

**Federal Court of Appeal**



**Cour d'appel fédérale**

**Date: 20160922**

**Dockets: A-137-15**

**A-138-15**

**Citation: 2016 FCA 236**

**CORAM: STRATAS J.A.  
NEAR J.A.  
RENNIE J.A.**

**Docket: A-137-15**

**BETWEEN:**

**HER MAJESTY THE QUEEN**

**Appellant**

**and**

**SALLY ANNE CHRISS**

**Respondent**

**Docket: A-138-15**

**AND BETWEEN:**

**HER MAJESTY THE QUEEN**

**Appellant**

**And**

**DONNA ELIZABETH GARIEPY**

**Respondent**

Heard at Toronto, Ontario, on June 21, 2016.

Judgment delivered at Ottawa, Ontario, on September 22, 2016.

**REASONS FOR JUDGMENT BY:**

**RENNIE J.A.**

**CONCURRED IN BY:**

**STRATAS J.A.  
NEAR J.A.**

**Federal Court of Appeal**



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**REASONS FOR JUDGMENT**

**RENNIE J.A.**

[1] The appellants appeal two Judgments (2010-863(IT)G and 2010-698(IT)G) dated February 11, 2015 of the Tax Court of Canada (2014 TCC 254). The main issue in these appeals is whether the Tax Court erred in finding that the respondents Sally Anne Chriss and Donna Elizabeth Gariepy resigned as directors of 1056922 Ontario Limited (105 Ltd., or the corporation) and therefore were not personally liable for the corporation's unremitted tax withholdings. This issue arises in two separate appeals from two separate assessments, one that imposed liability against Sally Anne Chriss, the other that imposed liability against Donna Elizabeth Gariepy, both liabilities arising on the basis that they were directors. The Tax Court found that Mrs. Chriss and Mrs. Gariepy had resigned as directors and set aside the assessments. The Minister appeals in both. Mrs. Chriss cross-appeals on the issue of costs.

[2] These reasons are rendered in respect of both appeals as well as the cross-appeal and a copy shall be filed in each of A-137-15 and A-138-15.

**I. Background**

[3] The facts are fully set forth in the judge's reasons. Suffice to say that in 2001, the respondents expressed to their husbands, the owners and executives of 105 Ltd., their desire to resign as directors. Mr. Chriss instructed 105 Ltd.'s solicitor at Gowlings to draft the resignations. The solicitor prepared resignation documents for both respondents. They were, however, not executed, contained a blank date field, and never left the Gowlings offices. The solicitor subsequently sought instructions as to the date the resignations were to be effective.

None were received. Several months later, Mr. Gariepy instructed a lawyer at a different firm, Mr. Caroline, to prepare resignation documents solely for the respondent Mrs. Gariepy.

[4] From 2000 to 2005, 105 Ltd. failed to remit its payroll tax withholdings, including EI, CPP and GST source deductions. Subsection 227.1(1) of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.), renders the directors of a company which fails to remit source deductions personally liable for the unremitted amounts. The directors may raise a due diligence defence under subsection 227.1(3). The Minister assessed the respondents for these liabilities.

[5] The respondents appealed the assessments. They advanced three arguments before the Tax Court. First, they argued that the steps taken in 2001 meant that they had in fact resigned as directors. In the alternative, they argued that they each had a reasonable belief that they had resigned in 2001. This reasonable belief, in turn, justified their not taking steps to prevent the failures to remit, and made out a due diligence defence. In the further alternative, they argued that even if they did not reasonably believe that they had resigned, they had effectively lost control of the company to Mr. Caroline and there were no further steps they could have taken to prevent the failure to remit. This also, in their submission, established the defence of due diligence.

[6] The judge concluded that the preparation of the draft letters of resignation, combined with the fact that the respondents verbally communicated to their husbands that they were tendering their resignations, resulted in an effective resignation. In the alternative, he found that if the resignations were not effective, the respondent Mrs. Chriss had a reasonable belief that she had resigned, but that the respondent Mrs. Gariepy did not. The judge rejected the argument that

the due diligence defence could be made out on the basis that the respondents had lost control of the company to Mr. Caroline.

## **II. Standard of review**

[7] The issues on appeal raise questions of mixed fact and law. Accordingly, they are to be reviewed on a standard of palpable and overriding error, except on an extricable question of law which is reviewed on a standard of correctness: *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235.

[8] In my view, the judge made reviewable errors and the appeals should be allowed.

## **III. Analysis**

### **A. *The efficacy of the resignations***

[9] The judge erred in concluding that the respondents resigned as directors. In the absence of the communication of a written resignation to the corporation, a resignation is not effective. On the facts before the judge, the respondents did not resign in 2001.

[10] 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. Subsection 121(2) of the Ontario *Business Corporations Act*, R.S.O. 1990, c. B.16 (OBCA) provides:

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.

[11] The reasons underlying the requirement of a written resignation which is communicated to the company are self-evident. Third parties rely on representations as to who is responsible for the governance of a corporation. Business decisions may be made on the basis of directorship of a corporation.

[12] Many laws attach liability to former directors within a certain period of time after resignations; see, for example, *Employment Standards Act, 2000*, S.O. 2000, c. 41, Part XIV.2. So too does the *Income Tax Act* subsection 227.1(4) of which provides a two-year limitation period on actions for recovery of amounts owing by directors. The two years is triggered by the date of resignation.

[13] This limitation period demands, for its application, precision in the date of resignation. If a director has resigned, the Crown may no longer be able to look to the director for unremitted taxes, and other directors may have to absorb the director's share of such liability. Further, there is a two-year limitation period which constrains the Minister's ability to initiate proceedings against directors for unremitted source deduction.

[14] It is thus self-evident that the status of directors must be capable of objective verification. Reliance on the subjective intention or say-so of a director alone would allow a director to plant the seeds of retroactive resignation, only to rely on it at some later date should a director-linked liability emerge. The facts of this case illustrate why subsection 121(2) of the OBCA has been drafted the way it is: the dangers associated with allowing anything less than delivery of an executed and dated written resignation are unacceptable.

[15] There was no “written resignation received by the corporation” within the meaning of subsection 121(2). Unsigned letters of resignation with no effective date, were found in the solicitor’s file, thus, the judge erred in concluding that the intention of the respondents’ to resign satisfied the necessary preconditions of an effective resignation.

**B. *Reasonable belief in resignation***

[16] This leads to the second issue, raised in the alternative. In the Tax Court, the respondent Mrs. Chriss was successful in her argument that even if the resignations were not effective, she had a reasonable belief that she had resigned and that this belief formed the basis of a due diligence defence. The respondent Mrs. Gariepy was unsuccessful in her argument. In this Court, she argues in the alternative that the judge made a palpable and overriding error in not finding her to have a reasonable belief that she resigned.

[17] In finding that Mrs. Chriss exercised due diligence, the judge committed an error on an extricable question of law. A director may be able to rely on a reasonable belief in having resigned to ground a due diligence defence, but the standard must be much higher than the one applied by the judge in this case.

[18] The scope of the due diligence defence is informed by the nature or subject matter of the director’s responsibility in question. Here, the question in respect of which due diligence is raised is fundamental to corporate governance – am I or am I not a director? There can be no ambiguity in the answer to that question.

[19] A director’s belief that they have resigned has no correspondence or connection to the underlying purposes of subsection 121(2) of the OBCA and its emphasis on an objectively

verifiable communication of a resignation to the corporation. To allow a subjective intention to suddenly spring to life, when, in the affairs of the corporation, or in the interests of the director, it is convenient to do so, would significantly undermine corporate governance. A reasonable belief that one has resigned must hew much closer to the requirements for an actual effective resignation. In addition, there was no communication of the resignation to the corporation. The draft letters never left the solicitor's office. The requirement that the resignations be received by the corporation cannot be ignored.

[20] Secondly, due diligence defences arise only by virtue of subsection 227.1(3) of the *Income Tax Act*. The scope of defence is thus informed by, or takes its shape in light of, the obligations in question. In *Canada v. Buckingham*, 2011 FCA 142 this Court gave clear direction with respect to the interpretation of the due diligence defence in subsection 227.1(3). The Court held, at paragraph 37, that “the standard of care, skill and diligence required under subsection 227.1(3) [...] is an objective standard as set out by the Supreme Court of Canada in *Peoples Department Stores*.” This objective standard is evaluated against a reasonably prudent person “in comparable circumstances.” The *Income Tax Act* is a key contextual element, which “requires more of directors and officers than the traditional common law duty of care.” More particularly, to satisfy the defence in subsection 227.1(3), “a director must thus establish that he turned his attention to the required remittances and that he exercised his duty of care, diligence and skill with a view to preventing a failure by the corporation to remit the concerned amounts” (at para. 40).



[21] As noted by the Court in *Buckingham*, a higher standard is an incentive for corporations to improve the quality of board decisions through the establishment of good corporate governance rules and discourages the appointment of inactive directors who fail to discharge their duties as director by leaving decisions to the active directors. One consequence of this is that a person who is appointed as a director must carry out the duties of that function on an active basis and will not be allowed to defend a claim for malfeasance in the discharge of his or her duties by relying on his or her own inaction.

[22] The judge did not consider the due diligence defence in light of these principles.

[23] The test applied by the judge in this case also set far too low a standard. He applied a test whereby a director who requests (orally) the executives of the corporation to arrange for counsel to prepare and draft a resignation can, by virtue of that act alone, reasonably believe that they have resigned. On this standard, a director need not ever sign a document or receive an indication to the effect that his or her resignation was delivered to the company.

[24] Directors must carry out their duties on an active basis. A director cannot raise a due diligence defence by relying on their own indifferent or casual attitude to their responsibilities. A reasonable director would insist on being satisfied that their intention to resign had been effected.

[25] The due diligence defence of Mrs. Gariepy stands on an even weaker factual foundation. In subsequently approaching a different lawyer to prepare a resignation letter and doing nothing further, Mrs. Gariepy could not have held a reasonable belief that her resignation was effective. For the reasons given, I see no error in the judge's decision to reject the respondent's argument.

**C. *The respondents' alternative argument: even if they were directors, they exercised due diligence***

[26] The respondents made one final argument: that if they did not in fact resign as directors, and they did not reasonably believe themselves to have resigned, they nonetheless acted with due diligence in the circumstances. Specifically, they argued that they lost effective control of 105 Ltd. to Mr. Caroline, and that as a consequence they were prevented from remitting the taxes to the CRA.

[27] This argument was rejected by the judge. He was right to do so.

[28] The respondents cite a number of cases for the proposition that when a director has lost *de facto* control of a company, such that they are unable to remit, they are no longer liable for failure to do so: see in particular *Canada (Attorney General) v. McKinnon*, [2001] 2 F.C. 203, 1 C.T.C. 79, 2000 D.T.C. 6593 (F.C.A.); *Liddle v. Canada*, 2011 FCA 159; *Moriyama v. Canada*, 2005 FCA 207.

[29] These authorities do not help the respondents. In all of the cases the respondents cite in which a director was found not liable, the directors were unable to discharge their responsibilities because a bank or creditor had intervened and had the legal ability to prevent the company from remitting funds.

[30] In the case at bar, by contrast, Mr. Caroline did not have control such that he could prevent the corporation from remitting to CRA. Mr. Caroline had influence due to his position as a creditor who held out the possibility of further cash infusions to 105 Ltd., but the decision of how to dispose of the corporation's available funds ultimately remained that of the corporation, under the stewardship of its directors.

[31] If a corporation faces bankruptcy and a third party offers the corporation a reprieve from bankruptcy if the corporation dips into what is, in effect, a trust account held for the benefit of its employees, as is the case here, the law is clear as to the obligations of the directors. They must not take from or dissipate the employee deductions. If they diverge from the course of action the law prescribes, they do so at their peril.

**D. *The cross-appeal on costs***

[32] Mrs. Chriss has cross-appealed the Tax Court's award of costs against her. Due to the success of the appellant on all issues in this Court, I would award costs against both Mrs. Chriss and Ms. Gariepy both here and below. Given this proposed disposition, Mrs. Chriss' cross-appeal must be dismissed with costs.

**IV. Conclusion**

[33] I would allow the appeal in A-137-15 (Chriss) and set aside the Judgment of the Tax Court of Canada dated February 11, 2015 in file 210-863(IT)G, and restore the Minister's assessment of October 22, 2008, with costs in this Court and below.

[34] I would allow the appeal in file A-138-15 (Gariepy) and set aside the Judgment of the Tax Court of Canada dated February 11, 2015 in file 210-698(IT)G, and restore the Minister's assessment of October 22, 2008, with costs in this Court and below.

"Donald J. Rennie"

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J.A.

"I agree  
David Stratas J.A."

"I agree  
D.G. Near J.A."

**FEDERAL COURT OF APPEAL**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

**APPEAL FROM A JUDGMENT OF THE TAX COURT OF CANADA DATED  
FEBRUARY 11, 2015, DOCKET NUMBER 2010-863(IT)G**

**DOCKET:** A-137-15  
**STYLE OF CAUSE:** HER MAJESTY THE QUEEN v.  
SALLY ANNE CHRISS

**APPEAL FROM A JUDGMENT OF THE TAX COURT OF CANADA  
DATED FEBRUARY 11, 2015, DOCKET NUMBER 2010-698(IT)G**

**DOCKET:** A-138-15  
**STYLE OF CAUSE:** HER MAJESTY THE QUEEN v.  
DONNA ELIZABETH GARIEPY  
**PLACE OF HEARING:** TORONTO, ONTARIO  
**DATE OF HEARING:** JUNE 21, 2016  
**REASONS FOR JUDGMENT BY:** RENNIE J.A.  
**CONCURRED IN BY:** STRATAS J.A.  
NEAR J.A.  
**DATED:** SEPTEMBER 22, 2016

**APPEARANCES:**

Andrew Miller	FOR THE APPELLANTS IN A-137-15 and A-138-15
Howard Manis Lauren Sigal	FOR THE RESPONDENT IN A-137-15
Brian M. Studniberg Lisa Watzinger	FOR THE RESPONDENT IN A-138-15

**SOLICITORS OF RECORD:**

William F. Pentney  
Deputy Attorney General of Canada  
Ottawa, Ontario

Macdonald Sager Manis LLP  
Barristers & Solicitors  
Toronto, Ontario

Couzin Taylor LLP  
Barristers & Solicitors  
Ottawa, Ontario

FOR THE APPELLANT  
IN A-137-15 and A-138-15

FOR THE RESPONDENT  
IN A-137-15

IN FOR THE RESPONDENT  
A-138-15