

When Is a Director's Resignation Legally Effective?

In *Canada v. Chriss* (2016 FCA 236), the main issue in dispute was whether the TCC (*Gariepy v. The Queen*, 2014 TCC 254) had erred in finding that Chriss and Gariepy had resigned as directors of 1056922 Ontario Ltd. ("105") and were therefore not personally liable for 105's unremitted tax withholdings.

The facts in the case as summarized by the FCA were relatively simple. In 2001, Chriss and Gariepy expressed their desire to their respective spouses to resign as directors of 105. Chriss's spouse directed his solicitor to draft the resignations. The resignations were drafted but never executed; they contained a blank date field; and they never left the offices of the solicitor. The solicitor subsequently sought, but never received, instructions concerning the date on which the resignations were to be effective. Several months later, Gariepy's spouse instructed a lawyer at another firm to prepare resignation documents solely for Gariepy.

From 2000 until 2005, 105 failed to remit its payroll withholdings. Pursuant to subsection 227.1(1) of the Act, which renders the directors of a corporation liable for unremitted source deductions, the minister assessed both Gariepy and Chriss in respect of 105's unremitted tax withholdings.

The TCC had held that the preparation of the draft letters of resignation on behalf of both Chriss and Gariepy in combination with verbal communication by each of Chriss and Gariepy to the officers of 105 that they were tendering their resignations had resulted in an effective resignation for each of them. In the alternative, the TCC held that if the resignations were not held to be legally effective, Chriss (but not Gariepy) had shown that she had held a reasonable belief that she had resigned. Thus, Chriss (but not Gariepy) had made out a due diligence defence in respect of the subsection 227.1(1) assessment. The TCC also held that, contrary to the arguments made by both Gariepy and Chriss, neither party had lost effective control of 105 and therefore neither party had established a due diligence defence on that basis.

The FCA held that the TCC had erred in concluding that the resignations of Gariepy and Chriss had been legally effective: it reviewed OBCA section 121(2), which provides that "[a] resignation of a director becomes effective at the time a written resignation is received by the corporation or at the time specified in the resignation, whichever is later." The FCA held that because many laws attach liability to former directors

within a certain period after resignation, precision with respect to the date of the resignation is required. The FCA further held that this precision necessitates that the status of directors be objectively verifiable. Thus, anything less than an executed and dated resignation would be unacceptable. Because 105 received no written resignation within the meaning assigned by OBCA section 121(2), the resignations of both Gariepy and Chriss were legally ineffective.

The FCA then turned to the TCC's alternative findings. The court addressed the question of whether Chriss's and Gariepy's purportedly reasonable belief that each of them had resigned as a director of 105 was sufficient to make out a due diligence defence in respect of the unremitted tax withholdings.

On the basis of *Canada v. Buckingham* (2011 FCA 142) (which in turn derived this principle from *Peoples Department Stores Inc. (Trustee of) v. Wise*, 2004 SCC 68), the FCA held that the due diligence defence provided by subsection 227.1(3) is based on an objective standard of care, skill, and diligence; this standard of care is to be evaluated against the standard of a reasonably prudent person in comparable circumstances. The FCA concluded that this standard requires that a director function on an active basis and not rely on his or her inaction to establish a due diligence defence.

On the basis of the foregoing, the FCA held that the TCC had applied too low a standard when evaluating Chriss's conduct: it had erred in allowing a director who had simply orally requested that the executives of a corporation arrange for counsel to prepare a resignation to claim that Chriss had acted diligently.

The FCA further held that a director must carry out his or her duties on an active basis. Thus, the TCC had erred in finding that Chriss had made out a successful due diligence defence on the basis of a purported reasonable belief that she had resigned. However, in light of its earlier reasoning, the FCA upheld the TCC's holding that Gariepy had not made out such a defence. The FCA concluded that Gariepy, in approaching a second lawyer to prepare her resignation and then doing nothing further, could not have held a reasonable belief that she had resigned.

Finally, the FCA rejected the argument that Gariepy and Chriss had lost effective control to a Mr. Caroline and therefore had established a due diligence defence. The FCA

reviewed certain cases (*Canada (Attorney General) v. McKinnon*, 2000 CanLII 16269 (FCA); *Liddle v. Canada*, 2011 FCA 159; and *Moriyama v. Canada*, 2005 FCA 207) that had been cited for the proposition that when a director has lost de facto control of a corporation such that the director is unable to remit, the director is no longer liable for that failure. The FCA found that the cases cited did not assist either Gariepy or Chriss.

The FCA said that in each of the cited cases where a director was found not to be liable for unremitted funds, the director was unable to discharge his or her responsibilities because a bank or creditor had the legal ability to prevent the company from remitting the relevant funds. In the case at bar, the FCA found that although Mr. Caroline was a creditor who held out the possibility of making further cash infusions into 105, he did not have the legal ability to prevent 105 from remitting the funds that it was required to remit. Thus, neither Gariepy nor Chriss had made out a due diligence defence on this basis.

This case is an important reminder to practitioners that a written resignation must be received by a corporation if the resignation is to be effective under the OBCA. Therefore, advisers should ensure that directors' resignations are properly documented and dated in order to achieve the desired effect.

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