Director Liability - Efficacy of Resignations - Sas Tullo

Author : sasan-ansari

Director Liability - Efficacy of Director Resignations

Canada v Chriss, 2016 FCA 236

At issue was whether two directors, being the spouses of shareholders, had effectively resigned as directors and therefore were not liable for unremitted payroll deductions and GST/HST amounts.

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FACTS

Both Appellants had indicated to their husbands (owners and executives of the corporations) that they desired to resign as directors. Resignations were drafted by solicitors but were not executed or dated.

The Tax Court of Canada had held that the draft resignations and verbal communications to the husbands of their tendering of resignations resulted in an effective resignation. Alternatively, even if not effective, a reasonable belief of resignation could be sufficient for a due diligence defence as the person would have lost control of the company.

ANALYSIS

The Federal Court of Appeal held that the TCC erred in concluding the appellants had resigned. Absent a communication of a written resignation to the corporation, a resignation is not effective. The *Ontario Business Corporations Act*, subsection 121(2), states that a resignation is effective at the time a written resignation is received by the corporation or at the time specified in the resignation (para 10). This is an important requirement as business decisions and legal liability depend on the identity of directors and the timing of their resignations. The status of a person as a corporate director must be capable of objective verification.

NOTE: *The FCA held that unsigned resignation letters with no effective date in the solicitor's file*

do not satisfy the preconditions of an effective resignation (para 15), and said at para 14 that "allowing anything less than the delivery of an executed and dated written resignation" is unacceptable. The FCA's imposition of a signature requirement adds a non-existent element to the OBCA, held in other cases to be not to be required.

The FCA agreed that a director may rely on a reasonable belief of resignation as part of a due diligence defence. However, the standard is higher than that applied by the TCC. To be operational, a reasonable belief of resignation has to be close to the requirements of actual effective resignation. The courts cannot ignore the requirement that the resignation be received by the corporation or its solicitors.

The due diligence defence on the basis of a reasonable belief of resignation must be informed by the obligations the ITA imposes on directors. The FCA referred to the decision *Canada v. Buckingham*, 2011 FCA 142, in stating that the standard of care, skill, and diligence required by ITA subsection 227.1(3) is an objective standard as set out in *Peoples Department Stores.* The *Income Tax Act* is a contextual element in determining what a reasonably prudent person would have done in comparable circumstances (para 20). To succeed, a director has to convince the court that (i) s/he turned attention to the required remittances and (ii) exercised the duty of care, diligence, and skill with a view to preventing the corporation's failure to remit the amounts. This standard is meant to discourage the appointment of passive directors so that a defence cannot be founded on inaction, indifference, or casual attitude towards duties by the director (para 21). A reasonable director would insist on being satisfied that the intention to resign has been effected (para 24).

Finally, the Appellants relied on *Liddle v. Canada*, 2011 FCA 159; *Moriyama v. Canada*, 2005 FCA 207, to argue that they had lost effective control of the corporation such that they should not be held liable. The FCA distinguished those cases by stating that those cases the directors were prevented from discharging their duties as a third party had intervened with the legal power to prevent the company from remitting funds. This was not the case at bar, the directors had the power to remit the funds in corporate hands.

Sas Ansari, BSc BEd PC JD LLM PhD (exp) CPA In-Depth Tax 1, 2 &3

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