Docket: 2021-2256(IT)G

BETWEEN:

ROSS McCAGUE,

Appellant,

and

HIS MAJESTY THE KING,

Respondent.

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Appeal heard on common evidence with the appeal in Court file 2021-3226(IT)G on February 10 and 11, 2025, at Calgary, Alberta. Written submissions of the Appellant received on February 28, 2025 and written submissions of the Respondent received on March 20, 2025.

Before: The Honourable Justice Michael U. Ezri

Appearances:

Counsel for the Appellant: Rami Pandher

Counsel for the Respondent: Damon Park

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**JUDGMENT**

The appeal is dismissed and the respondent is entitled to one set of costs to cover this appeal and the appeal in court file 2021-3326 in accordance with the attached Reasons.

Signed at Toronto, Ontario, this 24th day of April 2025.

"Michael Ezri"

Ezri J.

Docket: 2021-3226(IT)G

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ROSS McCAGUE,

Appellant,

and

HIS MAJESTY THE KING,

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Appeal heard on common evidence with the appeal in Court file 2021- 2256(IT)G, at Calgary, Alberta. Written submissions of the Appellant received on February 28, 2025 and written submissions of the Respondent received on March 20, 2025.

Before: The Honourable Justice Michael U. Ezri

Appearances:

Counsel for the Appellant: Rami Pandher

Counsel for the Respondent: Damon Park

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**JUDGMENT**

The appeal is dismissed, and the respondent is entitled to one set of costs to cover this appeal and the appeal in court file 2021-2256 in accordance with the attached Reasons.

Signed at Toronto, Ontario, this 24th day of April 2025.

"Michael Ezri"

Ezri J.

Citation: 2025 TCC 59
Date: 20250422
Docket: 2021-2256(IT)G
2021-3226(IT)G

BETWEEN:

ROSS McCAGUE,

Appellant,

and

HIS MAJESTY THE KING,

Respondent.

**REASONS FOR JUDGMENT**

Ezri J.

## I. OVERVIEW

[1] Mr. McCague appeals to this court in respect of two distinct matters. He was assessed because a company 2189632 Ontario Inc. ("218") paid him a dividend while it had an outstanding tax debt. Separately from that he was assessed because another company 2271561 Ontario Inc ("227"), failed to withhold and remit source deductions.

[2] On the 218 appeal, Mr. McCague's appeal should be dismissed. There is an abundance of case law that 50-50 shareholders who cause a corporation to declare and pay a dividend, while a tax debt is outstanding may be liable under section 160 of the *Income Tax Act* (the "*Act*") for having received a transfer of property, for no consideration, from a person, the corporation, with whom they do not deal at arm's length. That determination is made based on the facts of each case, but there is no difference between the facts of this case and the facts in a number of other cases where the section 160 assessment was upheld. Mr. McCague and the other shareholder acted with a common goal and a common intent to cause 218 to declare and pay a dividend while the corporation owed more than $76,000 in tax under the *Act*.

[3] Mr. McCague's appeal in respect of the 227 assessments should also be dismissed. 227 made source deductions but it did not remit them. 227 had employees, not independent contractors. Mr. McCague abdicated his responsibilities as a director, to oversee the financial affairs of his company and so his due diligence defence cannot succeed either.

## II. **FACTS COMMON TO BOTH APPEALS**

[4] The parties provided me with a partial agreed statement of facts. I also heard testimony from Mr. McCague.

[5] By way of a background set of facts common to both appeals, Mr. McCague obtained a degree from York University in 1986 in economics and political science. He then spent three years selling insurance, but he found the work uninteresting. A friend of his, Jim Christensen introduced Mr. McCague to the construction business through a franchise arrangement which was pursued through a company called Dial One. McCague and Jim each owned 45% of the business with a 3rd shareholder owning the rest. Dial One was an American franchise and the Canadian business was in effect a sub franchisor with the rights to franchise Dial One throughout Canada. Dial One itself was a kind of brand name. An existing business such as a plumber who became a franchisee would become in effect known as Dial One Plumbing whose phone number would be Dial One's 1-800 national phone number. Franchisee benefits included expertise in financing, sales and marketing, and synergies with other Dial One trades. Mr. McCague explained that small trades often had issues managing these areas of their operations.

[6] In addition to franchising, Dial One also expanded into General Contracting work.

[7] Over time, Mr. McCague became a highly skilled operations manager. He excelled at ensuring that projects were completed on budget and on time. He organized the trades, arranged schedules and dealt with problems. In his dealings with franchisees, he emphasized the importance of developing schedules, manpower plans and of meeting targets. He also started earning a variety of occupational licenses related to various aspects construction safety and later construction remediation.

[8] It was in his work with Dial One that the pattern at the heart of these appeals first emerged. Mr. McCague was a man who liked to stay in his lane. He looked at the balance sheets and income statements of Dial One, but he did not involve himself

in the financial or accounting affairs of the business. Things like employee source deductions were looked after by bookkeepers who reported to Jim. One of those bookkeepers, Linda Arthur is a key figure later in our story.

[9] Dial One suffered business reverses beginning in 2002. At the same time Mr. McCague was afflicted by health issues. Dial One went out of business around 2008.

[10] Against that background I now consider the 218 appeal.

## III. **THE 218 APPEAL**

### 1. The Motion to Strike Assumptions

[11] At the start of the appeal, counsel for the appellant moved to strike paragraphs 9(g) and (h) from the assumptions of the Crown's Reply, either with or without leave to amend. The basis for the motion was that the assumptions improperly pleaded matters of mixed fact and law. The impugned paragraphs read as follows:

> 9(g) the Appellant and the Corporation were not dealing at arm's length;
>
> 9(h) the Appellant and Jones were not dealing at arm's length; and

[12] Because of the short notice provided to the respondent, I heard the appellant's submissions and reserved on the matter pending receipt of the respondent's submissions along with any reply submission from the appellant.

[13] The respondent argued that the motion should fail because the appellant brought the motion in breach of the "fresh step" rule and that in any event the assumptions were not offside the jurisprudence on pleading allegations of mixed fact and law such that they needed to be struck.

[14] Having had the benefit of the written submissions of the parties, I find that the impugned paragraphs should not be struck.

[15] My most basic reason is a practical one. The function of pleadings is to place both parties on notice as to the case that they will have to meet. It could hardly have been clearer to the parties that this case was about whether or not, in fact, the appellant was in fact dealing at arm's length with Mr. Jones and by extension with 218. The pursuit of motions that serve no purpose, especially when advanced with little or no notice on the morning of a trial, should be discouraged.

[16] Turning to the "fresh step" rule, the proposed motion runs afoul of both branches of Rule 8 of the *Tax Court of Canada Rules (General Procedure)* which provide that:

> 8 A motion to attack a proceeding or a step, document or direction in a proceeding for irregularity shall not be made,
>
> (a) after the expiry of a reasonable time after the moving party knows or ought reasonably to have known of the irregularity, or
>
> (b) if the moving party has taken any further step in the proceeding after obtaining knowledge of the irregularity,

[17] Starting with paragraph (a), the impugned reply to the notice of appeal was filed in May of 2022. No explanation was given as to why it took until February 2025 to address the pleadings issue. In support of the motion, the appellant cited to *Hillcore Financial Corporation*[1] but that decision was released in May 2023 and it applied the 2003 Federal Court of Appeal decision in *Anchor Pointe*[2] to the question of whether the arm's length test is a matter of mixed fact and law. The appellant did not explain why he could not have addressed this issue as soon as the reply was filed and, in any event, no later than sometime shortly after *Hillcore* was decided.

[18] Turning to the second branch of the test, the appellant did take fresh steps after he obtained knowledge of the irregularity. The parties filed timetable order agreements, lists of documents, amendments to the timetable orders and finally, in June 2024, the parties filed a joint timetable request for hearing in which they advised the matter was ready for trial.

[19] I can hardly do better than to rely on the holding of the Federal Court of Appeal in *Dilalla* on an almost identical set of facts:

> 3 The Tax Court held that both parts (a) and (b) of Rule 8 were met and declined to grant leave for the appellant to file his motion. The judge gave four reasons for his decision: the lateness of the motion, its lack of merit, the absence of any prejudice to the appellant, and the prejudice to the respondent, the Minister. The judge also rejected the appellant's argument that as the Reply was deficient, he was deprived of jurisdiction to consider Rule 8.
>
> 4 The Tax Court found that the appellant brought the motion far too late in the litigation process. The motion objecting to the Minister's Reply came almost

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[1] *Hillcore Financial Corporation v R*, 2023 TCC 71,
[2] *Canada v Anchor Pointe Energy Ltd* 2003 FCA 294.

> three years after it was filed, and more than two years after all pre-trial proceedings had been completed. The motion was brought ten months after the parties had filed a joint application representing that the appeal was ready to be set down for hearing. The appellant had brought two interlocutory motions and one appeal to this Court. All had been dismissed, one with the observation by the Tax Court judge that it was a delaying tactic and abusive.
>
> 5 The judge also observed that, as the appellant received the Reply pleading three years ago, he knew or ought reasonably to have known about and raised any irregularities in the Reply at that time. Indeed, the appellant's second motion demonstrated that he understood the distinction between pleadings of law and fact. The judge noted that to allow the motion would be prejudicial to the respondent as the appeal was scheduled for hearing at the time the motion was brought, and the respondent had conducted the discovery process believing there was no irregularity in the Reply.
>
> 6 In declining to hear the motion, the Tax Court's reasons touched briefly on the merits of the appellant's motion. The judge concluded that the reply pleadings were not grossly deficient as asserted and that the facts assumed were not, as the appellant argued, conclusions of law. The judge observed that some of the evidence on which the Minister relied in the Reply had been corroborated by the appellant's own evidence. On the issue of prejudice, the judge noted that the Reply clearly set out the issues raised by the Minister, and the appellant would have an opportunity to challenge the Minister's assumptions at trial. The argument that the Reply contained statements of law could still be advanced by the appellant at trial.
>
> 8 …The facts amplify the decision not to grant leave to the appellant to file his motion.[3]

[20] In the event that I am wrong in my procedural conclusion, I turn to the merits of the motion.

[21] Firstly, the function of a pleading is to put the other party on notice of the issues that are contested. A court should be cautious about striking a pleading such as this one, which does exactly that. The factual arm’s length issue is the contentious issue between the parties.

[22] Secondly, it is an oversimplification of the jurisprudence to assert that the Crown cannot plead a mixed fact and law conclusion in an assumptions paragraph. As stated by the Federal Court of Appeal in *Preston*:

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[3] *Dilalla v R*, 2020 FCA 39, paras 3-6 and 8.

> There is no principle of law that a statement of mixed fact and law cannot stand as an assumption.[4]

[23] The pleadings error occurs when the Crown fails to extricate the assumed facts that underpin the assumption.[5] Here the key fact in dispute between the parties was pled as assumption 9(f):

> 9(f) the Appellant and Jones acted in unison with respect to the declaration and issuance of the dividend which is the subject of the Transfer;

[24] It is not *per se* wrong to plead matters of mixed fact and law. In *Famous Players*, a case later cited by the Supreme Court in *Operation Dismantle*, it was held that:

> It is quite proper and necessary to set forth the legal conclusion which the party will ask the Court to adopt provided that conclusion is adequately supported by a statement of facts which are material to that result. I concede, of course, that the plea of a legal proposition cannot be allowed to stand alone; the facts upon which it is based must be given. On the other hand, it is equally objectionable to simply plead facts without mentioning the legal consequences which the party contends will flow from the existence of those facts, for otherwise the opposite party and the Court may be left under a complete misapprehension as to the outcome which the party pleading will seek to secure at the trial.[6]

[25] I acknowledge at once that this Court in *Stackhouse* after referring to *Famous Players*, held otherwise, at least in the context of assumptions of fact. In *Stackhouse*, this Court held that the question of a "chief source of income" or the existence of a "reasonable expectation of profit" are matters of mixed fact and law which "…do not place an onus on the appellant, because they are conclusions of law".[7]

[26] With great respect, I think this could be too broad a formulation of the jurisprudence. The concepts described in *Stackhouse* may well be tax concepts but they are not conceptually different from other legal concepts like negligence that are often disputed in civil litigation.

[27] A party to civil litigation who puts into issue a matter of mixed fact and law, such as negligence must usually prove the mixed fact and law assertion on a balance

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[4] *Canada v Preston*, 2023 FCA 178, para 18.
[5] *Ibid*, para 31.
[6] *Famous Players Canadian Co v JJ Turner and Sons Ltd*, [1948] OJ No. 69, para 3; and see also, *Operation Dismantle v R*, [1985] 1 SCR 441, para 106.
[7] *Stackhouse v R*, 2023 TCC 156, para 22.

of probabilities. It is telling that Justice Sopinka's textbook on evidence repeatedly refers to the burden of proof for both "facts and issues". For example, in describing the persuasive burden, the authors of the text write:

> The term "burden of proof" is occasionally used to describe two distinct concepts relating to the obligation of a party in a proceeding in connection with proof. In its first sense, the term refers to the obligation imposed on a party to prove or disprove a fact **or issue** to either a balance of probabilities or beyond a reasonable doubt. In the second sense, it refers to a party's obligation to adduce or point to evidence on the record to raise an issue to the satisfaction of the trial judge.[8]
>
> In contrast, the term "persuasive (legal) burden" means that a party has an obligation to prove or disprove a fact **or issue** to the criminal or civil standard. The failure to convince the trier of fact to the appropriate standard means that party will lose on that issue.[9]

[28] The authors go on to write that burdens of proof in civil litigation generally only come into play where the evidence is evenly divided on an issue. In the case of negligence, "the plaintiff would lose if it was equally reasonable to infer negligence as no negligence, since the plaintiff had the (legal) burden on the issue of negligence."10

[29] Likewise in this Court, the party arguing for the mixed fact and law proposition does, subject to various exceptions, have to prove that they satisfy that mixed fact and law proposition, just as they would in any other court, though they do not have to prove the legal test itself.

[30] I do agree with the statement in *Stackhouse* that, "…there are cases where a legal standard adopted by a statutory provision requires nothing more than a determination fact" and "The question of whether a legal standard requires nothing more than a finding of fact is not always easy to answer".[11] To my mind, that observation reinforces the idea that a pleading of a matter of mixed fact and law should not automatically be struck.

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[8] 3.02 (3.2)
[9] Lederman *et al*, Sopinka, Lederman & Bryant: The Law of Evidence in Canada, 6th Ed. (LexisNexis Canada Inc. 2022) §3.03 (¶3.8) [emphasis added].
[10] 3.06 (3.68)
[11] *Stackhouse, supra* note 7, para 18 and 20.

[31] The impugned pleading here is primarily factual. Section 160 of the *Act* invokes the non-arm's length provisions in s. 251 the *Act*. The parties contest whether paragraph 251(1)(c) applies. The provision states that,

> "it is a question of fact whether persons not related to each other are, at a particular time, dealing with each other at arm's length."

Given that the legal test is a factual test, little is to be gained by attempting to argue that the non-arm's length assumption is not, "the findings or assumptions of fact made by the Minister when making the assessment"[12] provided that the assumption is reasonably supported by some pleaded facts and is not merely a conclusory statement.

[32] I conclude by going back to the decision of Rip C.J. in *Strother* where he wrote:

> [26] A non-arm's relationship is a question of fact: *Teelucksingh v The Queen*[12]. Bowie J. explained that matters such as:
>
> > … assertions as to value, that parties do not act at arm's length, that they did not carry on a business, that expenses were not incurred, or were not incurred for a particular purpose are assertions of fact. Certainly those facts have legal implications, and some of them use words that are used in the Act, but they are nevertheless factual assumptions.

## 2. The Facts

[33] By 2008, Mr. McCague had become acquainted with Robert Jones a brash ex-football player. Jones had established himself in a niche business. Institutional lenders were inundated with repossessed real estate that had been used for marijuana grow-ops and that required extensive remediation before they could be marketed. Jones had two businesses, Home Alone, which contracted with the banks to do remediation and National Remediation which performed demolition work on the properties. Mr. McCague and Mr. Jones decided to form a third company 218 which would carry on the business of rebuilding the homes once the interior demolition and remediation work was done. This of course meant that 218 had only one client, Home Alone. 218's corporate office was actually set up in Home Alone's corporate office.

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[12] *Tax Court of Canada Rules (General Procedure)*, SOR 90/688, as amended, Rule 49(1)(d).

[34] McCague and Jones were 50-50 partners in the business. Each was a 50% shareholder, and director. Mr. McCague was apparently not aware that he was also the secretary-treasurer of 218.

[35] As had been his habit, with Dial One, Mr. McCague concerned himself only with the operational side of 218's business, except to the extent of ensuring that trade payables and subcontractor payables were addressed. For the year ending September 30 2010, 218 was firing on all cylinders. The company had new tools, either owned by 218 or by Home Alone/National Remediation. According to Mr. McCague he consistently had 20 projects on the go. He worked 14 hours a day seven days a week. Most days started with early attendance at the office to meet with Jones before heading out to site visits with subcontractors starting at 7 or 7:30 am. Mr. McCague's job was to get the projects done. This meant finding subcontractors, motivating them, staying within budget and working to deadline, all the things that he had excelled at doing in his old job. Sundays were set aside to meet with Jones to cost and bid on new work.

[36] By the end of the fiscal 2010 year, Mr. McCague had worked or was working on 500 projects.

[37] Mr. McCague was an employee of 218. He was paid approximately $300,000 for his work in calendar 2010, which includes the first part of 218's 2011 tax year. Even after accounting for expenses and tax, 218 ended its 2010 fiscal year with significant retained earnings. Earnings had increased from $90,000 in fiscal 2009 to $524,000 at the end of 2010. The corporate taxes for 218, now assessed at $76,000, still left almost $450,000 in the company and so in late 2010 McCague and Jones decided to pay out most of that amount as a dividend of $430,000 or $215,000 to each of Messrs. McCague and Jones. That decision was taken at a meeting attended by Messrs. McCague, Jones and Elaine Francis who served as the accountant for both Home Alone and 218. At that meeting, Mr. McCague did review the financial position of 218.

[38] Mr. McCague's evidence about Elaine's role was confusing. He stated that Elaine was not his advisor and that he had no financial advisor. Elaine was the accountant to 218. I had no evidence that she provided advice to either shareholder or that there was any impediment to her answering any questions that Mr. McCague may have had about 218's financial position or the proposed dividend payment.

[39] At all times, Mr. McCague had signing authority over 218's bank account. He had access to the financial statements of 218. There was no shareholder or other

agreement that impeded Mr. McCague from blocking any action of Mr. Jones with which he did not agree, or from discharging his role as a director or officer or the corporation. In short, he had access to all the information and legal tools that he needed to ensure that 218's taxes were paid, and the company had enough retained earnings to pay its 2010 taxes and to pay a substantial dividend. The dividend was paid before the end of the 2010 calendar year and included by Mr. McCague in computing his 2010 income.

[40] The business continued into 2011, but sometime in early 2011 the business apparently slowed down. Mr. McCague was advised by employees of National Remediation that Mr. Jones had decided to have National Remediation do the rebuilding work rather than contracting it out to 218. In a meeting between Jones and McCague, Jones confirmed that to be the case and their business relationship came to an end as Mr. McCague's functions were now carried out by the employees of National and Home Alone who Mr. McCague had trained. Neither Mr. Jones nor Mr. McCague paid the income taxes owing by 218 and no one gave any evidence as to what happened to the rest of the retained earnings of 218 that were more than adequate to pay the taxes prior to the wind down of the Jones-McCague relationship.

[41] I turn then to the real issue in dispute. Did Mr. McCague and 218 deal with each other at arm's length.

*a) The Statutory Scheme*

[42] At the risk of oversimplifying, s. 160 of the *Act* applies where a taxpayer transfers property, for no consideration or for consideration less than fair market value to persons with whom it does not deal at arm's length. In this case, the property transferred was money in the form of a dividend.

[43] The parties did not dispute the proposition that the dividend received by Mr. McCague was not paid to him as consideration.

[44] It is also clear that Mr. McCague was not in *de jure* control over 218.[13] He did not have enough shares to control the corporation, nor did he have a shareholders' agreement that either gave him or deprived him of control. Almost by definition the whole point of a 50-50 shareholding arrangement is not to give control to any one party but rather to give each shareholder a veto to block any one party from

[13] *Dworkin Furs (Pembroke) Ltd v Canada (MNR)* (1965), [1966] Ex C R 228, CarswellNat, 312, paras 8-9, Aff'd [1967] SCR 223.

exercising control. It is in effect a tacit acknowledgment that the shareholders will control the business together or not at all.

[45] Mr. McCague and Mr. Jones are also not related to one another for the purposes of the *Act*. So, the only way that 218 can deal with them on a non-arm's length basis is under paragraph 251(1)(c) of the *Act* which provides that

> **(c)** in any other case, it is a question of fact whether persons not related to each other are, at a particular time, dealing with each other at arm's length.

b) *The Jurisprudence on factual non-arm's length*

[46] The question of whether two 50-50 shareholders of a corporation deal at arm's length with that corporation has been the subject of a number of cases.

[47] I am fortunate in that the most recent decision of this Court in a s. 160 case involving a dividend payment to a 50-50 shareholder contains a comprehensive review of the case law. That case is *Veilleux*[14] and it was decided in 2022.

[48] *Veilleux* sets out the factual non-arm's length test by referencing the Supreme Court decision in *McLarty*. The following criteria were set out as guidance in determining whether parties were in fact dealing with each other at arm's length.

> A. was there a common mind which directs the bargaining for both parties to a transaction;
>
> B. were the parties to a transaction acting in concert without separate interests; and
>
> C. was there "de facto" control.[15]

[49] In many cases, including *Veilleux*, it is often the second criteria of acting in concert without separate interests that is contested between parties. In this appeal, the respondent alleges that Mr. McCague and Mr. Jones acted in unison with respect to the declaration and issuance of the dividend.

[50] *Veilleux* cites to the 1991 *Fournier* decision of Dussault J. There, two shareholders each owned 45% of a company and they were assessed under s. 160 of the *Act* for receiving a dividend while the corporation was liable for tax. Ignoring

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[14] *Veilleux v R* 2022 TCC 69.
[15] *Canada v. McLarty*, 2008 SCC 26, para 62.

the other 10% interest, the Court in *Fournier* after reviewing a series of prior cases held that:

> When the parties to a transaction act in concert, when they have similar economic interests or they act with a common intent, it is generally admitted that they are not dealing at arm's length.[16]

And

> I cannot find a situation more suited to application of the concept of a non-arm's length transaction between unrelated persons, in that the company's two principal directors and shareholders apparently acted in concert and with a common economic interest to decide how they would withdraw the profits made by the company for their personal use. Acting both as directors of the company and its shareholders, they were in a position where the concept of not being at arm's length in fact as established by our courts could hardly be better applied.[17]

[51] Justice Dussault in *Gosselin* went a step further and made it explicit that a finding of acting in concert by two 50-50 shareholders entailed that each shareholder did not deal at arm's length with the corporation in respect of the transaction in issue, holding that:

> 12.…First, the issue is in fact whether the appellant and Gestion Farrell & Gosselin, and not the appellant and Mr. Farrell, were dealing at arm's length at the time of the transfer. The fact that the appellant and Mr. Farrell acted in concert is clearly relevant, since they were the only two shareholders, in equal proportions, and were also the only two directors of the company. Second, the situation in which the parties were must be analysed in terms of a specific transaction, not in very general terms, since the test refers precisely to "parties to a transaction acting in concert". This transaction, involving the declaration and payment of a cash dividend, resulted in a transfer of property from the company's assets to the shareholders'. As directors acting for the company, the appellant and Mr. Farrell transferred to the shareholders, that is to themselves, and only to themselves, property owned by the company, representing a portion of its undistributed profits. <u>If we consider a company's ultimate interests to be actually the interests of its shareholders or, if you like, of its owners, through the shares in its capital stock that they hold, it is hard to see any separate interests where there are only two shareholders who hold shares of the same class with the same rights and in equal proportions.</u> This is the meaning of the decision which I rendered in Fournier, the facts in which were similar to those of the instant case.[18]

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[16] *Fournier v R*, [1991] CarswellNat 471 (TCC), para 8.
[17] *Ibid*. para 12.
[18] *Gosselin v R*, [1996] CarswellNat 2472, para 12 [emphasis added].

[52] *Veilleux* referenced the *HLB Smith* decision. In that case, an operating company ("Opco") was owned on a 50-50 basis by two holding companies ("Holdco(s)"). The families that owned the companies agreed that instead of paying salaries, Opco. would declare a $1000 dividend each week to each Holdco. Opco did this while it owed income tax and so the Holdco. along with the family trust that owned the Holdco. shares and the trust beneficiaries were assessed under s. 160. The Court rejected the argument that Mr. Smith was a passive co-owner and found that smith acted in concert with the other shareholder, Scott, and his Holdco to, "decide how they would withdraw the profits made by the Opco for their personal use".[19]

[53] *Veilleux* also referenced to the case of *Gestion Yvan Drouin* (*Gestion*). *Gestion* was also a 50-50 case involving a s. 160 assessment, but with complex facts. The impugned dividends were declared not for the evenly held common shares but for the preferred shares which were owned only by the appellant. They were declared only following hard bargaining as part of corporate restructuring of the corporation's affairs.

[54] The Court in *Gestion* made two points of interest:

A. It held that prior jurisprudence with respecting to "acting in concert" asks whether a person acting in concert with another exercises control over the corporation by himself. It does not ask whether a person acting in concert with another are together exercising control over the corporation; and

B. Citing to *HT Hoy Holdings* case, Justice Archambault distinguished between having a common goal and a common interest in a transaction. Two shareholders/directors may have a common goal of having a company declare a dividend. However, it does not mean that they do so with a common interest. Gestion Drouin's interest was very different from the interest of the other taxpayer.

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[19] *HLB Smith Holdings Ltd v R*, 2018 TCC 83, para. 28.

*Some Criticisms of This Court's Approach to the applicable Tests*

[55] These reasons rely on *Veilleux* and a number of prior cases referenced therein. However, there has been some criticism of those prior cases.

[56] *Gestion* itself is critical of the *Fournier* and *Gosselin* decisions. Archambault J. noted that *Fournier* and *Gosselin* looked at whether the directors/shareholders acting in concert controlled the corporation rather than looking at whether a director acting in concert with another exercises control by himself.[20]

[57] In a 2022, CTF article, Dean Blachford briefly reviewed the *Smith* decision. In that case Mr. Blachford expressed concern that *Smith,* "…concludes that 50 percent shareholders are inherently not dealing at arm's length with their corporation when they decided to declare a dividend", without referencing the *Gestion* decision. Mr. Blachford agreed with the proposition that the "acting in concert" test looks at whether a person acting in concert with another is exercising control over the corporation on his or her own.

[58] I have some concerns about the reasoning set out in *Gestion* and endorsed in the Blachford article.

A. The proposition is hard to reconcile with other cases cited in *Gestion*, particularly *Swiss Bank*, which is quoted for the proposition that

> "…where several parties…act in concert, and in the same interest, to direct or dictate the conduct of another, … the 'mind' that directs that may be that of the combination as a whole acting in concert or that of any of them in carrying out particular parts or functions of what the common object involves. …"[21]

B. *Swiss* goes against the idea that one member of the group must exercise control by himself and for himself;

C. *Gestion* cites to the to the *Del Grande* decision for requirement that acting in concert requires that one person in the concert group exercise control. However, *Del Grande* does not state that acting in concert exists **only** where a person acts so closely with another that he is the directing mind. *Del Grande* contains no indication at all that the Judge

[20] *Gestion*, supra [2001] 2 CTC 2315, para 84.
[21] *Ibid*. para 73, ultimately citing to, *Swiss Bank Corporation v R*, 71 DTC 5235 (Ex. Ct.), Aff'd [1974] SCR 1144.

was asked to consider whether Mr. Del Grande together with the other shareholder controlled the relevant company. In, *Del Grande* the Court essentially considered whether Mr. Del Grande *de facto* controlled the relevant corporations because he "…exercised a degree of control over the corporations vastly disproportionate to his minority position…".[22]

D. There is no reference to *Fournier* in *Del Grande* much less is there a rejection of the approach to in concert acting, set out therein;

E. The reference to Del Grande and the other family acting in concert such that he controlled the companies came up only in *obiter* in *Del Grande*;[23] and

F. The insistence that one person control the company by virtue of acting in concert with another comes rather close to collapsing the "in concert" and "de facto" criteria in *McClarty*.

[59] The Blachford commentary came out in August 2022 just after the *Veilleux* decision and therefore it did not refer to *Veilleux*. *Veilleux* did however canvass *Gestion*, and while it did not endorse Justice Archambault's approach to acting in concert, it did put to rest any concerns that 50-50 shareholders automatically deal on a non-arm's length basis, holding that, "…it is not necessarily the case that such circumstances will give rise to a non-arm's length relationship, but it is a question of fact…"[24]

[60] Mr. Blachford also makes reference to a much longer scholarly article on acting in concert from a 2014 CTF report.[25] In that article Sandra Mah and Mark Meredith took a deep dive into the origin and application of the de facto control test and the acting in concert element in particular. They argue that *Fournier* takes too broad a view of the acting in concert test as formulated in earlier cases like *Swiss Bank* and seem to agree and endorse the idea that *Gestion* collapses the three approaches to acting in concert into a single test namely, "is the existence of a relationship between parties who are parties to a given transaction where one of the parties exercises over the other an influence such that this other party is no longer free to participate in the transaction in an independent manner". However, a key

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[22] *Ibid*. para 52.
[23] *Del Grande v R*, [1992] CarswellNat 1329, para 51.
[24] *Ibid*. para 27.
[25] S.Mah, and M. Meredith, "Factual Non-Arm's Length Relationships", Canadian Tax Foundation 2014 Conference Report, see esp p. 16:11-12;.

concern for the authors is to ensure that when large groups of investors own a company, as opposed to the 50-50 case here, a court does not automatically conclude that the investors also deal with one another on a non-arm's length basis.[26] This concern is important because larger groups of shareholders are less likely to have a common interest even if they have a common intent, but it is less pressing in the case of two 50-50 individual shareholders.

[61] The problem that I think both the courts and commentators are wrestling with is the need to avoid an outcome that ignores the facts in favour of a binary approach whereby the impugned dividend is somehow always the result a non-arm's length arrangement or never the result of a non-arm's length arrangement. The jurisprudence is clear that the factual arm's length question is supposed to be determined as a question of fact. So, neither this Court in all of the cases discussed, nor the CTF commentators, endorse the proposition that every 50-50 shareholding case must be reflexively adjudicated as a non-arm's length arrangement without any scrutiny of the circumstances. Likewise, a 50-50 arrangement to declare and pay a dividend, cannot simply be automatically discounted as being the product of an arm's length arrangement.

[62] I had thought that one way to approach the problem is to separate out the cases into those where the dividend payments relate to the needs of the business itself from those cases where the dividend payment is really the personal choice of the shareholders as the vehicle to get the money out of the corporation. And at first this seems to work. In *Drouin*, and also in *HT Hoy*,[27] this Court finds that the payment of dividends is the product of an arm's length arrangement because the dividend is a way for the parties to structure what is essentially a purchase of the business or a part thereof by the other shareholder. On the other hand, in cases like *Veilleux* and also *Smith* the dividends have nothing to do with the structure or operation of the business and so are the product of a non-arm's length arrangement.

[63] However, it must be acknowledged that the *Drouin* and *HT Hoy* cases are not simply 50-50 shareholding cases. They are both cases involving the payment of dividends on preferred shares to only one of the corporate shareholders as part of a restructuring or sale of the business. To these cases must also be added *Carter*, a case relied on by the appellant. *Carter* does not assist the appellant because it to

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[26] *Ibid*, p. 16:14.

[27] And see also *H.T. Hoy Holdings Ltd* v R, [1997] CarswellNat 235 (TCC), but that case like *Drouin* was not a 50-50 arrangement.

involves a corporate dividend payment that results from "hard bargaining" over the terms of a sale between corporate shareholders.[28]

[64] So, although the payment of a dividend on a 50-50 shareholding is not automatically one that is the result of a non-arm's length transaction, it does remain a type of transaction that is more likely to attract scrutiny as one resulting from acting in concert. The question of what is needed to avoid that result is fact specific. In cases like *Veilleux* and in this case, the 'diverging interests' between the shareholders are only the differing personal reasons for getting the dividends at the company, and this seems insufficient to avoid being tagged with the "acting in concert" label. There is no divergence between the shareholders as regards their common intent or their common interest.

*c) Application of the Law to this Case*

[65] I was struck by the factual similarities between this case and the *Veilleux* case. In both cases:

A. Each shareholder/director had signing authority and access to either a corporate credit card (*Veilleux*), or a bank card (this case);

B. There was a division of labour in which one shareholder focused more on the administrative side of the business while the other focused on the construction side of the business;

C. the shareholders/directors made major decisions together;

D. the corporation's accountant advised that a dividend be paid;

E. the shareholders/directors each had different financial needs. In the *Veilleux* case it was the other shareholder/director who looked to the corporation as his main source of income; and

[28] *Carter v R*, 2024 TCC 71, para. 48.

F. eventually the relationship between the two shareholder/directors broke down.

[66] This Court in *Veilleux* did not see how the facts set out above could lead to a holding that the appellant and the other shareholder/director had different interests. In particular, Justice St-Hilaire (as she then was) wrote that:

> "There were no such divergent or opposing interests. The two directors and shareholders, Mr. Veilleux and Mr. Carile, both wanted to withdraw profits from 9135. They followed their accountant's advice and chose to receive salaries and dividends."[29]

[67] I agree. It follows that I take issue with the way that the appellant framed his "common interest" argument. Counsel for Mr. McCague suggested that the reasons why Mr. Jones may have wanted a dividend were not necessarily the same as or aligned with those of Mr. McCague. However, as I have already indicated, this argument takes the inquiry too far into the nature of the personal reasons of each shareholder rather than the common nature of the reasons i.e. that their reasons were personal and not related to the business. McCague paid his credit cards, contributed to his RRSPs and took a much-needed vacation. Whether Jones did the same thing or did something else with the money is unknown and irrelevant. What matters is that they both wanted 218 to disgorge its retained earnings for personal reasons and they acted in concert to make that happen.

[68] Finally, much was said about Mr. McCague's preference to focus on operational matters rather than the financial affairs of 218. I find that evidence to be unhelpful to Mr. McCague. Mr. McCague was sophisticated. He is intelligent, logical and organized. He is a university graduate. He had extensive experience with budgets and logistics. He knew how to cost construction projects; he ensured that trades were paid on time, and he dealt with the purchase of materials. I know of no reason why he could not have turned his mind to ensuring that tax, which is in the end just another payable, was paid as and when required. The facts here were not like *Siracusa*[30] the case referenced in the appellant's submissions. In that case, the appellant was one of three shareholders in a fractious, even oppressive, relationship. I also note that the Court in that case found that the interests of the other two

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[29] *Veilleux, supra* note 14, para 29.
[30] *Siracusa v R* 2003 TCC 941.

shareholders were the interests of the corporation,[31] suggesting that they were acting in concert with that company.

[69] Here, the shareholders acted in concert and were together the controlling mind of 218 and each shareholder was not in fact dealing at arm's length with each other or with 218. This case is on all fours with *Veilleux* and similar to *Fournier* and *Smith* and the result is the same. The appeal of the section 160 assessment must be dismissed.

## IV. **The 227 appeal**

[70] In the 227 appeal, Mr. McCague argues that 227 had no source deduction liability, but if it did, he was duly diligent and so is not jointly and severally liable for it.

### 3. 227 Facts

[71] In early 2011, Mr. McCague set up his own company, 227. The company was supposed to provide competition to Home Alone in order to satisfy the banks that they were getting competitive bids for the work described earlier, but that arrangement never got off the ground because of the termination of the relationship between Messrs. McCague and Jones. Instead, Mr. McCague was induced by Steve Buck, a colleague he had met in the construction industry, to meet with Mike Holmes. Mr. Holmes was a well-known television personality whose television programs focused on home improvement and remediation of shoddy residential renovations. In turn, Mr. Holmes advanced money to induce Mr. McCague through 227 to bid on an asbestos remediation job for a Walmart store in Georgetown. Mr. McCague got the contract, one of the largest of its kind in Canda, and completed a demanding course to obtain a level 3 asbestos handling certification.

[72] The actual work required Mr. McCague to be personally present at the work site as remediation workers removed and bagged the asbestos. Mr. McCague testified that asbestos remediation workers tend to be itinerant. Although attracted by the prospect of a large contract, it was difficult to obtain a full complement of workers, so he turned to Mr. Buck who in turn turned to a Mr. Martel to recruit workers. He needed 8 to 10 workers per shift working two shifts a day.

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[31] *Ibid*, para 23.

[73] Workers were paid based on their experience and certifications, with wages starting at $30 an hour. Workers might stay for as little as a few days before moving to other sites. Frequency of pay was by agreement, bi-weekly though Mr. McCague suggested it may have been weekly to account for the itinerant nature of the workers.

[74] While on the job site, the work requirements were strict. Workers had to comply with detailed regulations that included wearing special protective clothing that was replaced up to six times a shift, using clean room facilities to change into appropriate attire, wearing respirators, and shaving to ensure good seals with the respirators. Asbestos material including the suits used by workers had to be doubled bagged, sealed and sent to a contained area where the exteriors would be decontaminated prior to the bags going into specially designated asbestos waste bins.

[75] The provincial Ministry of Labour conducted spot inspections every week and if problems were found, would attend every day until they were corrected. Regulatory breaches could result in warnings, steep fines, and ultimately worksite shutdown.

[76] In addition to the remediation workers, 227 also needed carpenters and other tradespersons to support the remediation work. For example, a 250-foot-long corridor had to be built to accommodate the work. Clean rooms, showers and change rooms had to be built and maintained as well.

[77] A review of the T4 summary disclosed that 19 workers were on the payroll. Out of that number, Linda Arthur was the accountant; six other workers,did not do remediation work and another 12 or 13 were asbestos remediation workers. When asked why there were so few remediation workers, Mr. McCague was not sure but assumed that the rest were paid as contractors.

[78] Mr. McCague testified that he hired Linda Arthur to be the accountant for 227 based on his long association with her dating back to Dial One. His instructions to her were that 227 was to have no employees and that even Linda herself would work through her own pre-existing company. I pause to observe a timing issue. Those instructions were given in early 2011 when 227 was set up, but, at that time Mr. McCague had not yet been introduced to Mike Holmes nor had he decided to bid on a remediation contract. The Walmart work did not start until the end of 2011 and into the beginning of 2012. I have, therefore, no way of knowing whether Ms. Arthur, who did not testify, believed that Mr. McCague’s instructions would apply to a completely different project than the one for which 227 had been established.

[79] Ms. Arthur, kept the books, ordered materials, ensured that trades showed up only when safe and appropriate, did the payroll and signed the cheques. She also, and unbeknownst to the appellant, signed the T4 summary which was received by the CRA and which served as the basis for the CRA assessments. Although Mr. McCague described a loss of trust in Ms. Arthur, that did not happen until he found out that Ms. Arthur had filed the T4s and the T4 summary and he did not find out about that until sometime after the 2012 year. Throughout the lifetime of the project, he did trust Ms. Arthur and she had great latitude in operating the business, including as I said, signing cheques.

4. Corporate Liability

[80] Mr. McCague argues that there is no corporate liability because, the workers were all contractors and not employees. Alternatively, he argues that the quantum of liability is not established by the respondent on the evidence and that in any event that quantum is limited to penalty and interest and not to the deductions themselves. I think that the status of the workers is a secondary issue and so I will start with the quantum issue.

5. Quantum Not Established

[81] Mr. McCague argues that the Minister had the burden to establish the quantum of liability and he failed to do that, or at any rate that the only liability established was for penalty and interest on amounts not deducted or withheld.

*d) Burden of Proof*

[82] The appellant relying on *Mignardi*, argues that the Minister bears the burden of proving that amounts were deducted or withheld by 227 because those facts are peculiarly within the Minister's knowledge.

[83] The facts here all come from 227's T4 summary. By contrast, in *Mignardi*, the appellant had been excluded from the operation of the corporation by the franchisor and thereafter the CRA had audited and assessed the corporation. *Mignardi* does not state that the assessed amounts were based on the corporation's filed returns so it may be that the facts underlying the corporate assessment were peculiarly within the knowledge of the CRA.

[84] It also does not help the appellant that, per the notice of appeal, the appellant repeatedly cancelled appointments to have the CRA review payroll records. During

the hearing, the appellant could not recall appointments being cancelled, but at a minimum it is clear that no such appointments were scheduled prior to 2014. I say that because the T4 summary was only filed in 2013. The appellant testified that he moved to Calgary late in 2013 and that he returned to Ontario to deal with various issues in 2014. He recalled that he had a conversation with the CRA just before he left Calgary for that 2014 trip. No actual payroll review was ever successfully scheduled or carried out. The CRA ultimately issued two assessments, one for provincial income tax withholding and another to cover all federal withholdings.

[85] Were it necessary, I would also cite to *Gagné Estate* where the appellant complained about a directors' liability assessment that was founded on the *pro forma* financial statements of the corporation, those being the only available documents provided despite numerous requests from the CRA. This Court held that, "A taxpayer cannot invoke his own turpitude and subsequently seek adjustments".[32] "Turpitude" is too strong a word to describe the appellant's conduct here. Mr. McCague's failure to provide proper financial records to the CRA was not intentional, but simply a result of the difficult personal circumstances faced by the appellant during the period after 2012, but this does not mean that the relevant facts were exclusively or peculiarly within the knowledge of the Minister.

*e) The Statutory Interpretation Argument*

[86] The appellant argued that as a matter of law he was not liable for 227's failure to remit source deductions except for penalty and interest unless the employee was a non-resident.

[87] In his written argument, the appellant explained that the corporation had no liability "to remit amounts it had not deducted or withheld, so such amounts should not have been included in 227's federal tax assessments". There is some support for this position.

[88] Employers must deduct and withhold source deductions under subsection 153(1) of the *Act*.

[89] Per subsection 227(9.4), an employer who deducts or withholds an amount but who fails to remit the amount is liable for the amount withheld or remitted.

[32] *Gagné Estate v R*, 2020 TCC 111, para 58.

> **(9.4)** A person who has failed to remit as and when required by this Act or a regulation an amount deducted or withheld from a payment to another person as required by this Act or a regulation is liable to pay as tax under this Act on behalf of the other person the amount so deducted or withheld.

[90] The employer who fails to remit an amount deducted or withheld is also liable to pay a penalty under subsection 227(9) of the *Act* which provides in part that:

> **(9)** Subject to subsection 227(9.5), every person who in a calendar year has failed to remit or pay as and when required by this Act or a regulation an amount deducted or withheld as required by this Act or a regulation or an amount of tax that the person is, by section 116 or by a regulation made under subsection 215(4), required to pay is liable to a penalty of…

[91] Subsection 227(9.2) also imposes interest on the amounts deducted or withheld but not remitted.

[92] However, and perhaps paradoxically, an employer who does not even bother to deduct or withhold tax from an employee resident in Canada is not liable for the failure to remit. The liability is limited to the penalty in subsection 227(8) which provides in part that:

> (8) Subject to subsection 227(8.5), every person who in a calendar year has failed to deduct or withhold any amount as required by subsection 153(1) or section 215 is liable to a penalty of

[93] Subsection 227(8.3) creates a liability to pay interest on the amounts that should have been deducted or withheld.

[94] Exceptionally, where the employee is a non-resident, provisions like 227(8.4) make the employer liable for the amounts that should have been withheld.

[95] Finally, section 227.1 of the *Act* provides as follows:

> 227.1 (1) Where a corporation has failed to deduct or withhold an amount as required by …or section 153 or 215, has failed to remit such an amount or… the directors of the corporation at the time the corporation was required to deduct, withhold, remit or pay the amount are jointly and severally, or solidarily, liable, together with the corporation, to pay that amount and any interest or penalties relating to it.

[96] The appellant's argument only works if they failed to deduct or withhold tax. However, the T4 summary that they put into evidence shows that 227 did deduct and

withhold tax. The assessed amounts were the amounts in the T4 summary. The appellant did not testify one way or another as to whether the amounts in the T4 summary were actually withheld and he did not call Ms. Arthur to testify. There is therefore no reason to doubt what is recorded in the T4 summaries, that certain amounts were deducted and withheld from the pay of the employees.

[97] Worse still, the appellant's written submissions appear to cherry-pick information from the T4 summary, arguing that, "Since 227's alleged employees were all Canadian residents based on the T4s, neither 227 nor the appellant would have liability for federal tax not deducted.". The corollary to that statement must be that 227 and the appellant do have liability for the tax that is shown to have been deducted on the T4 summary.

[98] The appellant relies on the *Storrie*[33] decision in support of his argument that he is not liable for the actual source deductions. *Storrie* has not been cited, applied or followed in the 29 years since it was decided. Leaving that aside, the facts in *Storrie* are distinguishable. In *Storrie*, the corporation was in financial difficulty and the corporation's bank advanced only enough funds to pay the net amounts owing to the workers. No T4's appear to have been issued and none were introduced into evidence. Here there is no evidence as to the financial position of 227 at the end of 2012 and a T4 summary and T4s were sent to the CRA. Those are important facts.

[99] It must be remembered that if no T4 is issued to a resident employee, the tax authority may not suffer any loss. The employee is likely to file a tax return and the CRA can attempt to collect the tax owed from the employee. This is cumbersome, but not doomed to fail in every case. However once a T4 is issued, the employee is almost certain to file a tax return in which they claim, not unreasonably, to have had all their income tax, CPP and EI deducted at source. That leaves the CRA with no option but to go after the employer, and sometimes the corporate directors for the source deductions recorded in the T4s. This difference may help explain why sections 227 and 227.1 of the *Act* impose a greater burden on employers and their directors when money is actually deducted and withheld as compared to employers who don't deduct or withhold at all.

6. Employee v Contractor

*f) Interplay of Statutory Interpretation Argument and Status of the workers*

[33] *Storrie v Canada (MNR)* (1995), [1996] 2 CTC 2596 (TCC).

[100] I have some doubt as to whether the status of the workers really matters. Having found that 227 deducted and withheld amounts from the workers, those amounts impressed with a trust in favour of the Crown under subsection 227(4) of the *Act*. It was no longer open to the appellant to do anything other then, in the words of 227(4), "to hold the amount separate an apart from the property of the person…, in trust for Her Majesty and for payment to Her Majesty in the manner and at the time provided under this Act."[34] This issue was fully canvassed in the *Suspended power Lift* case where Webb J. (as he was then) held that an employer must credit the employee with any amounts withheld in intended compliance with the *Act* and must remit any amounts deducted in intended compliance with the *Act*.[35] 227 was liable to remit the amounts collected even if they were collected by mistake and Mr. McCague was jointly and severally liable to make that remittance. However, since the parties fully argued the status of the workers my findings on that issue are set out below.

[101] Mr. McCague argues that the workers were contractors and not employees. I divide the workers into two groups, the remediation workers and everyone else.

*g) Remediation Workers*

[102] I find that the remediation workers were employees. Mr. McCague does not have the unilateral authority to decide, much less insist that a worker is a contractor. That designation follows from the arrangement under which the work is performed, though it can be informed by the intent of parties. Here are the factors most often referenced[36] in such cases. Most of the factors seem to work against Mr. McCague in this case:

A. Control: greater control favours an employment relationship. Here, the rigid requirements of the job do not easily lend themselves to the workers being contractors. They must work their prescribed shifts; they wear prescribed clothing; they must shave, they have no discretion or freedom of action in how they perform their work;

B. Use of tools: Employers provide tools and materials. Here, all material and tools needed for work were provided by 227. This includes the six Tyvek suits a day used by each worker. This is somewhat offset by the

[34] *Act*, ss. 227(4) as it read in 2012.
[35] *Suspended Power Lift Service Inc. v R* 2007 TCC 519, para. 27.
[36] *671122 Ontario Ltd. v Sagaz Industries Canada Inc.*, 2001 SCC 59, para 47.

fact that the workers had to supply their own respirator which could cost $500, however and per the evidence was custom fitted to the worker's face and is in the nature of a personal tool. I don't think that this tips the balance in favour of a contractor relationship.

C. Integration: Employees are integrated into the employer's business. Here, this factor somewhat favours the contractor relationship. The workers were itinerant and sometimes worked for multiple sites. That said, 227's project was the biggest of them all and likely would have attracted as steady a crew of workers as could be expected given the itinerant nature of the workforce. I should also add that I don't think that the itinerant nature of the workforce translates into the workers being in business for themselves. There is little to indicate that they were other than what they seem, casual employees.

D. Profit and loss: Contractors have a stake in the profitability of the enterprise. Here, the workers were paid an hourly wage; there was no risk of profit and loss beyond the usual risk associated with not working or not working well.

E. Intent of the parties. The appellant's intent was to establish a contractor relationship but I did not have the benefit of any evidence from a remediation worker, so I am not prepared to find a common intent on the evidence. Ms. Arthur's decision to T4 herself is not helpful to showing that Mr. McCague shared a common intent with her or any other worker.

*h) <u>The other workers, except for Martel and Arthur</u>*

[103] I considered carefully whether the following workers were contractors:

A. Neil Van Vugt had his own flooring business;

B. the Mill Brothers, Dylan and Robert had a small construction business;

C. Jerry Mularsky, worked for top class construction; and

D. Adam Och also worked for another construction company.

[104] What ties all of these workers together is that their work more easily lent itself to being subcontracted out.

[105] However, I don't actually know what each person did with respect to the job. I know that someone had to build rooms, hallways, and showers, but I was given no contracts or other documents detailing the work or the work arrangements. None of the individuals testified about what they did or how they did it. It is not the court's job to fill in the blanks of the case. There was insufficient evidence to characterize the work of the above persons as subcontract work, especially in light of the strict rules for accessing and working at the jobsite. Instead, these workers were treated by 227 as employees and they remain so for the purposes of deciding this case.

*i) Martel*

[106] I find that Martel was an employee; his job was, through Buck, to find and keep the workers. That makes him an integral part of the business. I also have insufficient evidence to show that control, tools, or profit and loss issues would break for in favour of 227.

*j) Arthur*

[107] I find that Linda Arthur was an employee of 227. Although she had a great deal of latitude in how she ran the business, and this normally favours a finding of a contractor, it works against her on these facts. She was essentially the manager of the business and so too tightly integrated with it to be anything other than an employee who wrote the cheques, filed the T4's did the books etc.

[108] I have no reason to believe that Arthur had chance of profit or loss other than the usual profit and loss experience based on hours worked.

[109] I have no reason to believe that Arthur had to provide her own tools to do the work. I think it more likely that she operated 227's systems.

[110] I therefore find that 227 did have an obligation to deduct and withhold amounts on account of income tax CPP and EI for the workers in issue.

7. Due Diligence

[111] Mr. McCague's notice of appeal pleads that a due diligence defence applies, but he does not actually specify such a defence. Instead, he argues that Ms. Arthur

should be liable for any failure to remit because she was, "a de facto director" who signed documents and submitted them to the CRA without the appellant's consent.

[112] Before considering the defence, I express my disagreement with the appellant's characterization of Ms. Arthur's conduct as taking place, "without the appellant's consent". Based on the evidence that I have heard, Mr. McCague fully acquiesced to turning over the administrative aspects of 227 to Ms. Arthur. Returning to where I started this case, Mr. McCague simply reverted to his old habits of staying in his lane. What he failed to realize however is that, as a director, corporate compliance with payroll deduction obligations were part of his core function. He could not contract out of his statutory obligations as a director by turning directorial functions over to Ms. Arthur. At best, Ms. Arthur may have become "**a** *de facto* director", but she could not become, "**the** *de facto* director" in place of Mr. McCague. That said, I turn to the due diligence defence.

[113] The due diligence standard is well known. The court asks what steps a reasonable person would do in a comparable situation to prevent a failure to remit. The test is objective.[37]

[114] The usual things that a person might be expected to do might include:

A. Having clear arrangements in place i.e. written documentation as to the nature of the relationships being established;

B. Having proper books and records and systems in place;

C. Engaging the services of a professional to deal with payroll;

D. Overseeing the work of the persons charged with maintaining the books and records;

E. Signing or reviewing year end filings with the government including T4 summaries and other tax documents like tax returns; and

[37] *Gagné Estate, supra* (FCA), para 54.

F. Where there are financial issues with a business, other steps may be required.

[115] How do Mr. McCague's efforts measure up? I don't think that his books and records were good. According to the PASF, no financial statements were prepared for the company. However, someone seems to have been doing some payroll tracking since T4s and a T4 summary was prepared.

[116] I have no information on what bookkeeping systems were in place. There were few internal controls especially given that either of Mr. McCague or Ms. Arthur could sign cheques;

[117] Mr. McCague did engage the services of a professional, Ms. Arthur, to assist with financial matters. Ms. Arthur was not called to testify so I don't know much about the quality of her work. From the evidence presented she had been performing similar work for at least 15 years. It was reasonable for Mr. McCague to hire her and to rely on her, but only to a point. Mr. McCague attempted to delegate his legal obligations to her and that he cannot do.[38]

[118] This leads to the fourth point: the need to oversee the financial affairs of the business. Mr. McCague did no such thing. He hired Ms. Arthur and then he washed his hands of his legal obligations. Per the PASF, he did not supervise Ms. Arthur in any of her work including of course her discharge of 227's obligations to the CRA. That does not meet the test of what an objective person would do in comparable circumstances.

[119] Mr. McCague did not sign the T4 summary and if a T2 was filed, I have no evidence as to who signed it. Mr. McCague testified that he did not know that Ms. Arthur had filed a T4 summary. I think he should have known. It was his job to know what Ms. McCague was doing. He didn't do that job.

[120] I have not heard any evidence that 227 experienced financial difficulties that would have required Mr. McCague to take additional steps to safeguard the withholding and remitting of source deductions so I consider this factor irrelevant.

[121] On balance Mr. McCague was not duly diligent because he failed to discharge any of his supervisory obligations. He hired Ms. Arthur but he never supervised her.

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[38] *Robin v R*, 2019 TCC 172, para 44.

His failure to know that a T4 summary had been filed with the CRA was not the cause of his problems; it was the symptom of his failure to act with due diligence.

8. Conclusion on 227 Appeal

[122] In this case, I find that 227 did deduct and withhold source deductions in the amounts set out in the T4 summary; 227's workers were employees, and therefore the appellant's joint and several liability extends to the amounts withheld and remitted and is not limited to just penalty or interest on amounts that should have been deducted or withheld. The appellant did not establish that he was duly diligent in ensuring that source deductions were reported and remitted as and when required.

[123] The appeal is dismissed.

## V. **COSTS**

[124] The respondent is entitled to a single set of costs to cover the two appeals.

Signed at Toronto, Ontario, this 24th day of April 2025.

"Michael Ezri"

Ezri J.

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| CITATION: | 2025 TCC 59 |
| COURT FILE NO.: | 2021-2256(IT)G |
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APPEARANCES:

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