Docket: 2011-3519(IT)G

BETWEEN:

ACHIM BEKESINSKI,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on October 29, 30, 31, 2013 and November 1, 2013 at Vancouver, British Columbia

Before: The Honourable Justice Diane Campbell

Appearances:

Counsel for the Appellant:	Gavin Laird; Drew Gilmour
Counsel for the Respondent:	Catherine M.G. McIntyre

JUDGMENT

The appeal from an assessment made under the *Income Tax Act* with respect to Notice of Assessment No. 1176897, bearing date October 15, 2010, is allowed, without costs, and the assessment is referred back to the Minister of National Revenue for reconsideration and reassessment in accordance with the attached Reasons for Judgment.

Signed at Summerside, Prince Edward Island, this 28th day of July 2014.

"Diane Campbell"

Campbell J.

Citation: 2014 TCC 245
Date: 20140728
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BETWEEN:

ACHIM BEKESINSKI,

Appellant,

and

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REASONS FOR JUDGMENT

Campbell J.

Introduction

[1] The Appellant was assessed as a director of D.M. Stewart's Cartage Ltd. (the "Corporation") in respect to the 2001, 2002 and 2003 taxation years for unremitted income tax, employer contributions, interest and penalties in the total amount of $477,546.08 pursuant to subsection 227.1(1) of the *Income Tax Act* (the "*Act*").

[2] The Appellant contends that he resigned as a director of the Corporation by Notice of Resignation (the "Resignation") dated July 20, 2006 and that the Minister of National Revenue (the "Minister") is now barred from raising the assessment because it was raised on October 15, 2010, which is beyond the two year limitation period set out in subsection 227.1(4) of the *Act*.

[3] The Minister argued that the Appellant did not cease to be a director of the Corporation on July 20, 2006 because the Resignation was backdated and it is therefore not an authentic document.

[4] The issue is whether the Appellant continued to be a director after July 20, 2006, such that he will be liable for the corporate debt. More specifically, the issue involves a determination of whether the Resignation was backdated.

[5] The Appellant purchased the Corporation in 1992. It was in the business of general cartage, trucking and warehousing. Initially, the Appellant's wife, Angelika Bekesinski, was also a director of the Corporation but she resigned on August 1, 2002.

[6] The last annual report of the Corporation was filed with the British Columbia Registrar of Companies in 2003. Beginning in 2004, the Appellant had numerous dealings with the Canada Revenue Agency (the "CRA"). Amid issues of bankruptcy and upon receiving notice that the Corporation would be stricken from the records on March 25, 2006, the Appellant's corporate solicitor, Ted Hawthorne, directed that the Appellant's corporate registered office be changed from his law firm to the Appellant's home address.

[7] On January 28, 2011, the Appellant contacted the CRA to advise that he had previously resigned as a director by virtue of the Resignation. Since this occurred shortly after the director's liability assessment and after numerous dealings with the Appellant over the years, the CRA had suspicions that the Resignation had been backdated. Consequently, the CRA had a forensic document chemist, with the Canada Border Services Agency, Annie Vallière, test the Resignation for its authenticity by ink date testing. At the hearing in October, 2013, following a *voire dire*, I ruled that Ms. Vallière would be qualified as an expert witness in her capacity as a forensic document chemist. After Ms. Vallière was qualified, the Appellant raised an objection that the Expert Report did not satisfy Rule 145 of the *Tax Court of Canada Rules (General Procedure)*. The parties provided written submissions on this objection and I issued my ruling on January 31, 2014 (2014 TCC 35). The Expert Report was excluded because it did not comply with Rule 145. The hearing did not resume and the parties provided no further evidence except for final written submissions.

The Evidence

[8] Four witnesses testified: the Appellant, his wife, Angelika Bekesinski, his corporate solicitor, Ted Hawthorne and a CRA collections enforcement officer, Cindie May Barlow.

[9] The Appellant had been involved over the years as a director with a number of companies. Between 2003 and 2004, an audit of the Corporation was commenced. When a number of corporate sales and purchases failed and litigation ensued, the Appellant and his wife began meeting with Tony Bocking at the CRA

concerning outstanding tax liabilities. Those two meetings occurred in 2005 and 2006 and the Appellant left his records and files with the CRA.

[10] In 2008, the Appellant received requests from the CRA to file year end returns for the Corporation despite its inactivity. His next meeting with the CRA to discuss the corporate tax liabilities occurred in 2009. The Appellant did not produce or mention the Resignation at any of these meetings. On cross-examination, the Appellant testified that he did not recall receiving a warning letter from the CRA in 2005 advising that he and his wife could be facing director's liability with respect to corporate remittances. However, he did recall that Mr. Bocking from the CRA advised him, in 2005 or 2006, that his wife would not be subject to director's liability because she had previously resigned as a director in 2002. He received numerous letters from the CRA between 2005 and 2011, some of which advised him of the possibility that he could be liable as a director of the Corporation. He never advised Mr. Bocking that he was considering resigning as the director prior to the Resignation in 2006, nor did he advise the CRA at any of the subsequent meetings that he had already resigned.

[11] With respect to his Resignation, he testified that he decided to resign because he received notice that the Corporation was going to be struck from the provincial records and he believed it was part of finalizing the corporate activities. He stated that his wife typed his Resignation and used the same wording as her own resignation, which she had signed four years previously in 2002. After he signed it, he assumed his wife put it in the corporate records. Eventually he packed up all the corporate records and stored them in boxes. He thought that his wife had prompted him to resign from the Corporation. No one except the Appellant and his wife knew about his Resignation. He stated that he did not advise the creditors of the Corporation because they were pursuing him, rather than the Corporation, based on his personal guarantees.

[12] It was on January 28, 2011 that the Appellant, through a letter from his present counsel, first contacted the CRA to inform them that he had resigned as a director in 2006. Upon request, he forwarded the original document to the Minister on April 8, 2011 for testing.

[13] Angelika Bekesinski recalled very little concerning her resignation signed in 2002 and even less concerning the Appellant's. She stated that she "likely" typed the Appellant's Resignation because she handled all the correspondence at their home. She testified that it would have been typed in the family room where the computer was located. She guessed that she "probably" would have stored the

Resignation with the corporate records as it was her practice to keep such things together. However, she had no independent recollection of any of the circumstances surrounding the preparation, signing or storing of the Appellant's Resignation. In fact, she admitted that she only remembered that the Resignation was drafted on July 20, 2006 through discussions with the Appellant and his present counsel.

[14] Ted Hawthorne, who had been the Appellant's corporate solicitor for 25 years, testified that he ceased to be corporate counsel around 2005 or 2006 when the Corporation experienced various difficulties and ceased to operate. He changed the registered office of the Corporation to the Appellant's home address to prevent an ongoing obligation to deliver service of documents and correspondence to this client. He recalled "generally" receiving inquiries from the CRA and he "believed" they attended at his office. His recollection was based primarily on what his general practice and office policies were about advising clients on resigning and on director's liability, especially when a company was in trouble. He could not provide a specific timeline as to when he advised the Appellant about resigning. However, he was certain that he would have given such advice to the Appellant, particularly within the context of their personal involvement as members of the same regimental association. With respect to the Appellant's Resignation, he testified that he did not prepare it, as the wording was not consistent with how he would phrase it. However, he believed it was consistent with how he would instruct a client to draft a resignation letter.

[15] Cindie May Barlow testified that she sent correspondence to the Appellant respecting liability. During her first call with the Appellant, he was concerned and recognized that this was a serious matter. After sending the director's liability assessment letter to the Appellant and receiving no response, she certified the debt as collectible in court and commenced various legal actions. She subsequently received a call from the Appellant and his present counsel, advising her that there existed a Notice of Resignation. Ms. Barlow stated this was the first indication that a resignation existed. As such, a referral was made to the Special Investigations Department on the basis that it seemed suspicious that, after contact with the Appellant over the course of a number of years, a resignation dated in 2006 suddenly materialized following the director's liability assessment in 2010.

The Appellant's Position

[16] The Resignation is legally effective and demolishes the Minister's assumption that the Appellant was a director of the Corporation. The Minister did

not introduce any evidence that would support its theory that the Resignation was backdated. For example, there were no letters, notes or collection diary entries to suggest that the Resignation was backdated. In addition, the Respondent did not call any witnesses that had been involved with the matter during the period immediately before or after the Resignation. With respect to the time delay in the disclosure of the Resignation, the Appellant pointed out that the Minister never asked or took any steps to inform the Appellant that he could resign.

[17] The Appellant relied on the case of *LeCaine v The Queen*, 2009 TCC 382, 2009 DTC 1246, to argue that there is a heightened onus where an unusual allegation is made, such as the present allegation of backdating. The party asserting such an unusual allegation has a higher onus while staying within the range of a balance of probabilities.

The Respondent's Position

[18] The Respondent did not dispute that the Resignation was effective for the purposes of the British Columbia *Business Corporations Act*. The Respondent's argument was based on the fact that the Appellant was a director of the Corporation when it incurred an outstanding tax liability. The Appellant did not adduce credible and cogent evidence that would demolish the Minister's assumption that the Appellant remained a director. For example, the evidence of the Appellant and his two witnesses was speculative and did not demolish the Minister's assumptions.

[19] The crux of the Respondent's argument was that the Appellant was not a credible witness because of his failure to disclose that a resignation existed until after the director's liability assessment against him. It is improbable that the Appellant would omit to inform CRA that he had resigned, especially when he knew that his wife had escaped director's liability by resigning in 2002.

[20] The Respondent relied on the decision of *Moll v The Queen*, 2008 TCC 234, 2008 DTC 3420, and *Campbell v The Queen*, 2010 TCC 100, 2010 DTC 1090, to support its theory that the Resignation was not authentic because the Appellant would have disclosed this critical piece of information had he, in actual fact, resigned.

Analysis

[21] The initial onus, in a tax appeal of this nature, is on an appellant to "demolish" the Minister's assumptions by making out a *prima facie* case on a balance of probabilities. In *House v The Queen*, 2011 FCA 234, 2011 DTC 5142, the Federal Court of Appeal, at paragraph 57, explained a *prima facie* case as follows:

> … In *Amiante Spec Inc. v. Canada*, [2009 GTC 1022] 2009 FCA 139, 2009 FCJ No. 603 (QL), our Court, at paragraph 23, explained a *prima facie* case in the following terms:
>
> > [23] A *prima facie* case is one "supported by evidence which raises such a degree of probability in its favour that it must be accepted if believed by the Court unless it is rebutted or the contrary is proved. It may be contrasted with conclusive evidence which excludes the possibility of the truth of any other conclusion than the one established by that evidence" (*Stewart v. Canada*, [2000] T.C.J. No. 53, paragraph 23).

[22] If an appellant "demolishes" the Minister's assumptions, the onus then shifts to the Minister to rebut the *prima facie* case and to prove the assumptions. If the burden shifts to the Minister but the Minister adduces no evidence, the taxpayer will be entitled to succeed (*Hickman Motors Ltd. v Canada*, [1997] 2 SCR 336).

[23] The Appellant relied on the decision in *LeCaine*, specifically paragraphs 31 to 33, to argue that there will be a heightened onus where one party makes an unusual allegation, such as the allegation in these appeals, of backdating the Resignation. I not only disagree with this interpretation, but I conclude that the Appellant's extraction of these three paragraphs to support his proposition is blatantly incorrect. These specific paragraphs are part of a comprehensive analysis by Justice Webb on the burden of proof in this Court:

> [31] In *The Continental Insurance Company v. Dalton Cartage Company Limited*, [1982] 1 S.C.R. 164, Chief Justice Laskin stated as follows:
>
> > Where there is an allegation of conduct that is morally blameworthy or that could have a criminal or penal aspect and the allegation is made in civil litigation, the relevant burden of proof remains proof on a balance of probabilities. So this Court decided in *Hanes v. Wawanesa Mutual Insurance Co.*, [1963] S.C.R. 154. There Ritchie J. canvassed the then existing authorities, including especially the judgment of Lord Denning in *Bater v. Bater*, [1950] 2 All E.R. 458, at p. 459, and the judgment of Cartwright J., as he then was, in *Smith v. Smith and Smedman*, [1952] 2 S.C.R. 312, at p. 331, and he concluded as follows (at p. 164):

> Having regard to the above authorities, I am of opinion that the learned trial judge applied the wrong standard of proof in the present case and that the question of whether or not the appellant was in a state of intoxication at the time of the accident is a question which ought to have been determined according to the "balance of probabilities".

It is true that apart from his reference to *Bater v. Bater* and to the *Smith and Smedman* case, Ritchie J. did not himself enlarge on what was involved in proof on a balance of probabilities where conduct such as that included in the two policies herein is concerned. In my opinion, Keith J. in dealing with the burden of proof could properly consider the cogency of the evidence offered to support proof on a balance of probabilities and this is what he did when he referred to proof commensurate with the gravity of the allegations or of the accusation of theft by the temporary driver. There is necessarily a matter of judgment involved in weighing evidence that goes to the burden of proof, and a trial judge is justified in scrutinizing evidence with greater care if there are serious allegations to be established by the proof that is offered. I put the matter in the words used by Lord Denning in *Bater v. Bater, supra*, at p. 459, as follows:

> It is true that by our law there is a higher standard of proof in criminal cases than in civil cases, but this is subject to the qualification that there is no absolute standard in either case. In criminal cases the charge must be proved beyond reasonable doubt, but there may be degrees of proof within that standard. Many great judges have said that, in proportion as the crime is enormous, so ought the proof to be clear. So also in civil cases. The case may be proved by a preponderance of probability, but there may be degrees of probability within that standard. The degree depends on the subjectmatter. A civil court, when considering a charge of fraud, will naturally require a higher degree of probability than that which it would require if considering whether negligence were established. It does not adopt so high a degree as a criminal court, even when it is considering a charge of a criminal nature, but still it does require a degree of probability which is commensurate with the occasion.

I do not regard such an approach as a departure from a standard of proof based on a balance of probabilities nor as supporting a shifting standard. The question in all civil cases is what evidence with what weight that is accorded to it will move the court to conclude that proof on a balance of probabilities has been established.

(emphasis added)

[32] In *Hickman Motors Limited v. The Queen*, [97 DTC 5363] [1997] 2 S.C.R. 336, Justice L'Heureux-Dubé stated as follows:

> 92 It is trite law that in taxation the standard of proof is the civil balance of probabilities: *Dobieco Ltd. v. Minister of National Revenue*, [65 DTC 5300] [1966] S.C.R. 95, and that within balance of probabilities, there can be varying degrees of proof required in order to discharge the onus, depending on the subject matter: *Continental Insurance Co. v. Dalton Cartage Co.*, [1982] 1 S.C.R. 164; *Pallan v. M.N.R.*, 90 D.T.C. 1102 (T.C.C.), at p. 1106.

[33] In the recent decision of the House of Lords of *In re Doherty*, [2008] UKHL 33, Lord Carswell stated as follows:

> 25. The phrase "degree of probability" was picked up and repeated in a number of subsequent cases -- see, for example, *In re Dellow's Will Trusts* [1964] 1 WLR 451, 455, *Blyth v Blyth* [1966] AC 643, 669 and *R v Secretary of State for the Home Department, Ex p Khawaja* [1984] AC 74, 113-4 - and may have caused some courts to conclude that a different standard of proof from the balance of probabilities or a higher standard of evidence was required in some cases. In so far as such misunderstanding has occurred, it should have been put to rest by the frequently-cited remarks of Lord Nicholls of Birkenhead in *In re H (Minors)*. Immediately after the passage which I have quoted from his opinion, he went on at pages 586-7:
>
> > When assessing the probabilities the court will have in mind as a factor, to whatever extent is appropriate in the particular case, that the more serious the allegation the less likely it is that the event occurred and, hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability. Fraud is usually less likely than negligence. Deliberate physical injury is usually less likely than accidental physical injury. A stepfather is usually less likely to have repeatedly raped and had non consensual oral sex with his under age stepdaughter than on some occasion to have lost his temper and slapped her. Built into the preponderance of probability standard is a generous degree of flexibility in respect of the seriousness of the allegation.
> >
> > Although the result is much the same, this does not mean that where a serious allegation is in issue the standard of proof required is higher. It means only that the inherent probability or improbability of an event is itself a matter to be taken into account when weighing the probabilities and deciding whether, on balance, the event occurred. The more improbable the event, the stronger must be the evidence that it did occur before, on the balance of probability, its occurrence will be established... No doubt it is this feeling

which prompts judicial comment from time to time that grave issues call for proof to a standard higher than the preponderance of probability.

...

27. Richards LJ expressed the proposition neatly in *R (N) v Mental Health Review Tribunal (Northern Region)* [2005] EWCA Civ 1605, [2006] QB 468, 497-8, para 62, where he said:

> Although there is a single civil standard of proof on the balance of probabilities, it is flexible in its application. In particular, the more serious the allegation or the more serious the consequences if the allegation is proved, the stronger must be the evidence before a court will find the allegation proved on the balance of probabilities. Thus the flexibility of the standard lies not in any adjustment to the degree of probability required for an allegation to be proved (such that a more serious allegation has to be proved to a higher degree of probability), but in the strength or quality of the evidence that will in practice be required for an allegation to be proved on the balance of probabilities.

In my opinion this paragraph effectively states in concise terms the proper state of the law on this topic. I would add one small qualification, which may be no more than an explanation of what Richards LJ meant about the seriousness of the consequences. That factor is relevant to the likelihood or unlikelihood of the allegation being unfounded, as I explain below.

28. It is recognised by these statements that a possible source of confusion is the failure to bear in mind with sufficient clarity the fact that in some contexts a court or tribunal has to look at the facts more critically or more anxiously than in others before it can be satisfied to the requisite standard. The standard itself is, however, finite and unvarying. Situations which make such heightened examination necessary may be the inherent unlikelihood of the occurrence taking place (Lord Hoffmann's example of the animal seen in Regent's Park), the seriousness of the allegation to be proved or, in some cases, the consequences which could follow from acceptance of proof of the relevant fact. The seriousness of the allegation requires no elaboration: a tribunal of fact will look closely into the facts

> grounding an allegation of fraud before accepting that it has been established. The seriousness of consequences is another facet of the same proposition: if it is alleged that a bank manager has committed a minor peculation, that could entail very serious consequences for his career, so making it the less likely that he would risk doing such a thing. These are all matters of ordinary experience, requiring the application of good sense on the part of those who have to decide such issues. They do not require a different standard of proof or a specially cogent standard of evidence, merely appropriately careful consideration by the tribunal before it is satisfied of the matter which has to be established.
>
> (emphasis added)

[24] There is no indication, either expressed or implied, within these paragraphs that could support the proposition that, in cases where there is an unusual allegation, the onus on the party that asserts it will be higher. First, the decision of the Supreme Court of Canada in *The Continental Insurance Company v Dalton Cartage Company Limited*, referred to in paragraph 31 of the *LeCaine* case, does not support the Appellant's assertion. Instead, the excerpt addresses the relationship between the scrutiny of the evidence and the gravity of the allegation. Where the gravity of an allegation is greater, then the standard of the balance of probabilities will require clear and convincing evidence, although the standard remains the same. Prior to the decision in *LeCaine*, Rothstein J. in *F.H. v McDougall*, 2008 SCC 53, [2008] 3 SCR 41, at paragraph 30, interprets Chief Justice Laskin's rejection of the "shifting standard" in *Continental Insurance* in the following manner:

> **30** However, a "shifting standard" of probability has not been universally accepted. In *Continental Insurance Co. v. Dalton Cartage Co.*, [1982] 1 S.C.R. 164, Laskin C.J. rejected a "shifting standard". Rather, to take account of the seriousness of the allegation, he was of the view that a trial judge should scrutinize the evidence with "greater care". At pp. 169-71 he stated:
>
> > Where there is an allegation of conduct that is morally blameworthy or that could have a criminal or penal aspect and the allegation is made in civil litigation, the relevant burden of proof remains proof on a balance of probabilities. . .
> >
> > . . .
> >
> > There is necessarily a matter of judgment involved in weighing evidence that goes to the burden of proof, and a trial judge is justified in scrutinizing evidence with greater care if there are serious allegations to be established by the proof that is offered.

> . . .
>
> I do not regard such an approach (the *Bater* approach) as a departure from a standard of proof based on a balance of probabilities nor as supporting a shifting standard. The question in all civil cases is what evidence with what weight that is accorded to it will move the court to conclude that proof on a balance of probabilities has been established.

Justice Rothstein does not interpret this passage to conclude that there is a heightened onus on the individual making the allegation, as Chief Justice Laskin was clearly of the view that a trial judge must scrutinize the evidence with "greater care" where the allegation is more serious.

[25] Second, it is apparent that the Appellant places reliance for his proposition on a few paragraphs that have been extracted from a line of jurisprudence. In extracting portions from the reasons of Justice Webb in *LeCaine*, Appellant Counsel lifted it out of context and misinterpreted it in an effort to support an incorrect proposition. After Justice Webb provided a review of the relevant jurisprudence in *LeCaine*, his summary referred only to the probability or improbability of an event as a factor to be considered by a judge in assessing the evidence <u>but not to any degree of heightened onus</u> within the standard of the balance of probabilities itself, as Appellant Counsel proposed. At paragraph 36, Justice Webb stated:

> [36] It seems to be that these cases are consistent and the issue in a civil case (which will include the current appeal) will be whether the evidence as presented is sufficient to satisfy the trier of fact, on a balance of probabilities, that the person who has the burden of proof has established what is required of him or her. In analyzing the evidence that has been presented, the probability of improbability of the event that is in issue is a factor that can be taken into account. The more improbable the event the stronger the evidence that would be required. Conversely it would also seem to me that a person may be able to establish, on a balance of probabilities, that a highly probable event occurred based on weaker evidence than would be required to establish that an improbable event had occurred.

By narrowly focussing only on paragraphs 31 to 33 of *LeCaine*, Appellant Counsel missed the big picture and, consequently, misconstrued Justice Webb's reasons.

[26] Third, there is no legal rule that exists respecting the impact of the inherent probability of an event. A trial judge must carefully scrutinize the relevant evidence in considering whether an allegation is inherently improbable or probable

within the assessment and weight to be accorded to the evidence. At paragraph 48 of *McDougall*, Justice Rothstein stated:

> Some alleged events may be highly improbable. Others less so. There can be no rule as to when and to what extent inherent probability must be taken into account by a trial judge. As Lord Hoffman observed at para. 15 of *In re B*:
>
> > … Common sense, not law, requires that in deciding this question, regard should be had, to whatever extent appropriate, to inherent probabilities.
>
> It will be for the trial judge to decide to what extent, if any, the circumstances suggest that an allegation is inherently improbable and where appropriate, that may be taken into account in the assessment of whether the evidence establishes that it is more likely than not that the event occurred. However, there can be no rule of law imposing such a formula.

[27] In summary, there is no heightened onus on a party asserting an unusual allegation as Appellant Counsel proposed. Rather, the probability of an event is dependent upon the circumstances and it is then incumbent upon the trial judge to decide to what extent the probability of an event should be taken into consideration when assessing the evidence. The standard of proof, therefore, in civil cases remains a balance of probabilities.

[28] With respect to *LeCaine*, the Respondent argued that, based on paragraph 36, the decision stands for the proposition that facts that tend to be more improbable must be more closely scrutinized. The Respondent may have based this conclusion on Justice Webb's use of the phrase "in analyzing the evidence." However, I believe it is a mischaracterization of the decision in *LeCaine* to propose that the probability of the event impacts the level of scrutiny a judge should afford the evidence. At paragraph 36 of *LeCaine*, Justice Webb highlighted that the probability or improbability of an event speaks to the assessment of the evidence to determine if the balance of probabilities has been met, not to the degree of scrutiny. Justice Rothstein, at paragraph 45 of *McDougall*, made it clear that there is only one legal rule in all cases and that is "… evidence must be <u>scrutinized with care</u> by the trial judge." (Emphasis added).

[29] I do not believe that the alleged backdating of the Resignation is an improbable event as Appellant Counsel has characterized it. Documents of convenience are often part of the evidence in tax appeals. Even if I accepted Appellant Counsel's interpretation of *LeCaine*, which I do not, backdating of a document is not an event that I would characterize as a highly unusual allegation.

[30] There was no documentary evidence to corroborate the Appellant's Resignation and no expert evidence in respect to the ink dating of the document. I have only the testimony of the witnesses and, consequently, credibility plays a key role in this appeal.

[31] The decision in *Springer v Aird & Berlis LLP*, 96 OR (3rd) 325, highlights that the most satisfactory "judicial test of truth" is in the harmony or lack of harmony with the balance of probabilities disclosed by the facts and circumstances unique to each case. Perfection in testimonies is not expected and evidence that is too consistent may even be an indication that it is artificially constructed.

[32] Justice V.A. Miller, at paragraph 23 of *Nichols v The Queen*, 2009 TCC 334, 2009 DTC 1203, sets out several criteria that can be used in assessing credibility:

> [23] In assessing credibility I can consider inconsistencies or weaknesses in the evidence of witnesses, including internal inconsistencies (that is, whether the testimony changed while on the stand or from that given at discovery), prior inconsistent statements, and external inconsistencies (that is, whether the evidence of the witness is inconsistent with independent evidence which has been accepted by me). Second, I can assess the attitude and demeanour of the witness. Third, I can assess whether the witness has a motive to fabricate evidence or to mislead the court. Finally, I can consider the overall sense of the evidence. That is, when common sense is applied to the testimony, does it suggest that the evidence is impossible of highly improbable.

[33] In *Chow v The Queen*, 2011 TCC 263, 2011 DTC 1196, Justice V.A. Miller encouraged the application of common sense to the testimony to determine whether the evidence is possible, impossible, probable or highly probable.

[34] The Appellant's testimony was, for the most part, consistent with the testimonies of the other witnesses. For example, the Appellant's testimony was consistent with Ted Hawthorne's evidence that they had several conversations about director's liability and resigning. The testimony of the Appellant and his wife regarding the typing and filing away of the Resignation was consistent.

[35] However, there was a significant inconsistency with respect to the Appellant's explanation for not disclosing his Resignation to the CRA. He stated that he was not sure what effect such disclosure would have. This was inconsistent with his admission that Mr. Bocking informed the Appellant that his wife would not be liable as a director because she had previously resigned. Based on this information, the Appellant should have known the crucial impact of resignation for

a director. His other explanation for failing to inform the CRA that he had resigned was that he assumed that the CRA had access to his records. It is apparent that the Appellant certainly had a monetary motive to manufacture evidence. He has been involved in a number of corporations over the years, many of them unsuccessful.

[36] Ted Hawthorne suffered from the lack of a clear recollection of events. There were no inconsistencies in his evidence but he could speak only in generalities as to how his office dealt with advising clients respecting liability as directors and consequences of resignations.

[37] Mrs. Bekesinski had almost no independent recall of the circumstances surrounding either the Appellant's Resignation or her own resignation in 2002 and her evidence was based primarily on speculation. Her testimony was consistent with the Appellant's evidence respecting what generally should have occurred. However, she had no actual memory of the events. She was adamant that she would have typed the Resignation and that she would not "fudge around" with the date of the Appellant's Resignation as she did not like confrontation. Despite having a motive to fabricate the evidence, she still admitted that she did not have an independent memory of typing the Resignation.

[38] Although Appellant Counsel attempted to put in issue portions of Ms. Barlow's testimony because there was either no corroborating evidence or the evidence was not consistent with her testimony, he failed to do so. For example, he attempted in cross-examination to demonstrate that there may have been no specific conversation between the CRA and the Appellant respecting his director's liability. However, since the Appellant himself admitted in his cross-examination that he received numerous letters between 2005 and 2011, advising him of the possibility of a director's liability assessment, I am unsure of exactly what Appellant Counsel was trying to demonstrate. In addition, I failed to see the relevance of whether or not Ms. Barlow herself conducted the corporate searches contained at Exhibit R-4.

[39] The Respondent placed a great deal of reliance on the fact that the Appellant did not disclose the Resignation to the CRA or to any of his creditors. The Respondent relied on the two decisions in *Campbell* and *Moll* to argue that a lack of disclosure to the CRA or to third party creditors of a resignation will affect its authenticity. The present appeals can be distinguished from the decision in *Moll*, as the latter turned on the conclusion that the taxpayer held himself out as a director after allegedly resigning and he did not inform anyone, including third party creditors, that he was no longer a director. The Appellant in the present appeal

testified that he did not inform his creditors because he had personally guaranteed the corporate loans and he was therefore liable personally to the creditors. This fact also distinguishes the present appeal from the *Campbell* decision where it was in the taxpayer's interest to inform third party creditors concerning his directorship.

[40] The Respondent did not introduce any independent evidence concerning third party creditors that might have impeached the Appellant's credibility. I had no evidence before me that indicated that there were any creditors pursuing the Corporation. Also, the Appellant stated that he believed he was responsible for events in the past regardless of resigning from the company.

[41] The decision in *Campbell* can also be distinguished from the present appeal because there were contradictory statements made during discoveries respecting where the resignation was kept and how it surfaced. The present appeal is absent any such inconsistency. Although I am of the view that Respondent Counsel could have pressed this point with the Appellant's wife in her cross-examination, the Respondent did not press Mrs. Bekesinski beyond the fact that she had no independent memory of the event.

[42] The fact that the Appellant did not inform anyone at the CRA that he had resigned as a director of the Corporation over a lengthy period is suspect. The Appellant's explanation was that he assumed the CRA had access to his records and that he believed he was responsible in any event for past liabilities. This contradicts the Appellant's admission that the CRA informed him that his wife would escape liability for past debts because she had resigned. However, the Appellant provided a plausible explanation by stating that, as he had already been dealing with the CRA, he thought he was responsible for the tax liabilities incurred in the past and that resigning as a director would only insulate him from future events.

[43] In cross-examination of the Appellant's witnesses and in direct examination of Ms. Barlow, Respondent Counsel attempted to highlight the Appellant's potential awareness of the connection between the tax liabilities and his capacity as director. Thus, the Respondent argued that, if the Appellant had actually resigned in 2006, he would have informed the CRA in order to escape potential liability. Although this was meant to undermine the Appellant's credibility, it was Ms. Barlow's evidence that the CRA would not have asked the Appellant if he resigned because they did not want to tip him off concerning his status as a director.

[44] There is a significant lack of memory recall of the events surrounding the Resignation. However, there were no significant inconsistencies or contradictions among the witnesses. Ted Hawthorne testified that he advised the Appellant of the potential liabilities of being a director. The Appellant stated that this advice from Ted Hawthorne, his long-time corporate solicitor and friend, influenced him to resign when the Corporation was winding down. This is consistent with Ted Hawthorne's practice of ensuring that his former clients avoided such potential liabilities.

[45] Applying the comments from the reasons in *Springer* and the criteria provided by Justice Miller in *Nichols* regarding credibility, I conclude that the Appellant's testimony is generally corroborated by the other witnesses called by the Appellant. The explanations are plausible and possible, even if weak due to the passage of time and the lack of specific recollection. There are no glaring inconsistencies with the evidence of the witnesses. On the whole, the Appellant has provided plausible explanations for certain choices that I might otherwise have characterized as questionable. In all likelihood, the Appellant backdated the Resignation, but without expert evidence respecting the ink dating of the document and without apparent gaps and contradictions in the evidence, I must conclude that the Appellant has successfully met the onus of refuting the Respondent's assumption of fact that the Appellant was a director of the Corporation.

[46] This shifts the burden to the Respondent. The Respondent's position is that the Resignation was backdated to 2006 and that it is therefore not an authentic document. On a balance of probabilities, the Respondent has not been able to successfully rebut the Appellant's evidence. There was no independent evidence introduced by the Respondent which would undermine the Appellant's credibility or demonstrate that the Resignation was backdated. The Respondent relied on circumstances to undermine the Appellant's credibility. More specifically, reliance was placed on the lack of exact recall of events and the failure to advise the CRA and creditors of the Resignation. However, the Respondent failed to demonstrate, on a balance of probabilities, that the Resignation was backdated and therefore fraudulent or that the Appellant remained a director of the Corporation after the Resignation.

[47] I believe that the Minister's assumptions of fact lacked clarity and precision. The five assumptions of fact that the Respondent pleaded were:

a) the facts stated and admitted above;

b) the Appellant was the sole director of DM;

c) DM was duly incorporated under the laws of British Columbia;

d) DM was involved in the trucking industry; and

e) a certificate in the amount of $477,546.08 and pertaining to DM's failure to remit source deductions was registered with the Federal Court pursuant to section 223 of the *Act* and execution for that amount was returned unsatisfied in whole.

The initial burden on the Appellant was therefore specifically to "demolish" the assumption that he was a director of the Corporation and nothing more.

[48] These pleadings are sloppy and inadequate and detrimental to the Respondent's success. Because of the advantage that the Respondent receives from the practice of pleading facts that are assumed to be true, jurisprudence has established that those assumptions must be accurate and precise so that the taxpayer knows exactly the case to be met. The assumptions omit those very facts upon which the Respondent's position is based, that is, that the Resignation had been backdated and was not authentic. Nor was there any reference to due diligence on the part of the Appellant. Had those facts been included, the onus would have been on the Appellant initially to demolish those facts. However, the critical assumption was only that the Appellant was a director of the Corporation. The Appellant would have had a much more difficult case to meet, had the Respondent paid more attention to its pleadings. The Appellant's responsibility was to adduce sufficient evidence to demolish the assumed fact that he was a director of the Corporation. It is not the Appellant's obligation to adduce evidence to demonstrate that the Resignation was not backdated. When the burden shifted to the Respondent, the Respondent was unable to prove, on a balance of probabilities, that the Resignation was backdated and the Appellant remained a director.

Conclusion

[49] The Notice of Assessment is dated October 15, 2010. The evidence supports that the Appellant ceased to be the director of the Corporation on the date of his Resignation, July 20, 2006. Since the assessment was issued more than two years after the Resignation, the Appellant will not be liable for the unpaid taxes and remittances.

[50] The outcome of these appeals was dependent upon the authenticity of the Resignation. Although the testimony of Angelika Bekesinski and Ted Hawthorne provided no specifics concerning the Resignation, there were no glaring inconsistencies or contradictions in their testimony with the testimony offered by the Appellant. The evidence was, for the most part, consistent and there was nothing to undermine their credibility.

[51] The initial onus, which is upon the Appellant, does not require him to prove his case with complete certainty but only to demonstrate, on a balance of probabilities, that he was not a director of the Corporation at least two years prior to the Notice of Assessment being issued. Consequently, the Resignation is sufficient to demolish the Minister's assumption that the Appellant "was the sole director" of the Corporation. Despite the Respondent's allegation of backdating, the Respondent failed to produce evidence that would prove, on a balance of probabilities, that the Resignation is not authentic. Although the Respondent had intended to rely on expert evidence, for the reasons set out in my interim ruling, the Expert Report was excluded. The Respondent did not produce any other independent evidence, except to question the actions of the Appellant and the witnesses in an attempt to undermine the Appellant's credibility. However, this did not produce the desired result of showing, on a balance of probabilities, that the Resignation had been backdated.

[52] I question the authenticity of the Resignation but, without the appropriate evidence before me, I must allow the appeal. The Respondent made a series of litigation choices which have resulted in my conclusion. The assumptions of fact contained in the Reply lacked the clarity and precision that may have better stated the facts specific to the Respondent's position, that is, that the Resignation had been backdated and was not an authentic document. Due to the lack of precision, the onus on the Appellant was limited to showing he was not a director of the Corporation during the relevant period. Incorrect choices were then made respecting the content of the proposed Expert Report on ink dating that was to be used to support the Respondent's position that the Resignation had been backdated. Some of the exhibits also lacked relevancy to the specific issue. For example, copies of corporate searches, (Exhibit R-4) had been conducted outside the taxation years in question. In addition, as pointed out during cross-examination of the Respondent's witness, none of the documentation, supporting Ms. Barlow's testimony that the Appellant was advised in writing that he could be facing director's liability, was introduced into evidence.

[53] In the end, I must deal with what is before me in evidence, despite my belief that the Resignation has been backdated.

[54] Although I am allowing the appeal, I am not giving costs in this matter. It was experienced counsel before me in this appeal, so I cannot make exceptions that I might ordinarily make for newer counsel. Appellant Counsel has in the past viewed things from both sides of the table, having worked for the Crown in the earlier part of his career. In cherry-picking several paragraphs to inappropriately support its position, and without apparent reference to other relevant jurisprudence, Appellant Counsel made blatantly incorrect propositions.

[55] For these reasons, the appeal is allowed, but without costs.

Signed at Summerside, Prince Edward Island, this 28th day of July 2014.

"Diane Campbell"

Campbell J.

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APPEARANCES:

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