Court of Queen's Bench of Alberta

Citation: R. v. Global Enviro Inc., and Ian George McIntyre, 2011 ABQB 32

Date: 20110120
Docket: 060808508 S2
Registry: Calgary

Between:

Global Enviro Inc. and Ian George McIntyre

Appellants

- and -

Her Majesty the Queen

Respondent

Corrected judgment: A corrigendum was issued on January 20, 2011; the corrections have been made to the text and the corrigendum is appended to this judgment.

Reasons for Judgment
of the
Honourable Madam Justice B.L. Rawlins

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[1] The Appellants, Global Enviro Inc. ("Global") and Ian George McIntyre, are a corporation based in Calgary and the director and controlling mind of that corporation, respectively. The Appellants were charged with the following offences:

> Count 1: On or about January 7, 2003, at or near Calgary, Alberta, did claim a refund or credit under the *Income Tax Act of Canada* to which they or any other person was not entitled by making, participating in, assenting to or acquiescing in the making of false or deceptive statements in the T2 Return of Income of Global Enviro Inc. and in their Claim for Scientific Research and Experimental Development in Canada (SR&ED) for the period from June 1, 2001 to May 31, 2002, contrary to paragraph 239(1.1)(a) of the *Income Tax Act of Canada*.

> Count 2: Between the 31st of May 2001 and the 24th of July 2003, both dates inclusive, at or near Calgary, Alberta, willfully in any manner did claim an Investment Tax Credit under the *Income Tax Act of Canada*, to which they or any other person was not entitled, contrary to paragraph 239(1.1)(e) of the *Income Tax Act of Canada*.

[2] The trial judge acquitted the Appellants on Count 1, but convicted on Count 2. Each Appellant was sentenced to a fine of $250,000.00, being approximately 77% of the SR&ED claim made. The Appellants appeal both the convictions and the sentences.

[3] The convictions arose from Global's claim for a Scientific Research and Experimental Development ("SR&ED") credit. The facts of this case were thoroughly canvassed by the trial judge in his reasons: see 2009 ABPC 76. I do not propose to review the facts in detail again here, but I will set out those points that, in my view, are of particular importance to the trial judge's decision and therefore to this appeal.

[4] On January 7, 2003, the Appellants filed a T2 corporate income tax return for Global for its taxation year June 1, 2001 to May 31, 2002. In that return, Global claimed to have incurred scientific research expenses totalling $923,437.00; it therefore claimed a SR&ED investment tax credit in the amount of $323,202.95, being 35% of the expenses claimed.

[5] The material time with respect to Count 1 was January 7, 2003, the date the Appellants made the SR&ED claim. The trial judge found that, at that time, the Appellants had an honest belief that the claim was valid. Thus, the Appellants did not wilfully make any false statements at that time and they were acquitted on Count 1.

[6] However, the situation changed after January 7, 2003. The Canada Revenue Agency ("CRA") raised concerns about the Appellants' SR&ED claim. Those concerns culminated in a meeting in Medicine Hat, Alberta on March 24, 2003. The persons in attendance at that meeting were the Appellants, two members of the CRA's audit team (Dr. Chandra Patel and Ms. Velma Quonn) and Mr. Patrick Glen Page, who was involved in business with the Appellants. Mr. Page was also charged under Counts 1 and 2, but was acquitted by the trial judge on both counts and is not involved in this appeal.

[7] This meeting was very significant and the trial judge made the following findings of fact in respect thereof at paras. 25 and 27:

> I have previously found that Mr. McIntyre had an honest belief that work performed prior to the claim period could be used based on representations made to him by Mr. Velhat. This particular belief changed during the March 24 meeting with Dr. Patel and Ms. Quonn. I find that during this meeting Mr. McIntyre and Global came to the realization that the [CRA] required the work to be done during the taxation year, June 1, 2001 to May 31, 2002. The importance of these dates were made clear to McIntyre and Global by Dr. Patel and Ms. Quonn. ...

> During the March 24, 2003 meeting with the [CRA] auditors, Mr. McIntyre acquired the knowledge that led him to conclude that if Global was to obtain the funds from the SR&ED claim, it must be shown to the auditors that the work was performed during the period of June 1, 2001 to May 31, 2002.

[8] The trial judge went on to find that, despite understanding by then the CRA's position that Global's SR&ED claim was not valid, Mr. McIntyre provided documentation to the CRA after this meeting that was intentionally misleading and designed to continue to pursue the claim. The trial judge made these findings at paras. 27 - 30 and 33:

> I find that McIntyre continued to attempt to mislead [CRA] by presentation of the WHMIS invoice (Exhibit 5), McIntyre's invoice of May 31, 2002 (Exhibit 3), and McIntyre's letter to Dr. Patel (Exhibit 11).
>
> Mr. McIntyre testified, at page 1228, that he personally picked up Exhibit 5, the WHMIS invoice from Dr. Arrison. Despite what Mr. McIntyre said about not knowing when the work was done by Dr. Arrison, it would have been obvious to Mr. McIntyre on a review of the invoice that WHMIS did not perform the work in the period of time of January to May, 2002. Providing this invoice to [CRA], in support of the SR&ED claim, was an attempt by McIntyre to mislead [CRA] as to when the work was performed.
>
> ...When we review McIntyre's testimony which commences with a review of Exhibit 87, Mr. McIntyre's notes, we see that work outlined in McIntyre's invoice to Global does not correspond with the dates of the claim period. During the claim period, June 1, 2001 to May 31, 2002, McIntyre is performing work, but it is for the purposes of raising money for [Global], rather than what is specified in his invoice of May 31, 2002. ... Once again to submit this particular invoice to [CRA], which does not accurately describe the work performed, was a further attempt to mislead the government agency.
>
> I find the letter to Dr. Patel which was faxed April 3, 2003 was intentionally misleading in that it did not describe a time period when various activities were performed. In Exhibit 11, McIntyre only refers to collection of sand in the "summer months", and testing and lab work done "throughout the year". At this time McIntyre knew the importance of the claim period and knew Dr. Patel wanted details as to dates. I find this letter was intentionally vague in an attempt to mislead Dr. Patel.
>
> ...
>
> Subsequent to the March 24, 2003 meeting, McIntyre and Global provided false and misleading documentation to the [CRA] in an attempt to show that the work claimed occurred during the specified time period.

[9] The thrust of the Appellants' argument seems to be that they should not be convicted if they genuinely believed that Global was entitled to the credit claimed, irrespective of the CRA's position. For example, the Appellants' brief states "There is simply no evidence that McIntyre had ceased to believe that Global was not entitled to the credit, and considerable evidence that he believed that it was. ... It is therefore submitted that the charge fails." (I believe the "not" in this sentence is there in error.) The Appellants' brief also states "...the Crown must prove that Global was not entitled to *any* SR&ED credit *at all*." (Emphasis in original.)

[10] In my view, the Appellants' argument miscasts what the Crown is required to prove. This is not the Tax Court. It is not the function of this Court to determine the validity of Global's SR&ED claim. If the Appellants believed that the CRA was wrong in its position with respect to the claim, there is a procedure to be followed to determine that question and the Appellants should have gone that route. Interestingly, the Appellants now concede that Global was not, in fact, entitled to the credit claimed. The following appears in a footnote in the Appellants' brief:

> Although it turned out, literally in mid-trial, that Global is *not* entitled to the credit, albeit for reasons that required Mr. Yaskowich's knowledge and experience as tax counsel to figure out. This is the sort of advanced wisdom that is not expected of lay taxpayers like McIntyre. [Emphasis in original.]

[11] Again, this last statement reflects a misunderstanding of what is at issue here. The question is not whether Mr. McIntyre was required to have "advanced wisdom". If Mr. McIntyre and Global questioned the correctness of the CRA's interpretation of the SR&ED rules, they should have objected directly and followed the proper procedure to have the matter dealt with. The issue here is whether, in the face of a clear understanding as to the CRA's position, the Appellants provided misleading information in an attempt to circumvent that position and claim the credit. This is exactly what the trial judge found.

[12] As the Crown points out, s. 686(1)(a) of the *Criminal Code* permits this Court, acting in an appellate capacity, to allow the appeal only where it is of the opinion that:

> (i) the verdict should be set aside on the ground that it is unreasonable or cannot be supported by the evidence;
>
> (ii) the judgment of the trial court should be set aside on the ground of a wrong decision on a question of law; or
>
> (iii) on any ground there was a miscarriage of justice.

[13] The Appellants' position seems to be that the trial judge wrongly decided a question of law, namely whether Global was entitled to the SR&ED credit claimed. As set out above, that is not the question. The trial judge found that the Appellants understood the CRA's position that Global was not entitled to the credit and that they provided misleading information designed to make it seem as though the claim was valid. These are findings of fact and led the trial judge to

conclude that the Appellants had wilfully claimed a credit to which they were not entitled, as contemplated by Count 2.

[14] As the Appellants' convictions rest not upon a question of law, but upon a question of fact, s. 686(1)(a)(ii) of the *Criminal Code* is of no assistance to them.

[15] In arriving at his findings of fact, the trial judge expressly found that Mr. McIntyre's evidence with respect to the March 24, 2003 meeting and the subsequent events was not credible. As an appellate court, I am obliged to show deference to the trial judge's findings of fact, particularly when they involve findings of credibility. The Crown cited *R. v. W.®.)* [1992] 2 S.C.R. 122, in which the Supreme Court of Canada held:

> It is thus clear that a court of appeal, in determining whether the trier of fact could reasonably have reached the conclusion that the accused is guilty beyond a reasonable doubt, must re-examine, and to some extent at least, reweigh and consider the effect of the evidence. The only question remaining is whether this rule applies to verdicts based on findings of credibility. In my opinion, it does. The test remains the same: could a jury or judge properly instructed and acting reasonably have convicted? That said, in applying the test the court of appeal should show great deference to findings of credibility made at trial. This Court has repeatedly affirmed the importance of taking into account the special position of the trier of fact on matters of credibility. ... The trial judge has the advantage, denied to the appellate court, of seeing and hearing the evidence of witnesses. However, as a matter of law it remains open to an appellate court to overturn a verdict based on findings of credibility where, after considering all the evidence and having due regard to the advantages afforded to the trial judge, it concludes that the verdict is unreasonable.

[16] Taking into account all of the evidence in this case, I am satisfied that neither the trial judge's findings of fact nor the verdict was unreasonable. The trial judge concluded that, after the March 24, 2003 meeting, Mr. McIntyre understood the CRA's position with respect to Global's claim, however much he may have thought it should be otherwise. I see no reason to disturb that finding. Equally, I see no reason to interfere with the trial judge's finding that Mr. McIntyre provided information intended to portray the claim as consistent with the CRA's position when he knew that it was not. The verdict, therefore, is not unreasonable and is supported by the evidence.

[17] Finally, I am not persuaded that the convictions represent a miscarriage of justice as contemplated by s. 686(1)(a)(iii) of the *Criminal Code*. The appeals from the convictions is therefore dismissed.

[18] The Appellants also appeal the sentence imposed by the trial judge. The Appellants' argument is simply that the sentence is excessive. I disagree. Section 239(1.1)(g)(ii) of the *Income Tax Act* provides for a fine on summary conviction of "not less than 50% and not more

than 200% of the amount by which the amount of the refund or credit obtained or claimed exceeds the amount, if any, of the refund or credit to which the person or other person, as the case may be, is entitled". The amount of Global's SR&ED claim was $323,202.95. The Crown's position, which was acknowledged by the Appellants in the quoted footnote from their brief, is that Global was not entitled to the credit claimed. Therefore, the "excess" amount claimed is the full amount. The $250,000 fine imposed on each Appellant is approximately 77% of this amount. This is on the low end of the range set out in the *Income Tax Act* and, in my view, there is no reason to reduce it. The appeals from the sentences are dismissed.

Heard on the 2nd day of December, 2010.
Dated at the City of Calgary, Alberta this 20th day of January, 2010.

B.L. Rawlins
J.C.Q.B.A.

Appearances:

Murray Stone
for the Appellants

Ross Mitchell,
Public Prosecution Service of Canada
for the Respondent

Corrigendum of the Reasons for Judgment
of
The Honourable Madam Justice B.L. Rawlins

Citation line should read as follows:

R. v. Global Enviro Inc., and Ian George McIntyre

In the Provincial Court of Alberta

Citation: R. v. Global Enviro Inc., 2009 ABPC 76

Date: 20090317
Docket: 060808508P10101-0102
Registry: Calgary

Between:

Her Majesty the Queen

- and -

Global Enviro Inc.,
Ian George McIntyre and Patrick Glen Page

Decision of the Honourable Judge J.D. Bascom

Introduction

[1] The defendants, Global Enviro Inc., Ian George McIntyre and Patrick Glen Page are charged that:

> Count #1: On or about January 7, 2003, at or near Calgary, Alberta, did claim a refund or credit under the Income Tax Act of Canada to which they or any other person was not entitled by making, participating in, assenting to or acquiescing in the making of false or deceptive statements in the T2 Return of Income of Global Enviro Inc. and in their Claim for Scientific Research and Experimental Development in Canada (SR&ED) for the period from June 1, 2001 to May 31, 2002, contrary to paragraph 239(1.1)(a) of the Income Tax Act of Canada;
>
> Count #2: Between the 31st of May 2001 and the 24th of July 2003, both dates inclusive, at or near Calgary, Alberta, willfully in any manner did claim an Investment Tax Credit under the Income Tax Act of Canada, to which they or any other person was not entitled, contrary to paragraph 239(1.1)(e) of the Income Tax Act of Canada.

[2] The three accuseds are charged under the *Income Tax Act* with offences relating to a claim for a Scientific Research and Experimental Development claim which was filed by Global Enviro Inc., January 8, 2003 (Exhibit 2). Exhibit 2 consisted of the claim documents, plus Schedule 'B' outlining the expenditures, a description of the process, a diagram of a washing vessel and six photographs of the processing system. The claim for Scientific Research and Experimental Development documents were signed by J. R. Bateman, an officer of Global Enviro Inc. The documents were for the taxation year, June 1, 2001 to May 31, 2002. The T2 Corporation Income Tax Return (Exhibit 1), claimed the amount of $323,202.95 as an investment tax credit, all of which was associated with the Scientific Research and Experimental Development investment tax credit (SR&ED).

[3] As outlined in Exhibit 7, a brochure entitled an Introduction to the Scientific Research and Experimental Development Program, the program was designed as a tax incentive to encourage Canadian businesses to conduct research and development that lead to new or improved technological advanced products or processes. The SR&ED program gives claimants cash refunds and/or tax credits for their expenditures on eligible research and development work done in Canada.

[4] The defendant, Global Enviro Inc., made a claim for the taxation year June 1, 2001 to May 31, 2002. The defendant, McIntyre submitted an invoice for work performed on behalf of Global Enviro Inc., (Exhibit 3). The defendant, Page, submitted an invoice on behalf of Ex-Cel Environmental Inc., to Global for work performed by Page and others, who were either employees or performed contract work on behalf of Ex-Cel. (Exhibit 4).

[5] An Agreed Statement of Facts (Exhibit 84), outlined the Corporate structure of Global Enviro Inc., and the fact that Ian McIntyre was a director and controlling mind of the Corporation along with Robert Bateman. Additionally, the Agreed Statement of Facts stated that Patrick Page was a director and controlling mind of the corporation, Ex-Cel Environmental Inc.

[6] The Agreed Statement of Facts contained the following relevant information:

> 6. GEI filed a T2 Return of Income on January 7, 2003 and a Schedule 31 Investment Tax Credit on January 8, 2003, a copy of which is contained within the Joint Exhibit Binder as Exhibit 1, and a Claim for Scientific Research and Experimental Development (SR&ED) in Canada on January 8, 2003, a copy of which is contained within the Joint Exhibit Binder as Exhibit 2, and are the subject of this prosecution.
>
> (a) GEI's SR&ED claim included a contractor expense from WHMIS Inc dated May 31, 2002 in the amount of $41,750. A copy of this invoice is contained within the Joint Exhibit Binder as Exhibit 5.

(b) GEI's SR&Ed claim included a rental expense from Hat Creek Fencing Ltd, for the period June 2, 2001 through May 1, 2002 totalling $95,622.00. A copy of the invoices is contained within the Joint Exhibit Binder as Exhibit #67.

(c) GEI's SR&ED claim includes a contractor expense for consulting from Ian McIntyre dated May 31, 2002 in the amount of $100,800. A copy of this invoice is contained within the Joint Exhibit Binder as Exhibit 3.

(d) GEI's SR&ED claim included a contractor expense from Ex-Cel dated May 31, 2002 in the amount of $780,887. A copy of this invoice is contained within the Joint Exhibit Binder as Exhibit 4.

7. This T2

(a) was GEI's first Income Tax Return
(b) was received by CCRA in Edmonton on or about January 7, 2003
(c) is dated November 21, 2002
(d) identifies the signer as "Robert Bateman, Vice President"
(e) is signed "J.R. Bateman"
(f) claims an Investment Tax Credit of $323,202.95
    (I) reports "Qualified expenditures for SR&ED, Current expenditures" of $923,437 on Schedule 31 Investment Tax Credit
    (ii) no other activity is reported on the return

8. GEI also filed a form T661 E(01) CLAIM FOR SCIENTIFIC RESEARCH AND EXPERIMENTAL DEVELOPMENT (SR&ED) IN CANADA, a copy of which is contained within the Joint Exhibit Binder as Exhibit 2, which:

(a) is dated January 6, 2003
(b) was received by the CRA (formerly the CCRA) Winnipeg Taxation Centre on or about January 8, 2003

(c) is for the taxation year June 1, 2001 to May 31, 2002

(d) shows a mailing address and location of the books and records as 2123 - 6 Avenue N.W., Calgary, Alberta

(e) is signed J. R. Bateman under the statement "I certify that this form, and the related schedules and attachments, have been examined and are true, correct, and complete"

(f) shows the "Project identification: code and name" as "#02A EX-CEL BITUMEN SEPARATION SYSTEM"

(g) under "Schedule B - Expenditures for SR&ED Contracts", shows contract expenditures incurred in the year which total $923,437

[7] The Crown's position that in order for the defendants to receive SR&ED credit, the work had to be done in the taxation year claimed, May 31, 2001 to June 1, 2002. The Crown urged that the work, that was the basis for the claim, was done prior to the claim period and that evidence was fabricated to support the claim. The Crown states that the accused mislead Canada Revenue Agency auditors with false statements as well as fabricated documents. Global Enviro Inc., Ian McIntyre, a Director of Global Enviro Inc., made a claim for a Scientific Research and Development credit for a prototype that separated oil from sand. The claim asserted the prototype was developed within the taxation year, June 1, 2001 to May 31, 2002. The claim was for an investment tax credit in the amount of $323,202.95. The Corporation reported expenditure of $923,437.

[8] The Defence position is that all of the invoices were legitimate. The defendant and their contractors performed the work prior to the claim period, but the invoices supplied to the Revenue Agency were prepared during the claim period and were therefore valid. In addition, the defendants, Global, McIntyre and Page relied on the expertise of Rick Velhat, the individual who prepared the SR&ED claim on behalf of Global. The defendants' position is that Mr. Velhat advised them that they could claim for work prior to the claim period, provided that the invoices covered the period from June 1, 2001 to May 31, 2002. The defence is that Global Enviro Inc., Ian McIntyre and Patrick Page never intentionally provided misleading information to Canada Revenue Agency.

[9] In that the accused, Ian McIntyre and Patrick Page have both testified in their defence, the court must examine their testimony in light of the analysis process outlined in ***R. v. D.W.***(1991) 63 C.C.C. (3d) 397, ***R. v. C.L.Y.*** (2008) S.C.J. No. 2, and in doing so I first analyze

and weigh the evidence of the accused prior to that of the Crown, as suggested by the Alberta Court of Appeal in ***R. v. Currie***, 2008 ABCA 374.

Global Enviro Inc. and Ian George McIntyre

[10] Mr. McIntyre, a Director of Global Enviro Inc., testified in his defence and in the defence of the Corporation. A witness' testimony must be assessed as to reliability and credibility. The court must determine whether the witness' memory is accurate as to events, as well as attempt to determine if the witness is intentionally attempting to mislead the court. We start with the presumption of innocence, analyze the accused's evidence, and use the formula outlined by the Supreme Court of Canada in ***R. v. D.W.***, *supra*. As stated by counsel for McIntyre and Global Enviro Inc.:

> The only issue is whether the defendants knew that the application composed by Velhat contained false statements as to the exact nature of the work done within that time, or made subsequent false statements in furtherance of the claim.

[11] In a decision of ***R. v. Snow,*** 2006 ABPC 92, His Honour Judge Semenuk analyzed the criteria in assessing an accused's testimony. In paragraph 70, His Honour Judge Semenuk refers to the decision of ***R. v. Covert*** (1916), 28 C.C.C. 25 (Alta. C.A.), where Justice Beck at page 37 stated the following:

> We are bound to presume the accused was innocent, until proved guilty; he gave all the available evidence and that evidence, if true, explained away the inference or presumption against him.
>
> It will be objected, of course, that the magistrate may have disbelieved entirely the evidence on behalf of the accused, and that it was open to him to do so; but in my opinion it cannot be said without limitation that a Judge can refuse to accept evidence. I think he cannot, if the following conditions are fulfilled:
>
> > (1) That the statements of the witness are not in themselves improbable or unreasonable;
> > (2) That there is no contradiction of them;
> > (3) That the credibility of the witness has not been attacked by evidence against his character;
> > (4) That nothing appears in the course of his evidence or of the evidence of any other witness tending to throw discredit upon him; and
> > (5) That there is nothing in his demeanor while in Court during the trial to suggest untruthfulness. To permit a trial Judge to refuse to accept evidence given under all these conditions would be to permit

> him to determine the dispute arbitrarily and in disregard of the evidence, which is surely not the spirit of our system of jurisprudence.

[12] In following Justice Beck's directions in the analysis of Mr. McIntyre's evidence, I note there is no evidence attacking Mr. McIntyre's character. In addition, there is nothing in his demeanour while testifying which would be detrimental to Mr. McIntyre's credibility. Mr. McIntyre was for the most part consistent in his testimony in chief and cross-examination. Where a thorough examination must be made, is whether his statements, on specific issues, as to intent are probable or reasonable. As Defence counsel argued, the issue to determine is whether the defendants knew the application prepared by Rick Velhat contained false statements. This would also encompass McIntyre's evidence that Velhat told the defendants that the work done outside of the time period was eligible, provided the invoices were dated within the specific time period.

[13] Ian McIntyre testified at pages 1172 and 1173 that he and Patrick Page specifically asked Rick Velhat whether the work had to be done within a particular period. Mr. McIntyre recalled that he and Page were told by Velhat that it did not matter when the work was done, as long as the invoice was prepared within the last 18 months. The issue is whether the belief by McIntyre and Global was reasonable when considering Mr. McIntyre's testimony. Mr. McIntyre's certainty of this particular fact is credible when we consider the evidence of Mr. Velhat commencing at page 463 and over to 464. Under cross-examination by Mr. Stone, Mr. Velhat acknowledged that the accused may have interpreted that work done prior to the claim period was eligible. Mr. Velhat testified at page 465:

> I would have stressed that if it was a continuing project there would have been certain expenses that would have been eligible, and I think one of the things that I did stress was to seek professional accounting advice for the claim.

[14] I accept the testimony of Mr. McIntyre that Mr. Velhat had told them they could claim for work that was conducted prior to June 1, 2001. McIntyre and Global relied on this advice. Mr. Velhat indicated to the defendants that he had worked for Revenue Canada and he had made successful SR&ED applications for others. I conclude that Mr. Velhat may have exaggerated his connection with Revenue Canada and left McIntyre and Global with the impression that as a result of his knowledge and connections he could assure the success of their claim. Mr. Velhat's comment that he would have Ms. Quonn fired as a result of the way she had treated Mr. Page and Mr. McIntyre, led McIntyre and Global to believe that they would receive preferred treatment from the Canada Revenue Agency. In his testimony, Mr. Velhat attempted to play down his particular role in the preparation of the SR&ED application. Mr. Velhat testified that his role was to prepare the scientific portion of the application. He testified that he directed the accused to get accounting advice concerning the preparation of the financial part of the claim. I accept the evidence of McIntyre and Global that Velhat was acting on their behalf in the preparation of the entire claim, and that McIntyre and Global relied on Velhat's expertise. Velhat's entire testimony is affected by what I would conclude as an inconsistency concerning

Velhat's remuneration for preparation of the SR&ED claim. Mr. McIntyre testified that Velhat was to receive thirty percent (30%) of the sum obtained from the Canada Revenue Agency. Mr. Velhat's testimony was that he believed in the particular project and was hoping to obtain either a percentage of the claim or perhaps an ability to invest in the project. I do not accept Mr. Velhat's testimony on this point. It is improbable that Velhat would expend effort and expertise with no clear arrangement to receive a financial benefit. This particular falsehood leads me to prefer Mr. Intyre's testimony over that of Mr. Velhat's.

[15] I accept Mr. McIntyre's testimony that at the time of the filing of Exhibit 2 that he believed that Global Enviro Inc. could claim for work done prior to June 1, 2001, based on the advice and direction of Mr. Velhat who had prepared the SR&ED claim. Mr. McIntyre had queried Velhat about this specific issue and I find that he had an honest belief that Global could make a legitimate claim due to the ongoing nature of the project. I therefore find Mr. McIntyre and Global not guilty on Count 1.

Global, McIntyre - Count 2

[16] As stated by the Defence, the second issue is whether McIntyre and Global made subsequent false statements in furtherance of their claim.

[17] After Exhibits 1 and 2 were filed with Canada Customs and Revenue Agency in January, 2003, employees of Canada Customs and Revenue Agency were assigned to perform an audit of the SR&ED claim. A meeting was arranged between Velma Quonn and Dr. Chandra Patel of Canada Customs and Revenue Agency and the defendants, McIntyre and Page. The meeting occurred in Medicine Hat on March 24, 2003. Mr. McIntyre testified that they first met at a hotel restaurant and then went out to Patrick Page's farm to examine the equipment. After visiting Patrick Page's farm they returned to the Medicine Hat hotel and obtained a room for the meeting. Mr. McIntyre recalls that Dr. Patel had a problem with the dates on the photographs (pages 11 through 13 - Exhibit 2). As McIntyre testified, Dr. Patel's concern was that the dates on the photographs were outside the claim period. McIntyre testified at page 1214 that he could not remember exactly what was said by either Page or himself in response to Dr. Patel's inquiry. McIntyre remembers very little about the meeting with Patel and Quonn. McIntyre, under cross-examination, at page 1259, stated the following:

> Q But you do remember the meeting with Quonn and Patel in Medicine Hat.
> A I do.
> Q Okay. Because you took notes pretty quick after it, right?
> A I did.
> Q Velhat told you you should take notes, right?
> A Yes.
> Q So it was the next day, I think, that you took the notes, something like that?

A I think it was the same day.
Q The same day. So in that meeting when you came back from the visit to the farm Dr. Patel provided you with a PowerPoint paper version about the SR&ED process, right? Remember that?
A I honestly don't remember that either.
Q Okay. But you certainly do remember Quonn explaining about what was eligible; what expenses were eligible and that they had to have been incurred in the claim year. You remember that?
A No, I don't. I don't remember much about that meeting either, other than it was fairly hostile.
Q Do you remember her asking - - do you remember her explaining what a claim year was?
A No, I don't.
Q Do you remember her asking what period the Ex-Cel invoice covered?
A No, I don't remember that.
Q You don't remember her asking that more than once?
A No.
Q If I'm correct at - - during that meeting at no time did you or Mr. Page suggest that some of the expenditures had in fact occurred in earlier years like '97, '98 or '99. No mention was made of that at that meeting.
A I don't remember.
Q And at that meeting you didn't tell her that you had had meetings with Rick Velhat, did you?
A I didn't - - I don't remember that either.
Q You didn't tell her in that meeting that you had relied on his advice.
A I don't remember.

And at page 1264:

Q Let's just go back to the photos. In the meeting both Patel and Quonn were concerned about the date stamp on the photos, right, 1998? Do you remember that?
A I remember they had a concern about the pictures but specifically I don't remember whether it was the date or what was wrong with the pictures.
Q Did you ever at any time tell her, Sure. Those were taken in 1998 because that's when we built the prototype?
A No.
Q That's because you knew the prototype had to have been built within the claim period and it wasn't. Right?

A No. Because we specifically asked Rick Velhat that when he filled out this - - this form. We said a lot of the work was done before the claim period and he said it didn't matter. He said that as long as your invoice was submitted in the claim year then everything was all right.
Q But, Mr. McIntyre, you never told Ms. Quonn or Dr. Patel that the photos were the right date, did you?
A I don't remember talking to them about the date.

Q And you never told them that the prototype was developed and built before the claim period, did you?
A I don't remember talking about that either.
Q That's because you knew it was important that everything had to be within the claim period, right?
A No.

[18] The Medicine Hat meeting of March 24, 2003 was of obvious importance to the Global SR&ED claim. Mr. McIntyre had informed Velhat about the meeting and was advised by Velhat to take notes. Despite the importance of this meeting, McIntyre testified that he recalled very little of the meeting, "other than it was fairly hostile" (page 1260). McIntyre's statement about not remembering much about the meeting is improbable when one considers the importance of this meeting for the SR&ED claim, the making of notes immediately after the meeting and his recollection about the perceived hostility.

[19] Mr. McIntyre testified during his examination in chief and in cross-examination that he did not remember what was said in response to the questions from Dr. Patel and Velma Quonn about the 1998 date that appears on the photographs in Exhibit 2. The dates on the photographs were of obvious importance to the auditors and McIntyre's lack of recollection of what was said by either himself or Patrick Page is unreasonable when we consider the importance of the date and claim period. McIntyre's lack of recollection of the events of the March 24, 2003 meeting requires the court to look at other evidence to determine McIntyre's credibility and reliability.

[20] Mr. McIntyre acknowledged making notes shortly after the meeting on March 24, 2003. In his notes Mr. McIntyre refers to; "very informative discussion with Chandra...". This, I find relates to information provided by Dr. Patel in a brochure, and a PowerPoint presentation. In addition to the documentary evidence reviewed by Dr. Patel with McIntyre and Page, we have the note of Ms. Velma Quonn, at Exhibit 9, page 2, which states the following:

> Dr. Patel explained the time requirement (activities occurred in the fiscal year) and the 18 month rule. Mr. McIntyre expressed they did not realize time requirements were a factor in the SR&ED claim. I explained that the 18 month period was there just so that a claimant had time to write up the project description and get the numbers together to put on the claim.

[21] Dr. Chandra Patel testified that he was present with Ms. Quonn during the March 24, 2005 meeting with McIntyre and Page. During the visit to Mr. Page's farm to view the equipment, Dr. Patel testified that he made a comment concerning the amount of rust that was on the equipment. He did not receive a response from either accused.

[22] The March 24, 2003 meeting continued back at the hotel where Dr. Patel gave an outline of the program and worked through the hard copy of the PowerPoint presentation. Dr. Patel stated the following at page 380:

> Q Then what happened at the meeting?
> A Then we continued to talk about the specifics of the project. What I was looking for was a timeline in terms of the work that was conducted, you know, what kind of work that was conducted and when it was conducted.
>
> I made - - you know I indicate to both McIntyre and Mr. Page that the work that was being - - was - - was noted in the project description was considerable that, you know, they achieved a tremendous amount of work in - - in a short period and I was, you know, surprised that they were able to achieve that much and.
>
> And that's why I was - - I sort of asked the question, was all the work performed during the 12 month period in question and Mr. Pat Page suggested no, there was some work that had been done in an earlier period.
>
> At that time I suggested to Mr. Page that one of the things I'd want him to do is to segregate the work that was done in - - in prior period and identify the work that was done during the taxation year in question.
>
> Q What was his response to that?
> A That they would provide me with that information.
> Q Okay. So then what happened in the meeting?
> A We continued on. I talked about the - - the actual experimentation work that was done. You know we tried to - - we discussed that, what was the - - the surfactant. How was that developed and, you know,

when were the tests performed? I also mentioned to - -

Q What was their response to when were the tests performed?

A Basically we were - - I was told that they were performed during the taxation year in question.

[23] At the hotel in Medicine Hat Dr. Patel asked McIntyre and Page about the photos in Exhibit 2 that were date stamped 1998. Dr. Patel indicated that he believed Mr. McIntyre said the camera was not set correctly and Mr. Page agreed with the statement. Under cross-examination the following was put to Dr. Patel at page 413:

Q Pat Page said to Ian McIntyre, that was your camera, wasn't it. .... said, yes, but he didn't know how to set the camera up that was used to take the photograph. OK? Could that had been what was said to you?

A It could have been.

Q Alright. Now you were the one who said, hey, what's with the 1998 date on the photographs? Did you - - I take it that you were suggesting to them that the date on the photographs was in need of an explanation of some sort. Is that correct?

A That's right, yes."

[24] Dr. Patel questioned Mr. McIntyre concerning the fact that there was no date on the drawing of the prototype that appears at Exhibit 2, page 9. Mr. McIntyre's response was that this was an oversight.

[25] As previously mentioned, Mr. McIntyre's recollection of the March 24, 2003 meeting was limited concerning specifics. It is therefore necessary to look at documentary evidence or the testimony of other witnesses to make a determination as to the credibility and reliability of the accused. I have previously found that Mr. McIntyre had an honest belief that work performed prior to the claim period could be used based on representations made to him by Mr. Velhat. This particular belief changed during the March 24 meeting with Dr. Patel and Ms. Quonn. I find that during this meeting Mr. McIntyre and Global came to the realization that the Canada Revenue Agency required the work to be done during the taxation year, June 1, 2001 to May 31, 2002. The importance of these dates were made clear to McIntyre and Global by Dr. Patel and Ms. Quonn. In particular, questions concerning the photographs, date stamped 1998, lead me to conclude that McIntyre is not truthful when he states that he does not recall what was said. As previously mentioned, this was far too important an issue. It was an issue that he specifically asked Rick Velhat about. Once again I would refer to page 1265 in Mr. McIntyre's testimony:

> Q That's because you knew the prototype had to have been built within the claim period and it wasn't. Right?
>
> A No. Because we specifically asked Rick Velhat that when he filled out this - - this form. We said a lot of the work was done before the claim period and he said it didn't matter. He said that as long as your invoice was submitted in the claim year then everything was all right.

[26] Dr. Patel testified McIntyre provided an explanation for the dates on the photographs and the lack of any date on the diagram of the prototype. I find that when McIntyre provided Dr. Patel with the explanation McIntyre knew that their claim was conditional on the work being performed during the taxation year.

[27] During the March 24, 2003 meeting with the Canada Customs and Revenue Agency auditors, Mr. McIntyre acquired the knowledge that led him to conclude that if Global was to obtain the funds from the SR&ED claim, it must be shown to the auditors that the work was performed during the period of June 1, 2001 to May 31, 2002. I find that McIntyre continued to attempt to mislead Canada Revenue Agency by presentation of the WHMIS invoice (Exhibit 5), McIntyre's invoice of May 31, 2002 (Exhibit 3), and McIntyre's letter to Dr. Patel (Exhibit 11).

[28] Mr. McIntyre testified, at page 1228, that he personally picked up Exhibit 5, the WHMIS invoice from Dr. Arrison. Despite what Mr. McIntyre said about not knowing when the work was done by Dr. Arrison, it would have been obvious to Mr. McIntyre on a review of the invoice that WHMIS did not perform the work in the period of time of January to May, 2002. Providing this invoice to Canada Revenue Agency, in support of the SR&ED claim, was an attempt by McIntyre to mislead the Agency as to when the work was performed.

[29] Mr. McIntyre's invoice of May 31, 2002 stated that he performed, "professional services to administrate and co-ordinate the research and development of a unique surfactant to separate various types of hydrocarbons from sands and clays". The invoice went on to say that he had liaised with various labs in Edmonton and Calgary and that the period was from December 1, 2000 to May 31, 2002. Mr. McIntyre testified at length concerning the work he performed on behalf of Global Enviro Inc. When we review McIntyre's testimony which commences with a review of Exhibit 87, Mr. McIntyre's notes, we see that work outlined in McIntyre's invoice to Global does not correspond with the dates of the claim period. During the claim period, June 1, 2001 to May 31, 2002, McIntyre is performing work, but it is for the purposes of raising money for Global Enviro Inc., rather than what is specified in his invoice of May 31, 2002. In Patrick Page's testimony, at page 1354 the following evidence is provided:

> Q MR. YASKOWICH: So just so that we're on the same page, the period of the claim ends on the May

> 31st, 2002, taxation year. So, again, looking at Mr. McIntyre's efforts, during that year what was he doing?
>
> A Just the same as what he'd been doing for the last couple of years. He was continually trying to raise money and put a project together.

Once again to submit this particular invoice to Canada Revenue Agency, which does not accurately describe the work performed, was a further attempt to mislead the government agency.

[30] I find the letter to Dr. Patel which was faxed April 3, 2003 was intentionally misleading in that it did not describe a time period when various activities were performed. In Exhibit 11, McIntyre only refers to collection of sand in the "summer months", and testing and lab work done "throughout the year". At this time McIntyre knew the importance of the claim period and knew Dr. Patel wanted details as to dates. I find this letter was intentionally vague in an attempt to mislead Dr. Patel.

The Rule in *Browne v. Dunn*

[31] During argument the court raised a concern with the evidence of McIntyre, as it relates to the rule in ***Browne v. Dunn***. The rule in ***Browne v. Dunn*** (1893), 6 R. 67 (H.L.) states that when a cross-examiner intends to rely on evidence in order to impeach a witness' credibility, the witness must be given an opportunity to address that evidence. This is a rule of trial fairness and was adopted in Canada in ***Peters v. Perras*** (1909), 42 S.C.R. 244, and more recently in the Alberta Court of Appeal decision of ***R. v. Werkman*** (2007), A.J. No. 418 (ABCA). Of significance in ***Werkman***, was the trial Judge using her discretion in diminishing the weight of the accused's testimony. The Court of Appeal stated at paragraph 14 in ***Werkman***, *supra*:

> After all, the trial judge did not get the full story, because of the lack of the cross-examination on some key topics, and the lack of any chance for the two Crown witnesses to know what Werkman's evidence or even its topics would be. When the trial judge looked at the credibility of Werkman's evidence, and when weighing the evidence as a whole, the judge logically could not ignore the gap in evidence. It is itself a fact. See also ***R. v. Herman*** [1994] 3 S.C.R. 758, 175 N.R. 323, approving Taylor J.A. (1994) 39 B.C.A.C. 241 (C.A.) (Para. 70).

[32] In the case of Mr. McIntyre's evidence, I have reviewed it closely and I find that Mr. McIntyre's defence has not contravened the rule in ***Browne v. Dunn***, *supra*. Further, even if there are specific violations, I would not use my discretion to diminish Mr. McIntyre's testimony. I have specifically found that I accept portions of Mr. McIntyre's testimony as it relates to Count 1 and the filing of Exhibits 1 and 2 with Canada Customs and Revenue Agency.

Summary

[33] To conclude, I make the following findings with regard to Count 2 on the Information. I reject Mr. McIntyre's evidence when he states that he did not intentionally attempt to mislead Canada Revenue Agency. Mr. McIntyre testified that he remembered very little of the specifics of the March 24, 2003 meeting with Velma Quonn and Dr. Patel. As a result of his lack of recollection, it was necessary for the court to review the evidence of other witnesses as to the specifics of the March 24, 2003 meeting. During the meeting of March 24, 2003, Velma Quonn and Dr. Patel made it clear that the work claimed in the SR&ED application must be performed during the period of time of June 1, 2001 to May 31, 2002. I reject McIntyre's evidence when he states he does not remember the specifics of this particular meeting. As previously mentioned, this meeting was too important to their claim for Mr. McIntyre to have forgotten what was told to him by Dr. Patel and Ms. Quonn. I find that McIntyre and Global acquired the knowledge of the importance of the work being done during the claim period at the meeting of March 24, 2003. During this meeting McIntyre attempted to mislead representatives of the Canada Customs and Revenue Agency as to when work was performed. Subsequent to the March 24, 2003 meeting, McIntyre and Global provided false and misleading documentation to the Canada Customs and Revenue Agency in an attempt to show that the work claimed occurred during the specified time period.

[34] Having rejected Mr. McIntyre's testimony, it is necessary for me to examine all of the evidence to determine whether prosecution have proven all the essential elements in Count 2. I find, based on the testimony of Dr. Patel and Velma Quonn, that on March 24, 2003, at a meeting in Medicine Hat, that it was made clear to Global and McIntyre that all expenditures, construction and testing of the bitumen separation system must have occurred during the period of June 1, 2001 to May 31, 2002. During this meeting Dr. Patel asked about the photographs contained in Exhibit 2 and was told by McIntyre that there was a problem in setting the date on the camera. This statement was made in an attempt to mislead Dr. Patel. Further, Mr. McIntyre provided to Canada Revenue Agency his own invoice and that of WHMIS. The work outlined in these invoices as it relates to the SR&ED claim was not performed during the time specified in the invoices. Finally, the letter faxed to Dr. Patel, on April 3, 2003, was intentionally vague, despite Dr. Patel's request for specific documentation to support the claim.

[35] I find that between the dates of May 31, 2001 and July 24, 2003, both dates inclusive, that Ian George McIntyre and Global Enviro Inc., wilfully did claim an investment tax credit to which they were not entitled.

Patrick Page

[36] Patrick Page testified on his own behalf. Once again I must analyze his testimony as I have analyzed that of Ian McIntyre. Patrick Page testified about the development of the system to remove oil from sand and his relationship with various individuals leading up to the SR&ED claim by Global Enviro Inc. Page was the individual who first became aware of Rick Velhat and

his work in SR&ED claims. Mr. Page provided this information to McIntyre and was in attendance at a number of meetings with Velhat and McIntyre concerning the SR&ED claim. Page testified that he was not interested in being involved in the claim. He indicated he was prepared to help on the scientific end and provided this information to Velhat.
Page testified that he informed Velhat that the product had been developed over the previous five years, and was told by Velhat that this was not a problem in that Global was acquiring the technology. Page testified that Velhat was preparing the entire SR&ED claim and that Page's role was to provide the scientific information that Velhat would use in the application to the Canada Customs and Revenue Agency. Velhat indicated to Page that he would be charging thirty percent (30%) fee for the preparation of the application. Page testified that Velhat advised him concerning expenses, of what rent should be charged and the fact that GST should not be included on the invoice. In Exhibits 50 and 51 we see various changes in the Ex-Cel invoice. In my analysis of Mr. Page's testimony, I find nothing in his demeanour which would lead me to disbelieve him. His testimony was probable, reasonable and consistent. There are contradictions between his testimony and that of Mr. Velhat. As I discussed previously with regard to the testimony of Mr. McIntyre, I prefer the evidence of the defendants over that of Velhat.

The Rule in *Browne v. Dunn*

[37] Once again I must deal with the argument that Page's Defence violated the rule in ***Browne v. Dunn***, *supra.* In argument, the Crown points to a number of important questions that were not put to Velhat. In particular, Page's testimony that Velhat had told him that the Ex-Cel invoice could contain work that had been done previous to the time period in question. This is an important issue as it relates to the testimony of Patrick Page and I find that Page's defence violated the rule of trial fairness by not questioning Velhat concerning the preparation of the Ex-Cel invoice. The Crown urges me to use my discretion and place less weight on the evidence of Patrick Page. As I have found in the case of Global and McIntyre, Velhat's testimony is suspect. He was not consistent in what was told to the Canada Customs and Revenue Agency investigator, and what was said in court concerning his financial remuneration. Also as I have found, Velhat exaggerated his contacts with the Revenue Agency to Page and McIntyre. Once again I accept the testimony of the accused, Page over that of Velhat. Page was not interested in participating in the SR&ED claim. He provided Velhat with the scientific information for the preparation of the application, and in turn received advice and guidance from Velhat concerning the preparation of the Ex-Cel invoice. I accept that Velhat was to receive thirty percent (30%) of the funds from the SR&ED claim. It would be only logical for him to provide information and advice to Page and McIntyre, beyond the scientific component to assure a successful claim. In that I believe Page's testimony, concerning Velhat's role in the preparation of the SR&ED claim, I will not use my discretion to minimize Page's testimony despite the violation of the rule in ***Browne v. Dunn***, *supra*.

[38] I accept the testimony of Patrick Page that he did not review Exhibits 1 or 2, which were submitted to Canada Customs and Revenue Agency. I find that he relied on Velhat and his

accountant's advice on the preparation of the Ex-Cel invoice. I further find that he was not a party in the preparation of Exhibit 1 and 2. I find Patrick Page not guilty on Count 1.

Page - Count #2

[39] As I have previously found, Page was at the March 24, 2003 meeting when McIntyre learned that Velhat's assertion that work performed prior to the claim period was eligible. Page testified that Ms. Quonn was accusatory in her approach and brought up a number of issues that were wrong with the application including whether the relationship was non-arms length and the GST issue. Page testified that he did not really understand because he did not know about the tax implications. Page recalls that Ms. Quonn was concerned about the time period and that the work outlined in the SR&ED claim was not done within the time frame of the application. Page testified that at page 1513 he was asked specifically if the work had been done in a certain time frame. He indicated that some of the work had been done prior.

[40] At the March 24, 2003 meeting Dr. Patel asked Page and/or McIntyre about the dates stamped on the photographs which were submitted as part of Exhibit 2. Mr. Page testified as follows:

> I said to Ian, I said, I don't know why the date was on the photos because that was your camera, wasn't it, or something like that. And Ian said, yes. Maybe the date was set wrong.

[41] Further, under cross-examination Page stated the following:

> Q But, Mr. Page, he asked about the date, right?
> A Yeah. That wasn't my question to answer.
> Q But why didn't you just tell him that the prototype was built in 1998 and that the - -
> A Because - -
> Q - - photos were taken in 1998?
> A I didn't do the application. I didn't put the pictures in the application. I didn't - - I wasn't even aware of that.
> Q But you didn't tell him that, yeah, those pictures were taken in 1998 because that's when the prototype was built.
> A Because I didn't know there was 1998 on the pictures. He asked what - - what about the date on the pictures. I didn't know the date on the pictures. I didn't do the application.

[42] As I have previously found, it became apparent to Global and McIntyre that for the SR&ED claim to be successful the work must be performed during the period of time of June 1, 2001 to May 31, 2002. Page testified that during the March 24, 2003 meeting he found Ms. Quonn to be condescending and he left the meeting prior to its completion. Based on Mr. Page's testimony, I am not convinced that Page appreciated that the work must be completed during the taxation year for the SR&ED claim to be successful. Page's recollection of the dialogue between the auditors concerning the 1998 photographs was superior to that of McIntyre. He testified he did not see the photographs, which were part of Exhibit 2, prior to it being filed. I find that during the March 24, 2003 audit, Page came to the realization that the application would be unsuccessful and left the meeting.

[43] Subsequent to the March 24, 2003 meeting, Page, McIntyre and Velhat had two further meetings. Page did not submit any further documentation or have any further dealings with representatives of Canada Customs and Revenue Agency. Exhibits 66 and 67 deal with the rent paid by Ex-Cel for the Hat Creek property. Both of these invoices were found in the residence of Ian McIntyre. Mr. Page testified that Exhibit 66 was prepared by Dale Page, his wife, after the audit, for the purposes of justifying the rent. Exhibit 67 was an invoice from Hat Creek that Patrick Page testified he had never seen before. Page testified that he did not participate in the preparation of the Hat Creek invoices. These invoices were not submitted to the Revenue Agency subsequent to the March 24, 2003 meeting.

[44] As I have previously found Patrick Page prepared the Ex-Cel invoice believing that work performed prior to the claim period was acceptable. There is nothing in his testimony concerning the March 24, 2003 meeting which would lead me to believe that he participated as a principal or a party in an attempt to mislead representatives of Canada Customs and Revenue Agency. I conclude that he did not have a full understanding of the requirements for the SR&ED claim prior to him leaving the meeting. Additionally, there is no evidence subsequent to the March 24, 2003 meeting that he participated as a principal or aided McIntyre in the preparation of further misleading documentation.

[45] I find Patrick Page not guilty on Count 2.

Dated at the City of Calgary, Alberta this 17th day of March, 2009.

J.D. Bascom
A Judge of the Provincial Court of Alberta

Appearances:

A. Szabo
for the Crown

Murray Paul Stone
Representing Global Enviro Inc.
And Ian McIntyre

James Yaskovich
Representing Patrick Page