Citation: 2014 TCC 254
Date: 20140819
Docket: 2010-698(IT)G

BETWEEN:

DONNA ELIZABETH GARIEPY,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent;

Docket: 2010-863(IT)G

AND BETWEEN:

SALLY ANNE CHRISS,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Boyle J.

[1] These two appeals heard on common evidence involve directors' liability assessments dated October 2008 of the two Appellants in respect of more than $500,000 of unremitted tax withholdings (including penalties and interest) of 1056922 Ontario Limited ("105"), a company whose affairs and business was managed and operated by their husbands. The unremitted withholdings were for periods in 2000 to 2005. The Appellants maintain that they had resigned as directors more than two years before the assessments being appealed from. In the alternative, if they continued to be directors after 2001, their principal due diligence defence is that it was reasonable for them to do nothing with respect to the company, including in respect of the company's withholding remittance

obligations, because they reasonably believed that they had resigned in 2001 or 2002, and because, before these resignations they were directors in name only. Their further alternate position with respect to their due diligence defence is that, even if they continued to be directors, and it was not reasonable for them to believe otherwise, then, for significant portions of the company's non-remittance periods, a third party lawyer investor in 105 had *de facto* assumed all control of the company to the exclusion of the Appellants, and at least Mr. Chriss, and that it is for this reason that they could not reasonably do anything to avoid the failures to remit during those periods.

The Law:

[2] I refer to the summary of the law I wrote in *Deakin v. The Queen*, 2012 TCC 270 at paragraphs 13 -16 and 24:

> [13] An employer is generally required by law to remit to the CRA the source deductions it has withheld from its employees' salaries and wages for income tax, CPP and EI deductions. This obligation differs from the employer's liability for its own taxes on its income. These amounts were withheld from the employees to be remitted to CRA and CRA, and hence Canadian taxpayers at large, give the employees credit for these amounts against the employees' tax liabilities. For this reason, the legislation gives CRA greater collection powers for such unremitted amounts than for the employer's own income taxes.
>
> [14] Similarly, a business is generally required to remit the amount of GST it collected from its customers, net of the GST the business paid on its purchases, supplies and inputs. The GST was collected by the business from its customers to be remitted to the CRA to satisfy the customers' GST liabilities. Again, recognizing this, the legislation gives CRA greater collection powers for such unremitted GST amounts.
>
> [15] Subsection 227.1 of the *ITA* and subsection 323 of the *ETA* provide that the directors of a corporation will be personally liable for a corporation's failure to remit employee withholdings and GST as required by law. Directors are not generally liable for a corporation's own income tax. The potential liability of directors reflects the degree of management and control directors have over a corporation's management and its affairs.
>
> [16] Subsections 227.1(3) of *the ITA* and 323(3) of the *ETA* each provide that a director will not be liable for the corporation's failure to remit such amounts as required by law if the director exercised a degree of care, diligence and skill to prevent the failure that a reasonably prudent person would have exercised in comparable circumstances.

> […]
>
> [24] Source deductions and GST remittances are required by law to be made by a business corporation. These are not the corporation's own funds. The corporation has collected them from its employees and customers. Those employees and customers are given credit for these amounts once withheld and collected, even when not remitted. When owner-managers and directors decide to use these funds to keep their business afloat and support their investments, they are making all Canadian taxpayers invest involuntarily in a business and investment in which they have no upside. In doing so, shareholders and corporate decision-makers are investing or gambling with other people's money. Directors should be aware of that when they cause or permit this to happen. The directors' liability provisions of the legislation should be regarded by business persons as somewhat similar to a form of personal guarantee by the directors that can expose them to comparable liability for the amount involved. It is they who are deciding to invest the funds in their own business, for their own gain, not the government or people of Canada. They are doing so contrary to clear law and it appears appropriate as a policy matter that Parliament has legislated clearly that they will generally be responsible for such decisions and the loss resulting from them. In essence, if a corporation and its directors choose to unilaterally "borrow" from Canadian taxpayers and the public purse, Canadians get the benefit of security akin to personal guarantees of the directors.

[3] The Federal Court of Appeal in *Canada v. Buckingham*, 2011 FCA 142, had occasion to consider the similar directors' liability provisions of the *Income Tax Act* and the *Excise Tax Act* in respect of remittance failures. That Court in *Buckingham* identified that in such circumstances the Crown is an involuntary creditor as a result of the company diverting Crown remittances due in order to pay other creditors to assure the continuation of their business operations. That Court confirmed that it is precisely that situation which the directors' liability provisions seek to avoid. It confirmed that the legislation clearly provides that directors of such a corporation must establish that they exercised the degree of care, diligence and skill required to prevent the failure to remit, and that this will generally require specific actions of turning their attention to the remittance obligations and taking specific actions to avoid the failure to remit. It is actions to prevent the failure to remit that must be focused on and therefore efforts to correct the failure to remit by making payment arrangements for remittance arrears will not generally be sufficient to establish due diligence given the wording of the sections.

[4] The Federal Court of Appeal in *Balthazard v. Canada*, 2011 FCA 331, wrote in paragraph 32:

[32] In *Buckingham*, this Court recently summarized the legal framework applicable to the care, diligence and skill defence under subsection 323(3), as follows:

a. The standard of care, skill and diligence required under subsection 323(3) of the *Excise Tax Act* is an objective standard as set out by the Supreme Court of Canada in *Peoples Department Stores Inc.(Trustee of) v. Wise*, 2004 SCC 68, [2004] 3 S.C.R. 461. This objective standard has set aside the common law principle that a director's management of a corporation is to be judged according to his or her own personal skills, knowledge, abilities and capacities. However, an objective standard does not mean that a director's particular circumstances are to be ignored. These circumstances must be taken into account, but must be considered against an objective "reasonably prudent person" standard.

b. The assessment of the director's conduct, for the purposes of this objective standard, begins when it becomes apparent to the director, acting reasonably and with due care, diligence and skill, that the corporation is entering a period of financial difficulties.

c. In circumstances where a corporation is facing financial difficulties, it may be tempting to divert these Crown remittances in order to pay other creditors and thus ensure the continuity of the operations of the corporation. That is precisely the situation which section 323 of the *Excise Tax Act* seeks to avoid. The defence under subsection 323(3) of the *Excise Tax Act* must not be used to encourage such failures by allowing a care, diligence and skill defence for directors who finance the activities of their corporation with Crown monies, whether or not they expect to make good on these failures to remit at a later date.

d. Since the liability of directors in these respects is not absolute, it is possible for a corporation to fail to make remissions to the Crown without the joint and several, or solidary, liability of its directors being engaged.

e. What is required is that the directors establish that they were specifically concerned with the tax remittances and that they exercised their duty of care, diligence and skill with a view to preventing a failure by the corporation to remit the amounts at issue.

Background

[5] George Chriss, husband of the Appellant Sally Anne Chriss, and Derek Gariepy, husband of the Appellant Donna Gariepy, together carried on the business of 105. They had previously carried on business together in another corporation, CG Industries (“CGI”), which ended up insolvent and leaving significant unremitted withholdings to CRA. They sought insolvency related

advice in respect of CGI's demise from their corporate counsel, Gowling Lafleur Henderson LLP ("Gowlings").

[6] It was decided by the husbands to start a very similar business afresh in 105 which was a corporation Gowlings had earlier incorporated for George Chriss but which had remained inactive until then. Aware of the two year potential liabilities attaching to the demise of CGI, the husbands chose to have their wives alone be the directors and officers of 105 when it was reorganized prior to becoming active in 1999. It is maintained by the husbands that they believed that was best given the advice as they understood it from Gowlings. Obviously, there had been a misunderstanding as this does not make sense. I do not believe that Gowlings would have recommended that the wives become directors.

[7] The wives had never been involved in CGI's business and did not intend to be involved in the operations of their husbands' new company. They did not want to become directors but agreed to their husbands' requests and became directors of 105. From the inception, it was intended by the Chrisses and the Gariepys that the wives would be removed from the board after the two year period the husbands were concerned about had past.

[8] In 2001, nearing the expiry of the intended period for the wives to be on the board, the husbands decided it was indeed time to get the wives off the board of directors and have themselves appointed directors of 105. The wives were in agreement with this.

[9] To this end, Mr. Chriss, who managed the business affairs of 105 while Mr. Gariepy attended to sales, contacted Gowlings shortly thereafter to advise of the change of directors. At this point in time, Gowlings was owed a significant sum in respect of the prior business dealings involving Mr. Chriss and Mr. Gariepy and CGI. After a follow-up call from Mr. Chriss, Gowlings prepared written resignations for the Appellants in September 2001.

[10] I can largely dispense with outlining at this stage much of the rest of the story, as I have decided that the 2001 resignations described above were valid and effective and that the appeals should be allowed on that basis. I will detail the relevant evidence to my conclusion that the 2001 resignations were valid in my analysis below.

[11] However, I can say that this was a lengthy 10 day trial with testimony from Mr. and Mrs. Chriss and Mr. and Mrs. Gariepy as well as a Canada Revenue Agency ("CRA") officer.

[12] Two of the lawyers involved from Gowlings testified and all of the Gowlings' documents that Gowlings was able to locate were in evidence. However, Gowlings acknowledged it could not locate or access all of the documents, including any of the e-mails sent by one of the key partners involved apart from those that were internally addressed to other persons at Gowlings. The materials Gowlings produced clearly did not tell a complete story as, reading only those documents and e-mails that were provided, there appears to have been considerable confusion among the six or so Gowlings' persons involved with the resignations George Chriss asked Gowlings to prepare. I can guess that the confusion apparent in the documents was dealt with and clarified in conversations or phone calls among them that they no longer recall or in other documents or e-mails that they have not been able to locate.

[13] I need only say at this stage that very serious credibility issues are raised by the testimony of the Chrisses and the Gariepys. There are multiple, largely irreconcilable versions of signing the 2001 resignations along with other resignations. Given my conclusion that the 2001 resignations were effective, I do not have to decide those credibility issues to decide the merits of this case. I can however say that there is absolutely no version of events that it is wholly reconcilable with each of the other versions of events in evidence. I can also say that I do not believe all of the taxpayers' witnesses were telling the truth about other resignations or even telling the full truth about the 2001 resignations.

[14] Unfortunately, the witnesses from Gowlings had little actual specific recollections of the events.

[15] I can add to this introductory portion that CRA only assessed the wives for directors' liability. In 2008 when assessing, Mrs. Gariepy continued to be shown as a director on the provincial corporate filings and Mrs. Chriss was recorded as having resigned in 2006, less than two years earlier. However, within the two year period preceding the directors' liability assessments of the wives, CRA turned its mind to whether the husbands were *de facto* directors. The husbands had even communicated in writing to CRA that they may have been *de facto* directors for certain periods, and even earlier the husbands had held themselves out as directors to CRA at meetings over the remittance arrears. Surprisingly, without any evidence of any further consideration being given to the issue, CRA assessed the wives as *de*

jure directors and did not assess the husbands as *de facto* directors. No explanation was given for this by the Crown, but it was observed that Mr. Gariepy had an intervening bankruptcy which might have made collection difficult. I would certainly hope this was not the case. The Crown's pursuit of litigation in this Court should not be used as a strategic collection mechanism. The prospect of collections against one taxpayer should not justify the pursuit of another taxpayer even if they are husband and wife. If the suggestion implicit in the observation was the reason for pursuing the wives and not the husbands, the result is that CRA is now unable to collect the unremitted withholdings on behalf of the people of Canada from any directors of the company. That is directly opposite to the intention of the directors' liability collection provisions as described by the Federal Court of Appeal. This case was heard over 10 days beginning in 2012 and ending in 2014. The question of why the wives and not the husbands were assessed, or simply why not the husbands as well, was raised early in these proceedings, with lots of time for CRA to go back and determine why that was done.

Legislation:

[16] The relevant provisions of the ITA provide:

> **227.1(1) Liability of directors for failure to deduct**
>
> (1) **Liability of directors for failure to deduct.** – Where a corporation has failed to deduct or withhold an amount as required by subsection 135(3) or section 153 or 215, has failed to remit such an amount or has failed to pay an amount of tax for a taxation year as required under Part VII or VIII, the directors of the corporation at the time the corporation was required to deduct, withhold, remit or pay the amount are jointly and severally liable, together with the corporation, to pay that amount and any interest or penalties relating thereto.
>
> **227.1(2) Limitations on liability**
>
> […]
>
> **227.1(3) Idem**
>
> (3) **Idem.** – A director is not liable for a failure under subsection (1) where the director exercised the degree of care, diligence and skill to prevent the failure that a reasonably prudent person would have exercised in comparable circumstances.
>
> **227.1(4) Limitation period**

> (4) **Limitation period.** – No action or proceedings to recover any amount payable by a director of a corporation under subsection (1) shall be commenced more than two years after the director last ceased to be a director of that corporation.

The relevant provision of the applicable *Ontario Business Corporations Act* ("*OBCA"*) provides:

> Effective date of resignation
>
> 108.(2) A resignation of a director becomes effective at the time a written resignation is sent to the corporation, or at the time specified in the resignation, whichever is later.

Findings

[17] I find that the 2001 Gowlings' resignations were valid and effective as of the date they were prepared by Gowlings, notwithstanding that they were never signed by Mrs. Chriss and Mrs. Gariepy. The preparation of the 2001 Gowlings resignations were only remembered by George Chriss shortly before the trial began, but promptly upon seeing the then recently produced Gowlings' file materials. (From documentary evidence in the intervening period, it appears George Chriss may have also remembered them briefly in 2007 when he appears to reference them in a letter to CRA.)

[18] As mentioned above, George Chriss communicated in 2001 to Gowlings on behalf of at least his wife, that both wives were resigning from 105. Gowlings' phone records had logged two calls in September 2001 the week before written resignations were prepared by Gowlings from George Chriss to the partner he had been dealing with, Tom Cumming.

[19] Tom Cumming, then recently moved from the Toronto office to the Calgary office of Gowlings, speaks (or writes, but probably speaks) with Angela Nikolakakos regarding 105 directors' resignations to be prepared. Angela Nikolakakos responds to Tom Cumming by e-mail confirming his instructions but ends referring to the company as CGI not 105. The e-mail records evidence that, after reviewing the Gowlings' files and the records, Angela Nikolakakos reverts in the e-mail exchanges to referring to 105. None of Tom Cumming, Angela Nikolakakos, nor the other Gowlings' persons attending to or involved with the resignations, ever suggest 105 was not in fact the company for which Tom Cumming had initially given Angela Nikolakakos instructions to prepare directors' resignations. That the instructions from Tom Cumming to

Angela Nikolakakos were in respect of 105 and not CGI is further confirmed by the fact that Gowlings had actually recommended and was aware of CGI directors' resignations in 1999 when George Chriss and Derek Gariepy were the directors, and those resignations were already in Gowlings' files.

[20] Gowlings prepared full and proper resignation documents in respect of the Appellants which were put in evidence. Gowlings issued a detailed bill for their preparation which is also in evidence.

[21] There is nothing in the Gowlings' files produced to evidence the resignations and related resolutions ever left Gowlings. I find that they did not.

[22] The adequacy of the 2001 Gowlings' resignations were comprised of and consisted of the following:

(i) The expressed intention of all four of the Chrisses and Gariepys that the wives were to resign from the board of 105 after two years from the demise of CGI.

(ii) The clearly expressed intention of the two wives as directors to immediately resign communicated to the corporation in 2001 in the form of its two principals, their two husbands. That is, Sally Chriss clearly told George Chriss and Donna Gariepy clearly told Derek Gariepy.

(iii) All of the directors, officers and principals of the company understood the wives were resigning at that time. This means that the company clearly understood they resigned.

(iv) George Chriss, on behalf of the two directors whom he knew wanted and had communicated their resignations to the company, communicated those resignations to a partner of Gowlings which was the company's corporate counsel since it was incorporated years earlier and which continued to hold the minute book throughout.

(v) Gowlings, as corporate counsel, prepared written documents to this effect for the corporate records and minute book. Had these documents been signed and dated there appears to be no doubt there would have been valid, effective resignations and the Appellants would not be needing to pursue these appeals. For whatever reason,

perhaps even the unpaid legal fees circumstances, the documents were never sent to the company or the wives.

(vi) There was nothing in the Gowlings' files in the other documentary evidence, or in anyone's testimony, that would even hint or suggest that there may have been any reason for the wives not signing them, or for the wives to have changed their minds and asked Gowlings that the resignations not be sent.

[23] I find that the communication of the resignations was entirely clear at each step, consistent with the resigning directors' desires and intentions, understood and accepted by the company, communicated by George Chriss for the benefit of the resigning directors (one of whom was his wife of many years who entrusted in him all business matters) and on behalf of the company, to the company's counsel who then prepared the written documents that reflected exactly what was needed for the corporate minute book.

[24] I am satisfied that, in these circumstances, this was a valid and effective resignation by each of the two wives. This is consistent with this Court's decisions in *Perricelli v. Her Majesty the Queen*, 2002 GSTC 71 (per C. Miller J.), *Walsh v. Her Majesty the Queen*, [2010] 1 CTC 2412 (per Sheridan J.), and *Corkum v. Her Majesty the Queen*, 2005 TCC 755 (per McArthur J.), each of which deals with the necessary form, content or communication of a valid director's resignation for these purposes.

[25] I am not satisfied on a balance of probabilities that there is sufficient credible evidence to establish that the 2001 Gowlings' resignation package left Gowlings, or that those resignations or any other (including those seemingly subsequently prepared by Gowlings in 2002) were ever signed. The *OBCA* specifies that a resignation be written but not that it be signed. A written resignation meaningfully communicated to the corporation was acceptable to this Court in *Irvine v Minister of National Revenue*, 91 DTC 91 (per Taylor, TCJ). It is also consistent with the views of this Court in *Cybulski v. Minister of National Revenue*, 88 DTC 1531 (per Christie, ACJ).

[26] The assessments were issued in 2008, more than two years after the 2001 Gowlings resignations by Mrs. Chriss and Mrs. Gariepy. For that reason, the appeals must be allowed as there can be no director liability assessed after that two year period by virtue of subsection 227.1(4).

Alternative Arguments

[27] In the event I am wrong in law in my conclusion that the directors had resigned in September 2001, I need to go on to consider whether it was nonetheless reasonable for Mrs. Chriss and Mrs. Gariepy to think that they had resigned and ceased to be directors after that date and, if so, whether their complete failure to act or concern themselves with the company's affairs during the non-remittance periods, can support a due diligence defence.

Mrs. Chriss:

[28] Given the differing testimonies and versions of events of the Chrisses and the Gariepys relating to the 2001 Gowlings' resignations and the other alleged resignations thereafter, it is necessary to consider Mrs. Chriss' and Mrs. Gariepy's circumstances differently for this purpose.

[29] Mrs. Chriss spoke to Mr. Chriss about resigning in 2001 and having Mr. Chriss communicate the resignations to Gowlings. When George Chriss spoke with Gowlings to communicate the resignations, he was clearly doing it on her behalf and with her actual knowledge if not at her direction. I find it more probable than not that she did indeed speak to her husband about her resignation and that he did assure her he would promptly call Gowlings to inform them of her resignation so that the appropriate minute book entries could be made.

[30] In such circumstances, including Mr. Chriss' role in 105 and his being the company's contact person with Gowlings, I find it reasonable for Mrs. Chriss to have trusted George Chriss and his trust of Gowlings as corporate counsel to ensure her resignation was valid. If the knowledgeable and experienced lawyers representing the parties could so credibly argue the point armed with authorities, and if I have in fact wrongly decided above that the resignations were effective, it is entirely reasonable to think that an average non-lawyer Canadian would reasonably think she had resigned unless someone suggested otherwise, or questioned the state of affairs, or tried to communicate with her in her capacity as director.

[31] Even though Mrs. Chriss did not receive anything to sign or confirming that she had resigned, her belief she had resigned continued to be reasonable until at least after the period of non-remittance. She did not receive anything or hear anything suggesting she was still a director or that her resignation was ineffective.

[32] While Mrs. Chriss took no action at all to prevent the failures to remit, this is one of the exceptional cases where no action was a reasonable step for the periods after September 2001. She was entirely reasonable in her belief that she had resigned as director in September 2001 and ceased to even have in law the powers of a director, nor any other role to influence the company to make its remittances to CRA.

Mrs. Gariepy

[33] Mrs. Gariepy's circumstances are somewhat different as the evidence does not support a finding that she asked or was aware that her oral resignation communicated to her husband was communicated to Gowlings. Instead the Gariepys' version of events is that they went on their own to another lawyer, Paul Caroline, a few months later to prepare formal resignation documents for Mrs. Gariepy alone. I am not satisfied on the evidence that any such document was asked for or prepared until years later when the so-called "reconstructed" resignation of Donna Gariepy was delivered to CRA as part of the corporate minute book after it was released by Gowlings to Mr. Gariepy.

[34] The letter of Mr. Gariepy to CRA holding out the minute book as original and true and complete, notwithstanding that it did not identify Mrs. Gariepy's resignation as a reconstruction of a lost document, may not have been prepared, seen or signed by Mr. Gariepy. It may have been prepared and signed or prepared and sent unsigned by Mr. Caroline. This may also be true of Mrs. Gariepy's letter as director to Gowlings to release the corporate minute book to Mr. Gariepy.

[35] Mr. Caroline is by all accounts a rogue who contributed to the failure of 105. The Chrisses and the Gariepys all agree in their testimony that Mr. Caroline was a rogue. Indeed, he served time in jail for convictions going back to the relevant time. However, at the time, he continued to be a friend of Derek Gariepy, and to work at, from and for 105 in key operating capacities. Further, Mr. Gariepy and Mr. Caroline, shortly after the non-remittance period, had the remaining assets of 105 transferred to a new company owned by Mr. Caroline and of which Mr. Gariepy was the key employee and operator of the business, and in which George Chriss was given no role or opportunity to participate.

[36] After a forensic analysis to try to better establish dating of Mrs. Gariepy's signed 2001 resignation by the Respondent, it was acknowledged by Mrs. Gariepy that this had not been dated as of its signing date, but was redone and reconstructed to reflect the Gariepys' and/or Paul Caroline's best recollections of the effects of

what would have been prepared in 2001 in response to Mr. Gariepy's request to Mr. Caroline and Mr. Caroline's delivery to Mr. Gariepy of a resignation which Mrs. Gariepy then signed. I note 105 was a technology company but it seemed no one could retrieve the earlier electronic version to reprint it. I find there is entirely insufficient credible evidence to support a finding that such an earlier document was ever asked for, prepared or signed. I am also satisfied that the delivery to CRA of the "reconstructed" Donna Gariepy resignation without noting it was backdated or reconstructed was done with intention to deceive.

[37] The result of the different and separate paths taken by the Gariepys from the Chrisses is that, if the Gowlings' 2001 resignations were not valid and effective, it was not reasonable for Mrs. Gariepy to think she had ceased to be a director. The evidence does not support a finding that at any relevant time she asked for, was advised of, or was otherwise aware that George Chriss had been asked to or did contact Gowlings to advise it of the resignations. The evidence is simply insufficient to support such a finding. Had the Gariepys been aware, it is hard to see why they would go to another lawyer, even a friend, colleague or lender, to prepare a resignation for Donna Gariepy. That they sought a resignation just for Mrs. Gariepy and not Mr. Chriss supports my conclusion that the Gariepys did not make any inquiries of George Chriss about the status of Gowlings paper work or just gave up on Gowlings ever getting it done. Had that been the case, it is very hard to imagine a good reason why both Mrs. Chriss' and Mrs. Gariepy's resignation paperwork was not sought by the Gariepys.

[38] Based upon these separate and different actions by the Gariepys, I can not accept that Mrs. Gariepy also reasonably thought she had already done everything needed to resign. For that reason, not concerning herself in any way with the company's tax remittance obligations alter September 2001 can not be considered to have been exercising the degree of care, diligence and skill to prevent the failure that a reasonably prudent person would have exercised in comparable circumstances.

Loss of Control to Paul Caroline

[39] In the further alternative, Mrs. Chriss and Mrs. Gariepy have argued that, if they continued to be directors throughout the non-remittance period of 105, it was reasonable for them to have done nothing to concern themselves with the company's remittance obligations or other affairs once Paul Caroline had taken full *de facto* control of the affairs of 105 to the exclusion of their powers as directors of 105. I do not find that this is a persuasive argument for either of them. Mr.

Caroline held the position of influence that he did in the company because their husbands chose to have him as a lender to the corporation, sometime counsel to the corporation, and to have him work for the corporation. His control over which bills of the company got paid resulted from his being a supplier to the company who needed to be paid in order to keep the business operations going. The company's failure to make remittances was the result of it preferring and allowing this supplier, Mr. Caroline, a supplier of money, to be repaid lest he call his loan and cease supplying the company with money. A named lender under a facility, even if he is a rogue and fraudster, pursuant to which money is in fact supplied to the company is no less a supplier and creditor of the company that the company chooses to repay out of its withholdings instead of remitting than would be any other supplier of inventory or other inputs needed to keep the business open. I do not agree that this type of economic necessity or control argument is sufficient to have removed the powers of the directors and its officers over the affairs and management of the company's business and its cash flows.

[40] If I am wrong in having concluded that the September 2001 Gowlings resignations were valid, I do not find that Mrs. Chriss and Mrs. Gariepy had been ousted from the company notwithstanding that they were directors, or had their powers as directors taken away from them by Mr. Caroline. Mrs. Chriss and Mrs. Gariepy never intended to exercise their powers as directors of the company even in the first two years while they knew they were directors. They always chose to not exercise them. They always let their husbands operate the company with employees, investors and outside advisors of the husbands' choosing.

[41] I will be signing judgments allowing the appeals on the basis of these reasons, that the September 2001 Gowlings resignations were valid and effective more than two years before the assessments appealed from. However, I would like to first receive submissions on costs from the parties so that costs can also be dealt with in the judgments along with contemporaneous reasons for the costs award. Let me be clear: I do not anticipate an award of costs in favour of the Appellants notwithstanding their success. I would like to receive submissions, in writing or orally as counsel prefers, on what amount of costs, if any, should be payable by each of the Appellants to the Respondent. I am very concerned about the significant amount of time spent by the Appellants putting forward evidence of other resignations that they recalled signing, which were not the same for each Appellant, and which evidence was a tangled web that, at best, was incorrect wishful thinking, but very much of which came across as fanciful, invented and untrue. I am even more concerned about the Gariepy's "reconstructed" resignation, both as pre-trial behaviour of a party, and as testimony from them which I find

largely very troubling. Counsel are asked to communicate their preferences and availability or timetable for costs submissions within 15 days hereof.

Signed at Hamilton, Ontario, this 19th day of August 2014.

"Patrick Boyle"

Boyle J.

CITATION:	2014 TCC 254
COURT FILE NOS.:	2010-698(IT)G; 2010-863(IT)G
STYLE OF CAUSE:	DONNA ELIZABETH GARIEPY AND H.M.Q.; AND BETWEEN SALLY ANNE CHRISS AND H.M.Q.
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	February 25-28, 2013, March 1, 2013, June 5-7, 2013, March 3-4, 2014
REASONS FOR JUDGMENT BY:	The Honourable Justice Patrick Boyle
DATE OF REASONS:	August 19, 2014

APPEARANCES:

Counsel for the Appellant, Donna Elizabeth Gariepy:	Roger Taylor Brian Studniberg
Counsel for the Appellant, Sally Anne Chriss:	Howard F. Manis Lauren Kenley
Counsel for the Respondent:	Andrew Miller

COUNSEL OF RECORD:

For the Appellant, Donna Elizabeth Gariepy:

Name:	Roger Taylor and Brian Studniberg
Firm:	Couzin Taylor LLP 222 Bay Street, Toronto, ON, M5K 1H1

For the Appellant, Sally Anne Chriss:

Name:	Howard F. Manis and Lauren Kenley
Firm:	Macdonald Sager Manis LLP Suite 800, 150 York Street Toronto, Ontario M5H 3S5

For the Respondent:	William F. Pentney Deputy Attorney General of Canada Ottawa, Canada