

Federal Court
of Appeal



Cour d'appel
fédérale

Date: 20101202

**Docket: A-377-09
A-378-09**

Citation: 2010 FCA 330

**CORAM: SHARLOW J.A.
TRUDEL J.A.
STRATAS J.A.**

BETWEEN:

JOHN SEBASTIAN BUTTERFIELD

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Heard at Vancouver, British Columbia, on December 2, 2010.

Judgment delivered from the Bench at Vancouver, British Columbia, on December 2, 2010.

REASONS FOR JUDGMENT OF THE COURT BY:

TRUDEL J.A.

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REASONS FOR JUDGMENT OF THE COURT

(Delivered from the Bench at Vancouver, British Columbia, on December 2, 2010)

TRUDEL J.A.

[1] These are two consolidated appeals from judgments of the Tax Court of Canada dismissing Mr. Butterfield's appeals from assessments made against him as the sole director of C. Davis Manufacturing Co. Ltd. (2009 TCC 575, Miller J. (the Judge)). On December 1, 2003, the company was assigned into bankruptcy. The appellant was assessed pursuant to the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) (the ITA) and the *Excise Tax Act*, R.S.C., 1985, c. E-15 (the ETA)

(together the Acts) for the balance of the company's unremitted source deductions and GST left owing after the discharge of the bankruptcy trustee.

[2] For the purpose of these appeals, suffice it to mention that the Acts state that the directors of the corporation at the time the corporation failed to comply with its obligations to withhold and remit are jointly and severally liable, with the corporation, for the unpaid amounts and any interest or penalties relating to them (subsection 227.1(1) ITA and subsection 323(1) ETA). However, to recover any amount so payable from a director, the action must be commenced within two years after he or she "last ceased to be a director of that corporation" (subsection 227.1(4) ITA and subsection 323(5) ETA).

[3] This statutory requirement has been the focus of the proceedings throughout. We need only answer the following question: Did the Judge err in finding that Mr. Butterfield last ceased to be a director less than two years before February 14, 2006, the date of the contested assessments? The answer is no.

[4] Mr. Butterfield does not contest the well-established principle that an assignment in bankruptcy does not trigger a director ceasing to be a director (*Kalef v. Canada* [1996] F.C.J. No. 269; *Her Majesty the Queen v. William George Wellburn and John F. Perri*, 95 DTC 5417, *Worrell v. Canada*, [2000] F.C.J. No. 1730, *Lassonde v. Canada*, [2001] F.C.J. No. 1080).

[5] Rather, he argues, as he also did in the Court below, that “the circumstances of his rude removal from the affairs of the company by the trustees no longer allowed him to perform the functions of a director” (reasons for judgment, at paragraph 7) [Emphasis added]. That event occurred on December 12, 2003. In argument in this Court, the appellant submitted that as a result of this event, he was in effect constructively dismissed and, therefore, ceased being a director as of December 12, 2003.

[6] In support of his argument, the appellant relies on the definition of *director* in the *Company Act*, R.S.B.C. 1996, c. 62 (repealed by the *Business Corporations Act*, S.B.C. 2002, c. 57, s. 445(a) as of March 29, 2004 (B.C. Reg. 64/2004)), which states that a director:

... includes every person by whatever name designated who performs functions of a director [Emphasis added]

[7] The Judge did not accept Mr. Butterfield’s argument. Firstly, the Judge found no need to rely on the definition stated above as the appellant had been properly appointed as the sole director of the company under the provincial legislation. Secondly, the evidence was that Mr. Butterfield never tendered his resignation and remained a director until the company was struck from the British Columbia Corporate and Personal Property Registries on July 4, 2005. This was then the date on which the appellant “last ceased to be a director.” It ensued that the assessments were not statute-barred.

[8] In appeal, Mr Butterfield argues that the Judge erred in his interpretation of section 130 of the *Company Act*, when he held that a director can "only cease to be a director by the limited provision set out in section 130 of the *Company Act*."

[9] It reads as follows:

- (1) A director ceases to hold office when his or her term expires in accordance with the articles, or when he or she
 - (a) dies or resigns,
 - (b) is removed in accordance with subsection 3,
 - (c) is not qualified under subsection 114; or
 - (d) is removed in accordance with the memorandum or articles.
- (2) every resignation of a director becomes effective at the time a written resignation is delivered to the registered office of the company, or at the time specified in the resignation, whichever is later."

[10] The appellant suggests that section 130, much like the definition of *director*, is an inclusionary and non-exhaustive provision such that it would allow a director to cease holding office in any and all circumstances, including those mentioned in the statute, whenever a director is precluded from performing the functions of a director.

[11] Despite Mr. Butterfield's best efforts, we disagree with his interpretation and see no error of principle or any other error in the Judge's reasoning, which would warrant the intervention of this Court. The appellant cannot simultaneously claim that the December 1 bankruptcy did not result in him ceasing to be a director, but that his last visit at his office on December 12 and what he perceived as his constructive dismissal did, in the absence of any statutory power by the trustee to remove him as director.

[12] Therefore, the appeals will be dismissed with one set of costs. A copy of these reasons will be filed in the Registry of this Court in relation to appeal A-378-09.

“Johanne Trudel”

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-377-09
A-378-09

STYLE OF CAUSE: JOHN SEBASTIAN BUTTERFIELD v.
HER MAJESTY THE QUEEN

PLACE OF HEARING: Vancouver, British Columbia

DATE OF HEARING: December 2, 2010

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DELIVERED FROM THE BENCH BY: TRUDEL J.A.

APPEARANCES:

John Sebastian Butterfield FOR THE APPELLANT
(self-represented)

Carl Januszczak FOR THE RESPONDENT
Laura Zumpano

SOLICITORS OF RECORD:

N/A FOR THE APPELLANT
(self-represented)

Myles J. Kirvan FOR THE RESPONDENT
Deputy Attorney General of Canada