TAX FOR THE Owner-Manager

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The Cliff Case: When Is a Resignation "In Writing" for the Purposes of the OBCA?

The recent case of *Cliff v. Canada* (2022 FCA 16) dealt with the question of what constitutes, for the purposes of the Business Corporations Act (Ontario) (OBCA), a "written resignation" that can give rise to a legally effective director's resignation for the purposes of the ITA and the ETA.

The facts of the case are straightforward. In 2001, the appellant's husband asked his accountant to incorporate a new corporation on his behalf. Pursuant to these instructions, the accountant incorporated Cliff Crucibles Inc. ("Corpco") under the OBCA. The accountant appointed himself as the first director and then stepped down. The appellant's spouse and the appellant, who were the shareholders of Corpco, appointed themselves as Corpco's directors effective May 18, 2001, pursuant to signed documents. The appointments were reflected in the public registry maintained by the Ontario Ministry of Consumer and Commercial Relations ("the ministry") (now the Ministry of Government and Consumer Services).

The appellant, who had been adamant from the beginning that she was willing to be a director of the corporation only on a temporary basis, now informed her spouse that she wanted to be removed as a director. Accordingly, the appellant's spouse contacted his accountant and the accountant's secretary prepared a "Form 1—Initial Return/Notice of Change" ("form 1"). The form 1 stated that the appellant's directorship began on September 4, 2003 and ended on December 12, 2003. At trial, no reason for the discrepancy between the May 18, 2001 appointment and the dates employed on the form 1 was provided. The form 1 was placed in Corpco's minute book. However, there was no evidence as to when the form was sent to the ministry, other than the accountant's testimony that his office had submitted the form to the ministry. Furthermore, the records of the ministry did not reflect the changes reflected in the form 1.

Corpco was dissolved in 2013. At the time of the dissolution, Corpco had outstanding tax liabilities under both the ITA and the ETA. The appellant and her spouse were both assessed by the minister of national revenue for unremitted tax under the ETA and unremitted source deductions under the ITA.

In the earlier TCC decision, it was held, on the basis of the decision in *Canada v. Chriss* (2016 FCA 236), that a valid resignation required, for the purposes of the OBCA, a director's personal signature in order to be effective. Therefore, in the TCC's view, since the form 1 did not have a signature, the appellant remained a director of Corpco.

The FCA reviewed the *Chriss* decision and noted that the facts in that case involved a resignation letter, prepared by the corporation's solicitor, that was neither dated nor signed and remained in a file at the solicitor's office awaiting signature. The FCA concluded that the TCC in *Chriss* had held that "where the decision to resign is to be communicated by means of a letter, signed by the director, it must be signed to be effective." However, the FCA also held that the decision in *Chriss* "does not require that all resignations must have a personal, physical signature to be effective." In fact, the court held that a director may validly resign by e-mail or text. The court analogized the scenario in *Chriss* to an e-mail that contains a resignation but remains in the draft folder unsent. The FCA also concluded that (1) regardless of the facts, a valid resignation must involve no ambiguity about whether a written resignation was received by the corporation, and (2) there must be certainty about the resignation's effective date. In this case, the FCA found that the TCC had erred in its understanding of the decision in *Chriss* by imposing a requirement that a legally effective resignation must have a physical signature.

The FCA went on to hold that a form 1 is not a resignation but a communication by the corporation to the ministry (not, importantly, to the corporation itself). Furthermore, the FCA noted that there is no place on a form 1 for a director's signature—physical or digital. Finally, examining the form 1 at issue in this case, the FCA noted that although the document showed that the appellant ceased to be a director on December 12, 2003, there was no evidence as to when the form 1 was completed. The FCA held that for a resignation to be effective, there must be evidence that the corporation received a written resignation confirming that the appellant had resigned. The FCA concluded by noting that although a form 1 may reflect something that may have happened, it is not a substitute for a written resignation. Accordingly, the appeal was dismissed.

This case serves as a reminder that for a director's resignation to be effective, it must be done in compliance with corporate law, and therefore be in writing (whether physical or digital). Finally, it should be noted that Ontario has enacted the Electronic Commerce Act, 2000, which deals with, among other things, the legal recognition of electronic information and documents and the use of electronic signatures.

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