

GMC Distribution Ltd v The Queen, 2012 TCC 262

A Dissolved Corporation Can be Sued and Can be Ordered to Pay Costs, but Cannot Defend Itself.

[GMC Distribution Ltd v The Queen, 2012 TCC 262](#)

At issue was whether a corporation dissolved for failing to file annual corporate returns could bring a motion to have an individual who was a shareholder, officer, and director of that dissolved corporation represent it in this appeal.

The Court held that a dissolved corporation is a non-person and therefore, though it can be sued pursuant to legislation, cannot take any action to defend itself, even bring a motion, until and unless it is revived.

[**NOTE:** Thorsteinssons has released a comment on CRA's position in reference to this [Here](#)]

The Court referred to *Amber Technology Ltd. v. The Queen*, 2006-313(IT)G, where a motion was granted in similar circumstances, but the court observed that the court in granting that motion did not know that Amber was dissolved, and thus could not serve as precedent in this case.

The Court then referred to OBCA subsection 242(1) dealing with proceedings dissolved Ontario corporations, and referred to *Reliable Life Insurance v. Ingle*, [2009] O.J. No. 2312, where it was held that unless and until the corporation does what is needed to be revived, it is a non-entity and has no rights in the litigation. Subsection 241(1) of the OBCA reads:

Subsection 242(1) of the OBCA provides that:

242. (1) Despite the dissolution of a corporation under this Act,

- (a) a civil, criminal or administrative action or proceeding commenced by or against the corporation before its dissolution may be continued as if the corporation had not been dissolved;
- (b) a civil, criminal or administrative action or proceeding may be brought against the corporation as if the corporation had not been dissolved;
- (c) any property that would have been available to satisfy any judgment or order if the corporation had not been dissolved remains available for such purpose; and
- (d) title to land belonging to the corporation immediately before the dissolution remains available to be sold in power of sale proceedings

[Note from Mr. Carl MacArthur: The Federal and various provincial corporation statutes generally permit the commencement of a civil, criminal or administrative action or proceeding against a corporation after it has been dissolved and make the shareholders liable to the extent that they received property of the corporation on dissolution. Some statutes do however limit the the period for brining an action (i.e within two years of dissolution under the CBCA).]

Given the wording of the applicable corporate statute, the MNR could bring administrative, civil, and even criminal actions against the corporation despite it being dissolved. However the matter is different when it comes to the corporation. The Court quoted from *Wolf Offshore Transport Ltd. v. Sulzer Canada Inc.* [1992] N.J. No. 82, the Court stated that:

A dissolved company is akin to a deceased person. It has no capacity to do anything. It is nothing. A person which is nonexistent could hardly be said to do anything. If it had a right prior to dissolution, it would have that right on being revived unless statute barred.

Given that the corporation was dissolved and had not been revived, it was a non-entity and could not bring a motion. The motion was dismissed with costs.

[DISCUSSION NOTES from Various Parties]

Carl MacArthur - "The federal and various provincial corporation statutes generally permit the comencment of a civil, criminal or administrative action or proceeding against a corporation after it has been disolved and make the shareholders liable to the extent that they received property of the corporation on dissolution. Some statutes do however limit the the period for brining an action (i.e within two years of dissolution under the CBCA)."

James Rhodes - The focus ought to be on whether a shareholder or director may be liable for any amounts on account of the tax debt of the dissolved corporation. Look to TA sections 160 and 325. "If the corporation has been dissolved, the directors have ceased to act, and if 2 years has occurred, they can be off the hook for whatever is assessed to the dissolved corp."

John Mill - "There are a number of overlapping issues here. Directors - if corporation dissolved and director does not resign, directors liability continues. Most cases CRA will have onus to prove underlying debt. Corporation can be revived to defend itself, however anyone who does revive has to admit to being director. Directors liability ceases - 6 months after dissolution unless CRA reassesses within 6 months of dissolution - two years after resignation, unless director is last director or continues to act as director (de facto) unless CRA reassesses within that two year period. Shareholder liability - shareholder is liable under s. 160 and HST section, for any transfers "without consideration" including: dividends, 15(1) benefits, 69(1) transfers, gifts, theft etc. This liability continues indefinitely. Unclear whether 10 year limitation applies. Does not apply to any transfers for FMV consideration: wages; fees; purchases, loan repayments."

"As a tactical matter you may not want to revive. Firstly only an active director has power to cause revival - there may be no one who wants to step into that role.

Secondly if director or shareholder is disputing the underlying "corporate" assessment then CRA has onus of proof to prove on a prima facie basis that corporation owes the tax. If corporation is revived and then disputes then corporation has onus. This exact point has not yet been litigated but it will be interesting to see what type of proof CRA would be required to produce. If the tax arises as a result of tax returns filed by CRA then those returns ought to be sufficient, but if it is an arbitrary of net worth assessment then you would want to see what evidence CRA has." See *Barry v. The Queen*, [2009 TCC 508](#); *Marshall v. The Queen*, [2012 TCC 21](#)

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