Federal Court of Appeal | Cour d'appel fédérale

Date: 20230118

Docket: A-307-20

Citation: 2023 FCA 9

[ENGLISH TRANSLATION]

CORAM: **GAUTHIER J.A.**
LOCKE J.A.
LEBLANC J.A.

BETWEEN:

ESTATE OF THE LATE GAÉTAN GAGNÉ

Appellant

and

HIS MAJESTY THE KING

Respondent

Heard at Montréal, Quebec, on November 14, 2022.

Judgment delivered at Ottawa, Ontario, on January 18, 2023.

REASONS FOR JUDGMENT BY: LEBLANC J.A.

CONCURRED IN BY: GAUTHIER J.A.
LOCKE J.A.

Federal Court of Appeal  Cour d'appel fédérale

Date: 20230118

Docket: A-307-20

Citation: 2023 FCA 9

CORAM: **GAUTHIER J.A.**
LOCKE J.A.
LEBLANC J.A.

BETWEEN:

ESTATE OF THE LATE GAÉTAN GAGNÉ

Appellant

and

HIS MAJESTY THE KING

Respondent

REASONS FOR JUDGMENT

LEBLANC J.A.

[1] This an appeal from a judgment of Justice Réal Favreau of the Tax Court of Canada (the TCC) rendered on November 17, 2020 (*Gagné (Estate) v. The Queen*, 2020 TCC 111) (the Judgment). In the Judgment, Justice Favreau (the Judge) dismissed the appeal of the appellant (the Estate) from an assessment made against Gaétan Gagné (now deceased) on May 22, 2013 (the Notice of Assessment) under section 323 of the *Excise Tax Act*, R.S.C. 1985, c. E-15 (the

Act). According to the conditions prescribed in that section, the directors of a corporation that is required to remit an amount of net tax are jointly and severally, or solidarily, liable, together with the corporation, to pay the amount and any interest on, or penalties relating to, the amount.

I. Background

[2] In this case, the Agence du Revenu du Québec (the ARQ), acting as an agent for the respondent, represented in this matter by the Minister of National Revenue (the Minister), determined that the late Gaétan Gagné (Gaétan Gagné) was, on the basis of that provision, jointly and severally, or solidarily, liable to pay an amount of net tax on goods and services that 9129-7903 Québec Inc. (the Corporation) was required to remit to the Minister, in accordance with subsection 228(2) of the Act, for the reporting period from December 31, 2006 to September 30, 2010 (the Reporting Period). The Corporation, which operated in the restaurant industry, had failed to remit this $162,696.42 amount of net tax, and the Minister had exhausted her collection remedies against the Corporation.

[3] Gaétan Gagné objected to the Notice of Assessment essentially on the grounds that it was time-barred, as more than two years had elapsed between the date it was issued and the moment he ceased to be a director of the Corporation. He also alleged that the Minister had determined the amount of the assessment using *pro forma* financial statements and that these statements therefore did not represent the Corporation’s actual revenue, but that anticipated from the projected expansion of the surface area of the restaurant that the Corporation was operating at the time.

[4] On July 7, 2015, the Minister dismissed Gaétan Gagné's objection, and a few weeks later, Gaétan Gagné brought the case before the TCC, reiterating the arguments he had raised in his objection to the Notice of Assessment. He also pleaded that the conditions giving rise to joint and several, or solidary, liability under section 323 of the Act had in any case not been met and, in the event that they had, he had exercised the degree of care, diligence and skill that a reasonably prudent person would have exercised in comparable circumstances. Gaétan Gagné passed away on October 3, 2017. The Estate subsequently took up his defence in the appeal before the TCC.

[5] On November 11, 2019, three days before the start of the hearing before the TCC, the Estate amended the Notice of Appeal, alleging (i) that Gaétan Gagné had never even been a *de jure* director of the Corporation; (ii) that if he had been, it was by mistake; and (iii) that he had never even been a *de facto* director of the Corporation during the entire period when the Corporation had been in operation.

II. Judgment

[6] The Judge found that Gaétan Gagné had been a *de jure* director of the Corporation throughout the Reporting Period, i.e. between June 26, 2006—the date his name was entered as a director of the Corporation in the Quebec enterprise register (the QER) created under the *Act respecting the legal publicity of sole proprietorships, partnerships and legal persons*, CQLR c. P-45 (the ALP), which was replaced by the *Act respecting the legal publicity of enterprises*,

CQLR c. P-44.1, the register being proof of its contents—and February 9, 2012, the date his name was removed from the register (Judgment at paras. 48 and 52–54).

[7] The Judge also rejected the idea that Gaétan Gagné could have been mistakenly appointed director, given the weakness of the evidence submitted by the Estate on this point. Rather, it seemed to him "very plausible" that Gaétan Gagné had been appointed director "because he held more than 50% of the [Corporation's] voting shares" (Judgment at paras. 50-51). His status as a director was "confirmed by the various resignation documents adduced in evidence" (Judgment at para. 53).

[8] Having found that Gaétan Gagné was a *de jure* director of the Corporation throughout the Reporting Period and that the Notice of Assessment was therefore not time-barred, the Judge determined that there was no need for him to also consider whether Gaétan Gagné had been a *de facto* director during this period. According to the Judge, the evidence in the record showed that, at any rate, it was Gaétan Gagné's son, Jean-François Gagné, who was then acting in this capacity (Judgment at para. 55).

[9] The Judge did not accept the due diligence defence. He was of the opinion that although Gaétan Gagné was aware of the Corporation's financial difficulties and had taken certain steps to help the Corporation meet its financial obligations, he had not done anything to prevent the Corporation from failing to meet its tax obligations (Judgment at para. 56).

[10] Finally, the Judge considered that the use of the Corporation's *pro forma* financial statements to determine the amount of net tax it owed during the Reporting Period was justified, because they were the only financial statements available during the Corporation's tax audit conducted by the ARQ and the ARQ did not have access to the Corporation's accounting records for the years audited. According to the Judge, "[a] taxpayer cannot invoke his own turpitude and subsequently seek adjustments", which the Estate was attempting to do (Judgment at para. 58).

III. The Estate's grounds of appeal

[11] The Estate's objections to the Judgment can be summarized as follows:

(a) By noting that nothing in the evidence indicated that he had consented to becoming a director of the Corporation and that the corporate formalities required to appoint him as a director had not been carried out, the Judge could not, without erring in law, find that Gaétan Gagné was a *de jure* director of the Corporation during the Reporting Period because, in both cases, under Quebec and Canadian law, these are mandatory conditions for becoming a director;

(b) The Judge erroneously dismissed the argument that Gaétan Gagné's appointment as a director of the Corporation was made in error by not attributing any probative value to the Estate's evidence-in-chief on this point. This evidence was the sworn statement and the testimony of Sylvain Doré, the Corporation's counsel at the time and the author of the supposedly erroneous amending declaration filed with the QER in 2006. The Judge also allegedly erroneously inferred this director

status from the resignation documents adduced in evidence or from the fact that Gaétan Gagné held more than 50% of the Corporation's voting shares at a certain time;

(c) He should have found that the facts adduced in evidence rebutted the presumption established by the ALP, which, under sections 62 and 82, provides that the information entered in the QER is proof of its contents in favour of third persons in good faith, which he did not do;

(d) As for the due diligence defence, the Judge erred in finding that Gaétan Gagné had not exercised due diligence because a person in comparable circumstances, that is to say a person who had been neither a *de jure* director nor a *de facto* director of a corporation, cannot be held liable for this corporation's failure to fulfill its tax or other obligations; and

(e) Finally, the Judge erred in finding that the use of the *pro forma* financial statements was justified for the purposes of determining the amount of the Notice of Assessment, whereas audited financial statements, reflecting the [TRANSLATION] "true" figures of the Corporation for 2009 and 2010, were submitted in 2013 by Gaétan Gagné's representatives as part of the Notice of Assessment objection process.

IV. Issue and standard of review

[12] In my opinion, there is only one issue to be resolved in this case: whether the Judge, in finding as he did, committed an error that would warrant intervention by this Court. This Court would be justified in intervening if the Judge committed an error of law or a palpable and overriding error on a finding of fact or of mixed fact and law.

[13] It is settled law that this Court must review the Judgment on the standard set out in *Housen v. Nikolaisen*, 2002 SCC 33 (*Housen*) (see also: *Canada v. Buckingham*, 2011 FCA 142 at para. 24 (*Buckingham*); *Contact Lens King Inc. v. Canada*, 2022 FCA 154 at para. 19). According to this standard, pure questions of law must be reviewed on a correctness standard, while findings of fact and findings of mixed fact and law that do not contain an extricable pure question of law are reviewable only if palpable and overriding errors were made.

[14] On a pure question of law, the Court "is free to replace the opinion of the trial judge with its own"; therefore, no deference is owed to the trial judge on these questions (*Housen* at para. 8). This is not the case with findings of fact (*Housen* at para. 10) or findings of mixed fact and law, which involve applying a legal standard to a set of facts (*Housen* at para. 26). The standard of review in such cases is higher. The Court will intervene only if the alleged error is obvious and has a direct impact on the outcome of the case, assuming, in the case of findings of mixed fact and law, that the applicable legal standard was correctly formulated by the trier of fact (*Housen* at paras. 4–6 and 27–28; *European Staffing Inc. v. Canada (National Revenue)*, 2020 FCA 219 at para. 13 (*European Staffing*)).

[15] As we have seen, the Estate is attacking the Judge's findings relating to Gaétan Gagné's status as a *de jure* director, the due diligence defence, and the use of the *pro forma* financial statements in issuing the Notice of Assessment.

[16] For the reasons that follow, the Estate has not persuaded me that there is any reason to intervene.

V. *De jure* director status

[17] The circumstances of this case are unusual to say the least. Since November 2019, the Estate's argument has been primarily based on the claim that Gaétan Gagné was never a director of the Corporation because, contrary to what the law in this respect requires, he never consented to becoming a director and the formalities to confirm his appointment were not carried out.

[18] However, the difficulty with this tardy contention is that the person concerned, Gaétan Gagné, never submitted it to the tax authorities when he was alive (Judgment at para. 32). There is no lack of evidence on this subject (Appeal Book, examination-in-chief of Valérie Casgrain at 748; examination-in-chief of Chantal Thériault at 801; examination-in-chief of Simon Rocheleau at 826). According to the evidence in the record, in their discussions with the ARQ during the objection to the Notice of Assessment stage, Gaétan Gagné's representatives even recognized his status as a director (Judgment at para. 40; Appeal Book, examination-in-chief of Simon Rocheleau at 840–841, 846–847 and 876–877). The notice of objection filed by Gaétan Gagné against the Notice of Assessment, as well as the original version of the Notice of Appeal filed

with the TCC, where the emphasis is actually on Gaétan Gagné's resignation as a director, make this abundantly clear (Appeal Book at 47–49).

[19] This backdrop is essential to resolving this appeal. In other words, the issue of Gaétan Gagné's status as a director cannot be examined without taking into account the fact that (i) according to the preponderance of the evidence in the record, the argument that he was never a director was raised only through the Amended Notice of Appeal filed at the eleventh hour with the TCC; (ii) Gaétan Gagné had ample opportunity to do so during his lifetime, either on his own or through his representatives; and (iii) he was assumed to be a *de jure* director of the Corporation throughout the entire period in question based on the information recorded in the QER.

[20] This is essential because, all things considered, determining Gaétan Gagné's status as a director in this case remains a question of mixed fact and law. In general, a *de jure* director has obtained this status formally, namely under the applicable legislation and the articles of the corporation of which he or she is a director (*MacDonald v. The Queen*, 2014 TCC 308 at para. 30 (*MacDonald*)). It is therefore necessary to examine the Act under which the corporation in question was incorporated. In common law provinces, a *de jure* director of a corporation is someone who has explicitly or implicitly consented to his or her appointment. This rule is generally followed in federal tax matters (*Hay v. The Queen*, 2004 TCC 51 at para. 34; *MacDonald* at para. 35).

[21] In this case, the Corporation was incorporated under the *Companies Act*, CQLR c. C-38. Section 88 of that Act provides that directors shall be elected by the shareholders in such manner as the constituting act or by-laws of the corporation prescribe. However, this Act is silent on the issue of consent to hold such a position. In this regard, we must rely on the second paragraph of article 338 of the *Civil Code of Québec*, CQLR c. CCQ-1991, which states that "[n]o one may be designated as a director without his express consent." However, this provision does not require that consent be recorded in writing, as is the case in other provinces, at least in Ontario and New Brunswick (*Business Corporations Act*, R.S.O. 1990, c. B.16, subsection 119(9); *Business Corporations Act*, S.N.B. 1981, c. B-9.1, paragraph 63(3)(b); see also: *MacDonald* at paras. 31 and 40; *Pereira v. The Queen*, 2007 TCC 737 at paras. 12–13; and *Lau v. The Queen*, 2002 CanLII 47028 (TCC) at paras. 5 and 15).

[22] In Quebec, therefore, explicitly expressed consent is a matter of circumstance, as demonstrated by case law in the area of corporate law in Quebec (*Commission de la construction du Québec c. Légaré*, 1998 CanLII 10989 (QC CQ) at paras. 15 and 24; *Bisaillon v. The Queen*, 2010 TCC 44 at para. 8 (*Bisaillon*); *Bishara v. The King*, 2022 TCC 105 at paras. 75–76 and 108 (*Bishara*)).

[23] In this case, the Estate pleads that from the moment the Judge expressed his opinion, at paragraph 49 of his reasons, that nothing in the evidence indicated that Gaétan Gagné had consented to becoming a shareholder and director of the Corporation, the Judge could no longer find that Gaétan Gagné had been a *de jure* director during the Reporting Period.

[24] I cannot draw that conclusion in the very specific circumstances of this case. There is no direct evidence in the record indicating that Gaétan Gagné consented to becoming a director of the Corporation. Nor is there any direct evidence that he did not consent to becoming one.
I consider that this is how this excerpt from the Judgment should be read. In my view, this is the only interpretation that can logically tie in with the rest of the Judgment and all the evidence in the record.

[25] The starting point of the analysis must be the presumption created by section 62 of the ALP. This provision reads as follows:

CHAPTER V – REGISTER	**CHAPITRE V - REGISTRE**
DIVISION I - CONSTITUTION	**SECTION I - CONSTITUTION**
62. The information relating to each registrant is proof of its contents in favour of third persons in good faith from the date on which it is entered in the statement of information. Third persons may submit any proof to refute the information contained in a declaration or in a document transferred to the enterprise registrar under section **72, 72.1** or **73**.	**62.** Les informations relatives à chaque assujetti font preuve de leur contenu en faveur des tiers de bonne foi à compter de la date où elles sont inscrites à l'état des informations. Les tiers peuvent par tout moyen contredire les informations contenues dans une déclaration ou dans un document transféré au registraire en vertu de l'article **72, 72.1** ou **73**.
That information shall include:	Ces informations sont les suivantes :
…	…
(6) the names and domiciles of the directors, with an entry indicating the position held by each;	**6°** le nom et le domicile de chaque administrateur avec mention de la fonction qu'il occupe;
…	…

[26] This provision is part of a set of rules designed to protect third persons in good faith in order to [TRANSLATION] "promote the security of legal relationships" (*Matte c. Charron*, 2010 QCCA 1496 at para. 71). However, the protection arising from section 62 of the ALP is not absolute. The presumption that it creates is rebuttable so as to protect the interests of individuals who can prove that they no longer occupy or have never occupied the office of director, despite the information entered in the QER.

[27] At the time the Notice of Assessment was issued, Gaétan Gagné was assumed, in favour of third persons in good faith, and therefore of the Minister, to have been an actual director of the Corporation during this period because his name had been continuously entered in the QER between June 26, 2006 and February 9, 2012. The Minister was therefore also entitled to assume that the formal requirements that needed to precede his appointment as director, including that of consent, had been fulfilled.

[28] It appears from paragraphs 47 to 49 and 52 of the Judgment that the Judge correctly applied the law in this regard. To be exonerated from the joint and several, or solidary, liability under section 323 of the Act that applied to him at the time as a director of the Corporation, Gaétan Gagné had to rebut this presumption (*The Estate of Bela Miklosi v. The Queen*, 2004 TCC 253 at para. 24; *Bishara* at para. 112), just as it was up to him, more generally, to demolish the Minister's assumptions by establishing "facts upon which it can be affirmatively asserted that the assessment was not authorized by the taxing statute" based on evidence that was "credible and sufficiently convincing on a balance of probabilities" (*Hickman Motors Ltd. v. Canada*, [1997] 2 S.C.R. 336, 1997 CanLII 357 (SCC); *European Staffing* at paras. 15–16).

[29] In this context, whether Gaétan Gagné had consented to being a director of the Corporation was largely a question of fact in this case. The Judge noted that, while the person concerned was alive, he had never on any occasion mentioned that he had never consented to being a director of the Corporation (Judgment at para. 32). However, he had had plenty of opportunities to do so. As we have seen, his position was rather that he had resigned from this position well before the start of the time limit set out in subsection 323(5) of the Act.

[30] The Judge could have added that Gaétan Gagné was represented by counsel during his discussions with the ARQ regarding the Notice of Assessment. His counsel included Mr. Dorais, the same person who had prepared the November 2006 amending declaration filed with the QER and appointing Gaétan Gagné as director, and Jocelyn Ouellette, [TRANSLATION] "Mr. Dorais's right-hand man" (Appeal Book, cross-examination of Jean-François Gagné at 704; examination-in-chief of Sylvain Dorais at 529), the two being identified as the representatives of Gaétan Gagné on the Notice of Assessment objection form (Appeal Book at 48).

[31] The Judge also rejected the Estate's position that Gaétan Gagné was mistakenly appointed director of the Corporation. As mentioned previously, the Judge did not give any probative value to the evidence-in-chief—namely, Mr. Dorais's affidavit—submitted by the Estate on this point because Mr. Dorais had essentially relied on the statements of Jean-François Gagné, Gaétan Gagné's son, and did not check his records before signing the affidavit (Judgment at para. 50).

[32] This finding of fact seems to me unassailable. It appears from the evidence in the record that this affidavit was signed after a meeting was held between Mr. Dorais and Jean-François Gagné in April 2019 at Jean-François Gagné's request. The affidavit was produced on the basis of [TRANSLATION] "explanations received from Mr. Gagné", without Mr. Dorais having performed any verifications of his own (Appeal Book, examination-in-chief of Sylvain Dorais at 533–534).

[33] But there is more. Mr. Dorais specified during his testimony that the addition of Gaétan Gagné's name to the QER in 2006 as a director of the Corporation was based on instructions given to him by Jean-François Gagné, from whom all his instructions came (Appeal Book, examination-in-chief of Sylvain Dorais at 540–541 and 545). He maintains that he then did [TRANSLATION] "what I was asked to do" (Appeal Book, examination-in-chief of Sylvain Dorais at 547). Jean-François Gagné strongly challenged this during his testimony, claiming that his being replaced by his father as a director of the Corporation in 2006 defied [TRANSLATION] "logic", was [TRANSLATION] "insane" and left him [TRANSLATION] "speechless" (Appeal Book, examination-in-chief of Jean-François Gagné at 639–640).

[34] The decision to appoint Gaétan Gagné as a director of the Corporation was perhaps ill-advised, as alleged by Jean-François Gagné at trial (Appeal Book, examination-in-chief of Jean-François Gagné at 620–621; examination-in-chief of Sylvain Dorais at 545; examination-in-chief of Simon Rocheleau at 843), but the decision was nevertheless made.

[35] In my view, all of this deepens the cracks in the position that it was a mistake, and the Estate's two main witnesses on this point did not agree on the key elements of this position. The late submission of the contention that Gaétan Gagné had never been a director of the Corporation, either because he had never consented to being one or because he had been appointed by mistake, also undermines the plausibility of this argument (*Hunter v. The Queen*, 2018 TCC 108 at para. 31).

[36] As the Judge noted, it appears equally plausible that Gaétan Gagné was appointed director of the Corporation given that he held more than 50% of the Corporation's voting shares at the time (Judgment at para. 51). In my opinion, the Judge was perfectly entitled to draw this inference in light of all the evidence before him.

[37] I would point out that the standard of review applicable to questions of fact and questions of mixed fact and law requires that, as an appellate judge, I accord a high degree of deference to the Judge's findings and inferences of fact (*Housen* at paras. 10–25). Indeed, determining whether to make inferences or assumptions of fact is a core function of the trier of fact. As we have also seen, the resulting findings can be overturned on appeal only in the presence of a palpable and overriding error (*Housen* at para. 21; see also *Tiger-Vac International inc. c. Mambro*, 2021 QCCA 53 at para. 18). This burden is high, and to illustrate what it entails, this Court has already stated that when arguing palpable and overriding error, it is not enough to pull at leaves and branches and leave the tree standing—"[t]he entire tree must fall" (*Canada v. South Yukon Forest Corporation*, 2012 FCA 165 at para. 46). This burden was not met in this case.

[38] The Estate therefore failed to provide “credible and sufficiently convincing evidence on a balance of probabilities” to demonstrate that Gaétan Gagné’s appointment as a director in 2006 was done by mistake or without the consent of the person concerned. The Judge was therefore right in rejecting this claim.

[39] In my opinion, the Estate also failed to demonstrate that the Judge did not attribute sufficient weight to the resignation documents, dating from late 2007, early 2008, adduced in evidence during the trial. At this stage, we are still assessing the facts, subject to review on the standard of palpable and overriding error.

[40] The facts surrounding Gaétan Gagné’s resignation raise more questions than they answer, to say the least. As the Minister pointed out in her memorandum, one of the three copies of notices of resignation mentioned at trial was not produced: the handwritten notice presumably signed by Gaétan Gagné on a yellow sheet of paper. Jean-François Gagné was unable to explain what he did with this notice of resignation, which presumably came from his father. In response to questions from the Judge, he even stated that it could have been drafted in 2017 (Appeal Book, examination-in-chief of Jean-François Gagné at 666–667).

[41] The format of the two other documents is different and they do not match in terms of dates; moreover, one was signed by Jean-François Gagné when he was no longer a shareholder or director of the Corporation. In addition, the evidence shows that changes were made to the information about the Corporation entered in the QER between January 2008 and February 9,

2012, but none of these changes were related to Gaétan Gagné's status as a director (Appeal Book, examination-in-chief of Simon Rocheleau at 829–830).

[42] Also, there are clues in the evidence in the record that tend to show that Gaétan Gagné took steps on behalf of the Corporation after the so-called notices of resignation. These included the signing of an amending declaration in October 2009 filed with the QER as a [TRANSLATION] "person authorized by the corporation to sign" (Appeal Book at 200-204), the signing of a power of attorney appointing the accounting firm Dufour, Charbonneau, Brunet et Associés as the Corporation's representative in its dealings with the ARQ in September 2011 (Appeal Book, screenshot of ARQ records at 456; see also: Appeal Book, cross-examination of Chantal Thériault at 806–807), and a $20,000 payment taken from his personal account to pay a portion of the Corporation's tax debt as part of the objection to the Notice of Assessment process (Appeal Book, examination-in-chief of Valérie Casgrain at 748).

[43] It is well established that a party relying on the time limit set out in subsection 323(5) of the Act must be able to demonstrate precision in the date of resignation capable of objective verification (*Canada v. Chriss*, 2016 FCA 236 at para. 14). In my view, the Judge's finding that this demonstration was not made in such a way as to trigger this time limit was supported by the evidence. In other words, in light of all the evidence in the record, this finding was not the result of a palpable and overriding error.

[44] Finally, what are we to make of the argument relating to the lack of formalities that preceded this appointment? The Estate pleads that Gaétan Gagné's appointment as director was

not done in accordance with the Corporation's by-laws, which the Judge acknowledged at paragraph 49 of his reasons. According to these by-laws, directors are elected by the shareholders at each annual meeting or at a special meeting. However, the Estate argues that none of this was done in the case of Gaétan Gagné. Furthermore, there was no corporate resolution to confirm his election, which would be enough, according to the Estate, to rebut the presumption set out in section 62 of the ALP.

[45] According to the evidence in the record, the Corporation's bookkeeping has been non-existent since 2005 (Appeal Book, examination-in-chief of Jean-François Gagné at 656-657; Appeal Book at 89–175). As a result, this argument does not carry much weight. Moreover, the decisions that the Estate relied on to support this point are of no help because they are essentially revisions of decisions rendered by the enterprise registrar (the Registrar) on petitions for the cancellation of entries in the QER made under section 84 of the ALP or its new version, section 132 of the Quebec *Act respecting the legal publicity of enterprises*.

[46] In this case, not only was this type of petition never made, but the case law cited by the Estate also mainly involves the Registrar's role in this matter; that case law describes this role as [TRANSLATION] "mostly technical and legalistic, so as to ascertain the reliability of the information filed in the register" (*Piciacchia c. Doroudian*, 2011 QCCQ 1843 at para. 130). This case law therefore focuses above all on the relationship between the Registrar and those who believed that their name had been entered in the QER by mistake. It is therefore of little use.

[47] In circumstances more similar to those in the matter at hand, that is to say a case also undertaken in the context of section 323 of the Act, *Bisaillon*, the lack of formality defence was considered, but that case was not decided on this basis (*Bisaillon* at paras. 4 and 8).

[48] In Quebec corporate law, this type of argument has little value with respect to third persons in good faith. It is well established that a corporation cannot invoke against them a flaw in indoor management, including irregularity in the election of a director, to avoid its obligations (Paul Martel, *La société par actions au Québec : Les aspects juridiques*, vol.1, (Montréal: Wilson & Lafleur, 2022) at paras. 26-63 and 26-103). In other circumstances, the corporate formalism defence is equally weak when it runs up against all the facts of the case (*Côté c. Côté*, 2014 QCCA 388; *Mennillo v. Intramodal inc.*, 2016 SCC 51, [2016] 2 S.C.R. 438; *Gestion Bon Conseil inc. c. Guèvremont*, 2006 QCCA 109 at paras. 163-168).

[49] In the context of this case, the problem is that the Estate is trying to take advantage of a flaw in indoor management that the person concerned never even raised when, once again, he would have had ample opportunity to do so.

[50] Some might argue that the Judgment contains shortcomings as regards justification. However, I would point out that the insufficiency of the reasons is not in itself a ground of appeal if the “what” is otherwise clear in the record (*Van de Perre v. Edwards*, 2001 SCC 60, [2001] 2 S.C.R. 1014 at para. 15; *Lesko v. Lesko*, 2021 ONCA 369 at paras. 22 and 49, referring to *R. v. G.F.*, 2021 SCC 20 at para. 70). In my view, that is the case here.

[51] In short, the Estate was unable to demonstrate that the Judge incorrectly applied the law or made a palpable and overriding error in finding that Gaétan Gagné had been a director of the Corporation during the entire Reporting Period and that, consequently, the Minister's claim against him arising from the Notice of Assessment issued under section 323 of the Act was not time-barred.

VI. Due diligence

[52] On the basis of the evidence in the record, the Judge found that although Gaétan Gagné had taken certain steps to help the Corporation meet its financial obligations, he had nevertheless taken no action to prevent the Corporation from failing to meet its tax obligations and had not exercised, in this context, the degree of diligence and prudence that a reasonable person would be expected to have exercised in comparable circumstances (Judgment at para. 56).

[53] The criticism that the Estate levels at the Judge on this point is based on the premise that Gaétan Gagné was never a director of the Corporation. Because I have determined that, on the basis of all the evidence in the record, the Judge was right in finding otherwise, this criticism has no merit and must, on this sole basis, be dismissed.

[54] In *Buckingham*, this Court pointed out that the conduct of the director must be assessed according to an objective standard, which sets aside the common law principle that "a director's management of a corporation is to be judged according to his own personal skills, knowledge, abilities and capacities" (*Buckingham* at para. 38). Consequently, 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” (*ibid*).

[55] Given all the evidence in the record in this case, I am satisfied that the Judge did not commit any palpable and overriding error in finding as he did on this issue, namely, that Gaétan Gagné did not, in fact, take any steps to prevent the Corporation from failing to meet its tax obligations.

VII. *Pro forma* financial statements

[56] According to the Judge, the ARQ was entitled to use the *pro forma* financial statements to determine the amounts due under the Notice of Assessment because they were the only financial statements available when the Corporation was audited and because no accounting records were provided to the auditor. The Judge was of the opinion that the Estate could not “invoke [its] own turpitude and subsequently seek adjustments” (Judgment at para. 58).

[57] The Estate claims that the Judge erred in not taking into account the financial statements submitted to the ARQ in 2013 as part of the proceedings for objecting to the Notice of Assessment; according to the Estate, these statements reflected the [TRANSLATION] “true” figures of the Corporation for 2009 and 2010. It adds that the *pro forma* financial statements, which are based on estimated values, were mistakenly submitted to the ARQ and maintains that the ARQ arbitrarily set aside those submitted in 2013.

[58] Here again, I see no palpable and overriding error on the part of the Judge. This issue is highly factual. According to the evidence, there is little doubt that the auditor who determined the amount of the sums due under the Notice of Assessment had only the *pro forma* financial statements in hand and that although she had made several requests, Gaétan Gagné and his representatives never provided the accounting records for the years audited (Appeal Book, examination-in-chief of Chantal Thériault at 788-790).

[59] The evidence also indicates that at the stage of the objection to the Notice of Assessment, the ARQ objection officer requested the documents supporting the financial statements submitted in 2013, but neither Jean-François Gagné nor Mr. Dorais responded to these requests (Appeal Book, examination-in-chief of Simon Rocheleau at 834).

[60] It seems that the *pro forma* financial statements were preferred to the financial statements submitted in 2013, following a debate within the ARQ, because the *pro forma* financial statements, unlike the financial statements submitted in 2013, were analyzed on the merits (Appeal Book, examination-in-chief of Simon Rocheleau at 835-836). Among other things, the sales recorded in the 2013 financial statements were supposedly considered low for the restaurant industry given the total merchandise sold (Appeal Book, examination-in-chief of Chantal Thériault at 797-798).

[61] I consider that the Judge’s finding on this issue, which was based on an assessment of the various testimonies heard at trial, in particular those of the auditor and the objection officer, was within his purview. Obviously, this messy situation could have been avoided by the Estate,

and by Gaétan Gagné and his representatives before it, if they had fully cooperated with the ARQ. As the Judge mentioned, the Estate is tending to take advantage of its own turpitude.

[62] I would therefore dismiss this ground of appeal and the appeal in its entirety, with costs in this Court. Because the parties did not make a joint suggestion on this issue, I would fix the amount of the costs, as permitted by subsection 400(4) of the *Federal Courts Rules*, SOR/98-106, at $1,500.00, disbursements included.

[63] In accordance with the Practice Direction issued by the Chief Justice of this Court on September 9, 2022, to members of the legal profession and all parties to proceedings in this Court, the designation of the respondent in this appeal was changed to “His Majesty the King”.

“René LeBlanc”
J.A.

“I agree.
Johanne Gauthier, J.A.”

“I agree.
George R. Locke, J.A.”

Certified true translation
Melissa Paquette, Senior Jurilinguist

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-307-20
STYLE OF CAUSE:	ESTATE OF THE LATE GAÉTAN GAGNÉ V. HIS MAJESTY THE KING
PLACE OF HEARING:	MONTRÉAL, QUEBEC
DATE OF HEARING:	NOVEMBER 14, 2022
REASONS FOR JUDGMENT BY:	LEBLANC J.A.
CONCURRED IN BY:	GAUTHIER J.A. LOCKE J.A.
DATED:	JANUARY 18, 2023

APPEARANCES:

Étienne Paradis	FOR THE APPELLANT
Gabriel Déry	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Zaurrini Avocats Laval, Quebec	FOR THE APPELLANT
A. François Daigle Deputy Attorney General of Canada	FOR THE RESPONDENT