wife, Joanne Spears. SCFS, Inc. is not being prosecuted for any offences but, as I will be discussing, it is relevant to this case.

The Crown's Theory of the Case

[9] With some modifications, the following includes passages adopted from the Crown's final written submissions.

[10] Darrell Spears has been responsible for source deductions from payroll from 1991. As he testified, he has always been solely and directly in charge of management and administration, that is, everything related to operating his business, except accounting.

[11] Between 2006 and 2008, Darrell Spears managed a non-unionized crew of between 25 to 40 construction workers providing moulding framing for foundation and structural components of high rise buildings. In direct connection with running a payroll of this size, Darrell Spears had a legal obligation to deduct at source the statutory payroll deductions for all his employees and remit such deductions plus a statutory mandated employer portion (contribution) for CPP

(Canada Pension Plan) and EI (Employment Insurance) to the Receiver General on a regular basis.

[12] Framing's statutory payroll deductions and the employer contributions did not get remitted to CRA. In December 2006, Mr. Spears incorporated a new company, Spears Concrete Formwork, that also did not remit. In August 2007, another company, Services, was incorporated. It too did not remit.

[13] These three companies, under the control of Mr. Spears, collected but did not remit HST to the Receiver General.

[14] Mr. Spears' T1 personal income tax return for 2007 was filed in 2014. It was due to be filed at the end of April 2008. Mr. Spears has since paid any outstanding personal income tax, interest and penalties. The Crown submits that this is irrelevant to the issue of whether Mr. Spears intended to evade payment of his personal income tax liability in 2007. The Crown says in 2007 Mr. Spears made himself collection-proof by divesting himself of "all personal assets and viewed himself as having retained full control of when and if he would tend" to his personal and his companies' liabilities.

The Position of the Defence

[15] I have lifted an overview of the Defence position on the fraud charge from the written submissions of the Defence and incorporated it here:

Spears was behind in his payments to creditors, subject to builders' liens and at different times, Workers' Compensation assessments. He was also behind in the payment of employee remittances and HST in 2006. (CRA has not alleged that his actions in falling behind were criminal.) Spears arranged to make catch up payments to CRA. He found it impossible to catch up (as CRA required that he pay his current remittances and all of his past remittances). Spears could not keep operating his business and meet the current expenses (including the creditor lawsuits) from the cash flow of his business while keeping up with the payment arrangement CRA imposed. Spears sought legal advice. The legal advice was to set up a ladder of companies, to allow him a fresh start. It was not for

the purpose of insulating Spears from his tax obligations (and it doesn't have that effect).

[16] As for the HST and personal tax evasion charges, the Defence submissions say the following:

While the defendant companies failed to remit HST by the deadlines imposed by the *Excise Tax Act*, Spears did not do this for the purpose of evading the payment of HST. Spears testified that he would have remitted the tax if funds were available but he nevertheless believed that he was ultimately responsible for the tax debts of companies if he was the director.

Similarly, Spears did not fail to file his 2007 personal income tax return on time for the purpose of evading the payment of income tax. Spears' bookkeeper testified that she advised the CRA that she required information to complete his return.

[17] This was a 35-day trial. Determining whether the Crown has proven beyond a reasonable doubt that Mr. Spears and the companies he controlled were engaged in fraud and tax evasion has required me to conduct a detailed examination of the evidence. I have not attempted to review it all in these reasons. In addition to lengthy examinations of witnesses, hundreds of pages of documentary evidence were admitted as exhibits. The Crown and Defence each filed extensive and detailed written submissions and made final oral submissions as well. I will be describing aspects of the Crown's allegations against Mr. Spears, and the Defence evidence, including from Mr. Spears, that was offered in response.

[18] Fundamentally, my assessment of the charges against Mr. Spears and his companies comes down to this question: Considering the whole of the evidence, including the evidence of Darrell Spears, am I satisfied the Crown has proven the charges of fraud and tax evasion beyond a reasonable doubt?

The Nature of Darrell Spears' Business

[19] Darrell Spears is a self-made businessman. He left school following Grade 9, worked in construction in Toronto and then took up carpentry as a trade. After

starting a wood-framing business in Ontario, Mr. Spears eventually moved back to Nova Scotia.

[20] Mr. Spears originally simply supplied labour, not supplies, for framing residential homes. From 1983 to 1991 he operated as a sole proprietorship but then incorporated his business, Spears Framing Limited, on the advice of his accountant at the time.

[21] Mr. Spears understood that incorporation would protect him, in the event of law suits, from personal liability. He testified it had been explained to him by the accountant he was using at the time that he would be liable as a director for any unpaid payroll remittances and HST.

[22] In the 1990's Mr. Spears started working on large framed apartment buildings. The nature of his business changed when he moved into doing structural formwork. He testified there was maybe one year in the early 2000's when Framing did both framing and formwork.

[23] None of the businesses Mr. Spears operated were unionized. This created tensions with the Carpenters' Union, in particular. The Union openly protested against developers who used Mr. Spears on their projects and viewed him as having the ability, with a non-unionized workforce, to unfairly compete on contracts. Mr. Spears saw the Union as trying to put him out of the business. He testified that the Union was "going around to all the developers and threatening to slow their projects down."

[24] It was Mr. Spears' evidence that his concrete formwork business experienced financial difficulties from the start. Formwork projects required Mr. Spears to provide labour and there was more capital expenditure than wood framing. Mr. Spears had to supply all the materials and equipment, such as staging, plywood, and shoring jacks. Flat slab work required a system that rented for more than \$50,000 a month. For certain formwork projects, cranes, which are also expensive, had to be rented.

[25] Mr. Spears testified that he was new to the formwork business and it cost him more than he had calculated. There were a lot of "external variables" outside of his control such as other trades having to do their work before he could get his

underway. While he waited for a site to be ready, he was paying rent on equipment that was not being used.

[26] Mr. Spears provided an example of the problems he encountered. He testified that sometime around 2004, Spears Framing signed a contract with an American company, Horizon Estates, to do concrete formwork for a development they were undertaking. Horizon was pressured by the Carpenters' Union about the use of non-union labour. This led to Horizon requiring that Framing agree to a completion schedule with penalties for non-performance. Excavation problems delayed the start of Framing's work on the project and, despite that not being Framing's responsibility, Horizon took a hard line on the contract price. Mr. Spears testified that he needed the money so he had to accept a reduced amount which made cash "very short." It was Mr. Spears' evidence that this meant there were "bills that needed to be paid and there weren't the funds to pay them."

Projects Undertaken by Spears Framing

[27] Louis Lawen, a local developer, testified that sometime in the summer of 2006 his company, Dixel, got its 1239 Barrington Street "W" Suites project underway. Dixel did not have a signed contract with Darrell Spears who did the concrete formwork for the project. Mr. Lawen testified that contracting on the basis of a handshake is not unusual in the construction industry. Mr. Lawen testified that the construction project went relatively well and progressed quite quickly. He thinks it was late winter/early spring when the formwork for the building was completed.

[28] A vendor listing from Dixel Developments in relation to Spears Framing was obtained by Laura Dauphinee, the HST auditor for CRA. It records payments to Framing starting on June 23, 2006 and ending May 11, 2007 for a total of \$923,555. (*Exhibit 70*)

[29] In 2006, Spears Framing secured a contract with developer, Wes Campbell. Mr. Campbell's company, Dicam Management, was building the Berkley Gladstone, a retirement home. The original subtrade agreement between Dicam Management and Spears Framing was dated August 29, 2006. (*Exhibit 18*) The contract start date was indicated to be October 15, 2006. The concrete pouring for the Berkley job started somewhere prior to December 15, 2006.

[30] Framing was still receiving payment for work in early 2007. Two cheques were written to Spears Framing from Russell Lake Developments on January 5 and 12, 2007 respectively, for work done on 30 Freshwater Trail, a multi-unit apartment building. (*Exhibit 43*) The cheques were for \$23,529.60 and \$50,735.70.

[31] George Daniel, the owner of Russell Lake Developments, recalls that there was a change during the project in the company being paid for the formwork. The cheques indicate this. On January 19, 2007, Russell Lake Developments, having paid Framing the two previous weeks, wrote a cheque to Formwork for \$23,897.25. (*Exhibit 43*)

[32] Mr. Daniel testified that his company “paid the bill, whatever bill was given to us.” He does not recall a written contract with Darrell Spears for the work and confirmed the work was done to his satisfaction and completed.

[33] Despite Mr. Spears’ continued success in obtaining and completing contracts, Spears Framing was enmeshed in law suits and carrying a very significant debt load. Exhibit 111 is a tabbed volume of documents relating to litigation involving Mr. Spears’ companies. Mr. Spears testified he was finding it very difficult to operate his business with all the pending law suits.

[34] It was Mr. Spears’ evidence that “Cash was very short.” He described considerable expenses to be paid, including crane rental, supplies, and payroll. He was defaulting on equipment rental and was in arrears with Workers’ Compensation. (Law suits ensued as a result.) He says he was not able to remit source deductions and HST to CRA.

Spears Framing’s Financial Difficulties

[35] Glenda Power, a Certified General Accountant, had been Mr. Spears’ bookkeeper since 1994 and was well aware of the financial problems being experienced by Spears Framing.

[36] Ms. Power’s responsibilities included doing data entry, payroll and corporate income tax returns (T2’s) for Mr. Spears’ companies. She testified that she received the bank statements for the companies and entered the information from them into her accounting program, Simply Accounting. She did payroll based on the hours that were called in and prepared the final tax returns for the corporation.

[37] Ms. Power testified that in 2006, Framing was having financial trouble. Its corporate tax return for 2006 (*Exhibit 27*) shows a net loss for income tax purposes of \$211,505. The unaudited comparative income statement Ms. Power prepared for Framing (*Exhibit 25*) shows a total operating expenses loss for August 1, 2005 to July 31, 2006 of \$362,565.23. Ms. Power confirmed that to be an accurate figure. She noted that equipment rentals for formwork were much higher than for wood framing. Exhibit 25 shows Framing's equipment rental to have been \$577,915 for 2006. Framing also showed a business loss on its corporate tax return for 2005 of \$59,844. (*Exhibit 26*)

[38] Framing's financial problems extended to its non-remittance of employee source deductions and HST. This brought it to the attention of the Canada Revenue Agency ("CRA"). On July 7, 2006, the Framing file was sent to the inventory of Alex Grover, a collections officer with CRA. The company had an outstanding HST debt totalling \$210,000. Alex Grover's evidence about his dealings with Mr. Spears is a crucial aspect of the Crown's case and I will be returning to discuss it separately.

[39] In November 2006, the Workers' Compensation Board sent Framing a letter to Ms. Power's address indicating that a clearance letter could not be issued on Framing's account. (*Exhibit 28*) Although Ms. Power now does not remember receiving this letter, she confirmed that her handwriting on it says, "copy to Darrell November 13, 2006." Ms. Power testified that she would have been aware that Framing had an outstanding account with Workers' Compensation.

[40] Given Framing's financial difficulties, it did not surprise Ms. Power to be told by Mr. Spears in late 2006 to stop working on Framing's accounts. She testified that she thought Framing had stopped operations at the time of its last payroll of January 8, 2007.

[41] In late 2006 Ms. Power knew Framing's remittances hadn't been paid. She had no discussion with Mr. Spears about this. It was her evidence that Mr. Spears always directed her when there was money to be paid so he would have known the remittances were in arrears. Ms. Power testified that the prioritizing of bill payments was made by Mr. Spears. She says: "I would know how much money would be in the account because I would be tracking it. Darrell would be the one to tell me what to pay with that money."

[42] Ms. Power testified that toward the end of 2006 she was having some difficulty getting source documentation from Mr. Spears. She wasn't getting records from Mr. Spears in as timely a fashion as she had been. Previously this had not been a problem because Mr. Spears and his wife, Joanne, lived on the Eastern Shore and, as they went back and forth, would drive past Musquodoboit Harbour where Ms. Power had her office. However, they moved and Ms. Power had less contact with them as a result.

[43] If the source documentation was not available, Ms. Power would use the bank statements although without the source documentation she would not necessarily know the origin of the debits and credits.

[44] Ms. Power did the T4 Summary for Framing for 2007. As Framing only had one payroll period in 2007, the source deductions due were relatively small - \$14,309.35 for 27 pay slips filed. (*Exhibit 9, page 150*)

[45] On March 27, 2007 Framing was sent a collection notice for its WCB arrears in the amount of \$40,266.11. (*Exhibit 9, page 94*)

[46] In May 2007, Framing's line of credit at the Bank of Nova Scotia in Musquodoboit Harbour was paid out with funds from a mortgage taken out on a property owned by Joanne Spears in Enfield. Framing was no longer an active entity.

[47] Laura Dauphinee learned in the course of her HST audit in 2008 that Framing was still indebted to Rapicon for the unpaid rental of a crane. (Exhibit 111, Tab 13, indicates the crane had been rented in 2006.) Ms. Dauphinee determined that a Peri Skydeck system had been returned to Concrete Shoring due to non-payment of the rental fees. (*Exhibit 82*)

Spears' Concrete Formwork Limited

[48] In late 2006, Mr. Spears started plying his formwork trade under the auspices of a new company, Spears Concrete Formwork Limited. On December 13, 2006, he effected the name change for a numbered company – 3194832 Nova Scotia Limited – that he had previously incorporated. He says he hoped this would enable him to develop a profitable business.

[49] 3194832 Nova Scotia Limited had been incorporated on December 8, 2006 by Karen Gardiner, a lawyer with McInnis Cooper who had a generic corporate practice. (*Exhibit 2, page 38*) Mr. Spears, by then living at 79 Bedros Lane, Halifax was named as Director. (*Exhibit 2, page 39*) Ms. Gardiner's reporting letter (*Exhibit 106*) noted that CRA had issued a business number for the company. (*Exhibit 29*)

[50] During her testimony as a Defence witness, Ms. Gardiner referred to her notes from Mr. Spears' client file. What she read from them was admitted into evidence by consent on the basis of past recollection recorded.

[51] Ms. Gardiner's file notes indicate "Spears Concrete Formwork Inc." and "Spears Framing" and "wants to assign contracts to new company" which she says means the party to the contract want to assign its rights and obligations to another entity. It means basically that somebody else is going to be performing the contract.

[52] Ms. Gardiner's notes also contain the notation, "Director liability" and although she now does not recall what that referred to, she testified that directors have certain obligations, such as remitting employee source deductions. Unfulfilled obligations can lead to personal liability.

[53] Framing did one payroll in 2007 and then the employees were brought under the new company. In January 2007, Ms. Power had prepared the payroll for Framing but did not issue the cheques. She learned that the payroll should have been from the Formwork account and so prepared cheques for the identical amounts from this account as the employees now worked for Formwork. It was Ms. Power's evidence that from an accounting perspective it did not matter if the contract is with one company and the payroll with another. This is not unusual.

[54] Formwork started doing business immediately. On December 13, 2006, Formwork issued an invoice to Wes Campbell's company, Berkeley Holdings, developing the retirement home.

[55] Formwork also did projects in 2007 with developers, W.M. Fares and George Daniel. As I noted earlier, Russell Lake Developments issued a cheque dated January 19, 2007 to Formwork for work on 30 Freshwater Trail.

[56] In early January 2007, Formwork applied to CRA for an HST number and indicated in the documentation that it would be making payroll remittances for a maximum number of 30 employees starting on January 23, 2007. (*Exhibit 30, page 004776*)

[57] CRA approved Formworks application and advised that its registration was effective as of January 12, 2007. Formworks was informed that its first HST return would cover January 12 to March 31, 2007 and be due on April 30, 2007. (*Exhibit 5*)

[58] In its application for HST registration, Formwork noted its business number as BN 83379 9760, the number that had been assigned to Mr. Spears' predecessor numbered company. The documentation included Mr. Spears' phone number, business address (79 Bedros Lane) and social insurance number. The "major business activity" was described as "concrete formwork" and its business operation was noted to be "year round." (*Exhibit 30*)

[59] The original subtrade contract between Dicam Management Limited, the company doing the Berkeley-Gladstone development (*Exhibit 18*) was amended with a handwritten date change to February 7, 2007, a change made by Wes Campbell, and a subcontractor change from Spears Framing to Spears Concrete Formwork, Inc. (*Exhibit 18*) Wes Campbell and Darrell Spears had signed the original contract. Mr. Campbell remembers that it was Formwork he dealt with for the Berkeley-Gladstone project. The project spanned the period of late 2006 to mid-2007.

[60] Invoices from Formwork to Berkeley Holdings for the Berkeley Gladstone project were dated throughout 2007: January 24, 2007; March 6, 2007; March 29, 2007; April 14, 2007; April 30, 2007; May 14, 2007; June 10, 2007; June 25, 2007; July 8, 2007; July 23, 2007 and August 21, 2007.

[61] A new subtrade contract was prepared (*Exhibit 19*) that showed the date of February 7, 2007 and the parties as Berkeley Holdings Limited and Spears Concrete Formwork Inc. Mr. Campbell testified that he must have received an invoice and, having seen that he was dealing with Spears Concrete, amended the original contract. (As I noted, Formwork issued an invoice dated December 13,

2006.) Mr. Spears and Mr. Campbell signed the new contract and it was witnessed. Mr. Campbell says the signing would have happened sometime after February 7.

[62] Mr. Spears testified that Framing and Formwork were working on contracts at the same time. It was his evidence that Formwork got work the same way Framing did. Mr. Spears says he would be doing a project and “just asked the developer to sign the contract over to Spears Concrete.” As I mentioned, he had told Karen Gardiner he was intending to do this.

[63] Mr. Campbell testified that there was a clear trail between the project owner and the subcontractors with HST numbers attached to the invoices and payments made by cheque. It was only Formwork’s last four invoices to Berkeley Holding Limited that did not show an HST number. Each of these invoices did show Formwork’s business number issued by CRA. (*Exhibit 23, pages 48, 49, 50, 51*)

[64] In a fax on March 29, 2007, Ms. Power advised Wes Campbell that Formwork had requested a clearance letter from Workers’ Compensation. She attached CRA’s HST registration approval for Formworks. (*Exhibit 5*)

[65] A letter dated June 4, 2007 from Workers’ Compensation threw a spanner into the works. Workers’ Compensation indicated they would not issue a clearance letter for Formwork because of the arrears owed by Framing. Mr. Spears was required to produce to the developers he was contracting with a letter of good standing with Workers’ Compensation. The June 4, 2007 letter told him that his new company, Formwork, would not qualify for the letter of good standing he needed. It was obvious to Mr. Spears from the Workers’ Compensation June 4, 2007 letter that notwithstanding the incorporation of the new company he was still liable for Framing’s debt to Workers’ Compensation.

[66] The Workers’ Compensation letter affected Formwork’s ability to fulfill its contracts. One example involved a contract with W.M. Fares for the MU-9 project, a 130-unit apartment building with a concrete construction.

[67] The contract for the MU-9 project was between the numbered company doing the project and SCFS Inc. (*Exhibit 39*) There is no indication of the date when the contract was signed but the signature for SCFS, Inc. is Joanne Spears’ signature. She did not become President of SCFS, Inc. until June 19, 2007. The

contract provides for the work to be started by March 1, 2007 and substantially completed by August 31, 2007. (*Exhibit 39*)

[68] Darrell Spears testified that Spears Concrete was to supply the labour on the contracts acquired by SCFS, Inc. Without the Workers' Compensation clearance letter, Formwork would have been unable to perform the MU-9 contract.

[69] Douglas Kaizer was the Chief Financial Officer for the Fares Group in the period of 2006 to 2008. He recalls the original contract for the MU-9 formwork was not with SCFS, Inc. It is his recollection that the contract was originally with Formwork and that it was later changed to SCFS, Inc.

[70] Mr. Kaizer testified that name changes to contracts were not uncommon. W.M. Fares had itself sought a name change from W.M. Fares Group to a numbered company. (*Exhibit 37*) It was necessary to show the correct name on the invoices as it was expected that CRA would audit the Input Tax Credits and want to see invoices from the subcontractor to the owner of the project. As Mr. Kaizer explained, the paperwork had to align with the parties who were doing the work – the contractor and the owner.

[71] Ms. Power testified that she was retained only to do payroll for Formwork. To do payroll Ms. Power had the employee's rate of pay, their deductions, and their hours of work, information she received from Mr. Spears. She did not receive bank statements from Mr. Spears for Formwork.

[72] Ms. Power's responsibilities included preparing the T4 Summary for Formwork for 2007 and 2008. (*Exhibit 9, pages 151 and 152*) For 2007, Ms. Power recorded 34 T4 slips filed and a total source deductions of \$396,184.92. She indicated this amount at line 86 for "Balance due." For 2008, Ms. Powers recorded 21 T4 slips filed and \$46,805.73 in source deductions as "Balance due."

[73] Ms. Power testified that she believes – "I'd say" – that she used the bank statements for the HST ledgers. She says she would have been doing the accounting for SCFS, Inc. and would have broken it down by subcontracting expenses and HST.

SCF Services

[74] SCF Services Inc. (“Services”) was incorporated as a numbered company in August 2007 with a name change in October. (*Exhibit 2*) It opened a bank account with TD-Canada Trust in Bedford in October 2007. (*Exhibit 9, page 000123*) Ms. Power considered the Services account to be a Formwork account. She testified that the money belonged to Formwork and the expenses were Formwork’s. Services did not have any contracts. The Services’ bank statement for November 2007 shows payroll cheques coming out of the account. There were two deposits that month – for \$10,000 on November 9 and for \$35,000 on November 23. These deposits came from SCFS, Inc. They were for labour supplied by Services.

[75] Darrell Spears testified that he didn’t know if Services was ever registered as a payroll company. He does not know if Glenda Power obtained an HST number for Services. If that was done, it would have been by Ms. Power.

[76] Services only paid four payrolls for labour performed on SCFS, Inc. contracts before its workforce was transferred to SCFS, Inc., which I will be describing later in these reasons. This caused Services to cease operation. It no longer had any employees and therefore no way to generate any money.

Darrell Spears’ Investment in the Business

[77] Having identified the respective companies controlled by Mr. Spears, I am going to now address the evidence concerning the investment that Mr. Spears made in his formwork business.

[78] Mr. Spears claims he dipped deep into his own pockets to keep Framing alive. There is evidence to support his having done so. Ms. Power confirmed that in 2003, Mr. Spears cashed in his RRSP’s in the amount of \$89,702. (*Exhibit 34*) She testified to her belief that, after taxes, the balance of Mr. Spears’ redeemed RRSP’s was invested into Framing.

[79] Mr. Spears’ ex-wife, Joanne Spears, also remembers “something about” Mr. Spears cashing in RRSP’s for the business. She testified that, “Everything went toward the business to keep it going.”

[80] Mr. Spears testified that he had sold a piece of property and cashed in bank stocks to keep Framing going. He invested the money that was generated in the company.

[81] Exhibit 33, General Ledger Report for Spears Framing, shows money being deposited into Spears Framing Ltd. – October 13, 2005 - \$5000; November 18, 2005 - \$20,000; November 22, 2005 - \$30,000; November 23, 2005 - \$14,000; and December 5, 2005 - \$15,000. In each case, these amounts are identified as “loan” from Darrell Spears. Although Glenda Power testified that these amounts came from Joanne Spears’ loaning money to Mr. Spears from the sale of their matrimonial home, that sale did not occur until August 2006. In any event, the deposits in 2005 indicate that Mr. Spears having to inject money into Framing.

[82] In addition to his own funds, Mr. Spears relied on Joanne Spears, as a source of revenue. She also played a central role in keeping the business going by accepting the sole Directorship of SCFS, Inc. so that it could obtain Workers’ Compensation clearance and acquire contracts for formwork projects. I will explain the genesis of SCFS, Inc. in due course.

[83] Ms. Spears had an interest in three properties that generated funds Mr. Spears says were put to use to keep his formwork business afloat. The first of these properties was the matrimonial home in Beaver Harbour on the Eastern Shore. It was sold on August 16, 2006 (*Exhibit 51*) Joanne Spears testified on cross-examination that she loaned Mr. Spears the house sale proceeds and received a Potain tower crane as collateral. Mr. Spears penned a handwritten note - Exhibit 36 - as President of Framing, giving Joanne Spears title to the crane and stating that “the crane is hers to do with as she pleases” if the loan of \$80,000, representing the total value of the Beaver Harbour sale, was not repaid by Framing by December 1, 2007.

[84] Darrell Spears testified that, before the sale of their matrimonial home, he had promised Ms. Spears she would have the sale proceeds. He says he did this because this was her “nest egg for the future”. Mr. Spears testified that he felt Ms. Spears should get the matrimonial home sale proceeds because she had cashed in her RRSP’s and “believed in me for 29 years” so he felt his promise was appropriate for her security, “not mine.”

[85] Mr. Spears says he considered the Potain crane to be Ms. Spears’ unless he was able to pay her the funds he had promised her. It was an asset she could sell. He testified that he thought he would be able to repay Ms. Spears by the first of December 2007 which is why he selected that date for the document he signed transferring the Potain crane. (*Exhibit 36*)

[86] The money paid at the closing of the sale of Beaver Harbour - \$64,700 (*Exhibit 114*) - went into the personal account of Mr. and Ms. Spears (*Exhibit 103, pp. 18 – 23*) and a cheque was written to Spears Framing and deposited into the Framing business account on September 8, 2006. (*Exhibit 101-D, page 5569*)

[87] It was Joanne Spears' evidence that after the sale of the Beaver Harbour property, she and Mr. Spears moved to Portland Estates in Dartmouth to live in a condominium in the Russell Lake development. That condominium had been purchased by them in June 2005 with a mortgage of \$224,620. (*Exhibit 102*) It was sold in September 2006. (*Exhibit 102*) Mr. Spears testified that equity in the amount of \$16,000 to \$20,000 was invested in Framing.

[88] In February 2006, Mr. Spears purchased a house for Ms. Spears on Boyd Avenue in Enfield. In September 2006, Scotiabank was given a first collateral charge on Boyd Avenue against a line of credit for Spears Framing in the amount of \$125,000. (*Exhibit 40*)

[89] About 10 days later, on September 25, 2006, Darrell Spears mortgaged his condominium on Bedros Lane for \$202, 991. (*Exhibit 102*) He had bought the condo in July 2005 and mortgaged it that September through private lenders for \$125,000 who were paid off when Mr. Spears remortgaged in September 2006. Mr. Spears says he put \$20,000 to \$30,000 from that remortgaging into Framing.

[90] On May 18, 2007 Joanne Spears re-mortgaged her Enfield home for \$125,000. (*Exhibit 41*) She says the money went to help Mr. Spears' business. It paid off Framing's line of credit. (*Exhibit 65*) Ms. Power testified that \$129,159.13 was identified in the General Ledger for Framing as a Shareholder's Loan on May 18, 2007. (*Exhibit 33, page 7*)

[91] Also recorded by Ms. Power on the Framing General Ledger is "deposit from McInnis Cooper" in the amount of \$35,000 on May 3, 2007. Ms. Power testified that this "may have been" from the sale of the Russell Lake condo. (*Exhibit 33*) This however seems unlikely. Although Mr. and Ms. Spears used the McInnis Cooper law firm for the sale of the Russell Lake condo, it was sold in September 2006. There is no \$35,000 deposit recorded in the Framing General Ledger for September 2006.

[92] Mr. Spears never repaid Ms. Spears for the matrimonial home sale proceeds. Nor did he ever pay any spousal support. He testified that he does not know if she received any consideration for transferring the crane to SCFS, Inc.

[93] Mr. Spears testified that when Ms. Spears re-mortgaged Boyd Avenue to help Spears Framing he would have given her some security for this loan if he had had any to give, but he didn't. He says he would also have liked to have given her some security for her RRSP's that were cashed in for the business, but he didn't have anything then either. He did however co-sign the September 2006 and May 2007 mortgages.

[94] Mr. Spears does not recall making any payments between September 2006 and December 2007 toward the value of the crane. He says he can't change the fact that he didn't have the funds. He understood what would transpire if he didn't pay, that the crane would belong to Ms. Spears.

Darrell Spears and Payroll Source Deductions and HST Remittances – An Overview

[95] Darrell Spears' companies – Framing, Formwork and Services – were delinquent in making payroll and HST remittances. Mr. Spears testified he knew that remittances were not being made. He was receiving information from Glenda Power about remittances relating to Framing and Formwork and agreed it is a reasonable assumption that Ms. Power would have forwarded important information about remittances to him.

[96] Mr. Spears says he assumed the company's business number was the HST number. He testified that Glenda Power was responsible for handling HST. He has always been satisfied with her performance and thinks of her as very thorough and professional. He did not have any involvement in the HST registration process until Ms. Power gave him something to sign.

[97] Mr. Spears says his move to Dartmouth from Beaver Harbour had a negative effect on his ability to get information to Ms. Power. He was no longer passing by her office in Musquodoboit Harbour twice a day as he had been when he had lived in Beaver Harbour, farther along the Eastern Shore. Joanne Spears testified that when she had been living in Beaver Harbour she too had dropped documents off with Ms. Power as the location of the office was a natural bypass.

[98] It was Mr. Spears' evidence that any amounts owed to CRA could be pursued against him on the basis of Director's liability unless he was able to show

due diligence. He understood this to mean he had to take every possible step to satisfy his debts. Mr. Spears testified that he viewed being duly diligent as ensuring that his business would be profitable so it could pay its debts, and that due diligence included his capitalization of the business with personal money.

[99] Mr. Spears testified that his plan was to pay payroll remittances when he had the money. He says he thought that in order to file remittances, he had to have the funds to send in at the same time. It was his evidence that he didn't remit HST for the same reason: he thought that if he didn't have the money, he didn't file the returns.

[100] Mr. Spears testified that he did mental calculations of what money was to come out when money would come in so as to ensure he was able to operate.

[101] Mr. Spears testified that his plan with respect to making payroll remittances from Formwork between the first payroll in January 2007 and the end of April was: "When I got money to pay it, I was going to pay it, when I had money to pay it." [page 234] It was his evidence that he would deal with the combined debt of Framing and Formwork when he got back on his feet. "I'd make a deal with people to find a solution to pay back debts."

[102] It was Mr. Spears' evidence that he always received HST and understood he was to remit it. When asked by the Crown why the HST amount was not available to Mr. Spears to remit to CRA when it was paid to him, Mr. Spears said that subcontractors would invoice him for HST and he would pay HST to them.

[103] The Crown pointed out that Mr. Spears did have the ability in 2007 to set priorities in relation to financial expenditures. He gave his employees raises, purchased a diamond engagement ring, may have taken a cruise, and shopped at a high-end men's clothing shop.

[104] Mr. Spears says he felt it was an obligation to the workforce to pay raises in order to move forward or lose employees. "Without employees, we don't operate." He made raises a priority over payroll remittances because "there would be no way to ever get to a position where I could deal with those debts without the employees."

[105] Mr. Spears acknowledged that in July 2007 he purchased a \$13,000 diamond engagement ring, paying it off at \$3000 per month. (*Exhibit 116*) He addressed this discretionary expenditure by saying that he made "certain things a priority. For the person I did it for, I would have let a lot of things go."

[106] Mr. Spears says “to a certain degree” his lifestyle “took a hit” in 2006 to 2007 because of the financial difficulties of his business, although he did shop at a high-end men’s clothing store. He says he did so infrequently. What the Crown produced -receipts for purchases in November 2006 for a scarf costing \$118 and pants costing \$176 – does not contradict this. (Mr. Spears says he does not think the scarf was a purchase he made for himself.)

[107] The Crown has shown however that in 2007 Mr. Spears drew significant money out of his companies - \$30,352 (Framing) and \$176,298 (Formwork). (*Exhibit 100*) What I don’t know is what withdrawals were business-related.

[108] Mr. Spears testified that he supplied Ms. Power with every receipt he had. If the purchase had been for something personal, Ms. Power would record it as income. These personal purchases were not treated as business expenses.

[109] By the end of 2007, Mr. Spears says his net worth was in a “strong, negative position” because of what he owed and the law suits against Framing and Formwork.

[110] Mr. Spears has never paid the payroll remittance and HST arrears. He responded to the Crown’s question “If you had that intention why didn’t you follow up on that?” by saying that if CRA had pursued Director’s liability instead of criminal charges and had a “What can we do?” attitude, he would have conducted himself differently. Mr. Spears went on to say that: “When you come in and take away employees and cause embarrassment – the damage to reputation cost a lot of opportunities. Criminal charges shut down my reputation along with my company (Spears Concrete) instead of seeing what we could work out.”

[111] Mr. Spears testified that this was not his attitude in 2006 to 2008 when he fully intended to pay the source deductions and HST once he had the money to do so. His statement that CRA must have “recognized they can’t get blood from a stone” was made in the context of not hearing from CRA after the January 2008 meeting at his condo. Mr. Spears says it was not, as the Crown has alleged in its written submissions, that “any future collection” was dependent on Mr. Spears’ “entirely discretionary good will.”

2016

[112] In February 2016, Mr. Spears received two letters from CRA. One letter, Exhibit 109, refers to Mr. Spears’ liability for unpaid source deductions of Spears Concrete in the amount of \$143,731.98. The other letter, Exhibit 110, is very

similar. It refers to unpaid GST/HST for Spears Concrete and indicates that CRA is considering assessing Mr. Spears personally for \$213,551.06.

[113] These amounts are smaller than the amounts that CRA calculated as the amounts owed by Framing, Concrete and Services. In Exhibit 89, “Payroll Quantum Consent Exhibit”, the unremitted source deductions for November 2006 to February 29, 2008 assessed by CRA for these companies totals \$492,002.78. The figures accepted by the Defence are \$53,622.43 for Framing and \$358,115.15 for Formwork. The Defence disputes the figure of \$80,265.20 for Services stating: “The defendants do not admit that SCF Services Incorporated was or is liable with respect to withholding any remittance of source deductions. Any unremitted source deductions allegedly owing by SCF Services Incorporated would have been the responsibility of Spears Concrete Formwork Inc.” (*Exhibit 89*)

[114] Exhibit 90 (“HST Quantum – Consent Exhibit”) assesses the unremitted HST for the period of October 31, 2006 to December 31, 2008 for Framing as \$132,702.33; and for Formwork as \$115,693.69. The Defence disputes the \$15,925.50 assessment for Services, stating: “The defence do not admit that SCF Services Incorporated is or was liable with respect to remitting HST and any amount allegedly owing by SCF Services Incorporated would have been the responsibility of Spears Concrete Formwork Inc.” Also noted on Exhibit 90 is this statement: “There is a continuing disagreement between Crown and Defence with respect to the appropriate HST component of the [transfer of the Potain crane to Joanne Spears]. The amount in dispute would be the HST on \$80,000 sale for the total of \$9,824.56.” Defence and Crown indicated that the Crown would double this amount.

[115] Mr. Spears testified that he has no knowledge of whether the February 2016 letters indicate that CRA has written off a large amount of source deductions and HST remittances. He says he does not know how CRA came up with the \$148,731.98 number in the unpaid source deductions letter. He passed the letters on to his lawyer.

The Creation, Corporate Structure and Operation of SCFS, Inc.

[116] SCFS, Inc. came into existence essentially because of Spears Framing’s financial problems. As I have mentioned, Mr. Spears sought to extricate his business operations from Framing’s issues by incorporating Spears Concrete Formwork. But he soon learned that Workers’ Compensation would not issue a clearance letter for his new company, Formwork, because of Framing’s Workers’

Comp indebtedness. (Daren Baxter said in his evidence that Workers' Compensation can pierce the corporate veil.) A clearance letter was essential for securing contracts.

[117] As I mentioned early in these reasons, Darrell Spears was SCFS, Inc.'s first President from May 1, 2007 to June 19, 2007. (*Exhibit 2, page 116*) He resigned (*Exhibit 113, page 4*) and Joanne Spears became the President until April 2013. (The company is now owned by Darrell and Joanne Spears' daughter, Sabrina Sabic, who has followed Mr. Spears into the formwork business and is a licensed crane operator.)

[118] Joanne Spears had no history with Workers' Compensation which allowed SCFS, Inc. to obtain the crucial Workers' Comp clearance letter.

[119] Ms. Spears testified that Mr. Spears controlled SCFS, Inc. and Glenda Power did the accounting. Of her role, Ms. Spears says: "I was just a figure." She says she had very little to do with the business. She testified that Mr. Spears asked to have the company incorporated in her name and that her role was to open bank accounts and make deposits as needed, "whatever was asked" of her.

[120] Ms. Spears testified that Ms. Power received the bank statements for SCFS, Inc. and Mr. Spears would have made the banking decisions.

[121] Ms. Spears testified that ownership of SCFS, Inc. was transferred to Sabrina because she, Ms. Spears, did not want to "do it anymore because I don't understand it and it was too stressful. If someone called I didn't know what to say. I wanted Sabrina to take it over; she has more knowledge than I'll ever have."

[122] Ms. Spears was paid out of SCFS, Inc. every two weeks. They were regular payments like a regular salary. These payments stopped when she no longer owned the company.

[123] Mr. Spears never paid Joanne Spears the money from the sale of their matrimonial home. She either sold or transferred the crane to SCFS, Inc. It was Mr. Spears' evidence that part of the income that Ms. Spears received from SCFS, Inc. was related to her ownership of the Potain crane. Mr. Spears testified that "indirectly I expect she got an income from the fact that she owned that crane."

SCFS, Inc.'s Bank Accounts

[124] The evidence disclosed that SCFS, Inc. had two bank accounts, one opened in May 2007 at the Halifax Shopping Centre Branch of the Royal Bank of Canada and another opened on January 24, 2008 at the CIBC in Lower Sackville.

[125] The first bank statement for the RBC account went to Mr. Spears' address on Bedros Lane. (*Exhibit 10*) After that, the statements were sent to Glenda Power. The "business address" provided to the CIBC for SCFS, Inc. was also Ms. Power's address in Musquodoboit Harbour. (*Exhibit 45*)

[126] Mr. Spears testified that he did not recall opening SCFS, Inc.'s RBC account although it seems likely that he did as the first statement went to his residence and the account was opened while he was the sole Director of the company.

[127] It was Mr. Spears' evidence that he did not know whose idea it was to open the CIBC account and says he believes Ms. Power informed him there were two bank accounts. Mr. Spears testified that whatever was convenient for Ms. Spears and Ms. Power "was fine with me." When the CIBC account was opened, Ms. Spears was the sole Director of the company.

SCFS, Inc. and HST Remittances

[128] SCFS, Inc. did not immediately register for HST. A fax to Mr. Spears from Amir Arab of W.M. Fares dated June 27, 2007 requested a Workers' Compensation clearance letter and an HST number. (*Exhibit 42*) On this same date a request was made for a change to the W.M. Fares MU-9 contract from Spears Concrete to SCFS, Inc.

[129] On September 18, 2007, Ms. Power sent an urgent fax to CRA asking that SCFS, Inc. be registered for HST as of June 1, 2007 or its date of incorporation – April 24, 2007. She referenced SCFS, Inc.'s business number and noted: "This company should have been registered for HST upon incorporation..." She attached an invoice dated June 1, 2007 from SCFS, Inc. to W.M. Fares for the MU-9 project. (*Exhibit 11*) The invoice had the company's business number on it.

[130] By a "Registration Confirmation Notice" dated September 25, 2007 addressed to SCFS Inc. care of Ms. Power, CRA approved SCFS, Inc. for HST registration, effective April 24, 2007. (*Exhibit 12*)

[131] Having an HST registration did not lead to SCFS, Inc. filing HST returns. A Notice of (Re) Assessment dated January 14, 2008 was sent from CRA to SCFS, Inc. care of Ms. Power advising that as SCFS, Inc. had not responded to requests to

file HST returns “as required under the Excise Act”, CRA had estimated the amount of tax owed as \$157,919.53. (*Exhibit 13*)

[132] On January 22, 2008, Ms. Power faxed Brian Smith HST “Return for Registrants” for SCFS, Inc. for two reporting periods – April 24 to June 30, 2007 and July 1 to September 30, 2007. (*Exhibit 15*) The April to June Return showed HST collected and Input Tax Credits (ITC’s) applied with a balance due of \$4,265.69. The July to September Return showed HST collected and ITC’s applied with a balance due of \$13,002.72. Ms. Power calculated the due balances from the SCFS, Inc. General Ledger Reports on her Simply Accounting system. (*Exhibit 16*)

[133] Ms. Power prepared a further HST return for SCFS, Inc. dated February 20, 2008 and faxed it to Brian Smith at CRA on that date. (*Exhibit 14*) It was for the period October 1 to December 31, 2007. With Input Tax Credits claimed, primarily in relation to payments to Spears Concrete, SCFS Inc. sought a net refund of \$635.19.

SCFS, Inc.’s Role and SCF Services

[134] Mr. Spears acknowledged on cross-examination that the decision to have SCFS, Inc. own the equipment for the jobs and handle the contracts significantly predated the corporate structuring advised by his lawyer, Daren Baxter, in October 2007, that I will be discussing. Mr. Spears testified that SCFS, Inc.’s role was conceived “probably in January of that year, because Joanne already owned the Potain...” (The contract, Exhibit 36, giving Ms. Spears the Potain crane as collateral against the money she loaned Mr. Spears in undated.)

[135] Initially, SCFS, Inc. did not have any employees. It was Glenda Power’s evidence that in 2007 SCFS, Inc. subcontracted with Spears Concrete who did have the employees to do the formwork contracts. Ms. Power was aware of that because she was doing the accounting for SCFS, Inc. and they were paying Spears Concrete as a sub-contractor. Ms. Power testified this was not unusual; that she had more than one client who used different companies to look after different aspects of their business.

[136] When SCFS, Inc. was established it was Mr. Spears’ understanding that it would be assigned the contracts and would subcontract to SCF Services to fulfill the contractual obligations. SCFS, Inc. would have the contracts and Services would supply the labour. SCFS, Inc. would pay Services for using its labour to perform the contracts.

[137] But the subcontracting relationship between SCFS, Inc. and Services was short-lived. In early 2008, CRA sought to have SCFS, Inc. take the employees onto its payroll which caused Services to cease operations as it then had no labour force to perform the subcontracting.

[138] Mr. Spears testified that the transfer of the labour force to SCFS, Inc. created some “hostility” between Ms. Spears and himself. Ms. Spears was not happy about the transfer to the employees to her company. It was Mr. Spears’ evidence that Ms. Spears had not wanted any responsibility for payroll. She did not want CRA harassing her for any amounts that SCFS Inc couldn’t pay.

[139] The transfer of the employees to SCFS, Inc. worked well for CRA. Mr. Spears agrees that SCFS, Inc. pays its bills and does its payroll and has done so since it was required to take over Services’ employees.

Canada Revenue Agency’s Involvement with Darrell Spears

[140] Canada Revenue Agency was engaged with Mr. Spears throughout 2006 and 2007 and into 2008. Collections, auditors, trust examiners and investigators have all been involved.

Alex Grover – Collections Officer

[141] Alex Grover works for CRA as a collection officer, collecting monies that are owed to the Crown. Collections officers also make sure taxpayers comply with the tax laws by filing returns on time and paying remittances such as source deductions and HST and personal income tax.

[142] Mr. Grover testified that an account either gets paid or it is determined to be uncollectable and submitted for “segregation” which means the debt is written off. He explained that an uncollectable account means the taxpayer or registrant does not have the ability to address the debt. “They can’t pay it. They can’t obtain financing. They don’t have the assets...to pay off the debt and there’s no deemed trust. There’s no...non-arm’s length. There’s no director’s liability assessments that can be raised. There’s just nothing there.”

[143] Mr. Grover made the point that it is not CRA’s intention to put companies out of business.

[144] Mr. Grover testified with reference to his CRA diary (ACSES) entries. He was permitted to refer to these notes to refresh his memory. Crown and Defence

also agreed that the basis for his evidence as past recollection recorded had been made out and that he could read his notes on that basis in response to questions. Mr. Grover did acknowledge on cross-examination that these notes were not reviewed by Mr. Spears for accuracy.

[145] Spears Framing came to Mr. Grover's attention on July 7, 2006 as an HST account. A recent trust exam by Gerry Chisholm had raised an assessment in the amount of \$210,000 for the outstanding HST. Mr. Chisholm had collected six post-dated, monthly cheques from Framing of \$42,000 to cover the HST debt.

[146] The six post-dated cheques were enough to cover the HST arrears so Mr. Grover's role was to monitor the cheques to make sure they were going through and monitor the account to see that the current year's HST remittances were being paid.

[147] Mr. Grover noticed on Framing's payroll account that there was a balance of about \$7200 outstanding. A post-dated cheque for \$7000 have been obtained by the trust examiner so Mr. Grover simply monitored that account as well.

[148] Framing was the only company of Mr. Spears that Mr. Grover knew about. He did not know about Formwork or SCF Services. It was later in 2007 that CRA research determined that these two other companies had been incorporated.

[149] Mr. Grover testified that on July 26, 2006 he received a call from Glenda Power to advise that there weren't sufficient funds to cover the July cheque for \$42,000 but that it should be cleared by August 8th. The prospective payment was monitored but it did not get made on August 8th. On August 14th, Mr. Grover learned from Ms. Power that Mr. Spears had put a stop payment on the cheque. Mr. Grover knew the cheque was drawn on the account of Spears Framing Limited, Bank of Nova Scotia, Sheet Harbour and had the account number.

[150] On August 17, Mr. Grover spoke to Mr. Spears who advised that he would have Ms. Power complete the payroll remittances for June and July. Mr. Grover testified that Mr. Spears said he would come into the office the next day to cover the cheque on the HST account. Mr. Grover's diary indicates that a legal warning was given to Mr. Spears to maintain compliance. Mr. Grover explained that a legal warning may involve issuing requirements to pay or garnishees to third parties, such as a bank, and putting liens on property if there is any. Mr. Grover says he

told Mr. Spears that if he didn't remain compliant, requirements to pay could be issued to his accounts receivables.

[151] Mr. Grover spoke with Ms. Power on August 17 about the payroll remittances for June, July and August. She told him she would fax remittances for these months to Mr. Spears and Mr. Grover. The fax from Ms. Power for June and July was received by Mr. Grover on August 18. It contained the figures for the source deductions but no payment.

[152] Mr. Spears did not go into the CRA offices on August 18 with a payment. He called with a request to postpone until August 21.

[153] Mr. Spears did meet with Mr. Grover on August 21. He provided a cheque in the amount of \$42,000 for the HST payment that the July cheque had been supposed to cover, a \$50,000 cheque for the payroll deductions, and a cheque post-dated to September 5, 2006 for payroll deductions in the amount of \$26,000.

[154] Asked by Mr. Grover what jobs he had on the go and lined up, Mr. Spears advised he was doing a job for Paramount Properties on the old YMCA property on Barrington Street and had a job with Greater Homes coming up. I note that there is no old YMCA site on Barrington Street. Where Dexel's "W" Suites development went up on Barrington Street is the site of the old YWCA. Mr. Grover explained in his evidence later that Paramount is Dexel, Mr. Lawen's company.

[155] According to Mr. Grover's diary entry, Mr. Spears also mentioned a receivable with Pinnacle Condominium Construction Limited.

[156] Mr. Grover was pleased with the progress that had been achieved on Mr. Spears' accounts with CRA. He testified he was "happy"; Mr. Spears had covered the July cheque he had previously cancelled, he had given Mr. Grover a list of receivables, and brought his source deductions up to date. "Everything seemed fine."

[157] Mr. Grover continued to monitor the Spears' accounts and sent off a request for a payroll auditor to review Framing's books and records to make sure the reported source deductions were correct.

[158] On October 4, 2006 the post-dated cheque Mr. Spears had provided for payroll deductions in the amount of \$26,000 was returned by the Bank of Nova Scotia for insufficient funds. Mr. Grover was satisfied when the cheque was covered a couple of days later as a result of Mr. Chisholm's trust examination.

[159] But Framing was not keeping up with its payment obligations to CRA. Mr. Grover testified that by December 2006, the HST return for October had not been filed and the source deductions were falling behind. In late December Mr. Grover was phoning Ms. Power and Mr. Spears and leaving messages for them.

[160] When Mr. Grover spoke to Ms. Power she advised that she was working on the HST return for October. She said she required some bank statements "and there was a question in regard to loans before she could complete it."

[161] By late December 2006, Mr. Grover had a growing concern that Framing was not "keeping current" with respect to its HST and payroll source deductions. Both accounts were in arrears. In their telephone conversation of December 5, 2006, Ms. Power indicated she would speak to Mr. Spears about the matter.

[162] According to Mr. Grover's diary, Framing's HST arrears as of December 12, 2006 were \$120,710.63, including interest and penalty, for assessed returns, in other words, returns that had been filed and processed. No such returns had been filed and processed for Framing in the last quarter of 2006.

[163] Framing's arrears for payroll source deductions as of December 12, 2006 were not a concern for Mr. Grover. They amounted to only \$1500. Mr. Grover testified that this amount was only for interest and penalty and that "There would have been some periods that were not filed, not assessed." He was monitoring the account for the results of the trust exam.

[164] Mr. Grover made several attempts during December to contact Mr. Spears and finally spoke to him on December 21. Mr. Spears indicated that at that time of year, he would not be able to make the October HST payment and would have to wait until the new year when he "received some money from draws" to do so. As for the payroll deductions, Mr. Spears told Mr. Grover that if Ms. Power had a form for the remittance, he would make arrangements to pay it.

[165] Mr. Grover testified that on December 21 he indicated to Mr. Spears that for a payment arrangement to be in place, Framing would have to maintain current

year remittances and file its returns to date and pay them on time. He gave Mr. Spears another legal warning.

[166] Mr. Grover brought the file forward to January 16. By then there was still no return for HST and the current year payroll remittances weren't being made. The post-dated cheque of \$40,000 for December's HST remittance had been returned by the Bank. Mr. Grover decided to issue a requirement to pay to the Bank of Nova Scotia. He also issued a garnishee to Greater Homes which he thought was an accounts receivable for Framing.

[167] The payroll account was still in arrears for interest and penalties, now in the amount of \$4432.97 as Framing's October payment had been late.

[168] Mr. Grover's requirement to pay to the Bank of Nova Scotia had the effect of freezing Framing's account there. The Bank is required to remit to CRA from the account the amount being sought under the requirement to pay.

[169] Mr. Grover talked to Ms. Power on January 22, 2007. She said she would fax him copies of the payroll remittances for November, December and January. She also advised that she was working on the October HST return.

[170] Mr. Grover kept monitoring Framing's HST and payroll accounts. On January 25, 2007, Mr. Grover received a fax from Ms. Power with the HST return ending October 31, 2006. With the Input Tax Credits calculated, the HST payable was \$57,141.

[171] Mr. Grover's diary notes indicate that Mr. Spears called him on January 31 and advised that there would be approximately \$100,000 coming from the Bank of Nova Scotia as a result of the requirement to pay. The notes also record that Mr. Spears told Mr. Grover: he was "stiffed" on a couple of jobs; collection of accounts receivable had been slow, causing cashflow problems; and he had work lined up but needed to have the bank account free in order to operate. Mr. Spears supplied his address – Suite 114, Bedros Lane, Halifax with his postal code, and asked to have all CRA correspondence sent to Ms. Power.

[172] Mr. Spears came and met with Mr. Grover on February 1, 2007 and they discussed the accounts. Mr. Grover testified that Mr. Spears advised that the requirement to pay sent to the Bank of Nova Scotia would secure \$100,000 for CRA, leaving another \$100,000 owing for HST and payroll. A payment

arrangement of \$20,000 per month to pay off that balance was discussed provided that current year remittances were paid up to date. Mr. Spears told Mr. Grover that there were “holdback monies” he was expecting from a couple of sources and that these monies and work he had lined up would be “more than enough to pay the HST and payroll accounts.”

[173] Mr. Spears advised Mr. Grover that there was \$60,000 coming from a project he did for Ghosn on “the Barrington Street property.” He was also expecting to do a job at Greater Homes that might be worth \$1.5 million. Mr. Grover’s diary notes indicate that Mr. Spears also mentioned doing work for W.M. Fares which he said was worth \$1.3 million.

[174] Mr. Grover wanted Mr. Spears to provide an updated accounts receivable listing and to be made aware of new contracts. Mr. Spears also told Mr. Grover about some of his expenses - \$27,000 per month to Concrete Shoring for the rental of a Skydeck System and \$15,000 per month to Rapicon for equipment rental.

[175] Later in March, Mr. Grover checked on the balance in the Framing account at the Bank of Nova Scotia and it was \$83,000. (I believe the correct amount was \$84,000.)

[176] Mr. Grover called Mr. Spears on February 13 and learned that he would be out of town until February 19. Mr. Spears called back on February 20. Mr. Spears told Mr. Grover that he was putting extra money into the bank so there should be \$90,000 in the bank account. He told Mr. Grover that he had a contract with Greater Homes. He said he would call Ms. Power for an update on the payroll figures on Monday, February 26, and advise Mr. Grover.

[177] Mr. Grover lifted the requirement to pay from the Bank and provided Mr. Spears with a requirement to pay letter to be given to Greater Homes.

[178] When Mr. Spears met again with Mr. Grover he advised that he was starting a job at the end of March with Campbell Comeau Engineering Limited at Gladstone Street. He also told Mr. Grover that he had jobs with Greater Homes, the “Waterton Project” in Halifax in mid-April, and the W.M. Fares Mount Royal Project (this refers to the Fares MU-9 project) mid-April to May. He said he had \$150,000 pending from Ghosn and \$100,000 for Louis Lawen. Mr. Grover’s diary

notes indicate that Mr. Spears expected to have the hold-back monies by mid-April, and intended to pay off the accounts with these funds.

[179] It was Mr. Grover's evidence that he believed Mr. Spears was trying to address the debts and was being upfront about the jobs he said he had lined up. Mr. Grover testified: "...there's some issues in regard to compliance issues that were ongoing, but he was trying to address them and...I was trying to work with him [in] regard to making sure he would be able to have a bank account to operate by and...if anything would happen down the road where the situation got worse, then we had collectability from the accounts receivable." He brought the file forward to mid-April.

[180] Mr. Grover's diary showed that the results from the trust exam by Gerry Chisholm were entered on April 19, 2007. It increased the outstanding debt on both accounts. Mr. Grover called and left messages for Ms. Power and Mr. Spears. It was Mr. Grover's intention to talk to Mr. Spears about what was going to be done to pay down the new balances as they exceeded the amounts previously discussed. Mr. Grover also wanted to know what was going to happen with the holdback monies.

[181] Mr. Grover spoke to Ms. Power on April 26. She did not have the bank statements for Framing and could not do the payroll remittances.

[182] At this point, Mr. Grover's concern was growing. He was "getting concerned that there may be a danger of loss on the account." He spoke with Mr. Spears on May 9. According to Mr. Grover's diary notes, Mr. Spears indicated he was going to meet with Louie Lawen about the holdback monies. He told Mr. Grover that there was a lien on the Ghosn project. To Mr. Grover it looked as though there were some issues around whether Mr. Spears was going to be receiving the holdback monies after all.

[183] A meeting with Mr. Spears set up by Mr. Grover didn't occur. Mr. Grover had told Mr. Spears the balances on the accounts were "going in the wrong direction." When Mr. Spears didn't come in, Mr. Grover issued garnishees to the Bank and the accounts receivables he had been told about by Mr. Spears – Campbell, Dexel, Fares, and Greater Homes.

[184] Mr. Grover spoke with Ms. Power on June 6. She advised that the last payroll she had processed for Framing was in January. She said she would advise Mr. Spears to give Mr. Grover a call.

[185] Mr. Grover contacted the companies he had sent the garnishees to. Greater Homes advised they had not hired Mr. Spears for a job. Mr. Grover also contacted the Bank of Nova Scotia and as a result did not release the garnishment on the account.

[186] By accessing the Registry of Joint Stocks online on July 31, 2007, Mr. Grover learned that Mr. Spears had incorporated Spears Concrete Formworks Limited on December 8, 2006. He also learned that SCFS, Inc. had been incorporated on April 24, 2007 and that Ms. Spears was the Director.

[187] CRA had also opened an HST account for Formworks, confirming this in a notice dated February 13, 2007 that was sent to Ms. Power. (*Exhibit 5*)

[188] On cross-examination Mr. Grover acknowledged that through CRA's database he could obtain a company's business number, HST and payroll numbers. He agreed that CRA have a number of avenues open to it for pursuing delinquent companies that have failed to remit the appropriate amount in a timely fashion. CRA can go after a named director on the basis of director's liability.

[189] Mr. Grover agreed that Mr. Spears may have told him that there had been no Framing employees since mid-January 2007. That is indicated in the ACSES diary that Mr. Grover had access to. The entry for May 1, 2007 states: "Examiner spoke to Alex and he was already aware that there have been no employees since mid-January." On redirect Mr. Grover said there was no indication in the diary as to when Mr. Spears told him this. He said that it was Glenda Power who told him there were no Framing employees since January.

[190] Mr. Grover acknowledged there were other avenues available to him in addition to what he did, speaking to Mr. Spears and Ms. Power, monitoring the accounts and issuing the requirement to pay. Field work was an option and could have involved finding out if Framing's employees were working, visiting the developers, and talking to crane operators to see if Framing was renting a crane. Mr. Grover testified he didn't feel field work was required at the time. Mr. Grover also did not inquire with the companies Mr. Spears says he rented equipment from

– Concrete Shoring and Rapicon – to see if Framing was making its payments and where the rented equipment was.

[191] Mr. Grover acknowledged that he always had phone numbers for Mr. Spears and Ms. Power. He also agreed that a large amount of money was paid to CRA on February 20, 2007 and that it came from the Bank of Nova Scotia in Musquodoboit Harbour.

[192] Mr. Grover was shown Exhibit 30 and agreed that CRA was aware that Formwork had received a business number and that Darrell Spears was the President. In the application for a business number Mr. Spears had provided his social insurance number and his work telephone number. Mr. Grover acknowledged that this information should have been available in the CRA database.

[193] Ms. Power testified that she had instructions from Mr. Spears to discuss the Formwork payroll with CRA as of January 23, 2007.

Gerry Chisholm – Trust Examiner

[194] As I have noted, Spears Framing had been on the CRA radar in 2006 through trust examinations. Gerry Chisholm, a CRA trust account payroll examiner, was assigned to the Framing file three times because current year remittances were not being made. Mr. Chisholm testified that he raised an assessment on the missed remittances so that Collections could collect the arrears and prevent the balance on the account from ballooning. It was Mr. Chisholm's evidence that the arrears were being paid but the current remittances were not being paid.

[195] Mr. Chisholm's April 10, 2007 trust examination was a referral from Alex Grover in Collections. There were remittances missing for the latter part of 2006 and early January 2007. The overdue amount in Framing's source deductions account at the start of Mr. Chisholm's examination was \$4525. Mr. Chisholm described this as a fairly insignificant arrears balance and said it indicated that Mr. Spears was keeping on top of the account. He agreed there had been large payments in 2006. The missing deductions from the latter part of 2006 and early 2007 brought the arrears up to \$40,000.

[196] Mr. Chisholm's trust examination included comments for the Collections officer, in this case, Alex Grover. It noted that "The last pay issued was for Jan 8/07 for all the bi-weekly employees and Jan 15/07 for the weekly employee." These were indicated to have been the last Framing pay cheques to have gone through the Bank. (*Exhibit 46, page 2*)

[197] In Mr. Chisholm's trust examination he noted that Mr. Spears had spoken to Mr. Grover and Mr. Grover was "already aware that there have been no EE's [employees] since mid January."

[198] Mr. Chisholm accessed Framing's financial documentation – Simply Accounting Payroll Journals and bank statements with cancelled cheques – at Glenda Power's office. He testified that Ms. Power's records were accurate. There was no indication of amounts paid outside the payroll to individuals. All employees were accounted for and the deductions were accurate. Mr. Chisholm raised an assessment for collection totaling \$65,197.40 including penalty and interest. (*Exhibit 46, page 49*)

[199] Mr. Chisholm also did an HST examination as well. (*Exhibit 46, page 3*) He estimated the amount of outstanding HST returns as \$152,275. (*Exhibit 46, page 47*)

[200] At the time of the April 2007 trust examination, it was not Mr. Chisholm's understanding that Framing had ceased operation. Had this been the case, he would have been responsible for preparing the T-4's for the employees but he did not do so. There was no indication of any employees being laid off. A lay off would have generated an ROE (Record of Employment) and there were no ROE's in the files.

[201] When the file was referred to Mr. Chisholm again by Collections in the fall of 2007, he was told by Glenda Power that Framing was a dormant company and there was a new company. As a consequence of this information, Mr. Chisholm prepared T-4's for Framing for 2007.

[202] Mr. Chisholm asked Ms. Power for the records of the new company but she was unable to help him. Their schedules did not coordinate and Mr. Chisholm advised Ms. Power that another trust examination officer would be contacting her to review Formwork's records. Mr. Chisholm testified that he then learned the

Integrated Underground Economy Unit would be dealing with the file so he backed away from it.

[203] Mr. Chisholm confirmed on cross-examination that Ms. Power had kept clear, accurate records, was respectful, cooperative and accessible. She was helpful and answered all his questions. In the context of the HST examination Mr. Chisholm said he looked at the documentation and was satisfied that the Input Tax Credits Ms. Power was claiming were accurate. Input Tax Credits offset all or part of the HST collected from a business' customers.

Brian Smith – Collections Officer and Integrated Underground Economy Team Member

[204] It was Alex Grover's referral in June 2007 of his Framing file to Brian Smith that lead to the involvement of the Integrated Underground Economy Team (IUET). Brian Smith was a Collections Officer with CRA and a member of the IUET.

[205] The file became part of Mr. Smith's inventory on October 11, 2007. He summarized the file and put together a plan of action. He looked for collections sources – bank accounts, any assets that could be seized, any non-arms length transactions, contracts – whether there were ongoing jobs, any new contracts being signed that could be garnisheed. He and the IUET knew there were two other companies – Spears Concrete Formwork and SCFS, Inc.

[206] Mr. Smith was intending to seize assets to pay Framing's payroll debt to CRA but he had to be satisfied the assets were worth seizing. Although Mr. Smith was not sure if Framing was active, he knew that employees were being paid through Formwork and not Framing. Knowing that Formwork had made no payroll or HST remittances, it was decided there should be a payroll audit to determine what remittances should have been paid. This was assigned to Rachel Henry.

[207] Mr. Smith attended Ms. Henry's December 5, 2007 payroll audit because he wanted to look at the bank records for Formwork. He was interested in finding sources for collection. He expected that Rachel Henry's payroll examination would raise a substantial indebtedness to CRA for Formwork which it did. Mr. Smith attended Ms. Henry's payroll examination at Glenda Power's office.

[208] Ms. Henry had a copy of Mr. Chisholm's trust examination for Framing. (*Exhibit 46*) She testified there was no filing history for Formwork and no payroll or HST remittances. No HST returns had been filed which was a major compliance issue.

[209] Ms. Power advised Ms. Henry at the trust examination that the employees had stopped working for Framing and then started to work for Formwork. This left Ms. Henry with nothing to do in relation to the Framing file but she knew there were approximately 10 months of outstanding payroll remittances.

[210] Glenda Power did not have bank records and cancelled cheques for Formwork but she did have the payroll ledger. Ms. Henry examined this to determine the source deductions for Formwork. She found Ms. Power's payroll records, including the source deductions, to be up-to-date. She assessed \$346,547 as unremitted payroll deductions. Ms. Power advised Ms. Henry that she prepared the payroll based on information from Mr. Spears. She did a complete payroll service except she did not do the remittances to the Receiver General. She told Ms. Henry she had given the remittance figures to Mr. Spears.

[211] Ms. Power advised Ms. Henry that she had not prepared any HST returns for Formwork. She had figures which Ms. Henry was unable to verify without any bank statements. Ms. Henry does not recall being shown the invoices, later entered as Exhibit 85, which she says would have been "directly relevant" to what she was examining. Ms. Henry says she would have made a note had she seen the invoices and that especially as they were in round figures and note "HST in" they would have caught her attention. Ms. Henry acknowledged on cross-examination that there is nothing wrong with the way the invoices were prepared, although she did say on re-examination that it was unusual. It would have been necessary for the HST to have been backed out and remitted.

[212] Ms. Henry was also able to examine bank statements and cancelled cheques for SCFS, Inc. There was no payroll for that corporation. An HST examination was not possible because the returns weren't ready. The company had no HST filing history although Ms. Henry determined that it should have been remitting HST.

[213] As Mr. Chisholm had found, Ms. Henry's experience was that Ms. Power was very cooperative. Ms. Henry testified that Ms. Power certainly appeared to be competent.

[214] Mr. Smith also examined the cancelled cheques for SCFS, Inc. and noted that a number of cheques from SCFS, Inc. to Formwork were converted to bank drafts at the Royal Bank of Canada where SCFS, Inc. had an account. The conversion of the cheques to bank drafts was the equivalent of converting the cheques to cash.

[215] By issuing a requirement to the RBC with the numbers for the bank drafts, Mr. Smith learned that Formwork had a Bank of Montreal account he was unaware of. He immediately issued a garnishee for the BMO account. (*Exhibit 53*) This froze the account.

[216] Mr. Smith recalls only being able to collect a fraction of the trust examiner's assessment from BMO. The requirement to pay was for \$397,333. Only \$3474 was collected from the bank.

[217] Mr. Smith had tried to contact Mr. Spears about the file but to no avail. He wanted to seize cranes belonging to Formwork but this did not happen. The seizure would have been extremely costly and one of the cranes had been sold and was out of CRA's reach.

[218] In the course of looking into Formwork, Mr. Smith obtained a copy of a contract between a numbered company, which Mr. Smith believes was a W.M. Fares company, and SCFS, Inc. indicating that SCFS, Inc. was doing a job in excess of a million dollars plus HST. The job had concluded and no HST was paid to CRA.

[219] In light of this, Mr. Smith raised a notional assessment against SCFS, Inc. under section 299 of the ITA. The notional assessment was prepared on or about January 11, 2008 in the amount of \$157,988.57. This was later reduced when Input Tax Credits calculated by Glenda Power were factored in. Mr. Smith confirmed on cross-examination that the notional assessment was reduced to approximately \$50,000, a significant difference.

[220] On January 16, 2008, Mr. Smith went with Laura Dauphinee, a CRA auditor, to Mr. Spears' residence. Ms. Dauphinee was looking to serve Mr. Spears with a requirement for books and records.

[221] Mr. Smith wanted to know what Mr. Spears' intentions were with respect to Spears Framing. He testified that Mr. Spears said his intention was to bankrupt the company and himself. He said he had another company – SCF Services that he was going to use for payroll and to “clean up his act.” Ms. Dauphinee recalled the discussion: Mr. Spears said he would like to be on the “straight and narrow” and that's why he formed SCF Services. He was unable to pay his debts and was considering bankruptcy.

[222] Mr. Smith testified that Mr. Spears was asking for some time to get his affairs in order. Mr. Smith did not have confidence that was going to happen, given the history of CRA's dealing with Mr. Spears.

[223] Mr. Smith had not known about SCF Services previously. There was a bank draft with SCF Services as the payee (*Exhibit 53, page 9*) but Mr. Smith does not recall noticing that when he had been looking through the bank drafts.

[224] After the January 16 meeting with Mr. Spears, Mr. Smith became aware of a new contract being undertaken by SCFS, Inc., with Bhalla Investments, he issued a requirement to pay to Bhalla. (*Exhibit 54*)

[225] A decision was made not to jeopardize the development or the employees on the Bhalla contract so each payroll was monitored. Mr. Smith allowed a certain amount of money to be released to SCFS, Inc. for payment of the employees. (*Exhibit 55* is a February 19, 2008 letter from Mr. Smith to Bhalla permitting them to release \$26,000 to SCFS, Inc.) The rest of the Bhalla payment on the SCFS, Inc. contract went to CRA. Bhalla would contact Mr. Smith each time a payment was to be paid to SCFS, Inc. Glenda Power prepared payroll calculations and SCFS, Inc. was permitted a certain amount to pay the employees. It appears that Ms. Power's payroll calculations went to Mr. Spears' lawyer, Daren Baxter, who then faxed them to Mr. Smith. (*Exhibit 56, February 19, 2008*) Ms. Power agreed to ensure that each month's remittances were paid.

[226] On cross-examination Mr. Smith acknowledged that he had gone to W.M. Fares' office and learned there were monies paid by Fares into court. Mr. Smith

does not now recall the details nor the fact that CRA made an application for the money to be paid from Court to CRA to settle a debt, but he did agree that would be the usual practice.

[227] Mr. Smith testified that the Spears' files "didn't feel right" to him and he pushed for it to be referred to Investigations. It had seemed to him that anytime he got "close to something as far as trying to resolve these files, then all of a sudden another company would appear, or something would be put out of my reach...we had the debt established for Spears Concrete Formworks, a substantial debt, that we had absolutely no avenues to collect from."

[228] Although Mr. Smith testified that a CRA file "never goes away until we write it off", it appears that a CRA file is only ever "set aside." Mr. Smith said a file "could be reinstated in a minute if we found something that we could collect on, if we found an asset that we could seize, or if we found some kind of activity in that company after we wrote that debt off, we could reinstate that debt. It's never written off. It's basically set aside."

[229] Mr. Smith did not refer Formwork's CRA debt to be written off. He testified that he does not like to give up "that easily" and says "I always felt that maybe there's something...there's got to be a way for me to get...this resolved. There has to be..." As for Framing, Mr. Smith felt its CRA debt didn't qualify to be written off, "There was still hope of potential there that we were going to collect some money out of that."

[230] It was Mr. Smith's evidence that SCFS, Inc. became compliant "with a little help." That "help" was Glenda Power providing information every month for the payroll so Bhalla could remit to CRA for the SCFS, Inc. debt.

[231] During cross-examination Mr. Smith was asked about a letter written under the signature of the President of the Carpenters' Union in which it is noted that Formwork's outstanding debts as of April 30, 2008 included a CRA debt of \$636,194. (*Exhibit 58*) Mr. Smith testified that the Union had done their own searches into the judgments registered against Formwork. Although he did not recall if CRA had registered a judgment against Formwork in Federal Court he said he would not be surprised if that had happened and that would be information accessible to the Carpenters' Union. The letter was provided by the Carpenters'

Union to Mr. Smith and was entered into evidence only for the purpose of showing this.

CRA Audits by Laura Dauphinee and Chris Diliberatore

[232] Laura Dauphinee did two HST audits of Spears Framing, including one in November 2007. She understood that Collections was having difficulty collecting HST and involved her to trace Framing's assets. She was briefed by the IUET leader and Brian Smith and tasked to look at Framing's assets and to make sure the HST returns were accurate. The information she had on the HST returns came from the HST filings on the CRA system. There were six outstanding returns for Framing when Ms. Dauphinee got involved.

[233] The scope of the Framing audit was July 2004 to the end of January 2007. Ms. Dauphinee was directed not to complete the November audit. No representations were obtained from Mr. Spears as a result.

[234] Ms. Power told Ms. Dauphinee that entries on September 1 and 8, 2006 in the amounts of \$127,734 and \$64,700 respectively were loans to Framing from Darrell Spears. Ms. Dauphinee there did not treat these amounts as income. A loan on August 30, 2006 in the amount of \$60,000 from "Roma" was treated by Ms. Dauphinee as a third party loan and not income. She also did not treat a loan on May 17, 2007 of \$129,159 from Joanne Spears as income. (*Exhibit 62*) That money, primarily from Ms. Spears' mortgaging her Enfield home, was used to pay out "a business line of credit", according to a letter from Daren Baxter to Ms. Power dated April 2, 2008. (*Exhibit 65*)

[235] In the course of her audit, Ms. Dauphinee received one page hand-written documents, signed by Darrell Spears, relating to two cranes. She believes she obtained these documents from Ms. Power. (This is likely as the documents transferring a crane to Joanne Spears, was, according to Ms. Spears', given by her to Ms. Power for safe-keeping.) One document was for the sale of the Kroll Tower Crane to SCFS, Inc. for \$40,000. The other document was the transfer to Joanne Spears of the Potain crane for collateral against the \$80,000 she had loaned Mr. Spears. (*Exhibit 63*) These documents were in support of Framing no longer owning the two cranes. Ms. Dauphinee does not recall being supplied with or requesting any supporting documentation.

[236] The two cranes had been owned by Framing, the Potain crane having been acquired in 2005 and the Kroll crane in 2002. (*Exhibit 66*)

[237] Ms. Dauphinee followed up on the jobs that had been identified as Framing jobs and confirmed them. She found no unreported revenue issues.

[238] Ms. Dauphinee acknowledged on cross-examination that there did not appear to be any unreported revenue issues on the Framing file. She agreed that during the period of the audit, the revenue being received by Framing was being reported. She also agreed that the companies that had done business with Framing – Dixel, Russell Lake Developments, and W.M. Fares Group, were all building fairly substantial real estate projects, and kept very good business records that she was able to access. She was able to trace the invoices from Framing and the cheques paid on those invoices. Both the development companies and Framing were registered for HST. This was not a “cash” economy situation. It was Ms. Dauphinee’s experience that Ms. Power was helpful, cooperative and always willing to get the documentation Ms. Dauphinee requested.

[239] Ms. Dauphinee was able to determine from information provided by Ms. Power that deposits were made to Framing’s bank account after the company had been ostensibly wound down at the end of January 2007. (*Exhibit 82, page 2*)

[240] Ms. Dauphinee testified that on the Spears Framing audit, Ms. Power did not have all the books and records for the taxpayer so she had to serve the requirement on Mr. Spears in January 2008. Ms. Dauphinee said she believes they got most of the documentation after the requirement was served.

[241] Ms. Dauphinee did not make any significant adjustments on the SCFS, Inc. HST file. She denied some Input Tax Credits in the amount of \$11,722.87 “due to lack of supporting documentation or items which are not expenditures of this corporation.” (*Exhibit 83*) An HST adjustment was made as the wrong rate had been used. She testified that these were not significant adjustments, describing them as “typical adjustments” seen on a file.

[242] Ms. Dauphinee didn’t see from her audit that a referral to Investigations/Enforcement was required but her Team Leader and Brian Smith

wanted the referral. She testified that it was correct that Brian Smith had a very strong desire for the file to be referred to Enforcement.

[243] In Late September/early October, 2008 Chris Diliberatore, a trust examiner for CRA, met with Glenda Power to do a Formwork payroll trust examination for unremitted payroll source deductions he had been tasked with. Mr. Diliberatore determined from his review that from the latter part of 2007 through to February 2008, payroll was being paid by SCF Services. When he discussed this with Ms. Power, she indicated that the monies paid by Services were being treated as a loan from Services to Formwork. Mr. Diliberatore accepted that representation and testified that such an arrangement was not uncommon and he had no reason to doubt Ms. Power's explanation. In light of Ms. Power's explanation, Mr. Diliberatore treated the deemed employer as Formwork.

[244] Mr. Diliberatore testified that a payroll account was opened for Services on January 8, 2008. No payroll remittances were ever made by Services on that account. The Defence position is that Services was not responsible for payroll remittances: this was Formwork's responsibility. (*Exhibit 89*)

Jeffery Klassen – CRA Investigator

[245] Jeffery Klassen is an investigator with CRA. He received the Spears' file from Collections. He believed there was fraud. He felt at the preliminary stage there was enough there that CRA could start a criminal investigation: the timing of events, what Mr. Spears was telling CRA officers, garnishees, and the movement from one company to another company. It appeared to Mr. Klassen to be a scheme that involved the evading of payment of trust funds.

[246] Mr. Klassen testified that in typical enforcement cases, there would be an under-reporting of revenue or an over-stating of expenses. He viewed this as a case of sheltering of assets in one company and the non-paying of trust funds in companies being utilized by the same taxpayer.

Darrell Spears' Evidence about the Relationship with CRA

[247] Mr. Spears asserts that how he conducted himself with CRA is clear evidence that he was not engaged in a scheme to defraud the government or evade the payment of source deductions or HST.

[248] He notes that CRA always knew how to contact him and were also in regular contact with Glenda Power, the accountant for his businesses. Mr. Spears believes that Ms. Power always spoke with CRA. He never objected to her talking to CRA on his behalf.

[249] Mr. Spears recalls the meeting with Brian Smith and Laura Dauphinee on January 16, 2008. It is his recollection that Brian Smith did almost all the talking. He made it clear he knew that Mr. Spears was in financial trouble. Mr. Spears says Mr. Smith asked what he thought could be done. Mr. Spears testified that he told Mr. Smith that if he had “six months grace”, he could turn the business around and make it profitable. Mr. Spears says he was “fairly confident” he would be doing one of the two jobs he was pricing and could retire or reduce the debt. Mr. Spears knew the debt was an issue he had to deal with and that as a Director he was personally liable.

[250] Mr. Spears says he recall Mr. Smith’s response: “I think you’d have to win the lottery to reduce this debt”, referring to the outstanding amounts owed by Framing and Formwork. Mr. Spears testified that Mr. Smith said he knew Mr. Spears had no equity anywhere, that he had “put everything into the business. I guessed they recognized they could not get blood from a stone.”

[251] It was Mr. Spears’ evidence that the payroll arrangements on the Bhalla project were short-lived. He says he was told by Brian Smith that “the people upstairs” no longer like this arrangement and you have to move the employees to SCFS Inc. Mr. Spears says he got a call from Glenda Power that Mr. Smith wanted the employees moved. Mr. Spears advised Joanne Spears knowing she would be unhappy with this development. Mr. Spears says the transfer of the employees did not overly concern him because he thought CRA was working with him.

[252] Mr. Spears testified that he told Ms. Spears that Mr. Smith was working with him to “move ahead.” At the time, it was Mr. Spears’ perception that Mr. Smith was being helpful. He says he now has a different view.

[253] Mr. Spears summed up his reaction to the January 2008 meeting with Mr. Smith and Ms. Dauphinee in these terms: “I walked away with a very enlightened...perspective. It was a very good learning experience...we got to start changing things around...Up till that time I sort of just sort of ran blind, that, oh, I think I can, I think I can. And at that time I sat back and evaluated, okay, I need to do things different...”

[254] It was Mr. Spears' evidence that in January 2008 his financial situation was so strained Bhalla had to buy the supplies needed for the formwork and deduct the expense from the draws being paid under the contract. Mr. Spears explained that he was in default on rental payments for a crane being used on the Bhalla project. This led to a lawsuit by Comansa against Formwork who rented the crane and SCFS, Inc. and Bhalla who were using it. (*Exhibit 111, Tab 21*)

[255] Mr. Spears testified that he has not been able to bid on another Bhalla job because of the problems created by CRA.

[256] Mr. Spears testified he moved the employees to SCFS, Inc. as requested by Mr. Smith. He says he felt this would be as beneficial to get on track as anything would be and says, "I was working with CRA."

[257] It was Mr. Spears' evidence that he viewed the situation with CRA as stabilized: the employees were getting paid. "We were working. CRA seemed happy with the arrangement so I was content with that." He says his perception of CRA was that they would work with you to bring down the debt. Mr. Spears testified that in 2007, "I wasn't on my feet to make any proposals to CRA" to resolve his indebtedness.

[258] Mr. Spears testified that Ms. Spears asked him six or eight months later if he had heard anything from CRA about the money he owed them. Mr. Spears says he told her he had not heard "a peep" and said he "assumed when there was something there [money] then they'll come for it."

[259] Mr. Spears says he presumed, when CRA didn't contact him after the meeting with Brian Smith, that they walked away because it wasn't a collectible debt. He testified that CRA "had everyone looking at my books etc." He says he thought CRA's approach was, "We'll monitor him and see how this company does." Mr. Spears says he assumed CRA would "absorb the debt and just let the company move forward."

[260] It is Mr. Spears' view that if Brian Smith would have worked with Formwork as opposed to closing it down, perhaps not in the timeframe that CRA would have liked, "but I think it would have generated money to pay the bill." He says it is "safe to assume" that Formwork would have become more successful and generated extra money the way SCFS, Inc. did. It was the same management, that is, Mr. Spears who directed the labour portion of SCFS, Inc., and the same employees. It was his evidence that "if Brian Smith hadn't moved those employees, the new company could have paid those debts."

[261] Mr. Spears testified that up until the point with the IUET got involved, he was willing to work with CRA. He says he now believes, as a result of this trial, that CRA was “looking for an example to set...I was their test case because I was in trouble.” He is of the view that CRA’s intention was “never to make it work.”

[262] Mr. Spears was emphatic that he had been honest and upfront with Alex Grover in relation to Framing’s CRA debt. He testified that “to the best of my recollection I was always honest with Alex Grover.” He says, “I had constant communication with CRA to try and make payments. The intention was always to make it work.”

[263] Mr. Spears says he remembers going to see Alex Grover in February 2007. It is his evidence that he told Mr. Grover he was “pricing” a number of jobs. He says he never said he had contracts he didn’t have. He did not tell Mr. Grover what company he was pricing those jobs under.

[264] And although this is different from what Mr. Grover testified to based on his diary entries, as Mr. Bright elicited from Mr. Grover on cross-examination, Mr. Spears never saw the diary entries and never confirmed their accuracy.

[265] Mr. Spears testified that he presumed that CRA would know he was operating as Formwork. He had a business number and says that as far as he knew he had registered for HST. Mr. Spears says Formwork was disclosed from the beginning when Ms. Power filed for a business number.

[266] Mr. Spears testified that he assumed CRA was aware of Formwork and that Mr. Grover had “access to all the information about Darrell Spears. Anything they needed to know was available at the punch of a key. I believe CRA can audit my books and records anytime they want and they have a right to those records.”

[267] It was Mr. Spears’ evidence that he did not keep Mr. Grover in the dark. He says he met with him whenever either of them thought it necessary. He says he met with Mr. Grover on May 14, 2007 to discuss Framing. He knew that Formwork had a large, growing debt. He says he thought the May 14, 2007 meeting with Alex Grover involved the old debt of Framing and he did not discuss the growing debt of Formwork.

[268] I note Mr. Grover’s evidence that Mr. Spears did not attend for the May 14 meeting. At that point Mr. Grover started issuing the garnishment orders. Mr. Spears had spoken with Mr. Grover on the telephone on May 9.

[269] Mr. Spears testified that he was acting in good faith with Alex Grover. "...I owed the debt. I considered the company's debt to be my debt, and that's what I was negotiating, not the company, not the employees, me personally, we're going to make payment on the debts."

The October 30, 2007 New Corporate Structure

[270] Daren Baxter is a lawyer at McInnes Cooper whose practice focuses on income taxation and tax effective structures. He advises on structuring commercial transactions, structuring corporations and estate planning with a focus on tax efficiency. In 2007/2008 he was acting for Darrell and Joanne Spears who waived solicitor-client privilege so he could testify for the Defence at trial. Mr. Baxter has the professional designation of T.E.P., trust and estate practitioner. He has undertaken a considerable amount of education in tax law, tax planning and corporate management.

[271] In 2007, Mr. Baxter designed for Darrell and Joanne Spears a "go-forward corporate structure to operate a successful and profitable business." The diagrammatic representation of the structure, dated October 30, 2007, is found attached to Exhibit 61, the Referral to Enforcement prepared by Laura Dauphinee.

[272] Mr. Baxter was aware that Darrell and Joanne Spears were separated. He testified that when he was acting for them he formed the impression that they had a common interest and got along very well. He says he recalls thinking that "they seemed to have a pretty good relationship for ex-spouses."

[273] The go-forward corporate structure identified SCFS, Inc., a corporation already in existence and created a new family trust – Spears Family Trust - with a number of beneficiaries. A new company was incorporated, SCF Investments, Inc. The structure also included SCF Services, Inc. a company owned by Mr. Spears. SCFS Services had been incorporated on August 9, 2007 by Darrell Spears. (*Exhibit 100*)

[274] I do not intend to describe the details of the corporate structure explained by Mr. Baxter as it unnecessary to do so. Indicating that he was aware there were issues with builders' liens, and unpaid holdbacks, Mr. Baxter testified about the purpose of the new structure as follows:

They were looking for a clean structure that was going to be efficient on a go-forward basis. This structure would be something that's designed for -- where we're expecting to have

profitable operation without having surplus profits beyond, you know, covering the operations. And, in fact, it was contemplated that the surplus profits could be invested through SCF Investments Inc.

[275] It was Mr. Baxter's evidence that both SCFS, Inc. and SCF Services were expected to be profitable and the "net resulting profit of both those companies would be available for distribution to SCF Investments, Inc., and then it would take those surplus profits and either invest them in the market or reinvest in one of the businesses or another business..."

[276] Mr. Baxter explained that SCF Investments was incorporated to house "surplus after-tax profits" for "future investments or even for retirement savings for Darrell and Joanne..."

[277] Mr. Baxter was aware there were issues with Mr. Spears' previous companies not being able to pay CRA. He testified, "...I believe that there were concerns with a whole mess of things with the previous companies not being paid, not being able to make certain payments. I believe tax may have been in there..."

[278] Mr. Baxter's file notes (*Exhibit 108*) indicate "Tax debt, payroll, HST." Asked about these notations, Mr. Baxter testified that he was "probably informed that there was a tax obligation out of Spears Framing Limited, also the same for Spears Concrete Work, Inc. (sic), for certainly payroll and HST." He was not sure whether there was income tax as well but says he "might have thought that that was there too. So I was cognizant of the fact that those obligations were there."

[279] Mr. Baxter recalled there "was about \$300,000" that was invested personally into the companies by Mr. and Ms. Spears. He recalled being told that a sizeable matrimonial asset was sold and RRSP's were cashed with the money going into the business.

[280] Mr. Baxter knew that assets moved from the old companies to new ones "would be traceable...CRA would have a number of legislative provisions to do that, any general creditor would have a number of creditor protection laws that would enable them to do that." Mr. Baxter testified he was "familiar that there was something there, but that's not what I was dealing with. What I was dealing with was the fresh go-forward structure."

[281] Asked about unremitted HST and source deductions, Mr. Baxter noted that no assets were being transferred into the new structure and said: “Certainly this new structure couldn’t be used to...defeat any of those existing liabilities.”

[282] It was Mr. Baxter’s evidence that CRA can pursue the transferee who received an asset at less than fair market value to the extent of the difference. And he noted that directors have personal liability for unremitted HST and source deductions, and notwithstanding the new corporate structure, “that liability would continue.” He testified that it was very difficult for a director to show due diligence, a defence to personal liability, in a smaller business operation like Mr. Spears’.

[283] The new corporate structure was for new ongoing business – new contracts, new projects undertaken by SCFS, Inc. and subcontracted out by it to one of the other corporations. Mr. Baxter explained the structure “did not contemplate assets being transferred from an existing business.”

[284] Mr. Baxter was aware that Joanne Spears owned or took security on the Potain crane and could permit it to be used by SCFS Inc. for new contracts. Mr. Baxter noted that SCFS, Inc. could in turn, allow Services to use the crane for work subcontracted to it. It was Mr. Baxter’s understanding from Mr. Spears that the crane was important to Ms. Spears, that she had put money into the business “and it was important not to lose the crane” because of unforeseen operational liabilities incurred on the labour side of the business, such as a workplace accident or an environmental issue.

[285] Mr. Baxter testified on cross-examination that it is “quite common practice to try and keep the equipment separately. We certainly do that with the real estate and we often do that with expensive equipment. So that wouldn’t be uncommon here...You generally want to keep...any of the expensive assets separate from where the liabilities might arise.” He said about the crane, “...we certainly wouldn’t want the crane where the labour pool was, so I would have advised on that.”

[286] Mr. Baxter explained the corporate structure with its several companies as common for “high-risk operations.” He testified:

...what we try to do is, where we have high risk operations, we try to carve those off separate from – you know, from other I’ll say assets that are deployed in the business. Quite often equipment is kept in a separate company. Very common, if we

have real estate that's owned in a business, we have a separate company to own the real estate, to keep it separate from the business operations. And the main reason for it is liability. Another reason for it may very well be control. In this particular case, I think Joanne wanted to have some degree of control or comfort with respect to the use of the crane, while Darrell was the person that was running the crews and had control over the crews, so another reason for separation.

[287] Mr. Baxter testified that if Services has employee source deductions that it withholds but doesn't remit to CRA, that will be a liability of Services. CRA will look to the directors who are personally liable and any amounts paid by Services to SCFS, Inc. or Investments that was not at fair market value could be pursued by CRA. IF SCFS, Inc. was paid for a contract, it would have to pay Services for the labour on the contract and Services would have to pay the employee source deductions. If SCFS, Inc. did not pay Services for its services under the subcontract, CRA would be able to pursue SCFS, Inc. And if Mr. Spears took money out of Services, CRA would be able to go after him personally for that money. Mr. Baxter said: "So this was not designed to defeat CRA in any aspect, or, for that matter, any future creditors of a particular business."

[288] Mr. Baxter recalls that Darrell and Joanne Spears were optimistic about the future of Mr. Spears' business. Mr. Baxter is sure he raised the issue of Mr. Spears consulting a trustee in bankruptcy but that was "not the route he wanted to go." He testified that Mr. Spears was confident the financial problems of unpaid contracts "would all get sorted out" and "wanted to make sure that there was a good structure going forward..." Mr. Baxter expressed Mr. Spears' instructions about what he and Ms. Spears were looking for in these terms: "We just wanted to make sure we had a good structure going forward that was going to be nice and clean."

[289] Mr. Baxter's evidence indicates he had some general awareness of "other companies that were caught up in builder lien actions and amounts weren't paid...I was aware that there was financial stress in some of the other companies, but that would be about it." Although Mr. Baxter said on cross-examination that he was not aware of any liabilities of Framing and Formwork, in his notes from the file (*Exhibit 108*), he had an entry in a list of issues: "HST/source deduction concerns". Asked about this on cross-examination, Mr. Baxter testified that he wanted "to make sure we weren't transferring problems..." He did not recall Mr. Spears' "specific answers" but recalls "knowing that that was an issue with existing

companies.” Mr. Baxter says for a “go-forward structure, I would like to make sure the structure was clean and, if there are any existing issues, make sure that they’re properly dealt with.”

[290] Mr. Baxter believes that his notes including the reference to “HST/source deduction concerns” were prepared by him after he was first consulted on the Spears’ file by a law partner, Bruce Russell, now Justice Russell of the Tax Court. He described the list as “potential issues” he was thinking about before meeting with Mr. Spears.

[291] When, in February 2008, CRA was pursuing HST returns for SCFS, Inc., Mr. Baxter assisted in getting the issue addressed, with the help of Glenda Power. It was his evidence that Brian Smith was “very helpful” in sorting out the payroll issue in relation to the Bhalla Investments project and making sure that the workers got paid and the development project continued its operations. Mr. Baxter testified on cross-examination that at this time, to the best of his recollection, he and Ms. Power were trying to work with Brian Smith, “...he had a bunch of questions and we were trying to, I think, answer them.” According to his file notes (*Exhibit 108*), those questions included the Potain crane that had been transferred to Joanne Spears. Mr. Baxter’s notes for February 9, 2008 from a telephone call with Mr. Spears include entries that indicate Framing owed \$80,000 to Joanne Spears “since Nov 2006” and that she held the crane “as security.”

[292] Mr. Baxter testified that it was standard legal advice to clients to provide documentation CRA was seeking, but in the absence of an assurance that CRA was not putting together “a case for Special Investigations”, not to speak to CRA directly. It was Mr. Baxter’s evidence that he would indicate to CRA, “If you require something, put it in writing, let us know what it is and we’ll get you what you need.”

[293] Mr. Baxter had become involved in the Spears’ file in August 2007, inheriting it from Bruce Russell. There is no evidence to suggest Mr. Russell didn’t provide Mr. Spears with the same standard legal advice given by Mr. Baxter about communicating directly with CRA.

[294] Mr. Baxter was asked on cross-examination if there was any communication from Mr. Spears, back in 2007, 2008, that he wasn’t going to pay his CRA tax debt. To the contrary, Mr. Baxter said. It was Mr. Baxter’s understanding that Mr. Spears “wanted to arrange his affairs to deal with...the outstanding or the coming litigation... on the builders’ liens holdback so he could pay the debt.” The

direction Mr. Baxter got from Mr. Spears was that he wanted money that was held up by a builder's lien to go to CRA. Mr. Baxter testified that he communicated with CRA that there were monies that were tied up and that they needed to get involved so they could get them. That, Mr. Baxter says, was at the direction of Mr. Spears.

[295] The Crown asked Mr. Baxter on cross-examination whether the new corporate structure he developed for Darrell and Joanne Spears (*Exhibit 61, page 12*) was ever implemented. He expressed confidence it would have been but said he could not confirm this without looking at the Minute Books for the companies. No evidence was led by the Crown that the structure was a sham.

[296] Notably, Mr. Baxter's corporate structure had the ability to achieve greater tax efficiency but did not permit avoidance of source deductions and HST liability for the companies.

[297] Mr. Draghici-Vasilescu asked Mr. Baxter whether the transfer of a contract from a company with unpaid HST and source deductions to another company was legally acceptable. Mr. Baxter responded by saying the contract could be legally transferred but the question the transfer raises is, "what's the net effect of that?" It was Mr. Baxter's evidence that, "If the net effect is that you're moving value and you're defeating creditors of Spears Framing, then that's an issue. That's a concern. You shouldn't do that...if there is value in there that you're transferring, you want to make sure that that's paid for in some fashion."

[298] Asked by Mr. Draghici-Vasilescu about whether he had considered utilizing one of the existing Spears' companies in the new corporate structure he designed, Mr. Baxter testified that,

...if you have a company that's going to be mired in litigation and there's all kinds of issues there of putting...new assets into a new business...that business could easily get impaired by some of the historical or court wranglings...So it would be common to use a...new company or a clean company go forward for new business or clean business. There's certainly no obligation to continue to put new business into an existing company.

[299] Mr. Baxter went on to say that he knew about the old companies but doesn't recall specifically looking at what their issues were. He was told there were issues to be dealt with, such as builders' liens. He says he was asked about the structure

for “go-forward, new contracts, profitable business contracts. So that’s what this [the corporate structure] represents.”

[300] Mr. Baxter also addressed the issue of invoices, in response to being asked about his file notes from a telephone conversation with Glenda Power in February 2008. Under the heading, “SCFS”, Mr. Baxter notes the following:

-doing payroll on Spears Concrete

-Can generate invoices for

->Totally

[301] Mr. Baxter could not recall what these notations referred to but testified that the reason for invoices for “inter-corporate transactions” is to “clearly characterize what they’re for...for services...it’s a good idea to have an invoice generated and have a record of it...” He speculated that this is what he and Ms. Power were discussing and said that seemed reasonable to him.

[302] Mr. Baxter described the corporate structuring he designed for Darrell and Joanne Spears as “not complicated...very straightforward...run of the mill...there’s nothing out of the ordinary here.” He said the companies in the structure were created “to be able to silo commercial liabilities.” He added:

This structure was not in any way designed to eliminate or defeat any HST or payroll source deduction responsibilities, liabilities. It can’t. I don’t see how it could...certainly that was not the purpose. And...I can be very clear, that was not the instructions I was given...

Darrell Spears’ Evidence about the October 30, 2007 New Corporate Structure

[303] Darrell Spears also testified about the new corporate structuring advised by Daren Baxter. Mr. Spears says, “everything seemed to follow me around.” He says he knew the formwork business could be lucrative. He had been using McInnes Cooper for legal matters and had told them his situation. Mr. Spears says he wanted to get a fresh start and knew he could make it work. An introduction to Bruce Russell and conversation with him led to a referral to Daren Baxter who drew up the corporate structure.

[304] Mr. Spears testified that before he was referred to Mr. Baxter he saw a trustee in bankruptcy and was advised to go bankrupt. He says that is not the

direction he wanted to go. He felt that he could turn things around and wasn't ready to give up. Mr. Spears thought his formwork business would be viable and that he could turn his financial situation around.

[305] It was Mr. Spears' evidence that he wanted to get "cleaned up, straightened around and do what CRA would propose to me in order to handle that debt." He says it was his intention to deal with the accumulated debt of Framing and Formwork "when I got on my feet, make a deal with people to find a solution to pay back debts."

[306] Mr. Spears says in seeking advice from Mr. Baxter all debts were considered – the significant debts of Framing, Formwork and his personal liabilities. Mr. Spears says he was aware there was a large accumulated debt from a number of sources.

[307] It was Mr. Spears' evidence that filing and remitting was "definitely" the objective of the clean start. He added: Now, whether or not it was achievable, that remained to be seen."

The Elements of the Offence of Fraud

[308] To obtain a conviction against Mr. Spears for fraud, the Crown must prove the following beyond a reasonable doubt:

- 1) That Mr. Spears deprived HMQ of \$766,788.67;
- 2) That his deceit, falsehood, or other fraudulent means caused the deprivation; and
- 3) That he intended to defraud HMQ.

[309] The Supreme Court of Canada in *R. v. Olan*, [1978] 2 S.C.R. 1175, set out the following principles for the *actus reus* of fraud:

- (i) the offence has two elements: dishonest act and deprivation;
- (ii) the dishonest act is established by proof of deceit, falsehood or "other fraudulent means";
- (iii) the element of deprivation is established by proof of detriment, prejudice, or risk of prejudice to the economic interests of the victim, caused by the dishonest act.

[310] *Olan* was described as having,

...marked a broadening of the law of fraud in two respects. First, it overruled previous authority which suggested that deceit was an essential element of the offence. Instead, it posited the general concept of dishonesty, which might manifest itself in deceit, falsehood or some other form of dishonesty. Just as what constitutes a lie or a deceitful act for the purpose of the actus reus is judged on the objective facts, so the "other fraudulent means" in the third category is determined objectively, by reference to what a reasonable person would consider to be a dishonest act. Second, Olan made it clear that economic loss was not essential to the offence; the imperilling of an economic interest is sufficient even though no actual loss has been suffered. By adopting an expansive interpretation of the offence, the Court established fraud as an offence of general scope capable of encompassing a wide range of dishonest commercial dealings. (para. 17)

[311] "Other fraudulent means" is intended to encompass a broad range of dishonest conduct, including "the use of corporate funds for personal purposes, non-disclosure of important facts...[and] unauthorized diversion of funds." What constitutes "other fraudulent means" is assessed according to a reasonable person standard. (*Olan*, para. 18)

[312] Fraud is made out where there is a prohibited act of deceit, falsehood or some other dishonesty and the prohibited consequence of deprivation. As *Olan* explains what constitutes the *mens rea* of fraud is:

...the subjective awareness that one was undertaking a prohibited act (the deceit, falsehood or other dishonest act) which could cause deprivation in the sense of depriving another of property or putting that property at risk. If this is shown, the crime is complete. The fact that the accused may have hoped the deprivation would not take place, or may have felt there was nothing wrong with what he or she was doing, provides no defence...the proper focus in determining the mens rea of fraud is to ask whether the accused intentionally committed the prohibited acts (deceit, falsehood, or other dishonest act) knowing or desiring the consequences proscribed by the offence (deprivation, including the risk of deprivation)...(*para. 24*)

[313] What is criminalized is dishonesty with consequences, as explained in *R. v. Theroux*, [1993] S.C.J. No. 42:

40 The requirement of intentional fraudulent action excludes mere negligent misrepresentation. It also excludes improvident business conduct or conduct which is sharp in the sense of taking advantage of a business opportunity to the detriment of someone less astute. The accused must intentionally deceive, lie or commit some other fraudulent act for the offence to be established. Neither a negligent misstatement, nor a sharp business practice, will suffice, because in neither case will the required intent to deprive by fraudulent means be present. A statement made carelessly, even if it is untrue, will not amount to an intentional falsehood, subjectively appreciated. Nor will any seizing of a business opportunity which is not motivated by a person's subjective intent to deprive by cheating or misleading others amount to an instance of fraud. Again, an act of deceit which is made carelessly without any expectation of consequences, as for example, an innocent prank or a statement made in debate which is not intended to be acted upon, would not amount to fraud because the accused would have no knowledge that the prank would put the property of those who heard it at risk. *We are left then with deliberately practised fraudulent acts which, in the knowledge of the accused, actually put the property of others at risk. Such conduct may be appropriately criminalized, in my view.* (para. 40, emphasis added)

[314] In its final written submissions, the Crown sets out its argument that Mr. Spears committed fraud:

The evidence establishes that Darrell Spears engaged in a pattern of dishonest conduct aimed at the unauthorized retention and misuse of deemed trust public funds consisting of unremitted employer source deductions and HST collected. To this end he incorporated two shell companies with no assets and, fully aware of his legal obligations, intentionally

misappropriated employer source deductions and HST collected for more than a year, all the while deceiving CRA representatives in regards to his business activity. Having divested himself of any assets, Mr. Spears confirmed in his testimony to the Court that he rendered the remittance of the respective trust funds discretionary and that given the way CRA interacted with him going into the present prosecution, his alleged original intention to pay those amounts evaporated.

Assessing the Evidence

[315] This is a case that requires the application of the Supreme Court of Canada's decision in *R. v. W.(D.)*, [1991] S.C.J. No. 26. *W.(D.)* provides that an accused must be acquitted if his evidence is believed, but that even if it is not, a trial judge must determine if there is a reasonable doubt left by his evidence, and ultimately, even if the accused's testimony does not leave a doubt, the determination must be made whether on the whole of the evidence there is a reasonable doubt on the issue of guilt. (*W.(D.)*, paragraph 28)

[316] Since *W.(D.)*, the Supreme Court of Canada has clarified the obligation that rests on a trial judge deciding a case that where the accused's credibility is a significant factor: "... the trial judge must direct his or her mind to the decisive question of whether the accused's evidence, considered in the context of the evidence as a whole, raises a reasonable doubt as to his guilt. Put differently, the trial judge must consider whether the evidence as a whole establishes the accused's guilt beyond a reasonable doubt." (*R. v. Dinardo*, [2008] S.C.J. No. 24, para. 23)

[317] Ultimately, in order to convict, a trial judge must be satisfied that on the totality of the evidence there is no reasonable doubt as to the accused's guilt. The task of adjudication is to assess the evidence for reasonable doubt.

[318] An accused does not have to be believed to be acquitted. (*R. v. J.H.S.*, [2008] S.C.J. No. 30, paragraph 13) The burden of proof is borne not by Mr. Spears (or the defendant companies) but exclusively by the Crown. I have to examine all the evidence, including Mr. Spears' testimony, to determine if there is reasonable doubt.

Analysis – the Fraud Charge

[319] The fraud charge against Mr. Spears makes a very specific allegation against him. It charges him with defrauding HMQ of a specific amount of money - \$766,788.67 in unremitted employee source deductions and HST during a defined period of time between July 31, 2006 and June 1, 2008. That is what the Crown must prove beyond a reasonable doubt to obtain a conviction against Mr. Spears for fraud.

[320] I find there is good reason to be suspicious of Mr. Spears' conduct and intentions when employee source deductions and HST were not being remitted. The suspicious circumstances included:

- The incorporation of Formwork and Services;
- Not telling Alex Grover explicitly about Formwork and Services;
- Converting the cheques into bank drafts;
- Limiting Glenda Power's retainer for Formwork to payroll;
- The SCFS, Inc. invoices generated by Mr. Spears for the W.M. Fares MU-9 project;
- Mr. Spears' divestment of assets;
- Spending money on discretionary items.

[321] Suspicion falls far short of the required proof beyond a reasonable doubt to establish fraud. It is necessary to carefully examine the evidence about what Mr. Spears was doing to see if it supports the Crown's allegation that he was engaged in "deliberately practised fraudulent acts."

The Incorporation of Formwork and Services

[322] The Crown alleges that Mr. Spears formed new companies to keep a step ahead of CRA and his source deduction and HST remittance obligations. In effect, the Crown is saying that the incorporations were part of a criminal enterprise, that they were created to further Mr. Spears' fraudulent purposes.

[323] The Crown argues in its written submissions, for example, why the incorporation of Services looks fishy. Formwork had been operating since December 2006 and had not made any source deduction remittances. A CRA trust audit could determine the extent of the payroll liability. Here is how the Crown views Mr. Spears' incorporation of Services: "Clearly understanding that no collection action against Formwork can begin until its liabilities were assessed,

Darrell Spears did not switch the flow of payroll to yet another incorporated shell company until the trust examination for Formwork was set to December 5, 2007. Darrell Spears had every reason to surmise the freezing of Formwork's bank account would immediately follow the assessment of 10-months' worth of misappropriated payroll deductions." The Crown submits that Mr. Spears started paying his employees from Services immediately after the corporate restructuring he discussed with Daren Baxter.

[324] I have described in these reasons Mr. Spears' explanation for the incorporation of his companies. He says he was struggling to make his formwork business viable, trying to get it airborne despite having accumulated very significant indebtedness as evidenced by Exhibit 111, the collection of lawsuits against Framing and Formwork. Mr. Spears' financial situation was so compromised that he had been advised to consider insolvency. This was right before he started to operate through Services. He testified that the plan was for Services to provide the labour for contracts obtained by SCFS, Inc. and that any payroll remittances that were owing for Formwork or Services would be his personal responsibility as the Director. It was Mr. Spears' evidence that the "go-forward" plan in October 2007, when he met with Daren Baxter, was for Services to be the subcontractor. Mr. Spears described this as "trying to get on track and deal with outstanding debts down the road."

[325] As I mentioned earlier, Formwork had been incorporated by Karen Gardiner. Mr. Spears told her that he planned to assign contracts to a new company. Ms. Gardiner's notes indicate "Spears Concrete Formwork Inc." and "Spears Framing" and "wants to assign contracts to new company" which she testified meant the party to the contract wants to assign its rights and obligations to another entity.

[326] In its written submissions, the Defence explains the benefits of incorporation where there is the potential for personal liability:

When lawyers advise business owners, they often counsel them to incorporate, because that limits their liability. There is nothing fraudulent or criminal in making it more difficult (or impossible) for a creditor to claim against an individual personally. The necessary effect of an incorporation is to limit the liability of the individual shareholders and as a matter of

public policy it is perfectly lawful to do so. Here, Spears' act in incorporating (and then subsequently incorporating other companies) had no effect whatever on CRA's ability to collect against him personally. It limited the ability of Spears' other creditors to claim against him, and it moved his future income to businesses unencumbered by the debts of the previous corporation. (para. 105)

[327] The allegation that Mr. Spears was creating and using his companies as a fraudulent means for not paying the source employee deductions and HST remittances is related to how he dealt with CRA. He was not flying under CRA's radar nor do I find, has it been established beyond a reasonable doubt that he was trying to.

Communications with Alex Grover

[328] Mr. Spears did not inform Mr. Grover about the existence of Formwork or Services. There were however ongoing communications by Ms. Power on Mr. Spears' behalf and Mr. Spears with Mr. Grover. Earlier in these reasons, I described those interactions. They included Mr. Spears providing Mr. Grover with specific information about projects he was bidding on and contracts he had secured.

[329] Mr. Grover has testified that Mr. Spears and he talked about the jobs that Mr. Spears "had on the go and lined up." One of those "jobs" was, according to Mr. Grover's diary notes, with Greater Homes. It later turned out that Mr. Spears did not have a contract with Greater Homes. The Crown submits this as an example of Mr. Spears having misled Mr. Grover.

[330] I am not satisfied beyond a reasonable doubt that Mr. Spears was dishonest with Mr. Grover about the work he expected to be doing. One of the difficulties with this case has been the long passage of time since the events. Quite understandably all the principal witnesses struggled to recall details from ten years ago. For details about his discussions with Mr. Spears, Mr. Grover relied exclusively on his diary notes. His evidence was admitted, with the consent of the Defence, on the basis of past recollection recorded. But there is still the issue of

weight. Mr. Spears never saw the diary notes and had no opportunity to assess their accuracy. I therefore cannot be confident that Mr. Grover's diary entry about Greater Homes captured what Mr. Spears said. This could have been an unsuccessful bid. Mr. Spears said the following on cross-examination:

I never told him what company, and...I've never told him ever that I had a job...that didn't have. I told him that I was pricing a number of jobs. I don't remember which ones or where they were, but, yes, any contracts that I – or any projects that I was bidding, I told him about...

[331] Mr. Spears may be incorrect that he “never told him what company” but I am not satisfied that Mr. Grover's diary evidence supports proof beyond a reasonable doubt that Mr. Spears misled him into thinking he had an actual contract with Greater Homes. I am left with a doubt about what Mr. Grover was told: it is reasonable to think that Mr. Spears may have been referring to putting in a bid for a Greater Homes project.

[332] Mr. Grover's diary notes refer to Greater Homes being mentioned on several further occasions by Mr. Spears. Mr. Spears didn't keep a record of the bids he won and lost. Through the service of a garnishment order on Greater Homes, Mr. Grover learned that Greater Homes had not hired Mr. Spears for a job. But I find myself unable to determine to the standard of proof required that Mr. Spears lied to Mr. Grover about Greater Homes. There is no evidence that Mr. Spears did not bid on a Greater Homes project. Hoping to have more money coming in, Mr. Spears may have presented an honestly optimistic view of the bid to Mr. Grover. I am simply not satisfied the Crown has established that Mr. Spears was dishonest with Mr. Grover.

[333] Mr. Spears was not hiding from CRA or compromising CRA's ability to find him. Mr. Grover had Mr. Spears' phone numbers. In a phone call on January 31, 2007, Mr. Spears supplied his address on Bedros Lane and asked that all CRA correspondence be sent to Ms. Power.

[334] At an in-person meeting on February 1 when Mr. Spears went to meet Mr. Grover at his office, he informed him about the W.M. Fares project, holdback monies he was expecting from a couple of sources, and some large expenses he

was incurring for equipment rental. At a subsequent meeting Mr. Spears advised Mr. Grover about the Wes Campbell Berkeley Gladstone project. He had previously told Mr. Grover about the Dixel project on Barrington Street.

[335] After a substantial amount, \$84,000, was paid to CRA on behalf of Framing in February 2007 (*Exhibit 97, page 6674*), Mr. Spears did not make any further payments and had not resolved the outstanding Framing debt. But he continued to work as he had previously, in the manner I have described, out in the open.

[336] Mr. Spears' corporate entities were not elusive. He did not establish companies with directors that would have been hard to trace back to him. An online search of the Registry of Joint Stocks told Mr. Grover about Formwork and SCFS, Inc. Mr. Grover had CRA database access to business numbers, HST and payroll numbers for Mr. Spears' companies. The Formwork application for a business number contained Mr. Spears' social insurance number and his work telephone number. Mr. Spears had the reasonable belief that CRA would know about his companies because registration with the Registry of Joint Stocks led to CRA issuing a unique business number that applied to the newly incorporated entity.

[337] Mr. Grover acknowledged that Mr. Spears may have been the source of the information that Framing had had no employees since mid-January 2007. Or it may have been Ms. Power who told him. That is as good as Mr. Spears telling him: Ms. Power was authorized to talk to CRA on Mr. Spears' behalf and it is clear from the evidence that he relied on her to do so.

[338] I find the evidence does not support the inference that Mr. Spears did not tell Mr. Grover about Formwork and Services as a deliberate tactic intended to deceive.

The Cheques to Bank Drafts (Exhibit 53)

[339] Mr. Spears testified that in 2007 and 2008, Formwork, Services and SCFS, Inc. did not have overdraft protection. He says he used to get cheques from jobs certified. There was not enough money in the Formwork bank account to cover the developer's cheques so the cheques would be held until the funds were confirmed. That would mean there was no money available for payroll.

[340] Douglas Kaizer was subpoenaed by Defence to answer questions about payment of subcontractors. He had worked as the Chief Financial Officer for W.M. Fares and his group of companies.

[341] As CFO Mr. Keizer oversaw payments to subcontractors. How long subcontractors had to wait for access to their funds depended on their relationship with their bank. In some cases it would be 7 days or 10 days but it could be as little as none or 2 days.

[342] When a cheque was certified the money would immediately come out of the issuer's account and be immediately available to the subcontractor.

[343] In 2007, the bank would not necessarily call W.M. Fares Ltd. to get a cheque certified. A subcontractor could seek to get a Fares cheque certified without Fares knowing that had occurred. A subcontractor would get a cheque certified to get immediate access to the cash. The subcontractor could then immediately deposit the funds into its bank account.

[344] Mr. Spears that it was his experience banks became less enthusiastic about certifying cheques so he obtained bank drafts. Mr. Spears testified that he was not using bank drafts to avoid his obligations with CRA. It was his evidence that the money went directly into the bank account and would have been accessible to CRA.

Glenda Power's Formwork Retainer

[345] Glenda Powers drafted a retainer document dated January 1, 2007 in relation to Formwork for Mr. Spears to sign, which he did. (*Exhibit 9, page 141*) She does not recall when it was signed. The retainer confirmed that Ms. Power was "retained to prepare payroll calculations and the necessary remittance forms for Canada Revenue Agency and Workers Compensation Board." It further states that: "These reports will be forwarded to Darrell Spears for filing and the necessary remittances."

[346] The Crown, noting that the retainer does not mention HST remittances, asked Mr. Spears about the document. Mr. Spears testified that he viewed the retainer as encompassing "all the forms." Mr. Spears says he would have expected Ms. Power to do the HST remittance forms for Formwork as part of her responsibilities, "It's basic accounting, so, yeah, I would expect her to have done that." And, as Exhibit 5 indicates, Ms. Power did obtain an HST registration number for Formwork.

[347] Mr. Spears testified that he understood Ms. Power wanted the retainer because he was no longer passing through Musquodoboit Harbour and she was concerned about getting documentation from him when she needed it.

[348] Ms. Power's recollection was different: she said she drew up the retainer because "this was a different request", she was being hired to only provide payroll-related services to Formwork whereas usually she did "a full service." She testified that she "wanted to make it clear" that Mr. Spears was only expecting her to do payroll. She also said the more limited service request did not concern her at all.

[349] Ms. Power did say, just as Mr. Spears recalls, that she wasn't getting information from Mr. Spears as reliably as before because once he was living in the city he was not travelling along the Eastern Shore anymore.

[350] The Crown says Ms. Power was kept in the dark about Formwork and that this was an aspect of Mr. Spears' efforts to withhold information from CRA. But the evidence falls short of establishing that. I am unable to find that Mr. Spears orchestrated a deliberately limited retainer with Ms. Power's so she would not have information to share with CRA.

The MU-9 Invoices (Exhibit 85)

[351] It is the Crown's contention that the MU-9 invoices (*Exhibit 85*) are a fraud. Its support for this contention is circumstantial. Mr. Spears testified that he prepared the invoices in accordance with the work being done on the MU-9 project.

[352] Invoices 206902 to 206940 are issued from Formwork to SCFS, Inc. for work done on MU-9. They are for rounded numbers and indicate HST "in". Invoices 07551 to 07555 are issued from Services to SCFS, Inc. for rounded numbers and indicate HST "included." All the invoices show, as applicable, the HST number for either Formwork or Services.

[353] The Services' invoices are dated November 11 and 19, 2007; December 19 and 8, 2007; and January 2, 2008. The Formwork invoices are all dated sequentially, starting in May 2007 to January 2, 2008. Mr. Spears testified that he has "a concrete memory" that he didn't write the Invoices all at once. He says, "I would say they were wrote on the date that they were invoiced.

[354] The Crown submits that the effect of the invoices is that HST liability of the contract-holding company is transferred to the "alleged" subcontractors, that is

from SCFS, Inc. to Formwork and Services. The Crown goes on to say that the invoices have a “secondary effect” in “that they remove [CRA’s] discretion to refuse to accept the corresponding transfers of money from SCFS, Inc. to Formwork and Services as business expenses that will in turn permit the claiming of Input Tax Credits.” Mr. Draghici-Vasilescu has said in his written submissions that the invoices enabled Mr. Spears to “[download] the HST liability of the company that has income and assets to the shell companies that are never going to remit a cent on deemed trust funds...The fraud happens when, with the knowledge that the liability of a solvent company moves to the insolvent one, the [input tax credit] claim is substantiated with documentation created after the fact.”

[355] The Crown asks me to infer that, contrary to his testimony, Mr. Spears did not write the invoices sequentially when the MU-9 project was underway, but later, in order to further his fraudulent purposes.

[356] Mr. Draghici-Vasilescu supports his argument with reference to the type of pen strokes – thin and thick – on the invoices, notations by Glenda Power in communications with Mr. Spears, use of computer-generated invoices for the Berkeley Gladstone project as contrasted with the hand-written drugstore notebook invoices of Exhibit 85, evidence from Daren Baxter, the lack of detail on the invoices and various banking transactions. Mr. Draghici-Vasilescu submits that the “totality of the evidence overwhelmingly establishes that the handwritten invoices in Exhibit 85 have all been written at the same time, in two batches, and long after the fact.”

[357] What emerges from the Crown’s submissions about the MU-9 invoices is a persuasive case that Mr. Spears did not prepare the invoices according to the dates shown on them. But for the invoices to be evidence of fraud, I have to be satisfied they were prepared dishonestly, for the purpose of perpetrating the fraud alleged by the Crown. I am not satisfied that has been proven.

[358] Ms. Power did not recognize the invoices when they were shown to her but, as the Crown points out, two of them are referenced in a March 2, 2008 two-page note she prepared for Mr. Spears – Exhibit 6. At the bottom of page 2 of the note, Ms. Power indicated: “Spears Concrete 206936 SCF Services 07553 last receipts” This corresponds to invoices in Exhibit 85.

[359] Daren Baxter testified that he may have discussed the need for the invoices, saying it is “a good idea to have a record of what payments are for” and noted that “it could be” he asked Ms. Power to “generate the invoices for the inter-company

payments.” Although he said he was speculating about this, he made the following notation in a telephone conversation with Ms. Power under the heading “SCFS” “doing payroll on Spears Concrete – can generate invoices for – totally”. The date of the telephone call is not noted but Mr. Baxter testified that a reference to “only two contracts” probably referred to the Bhalla and W.M. Fares jobs.

[360] The MU-9 project was SCFS, Inc.’s contract and the invoices were either, as I have indicated, Formwork billing SCFS, Inc. or Services billing SCFS, Inc. Mr. Spears testified that at the end of the contract, profit from the job would have been shared between SCFS, Inc. and Formwork. Mr. Spears says he felt that “eventually...I would be making a profit.” However, it is his recollection that “there was a lien put on that project from old debts that Spears Concrete owed and Spears Framing...”

[361] In November 2007, Laura Dauphinee did two HST audits for Framing and a period for SCFS, Inc. She accepted the Exhibit 85 invoices at face value and made no significant adjustments as a result of her audit.

[362] Ms. Dauphinee testified that she has seen both a flat fee requiring the HST to be backed out and the fee and HST shown separately. She said the flat fee approach is not a concern. She noted that the invoices between Formwork and SCFS, Inc. were a flat fee and she allowed that.

[363] I think the Crown is correct the MU-9 invoices were generated later and Mr. Spears’ evidence that they were created on the dates shown is wrong. But, especially given the evidence of Daren Baxter, I am not satisfied the Crown has proven beyond a reasonable doubt that the invoices were illegitimate and created for a fraudulent purpose.

The Allegation that Darrell Spears Intentionally Made Himself Collection-Proof

[364] There is evidence, that I accept, that over the years Mr. Spears liquidated assets and ploughed the money into his business. I am not satisfied the Crown has established beyond a reasonable doubt that Mr. Spears deliberately divested himself of assets to thwart possible collection efforts by CRA.

[365] As I described earlier in these reasons, Mr. Spears used to own real property but no longer does. He now lives in a property - 201 Lindenwood - that is owned by SCFS, Inc., the company he manages that is owned by his daughter. The

property was acquired by SCFS, Inc. in partial payment for a job the company was doing. It was then sold to Sabrina. Mr. Spears pays rent “as part of his salary” as the manager of SCFS, Inc., to live there.

[366] There is simply no definitive evidence as to why Mr. Spears has not re-entered the property market and purchased title to a residence in his name. But that is irrelevant. At the relevant time in relation to the charges against him, he owned Bedros Lane, purchased in 2005 and sold in 2011. (*Exhibit 102*) (In 2008, liens were being placed against Mr. Spears’ Bedros Lane condo for failure to pay common expenses. These liens were discharged in 2010.)

[367] Mr. Spears, that is, Framing, had owned two cranes, both of which are now owned by SCFS, Inc. SCFS, Inc. was the beneficiary of decision by Mr. Spears to sell a Kroll crane. The handwritten contract prepared by Mr. Spears is dated May 3, 2007 and indicates a sale price of \$40,000. Mr. Spears states in the contract that he believed the sale price “to be fair market value.” (*Exhibit 63*) He testified that he wrote the contract on May 3 but is not sure when the crane was actually transferred.

[368] It was Mr. Spears’ evidence that he arranged a private loan with Roma for SCFS, Inc. to acquire the crane. (*Exhibit 81*) He says as far as he knows, SCFS, Inc. made payments. The interest payments on the loan were onerous. The lender – Roland Hage - had not wanted to loan the money because, as Mr. Spears put it, “neither company would be a very credible borrower.” According to Exhibit 74, arising from Laura Dauphinee’s audit of SCFS, Inc., on May 3, 2007, \$40,000 was deposited to the SCFS, Inc. Royal Bank account with Ms. Dauphinee’s description, “Roland Hage.”

[369] Mr. Spears testified that he arranged for SCFS, Inc. to buy the crane because it would provide income to Joanne Spears’, the sole owner of SCFS, Inc., at the time, if she rented it. It was put to him on cross-examination that despite having said in direct that Formwork had no money to buy the crane which is why it was not sold to Formwork, in May 2007, Formwork had contracts and payroll and SCFS, Inc. did not. Mr. Spears denied that the transaction, the sale to SCFS, Inc. and not Formwork, was to avoid the crane becoming a target of CRA trying to recoup what Formwork owed. It was Mr. Spears’ evidence that if CRA seized the crane “they couldn’t get \$1000 for it” on the market or at auction.

[370] It seems to me this response throws into question Mr. Spears’ assertion in the sales contract for the crane that it had a “fair market value” of \$40,000.

However there is evidence from Brian Smith that seizing and selling the crane was not a practical option for CRA. As the Defence notes in their written submissions, also referring to the transfer of the Potain crane to Joanne Spears, “the cranes did not have any realizable value other than as assets in an operating company.” I infer this to have been what Mr. Spears meant.

[371] Mr. Smith testified that he wanted “to do a seizure on the file” and he wanted to seize the cranes as the only real assets that would be of any value to CRA. He explained why that didn’t happen: “mainly because of the extremely high cost factor to us to seize those cranes. It would have been astronomical as far as the sheriff getting involved and having to arrest the cranes, and then dismantling the cranes, and all the regulations that go along with it.”

[372] I note as well that Mr. Spears transferred both cranes before Brian Smith became involved with the file. So Mr. Smith’s comment in his direct evidence that “every time I would get close to something as far as trying to resolve these files...something would be put out of my reach...you know, with respect to the cranes or anything I was looking at seizing...” is not accurate.

[373] Mr. Smith was aware of the transfer of the cranes. They had been transferred to a related individual – Joanne Spears – and a related company – SCFS, Inc. Mr. Smith acknowledged in his evidence that CRA can raise a section 160 *ITA* assessment against a related third party of a transferee for the value of the asset. As Mr. Smith testified, CRA “...just decided that with the value of the transfer as far as monies received or paid it probably wasn’t worth our while” to pursue a section 160 assessment.

Spending Money on Discretionary Items

[374] The Crown produced receipts that show Mr. Spears purchasing a \$13,000 diamond engagement ring in July 2007 and doing some shopping at a high-end men’s clothing store. It is reasonable to view such expenditures with disapproval: Mr. Spears’ companies were accumulating large debts, including to CRA. It doesn’t seem appropriate that he wasn’t tightening his belt as much as he could. However, he was not exclusively prioritizing personal benefit: the VW Golf he was leasing was eventually repossessed because he was unable to keep up with the payments. In short, the diamond engagement ring really adds little to the Crown’s case.

The Allowable Business Investment Loss (ABIL)

[375] The Allowable Business Investment Loss (ABIL) is the money invested by the taxpayer in the company with no possibility of repayment. Ms. Power testified that no possibility of repayment means the company is not active and cannot pay the money back to the shareholder. Ms. Power testified she had calculated the amount of money invested by Mr. Spears into Framing less the money he had taken out of the company and arrived at a final ABIL balance. According to Exhibit 33, Spears Framing General Ledger, \$134,735.89 was what was owed to Mr. Spears at the end of 2007. (*Exhibit 33, page 7*)

[376] This amount is shown on Mr. Spears' 2007 income tax return prepared for him by Ms. Power. (*Exhibit 32*) The effect of the allowable deduction for Mr. Spear's ABIL in 2007 was a reduction of his taxable income to \$113,850.03. (*Exhibit 32, page 3*) On page 7 of his return Ms. Power indicated the \$134,736 had been loaned to Spears Framing.

[377] Mr. Spears' personal income tax was adjusted by CRA in 2014. (*Exhibit 115*) An adjustment was made for \$30,351 which had been paid to a shareholders' loan account. This reduced Mr. Spears' income. The business investment loss of \$134,736 was also allowed. (*Exhibit 115, page 1*)

[378] I have reviewed several times the dense, complex discussion by the Crown on the ABIL in its written submissions at pages 59 through 70. I have been unable to conclude that the issue of the ABIL, especially in light of Exhibit 115 allowing it, should be revisited in this prosecution. It seems to be more properly a civil matter. Describing it as "the closest legal precedent on point...", the Crown referred me to a decision of the Tax Court of Canada, *Morrison v. The Queen*, [1993] T.C.J. No. 806. *Morrison* dealt with whether a taxpayer could claim an ABIL. And I am told in the Crown's written submissions that "neither the Crown nor the Defence in this matter invite this Honourable Court to get into the fray of a rapidly evolving and very specialized body of jurisprudence."

[379] The Crown submits that even if I made a factual finding that Framing was no longer an income-producing company by the end of May 2007 notwithstanding that Mr. Spears loaned it money then, I "cannot disregard a specific legislative provision that prohibits the ABIL claim in question." The invitation to sift through the ABIL issue in the face of Exhibit 115 creates the risk, I think, of tipping my analysis into the civil realm of tax law. CRA, equipped with whatever information was provided to it in relation to the ABIL, has dealt with the matter on the civil

side. I am of the view it would be unfair to plough up that ground in the context of this criminal prosecution. I accordingly decline to do so.

Was Mr. Spears Defrauding HMQ or Was He Simply Unable to Pay?

[380] Mr. Spears and the defendant companies enjoy the presumption of innocence, a presumption only displaced if the Crown proves guilt beyond a reasonable doubt. Suspicion of guilt or a belief in probable guilt do not displace the presumption. They fall far short of the reasonable doubt standard. Only proof beyond a reasonable doubt can establish guilt.

[381] A reasonable doubt is based on reason and common sense which must be logically connected to the evidence or lack of evidence. (*R. v. Lifchus*, [1997] S.C.J. No. 77, para. 36; Proof beyond a reasonable doubt “falls much closer to absolute certainty than to proof on a balance of probabilities.” *R. v. Starr*, [2000] S.C.J. No. 40, para. 242)

[382] Mr. Spears and the defendant companies do not have to prove anything to be found not guilty. The burden rests on the Crown to prove the allegations of fraud and tax evasion beyond a reasonable doubt and that heavy onus never shifts. “The onus resting on the Crown to prove the guilt of the accused beyond a reasonable doubt is inextricably linked to the presumption of innocence.” (*Lifchus*, para. 13)

[383] The case against Mr. Spears is circumstantial. In such a case I must be satisfied beyond a reasonable doubt that his guilt is the only reasonable inference to be drawn from the evidence. (*R. v. Villaroman*, 2016 SCC 33, para. 30) The Supreme Court of Canada has been explicit about the burden that rests on the Crown in a circumstantial case:

...Requiring proven facts to support explanations other than guilt wrongly puts an obligation on an accused to prove facts and is contrary to the rule that whether there is a reasonable doubt is assessed by considering all of the evidence. The issue with respect to circumstantial evidence is the range of reasonable inferences that can be drawn from it. If there are reasonable inferences other than guilt, the Crown’s evidence does not meet the standard of proof beyond a reasonable doubt. (*Villaroman*, para. 35)

[384] CRA’s scrutiny, through various audits and trust examinations and investigation, of Mr. Spears and his operations did not find any of the usual

indicators of fraud – the over-reporting of expenses and/or the under-reporting of revenues. (*see, for example, Exhibit 82*)

[385] Mr. Spears' business operations included his using Glenda Power, a Certified General Accountant, who had provided him with accounting services for many years. Mr. Spears also entrusted Ms. Power with the responsibility of communicating with CRA and addressing payroll source deduction and HST remittance issues. Ms. Power was described by CRA personnel who dealt with her as cooperative, helpful and competent.

[386] Mr. Spears' large payment to CRA in February 2007 is not consistent with a fraudulent intent. In its written submissions, the Crown has described this payment as "a calculated move" by Mr. Spears to reassure Alex Grover that he was acting in good faith but it is equally consistent with Mr. Spears trying to meet his obligations.

[387] Mr. Spears' business practices were not consistent with fraud - obtaining traceable payments from developers by cheque, registering for business and HST numbers, issuing cheques, not cash, to employees for payroll with supporting records, and, through Ms. Power, maintaining records that permitted the reconciliation of revenue and expenses. His practices did not change when he started to operate through Formwork instead of Framing.

[388] It was the evidence of Daren Baxter, which I reviewed earlier, that Mr. Spears was not seeking to avoid payment of what was owed to CRA. Mr. Baxter testified that the corporate structure he designed for Mr. Spears was not intended "to eliminate or defeat any HST or payroll source deduction responsibilities...I can be very clear, that was not the instructions I was given."

[389] Of course, Mr. Baxter could not be involved in a tax evasion scheme and I am satisfied he would have had very clear, pointed advice to any client he suspected was trying to circumvent his legal obligations. Not only did Mr. Spears consult him, he produced him as a witness able to discuss their interactions and describe what Mr. Spears was endeavouring to achieve, which was a more successful business structure.

[390] It was only two and a half months after meeting with Daren Baxter that Mr. Spears met with Brian Smith and Laura Dauphinee at his Bedros Lane

condominium. He says he knew at that time the outstanding amounts owed to CRA were “an issue for me to deal with...as a director of the company I was liable for it...” He says that he was endeavouring to find a way forward, “get straightened around, cleaned up and deal with what CRA would propose to me in order to handle that debt.”

[391] Daren Baxter’s notes of a telephone conversation with Mr. Spears on February 9, 2008 support Mr. Spears’ evidence that he had been struggling to make his business profitable. Under a heading “Spears Concrete”, Mr. Baxter noted, “Just trying to hold on, exist.” Also noted is Mr. Spears’ capitalization of his business, “Put everything in” with details of what this included. The notes set out the financial challenges Mr. Spears had encountered: “burnt on a few contracts/got behind on supplies/took jobs too low, for cash flow/kept falling behind” (*Exhibit 108, page 6*)

[392] This case is not like *R. v. Dieckmann*, 2014 ONSC 717, a case provided by the Crown where the following was found:

Between 2002 and 2006, and over the course of thousands of transactions with multiple clients, [the offenders] recovered 5.7 million [dollars] of CPP, EI and income tax deductions from hundreds of employees, none of which they remitted to the CRA. Instead, they converted them to their own use. The offenders funneled the money they recovered through various corporations, but attempted to conceal their identities as the real operators of these businesses by enlisting dozens of unwitting dupes to act as nominee directors. (*para. 9*)

[393] Nor do I find this to be a case like *R. v. Eid*, 2016 ONSC 3221 where Mr. Eid was described as having “knowingly practiced a deceit on the creditors, employees, trades and subcontractors [of the company he controlled] causing them significant deprivation. (*para. 298*) Mr. Eid, the controlling mind of a numbered corporation doing business as ICI Construction Management, undertook a series of deceitful steps that enabled him to have \$1.7 million transferred to a bank account in his name in Lebanon. After he pretended to go to Florida but actually moved permanently to Lebanon, ICI senior management discovered that the company’s

bank accounts had been stripped clean and the files on the defendant's computer had been deleted.

[394] I also find this case to be distinguishable from *R. v. Gaetz*, [1992] N.S.J. No. 444 where dishonesty was found as a fact. Mr. Gaetz was the sole shareholder and President of Concept Ford Ltd., a Ford dealership in the business of selling and leasing cars and trucks. He was convicted of fraud based on the following facts: Concept purchased vehicles through a credit agreement with the bank and leased the vehicles out. Upon the disposal of a leased vehicle, the funds received by Concept were deposited into Concept's current account at the bank. Concept issued a cheque to the bank to repay the loan against the leased vehicle. The cheque indicated the lease number and the vehicle's serial number which notified the bank that the lease had been terminated, "triggering the obligation to pay out the loan."

[395] Over a couple of months, cheques received by Concept from the sales of six leased vehicles were not repaid to the Bank. Concept "continued to make monthly loan payments to the bank as if the vehicles were still being leased."

[396] It was noted in *Gaetz* that there was evidence Mr. Gaetz had "every intention of ultimately paying out" the unpaid lease loans. Mr. Gaetz's business was "in great difficulty" and he was "desperately trying to keep it afloat." But in *Gaetz* there was clear evidence of dishonesty. Mr. Gaetz himself admitted to bank representatives that he did not tell the bank he had withheld the loan payouts "because he knew the bank would have moved more quickly than it ultimately did to have a receiver appointed to seize the assets of Concept and put it out of business."

[397] The Nova Scotia Court of Appeal upheld Mr. Gaetz's conviction for fraud and characterized his conduct as dishonest:

There was more than a mere failure on [Mr. Gaetz's] part to pay a debt due to the bank. [Mr. Gaetz] caused Concept to withhold payments and divert the money without disclosing to the bank that the money was due, while keeping up the pretence that the leases were still in existence by continuing to make monthly payments thereon to the bank. That he knew that by so doing the bank would suffer a detriment, prejudice or a risk thereof to

its economic interests could be inferred from his admission in April, 1990, that he did not tell the bank the truth because he knew they would call the loans sooner.

...the evidence reveals much more than mere non-disclosure. As well, there was a withholding and diversion for Concept's benefit of the money due the bank, coupled with the continuance of monthly payments on loans no longer existing - a course of action the jury could find was calculated with an intent to mislead

[398] As the Court of Appeal found, there was also no grace period for dealing with the money paid when a leased vehicle was sold. The Bank's security was the vehicle. "Once a leased vehicle was sold, the loan secured by that vehicle ceased to be secured. Therefore payment on the date of sale was an important protection to the bank." Mr. Gaetz was found to have had "a specific duty to pay a clearly identified sum upon the occurrence of agreed events."

[399] I have not found that dishonesty has been proven in Mr. Spears' case which differentiates it from *Gaetz*.

[400] On the whole of the evidence in this case I am not satisfied beyond a reasonable doubt that the Crown has established that Mr. Spears was deceitful in his communications with CRA, that he incorporated and then utilized Formwork and Services for fraudulent purposes, that he purposely controlled Glenda Powers' access to information to shield his fraudulent activities, that he was not in serious financial difficulty as he claimed, and that he adopted a discretionary attitude toward his source deduction and HST obligations.

The "Trust Funds" Issue

[401] It is the Crown's submission that Mr. Spears' crime was the intentional repurposing of trust funds to further his business interests. The Crown says Mr. Spears was not entitled to finance a fresh start by withholding HST and employer source deductions.

[402] This submission overlooks several important facts: as Alex Grover noted, CRA does not want to put taxpayers/registrants out of business; Mr. Spears has

testified that tax evasion was not his purpose - he was trying to keep his formwork business going so he could satisfy his indebtedness; and CRA did not pursue the range of options it had to collect the debt, including through Director's liability.

[403] In its "trust funds" submission, the Crown points to the language of "deemed trust" in section 227(4) of the *Income Tax Act* and section 222(1) of the *Excise Tax Act*.

[404] The *ITA* provides that,

Every person who deducts or withholds an amount under this Act is deemed, notwithstanding any security interest...in the amount so deducted or withheld, to hold the amount separate and apart from the property of the person and from property held by any secured creditor...of that person...in trust for Her Majesty and for payment to Her Majesty in the manner and at the time provided under this Act.

[405] The *ETA* provides that:

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

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

[407] But as I stated earlier, the failure to remit source deductions and HST does not, by itself, amount to fraud. The Defence made submissions on the trust funds issue with reference to jurisprudence from the Supreme Court of Canada. I do not find it necessary to address the arguments around what significance these cases

could have to a case like this one. What the cases broadly acknowledge is that the deemed trust funds referred to under the *ITA* and *ETA* are not always remitted as directed by the legislation. Delinquency does not automatically amount to fraud. Commentary from two of the three cases provided by Mr. Casey illustrates this point. In *First Vancouver Finance v. Canada (Minister of National Revenue)* 2002 SCC 49 the Court said the following:

3... By virtue of s. 227(4), when source deductions are made, they are deemed to be held separate and apart from the property of the employer in trust for Her Majesty. If the source deductions are not remitted to the Receiver General by the due date, the deemed trust in s. 227(4.1) of the *ITA* becomes operative and attaches to property of the employer to the extent of the amount of the unremitted source deductions. As well, the trust is deemed to have existed from the moment the source deductions were made.

4 For the reasons set forth below, I find that the s. 227(4.1) deemed trust is similar in principle to a floating charge over all the tax debtor's assets in favour of Her Majesty. The trust arises the moment the tax debtor fails to remit source deductions by the specified due date, but is deemed to have been in existence from the moment the deductions were made. As long as the tax debtor continues to be in default, the trust continues to float over the tax debtor's property. Thus, at any given point in time, whatever property then belonging to the tax debtor is subject to the deemed trust.

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

25... In a perfect world, these deductions would be made, a cash fund would be set aside by the employer, and the withheld amounts would be promptly remitted to the Receiver General when due. The deducted amounts, lawfully the property of the employee, would in this way be transferred to Her Majesty to be set against his overall tax payable.

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

27 The economic reality of this sort of misappropriation of statutory deductions is artificially to increase the working capital of the tax debtor. By foregoing a cash payment to Her Majesty in the amount of the payroll deductions, the tax debtor is able to utilize the freed resources elsewhere in its business...

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

[410] The Crown has made the point that a taxpayer cannot simply decide to re-purpose monies owing for source deductions and HST and utilize them for other priorities. That appears to be what happened in *Dieckmann*. Here, Mr. Spears has said he would have paid what he owed if he could have but because his business was in difficult financial straits he worked at keeping his head above water with the expectation that he could turn the situation around. It was Mr. Spears' evidence that "there was always an attempt to make payments to CRA, not successfully maybe, but the intention was always to make it work."

[411] Mr. Spears testified that his efforts to make his business a success and pay his CRA obligations were a work-in-progress. He said:

...I believed in the business and I believed that I had a lot to learn, and I lost a lot of money, but I always believed that I could have negotiated the debt and have satisfied it. It may have not been all at once, but over a long term definitely. Just the fact of what the embarrassment of this cost me in business would have repaid the debt. So, yes, my intention was always to pay those debts, and I believe I could have, and would have. And if Brian Smith wouldn't have moved the employees, we wouldn't be having this conversation because the new company could have repaid those debts.

[412] I find that despite a constellation of suspicious circumstantial factors in this case, there are reasonable inferences other than guilt to be drawn from the evidence. This means the Crown's case falls short of proof beyond a reasonable doubt that what Mr. Spears was did between July 31, 2006 and June 1, 2008 was dishonest and constituted fraud.

Analysis – The Excise Tax Act Charges alleging Tax Evasion

[413] Mr. Spears and his three companies – Framing, Formwork and Services – are all charged with willfully evading the payment of HST, an offence under the *Excise Tax Act*. To be convicted the defendants must be shown to have had a specific intent; the Crown must prove beyond a reasonable doubt they intended to avoid payment of the tax. It is Mr. Spears' intent that is relevant as he was the sole Director of the companies.

[414] The *Excise Act* section pursuant to which Mr. Spears and the companies have been charged provides that tax evasion is made out where a person “willfully, in any manner, evaded or attempted to evade compliance with this Part or payment or remittance of tax or net tax imposed under this Part...” (*section 327(1)(c), ETA*)

[415] What has to be proven is that Mr. Spears’ purpose in not remitting HST was to avoid paying it or that he knew what he was doing was virtually certain to result in the avoiding of his HST remittance obligations under the *Act*. (*R. v. Klundert, [2004] O.J. No. 3515, para. 46*)

[416] In *Klundert*, a tax protester was found to have “made a considered decision not to pay tax that he knew was owing under the *Act*.” (*para. 64*) The mere fact that Mr. Spears and the corporate defendants did not file HST returns or remit HST that was owing does not, by itself, support an inference that Mr. Spears’ purpose was to evade payment. Mr. Spears testified that he didn’t file returns because he thought he needed to have the money to send in with the returns and, he has said, he didn’t have the money. In short, it is Mr. Spears’ evidence that he did not pay the HST owed by the defendant companies because he was struggling to keep his formwork business afloat and could not do so and pay the HST.

[417] The Crown has argued that Mr. Spears’ belief that he was personally liable through Director’s liability for his companies’ debts supports the inference that his failure to remit was intentional and therefore, tax evasion. But Mr. Spears’ awareness of his liability as a director does not turn him into a tax evader. I have to be satisfied that Mr. Spears’ purpose for not remitting was to elude his tax obligations.

[418] As I discussed in relation to the fraud charge, how Mr. Spears managed his business and personal affairs can be reasonably viewed as suspicious. But the Crown has not succeeded in raising Mr. Spears’ decisions or circumstances higher than that. There is a considerable distance between Mr. Smith’s characterization that “there was something not right” and proof beyond a reasonable doubt of either fraud or tax evasion.

[419] In *R. v. Ming*, [1996] S.J. No. 418, (Q.B.), a delinquent restaurant owner’s conviction for tax evasion was overturned on appeal because his explanations for not remitting did not establish there was any wilful intent. The owner’s

explanations were that he “just didn’t have the money to pay [GST]” and “knew that eventually they would have to pay the GST but they were trying to promote the restaurant and make it profitable so that they would have the funds to pay it.” (*paras. 19 and 20*) These explanations are what Mr. Spears has given for why he did not remit HST.

[420] The Court in *Ming* found that there had to be “something more” to establish the offence of tax evasion than simply the failure to remit. (*para. 24*) Although *Ming* is, as the Crown points out, a case decided over 20 years ago, the principle that the failure to remit is not enough to ground a conviction for tax evasion remains sound.

[421] The Crown has argued that what Mr. Spears failed to remit are trust funds, money that belongs to CRA, but that doesn’t change the fact that a conviction for tax evasion requires proof of wilful intent. The accused must be shown to have intended to evade the payment of the tax. It is not enough to merely show that the accused didn’t remit money which is statutorily deemed to be trust money.

[422] The timeframe of non-remittance has been raised by the Crown as supporting an inference that Mr. Spears never intended to pay CRA. But, in addition to a drawn-out period of non-payment, there must be proof that the purpose for not remitting was to avoid paying the tax. The duration of the failure to remit is relevant but, on the whole of the evidence, I still have to be satisfied beyond a reasonable doubt that the only reasonable inference to be drawn is that Mr. Spears had no intention to pay.

[423] Mr. Spears’ McInnis Cooper lawyers knew about his indebtedness to CRA. This is confirmed in Mr. Baxter’s notes. (*Exhibit 108, page 2*) Mr. Baxter’s notes indicate: “Tax debt, payroll, HST” in relation to Framing and Formwork. Asked about this on cross-examination, Mr. Baxter testified: “I was probably informed that there was a tax obligation out of Spears Framing Limited, also the same for Spear Concrete Work (sic) Inc. for certainly payroll and HST.” Mr. Spears was not advised that he had to get the outstanding accounts resolved immediately. The advice he received was that he was entitled to undertake a corporate restructuring to try and get his financial feet under him. Mr. Spears had an optimistic view that he would be successful and able to resolve his accounts with CRA. Instead, soon after the meeting with Mr. Baxter, Mr. Spears understood he was to relocate the

employees from Formwork to SCFS, Inc. which deprived Formwork of the ability to develop the financial viability Mr. Spears believed was possible with a fresh start.

[424] Reasonable doubt is raised when an accused's actions are inconsistent with an intention to evade. (*R. v. Tri-Tex Sales & Services Ltd.*, [2006] N.J. No. 230, para. 90) As I discussed earlier, Mr. Spears' actions – registering his companies, naming himself or Ms. Spears as the Directors, maintaining accurate records and a paper trail of payments from project work and to employees, engaging a qualified accountant, authorizing that accountant to communicate with CRA, providing CRA with his contact information and accurate and verifiable information about formwork projects – are not consistent with an intention to evade the payment of HST. There are devious strategies available to tax evaders, for example, creating companies with sham nominees for directors: the fact that Mr. Spears conducted himself in ways that were inconsistent with dishonesty undercuts the Crown's case that he was wilfully avoiding the payment of HST.

The Testimony of Darrell Spears

[425] The evidence has satisfied me there were valid reasons for CRA to be suspicious of Mr. Spears and to question his *bona fides* in relation to the payment of source deductions and HST remittances. Having said that, I am unable to say I have no reasonable doubt about the Crown's case. To find guilt, I have to be satisfied that Mr. Spears' evidence about his intentions does not raise a reasonable doubt. I did note failings in Mr. Spears' memory and some vagueness in his recollection, but I have had to acknowledge that the events under discussion happened ten years ago. And, while I wondered whether it was simply convenient to say certain things, for example that it had become harder to get information to Ms. Power because he had moved to the city or that his important documents got swept up in the repossession of his VW Golf, I was unable to identify any evidence that showed those statements to be untrue. Indeed, there is support for testimony given by Mr. Spears' in the evidence.

[426] It may be, as the Crown has argued in its written submissions, that Mr. Spears' "actual objective and hope was that CRA would discover his cascade incorporation and shift of operations to shell corporations with no assets as late as possible in order to misappropriate, with no hope of recovery as much payroll

deductions and HST as possible.” But the Crown is required to prove the fraud and tax evasion charges to the very high standard of beyond a reasonable doubt. I am simply not satisfied, having considered the whole of the evidence, that very high standard of proof has been met.

Analysis – The Personal Tax Evasion Charge – Count 5

[427] The *Income Tax Act* pursuant to which Mr. Spears has been charged provides that tax evasion is made out where a person “willfully, in any manner, evaded or attempted to evade compliance with this Act or payment of taxes imposed by this Act...” (*section 239(1)(d), ITA*)

[428] The Crown alleges that Mr. Spears deviated from his pattern of personal income tax filing at exactly the time when he was operating under the assumption that his liabilities were no longer accessible to CRA. In the Crown’s submission, Mr. Spears had rendered himself collection-proof and I should draw the inference that in that context, his failure to pay his 2007 taxes when they were due was an act of wilful evasion.

[429] Mr. Spears agrees it was anomalous for him not to file his personal income tax return but says there was nothing evasive about his non-filing for 2007. He says it was circumstances that obstructed his ability to do what he had always done in the past. The return wasn’t filed because there was missing information. The reason he didn’t file had nothing to do with trying to avoid paying his taxes.

[430] When Mr. Spears’ 2007 return was due – that is, on April 30, 2008 –he has said he believed CRA was content with the arrangements that had the employees working for SCFS, Inc., and the current compliance that had been achieved.

[431] The issue is Mr. Spears’ state of mind in relation to not filing his 2007 return: has the Crown proven beyond a reasonable doubt that Mr. Spears intended to evade the payment of tax that he knew was owed under the *Act*?

[432] In *R. v. Klundert*, [2004] O.J. No. 3515 (C.A.), Doherty, J.A. held that the fault component of section 239(1)(d) of the *ITA* is "twofold."

...First, the accused must know that tax is owing under the Act and second, the accused must intend to avoid or intend to attempt to avoid payment of that tax. An accused intends to avoid, or intends to attempt to avoid, payment of taxes owing under the Act where that is his purpose, or where he knows that

his course of conduct is virtually certain to result in the avoiding of tax owing under the Act. (*cite omitted*) (paragraph 46)

[433] The evidence establishes there was a delay in Mr. Spears' income tax filing for 2007. It was 2014 when Glenda Power prepared Mr. Spears' personal income tax return for the 2007 taxation year. (*Exhibit 32*) But there is no evidence that Mr. Spears "made a considered decision not to pay tax that he knew was owing under the Act." (*Klundert, para. 64*)

[434] Ms. Power testified that she was missing information and had been unable to prepare Mr. Spears' tax return. Exhibit 8 is a file card with Ms. Power's writing on it. She was asking Jim Creaser, an accountant with Grant Thornton, how to deal with the money Mr. Spears had taken out in 2007. Mr. Creaser's advice to Ms. Power, on November 9, 2010, was to wait until CRA had finished its assessment and not to prepare the return on the basis of what she had as there was so much information missing at that point. Ms. Power testified that Mr. Spears may have had receipts for money he took out of the company. She did not have this paperwork to know how to categorize the money he had withdrawn from Formwork.

[435] Ms. Power testified that the money Mr. Spears took out of the shareholder's loan account was not necessarily taxable income. She said some of it could have been for business expenses. She says that during 2007 Mr. Spears had been drawing income exclusively from Formwork. She testified that the CRA auditors had the documentation at this point. It was her evidence that,

Just because he [Darrell Spears] took the money out didn't mean it went always to him. If I...didn't have all the receipts, and I don't know that, because I can't remember the time line of when everything got completed, but it all the receipts weren't there, I wouldn't know what money he took out, whether it was going to him directly or it if was business expenses...Those would be the types of things to determine at the bottom line how much of it was actually going to be taxable income to him.

[436] It was Mr. Spears' evidence that he had Glenda Power contact CRA about completing the return that had information missing. He thinks it was the only return that he did not complete. Mr. Spears' testified that he had lost a lot of

banking information when a 2004 VW Golf he had been leasing was repossessed. He says he had been using the VW it as his working office. It was repossessed because he didn't have the money to pay the lease. He believes the repossession happened around April 2008.

[437] And although it is tempting to wonder why important papers and documents inside a repossessed car would not have been returned to Mr. Spears, without any evidence to explain the circumstances of the repossession, I have nothing but speculation to resort to.

[438] Mr. Spears testified that he has no idea what information Ms. Power was missing. He says he didn't keep very good track of receipts and was receiving bank statements that may not have got passed on to Ms. Power.

[439] Mr. Spears was asked about the allocation of amounts paid to him in 2007 as documented by Jeffery Klassen's investigation and noted in Exhibit 100, page 7. Mr. Spears testified that if he didn't have a receipt or some sort of proof of what money was spent on it was allocated to him as income. He says he may have paid cash for supplies for example, he has no idea. "I had no proof of it."

[440] Not filing a tax return on the date it is due is not enough to constitute tax evasion. (*R. v. Paveley*, [1976] S.J. No. 411 (C.A.)) The act of not filing must be "done with a particular purpose – the purpose of evading the payment of tax." (*Paveley*, para. 34)

[441] I am not satisfied on the evidence that the Crown has proven beyond a reasonable doubt that Mr. Spears' non-filing of his 2007 personal income tax return when it was due was done for the purpose of evading the payment of his taxes.

Conclusion

[442] Darrell Spears was hardly a model taxpayer in the period of 2006 to 2008. His approach to running his formwork business and his attendant obligations to CRA can only be described as suspicious. The evidence cruises close to probability that he was actively engaged in trying to dodge the legal requirements to pay source deductions and HST. I can understand why CRA began to question what he was up to and investigated him for fraud and tax evasion. But, as I have said, suspicion and even probability are well below the standard required for proof

beyond a reasonable doubt. And only proof beyond a reasonable doubt can dislodge the presumption of innocence.

[443] The reasonable doubt in this case lies in the evidence that Mr. Spears' strategies were intended to make a floundering business successful and then address the debt owed to CRA. His strategies were undertaken while he engaged an independent accountant, consulted with legal counsel, and remained in plain view of the CRA. Enough of what Mr. Spears did was inconsistent with dishonesty that I am left with a reasonable doubt. My examination of the whole of the evidence, including Mr. Spears' testimony, leads me to conclude there are reasonable inferences to be drawn from it other than Mr. Spears' guilt for fraud and tax evasion.

[444] I am accordingly acquitting Mr. Spears of all counts in the Information.

- **Count 1** - that Darrell Spears between July 31, 2006 and June 1, 2008 defrauded Her Majesty in Right of Canada of \$766,788.67 contrary to section 380(1)(a) of the *Criminal Code* – Not Guilty

- **Count 2** – that Spears Framing Limited (“Spears Framing”) and Darrell Spears as a director of Spears Framing between July 31, 2006 and September 1, 2007 willfully evaded the remittance of HST in the amount of \$143,039.87 contrary to section 327(1)(c) of the *Excise Tax Act* – Not Guilty

- **Count 3** – that Spears Concrete Formwork Inc. (“Spears Concrete”) and Darrell Spears as a director of Spears Concrete between December 7, 2006 and May 1, 2008 willfully evaded the remittance of HST in the amount of \$115,693.68, contrary to section 327(1)(c) of the *Excise Tax Act* – Not Guilty

- **Count 4** – that SCF Services (“Services”) Incorporated and Darrell Spears as a director of Services between August 8, 2007 and June 1, 2008 willfully evaded the remittance of HST in the amount of \$15,925.50, contrary to section 327(1)(c) of the *Excise Tax Act* – Not Guilty

- **Count 5** – that Darrell Spears between December 31, 2006 and May 1, 2008 wilfully evaded the payment of taxes in the amount of \$51,797.91 due for the 2007 taxation year by failing to declare income in the amount of \$215,314.26, contrary to section 239(1)(d) of the *Income Tax Act* – Not Guilty

Jurisdiction

[445] I should end with a short note about the fact that in mid-July I was appointed to the Nova Scotia Court of Appeal, however section 669.3 of the *Criminal Code* provided me with jurisdiction to continue and complete the trial.

Derrick, J.A.