Director’s liability for source deductions where no consent to serve was given

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A recent decision from the Ontario Superior Court of Justice (the Court) confirms the importance of a director’s written consent to serve for protection against liability.

In *Bunton* v. *FTA Logistics Inc*. *and Ikenouye*[1] (*Bunton*), the Court dealt with a situation where the Canada Revenue Agency (the CRA) claimed unremitted source deductions from an individual who was listed as a director of a corporation without her consent.

What you need to know

- Various statutes, including the *Canada Business Corporations Act*[2] and the *Business Corporations Act* (Ontario)[3] (the OBCA), provide circumstances in which a serving director may be personally liable for the obligations of the corporation.
- In *Bunton,* the issue raised was whether Ms. Bunton was a director of FTA Logistics Inc. (FTA), such that she was liable for FTA’s unremitted source deductions that were required under the *Income Tax Act* (Canada) (the ITA).
- Subsection 227.1(1) of the ITA provides that where a corporation fails to deduct, withhold, remit or pay source deductions in respect of salaries, wages, or other remuneration, the directors of the corporation at the time are jointly and severally, or solidarily, liable, together with the corporation, to pay that amount and any interest or penalties relating to it.

Director’s liability and consent to serve

FTA was governed by the OBCA, and as such, section 119(9) of the OBCA was applicable, pursuant to which, an election or appointment of a director is not effective unless the person consents in writing within 10 days following the date of the election or appointment.

In *Bunton*, the Court dealt with a situation where the CRA demanded payment of unremitted source deductions from the applicant, Ms. Bunton, as a result of her being listed as a director of FTA.

Several years before the CRA demanded payment of the unremitted source deductions from Ms. Bunton, Ikenouye had asked Ms. Bunton for permission to add her as a director of FTA. Ms. Bunton declined the request, but unbeknownst to her, her name was added as a director, as it appeared in two letters from the CRA claiming Ms. Bunton's liability for the unremitted amounts.

Ms. Bunton's defence was to seek a declaration by the Court that she had never been a director of FTA due to a lack of written consent to serve on her part, and to seek an order that the records of FTA be rectified to remove her name.

In the absence of contradictory evidence presented by the respondents, the Court had no issue to conclude that Ms. Bunton's election as a director of FTA was not effective. As the Court stated, "[t]here must be something more than the mere appearance of an individual's name in the list of directors as evidence of consent to the appointment or election to that position".[4] The Court also stated that Ms. Bunton is entitled to file a Notice of Change Form with the appropriate provincial ministry to remove her from the list of directors of FTA going forward.

As an additional relief, Ms. Bunton requested that FTA compensate her for any future losses, which may result from her being listed as a director.

Discussion

Directors may be found personally liable for monetary amounts by virtue of holding office pursuant to a broad range of legislation. The requirement that directors consent to their election in writing is a fundamental principle of corporate law.[5] In the words of the Tax Court of Canada (the TCC), "[t]his presumably relates to the liability issues which directors face in assuming such a role within a corporation and establishes the requirement of personal knowledge by that director of his election or nomination to that role."[6]

Hence, since in *Bunton* the respondents presented no evidence in support of the fact that Ms. Bunton had consented to act as director of FTA, the Court had no difficulty ordering the rectification of FTA's registers and records. Consequently, the Court's order cleared Ms. Bunton of the liability to pay to CRA the unremitted source deductions.

It must be noted that a director's election without written consent can be viewed as effective, hence engaging the director's personal liability.[7] The TCC has identified the following situations where a director's election may be effective *de facto* despite the lack of their written consent:

- directors who are duly elected but may lack some qualification under the relevant corporate law that disqualifies them from legally being directors;
- former directors whose term of office has expired but who have continued to act as directors (the holding-over principle); or
- directors who simply assume the role of director without any pretence of legal qualification.[8]

However, Canadian courts have acknowledged that the *de facto* director doctrine should be applied with caution in situations where it imposes liabilities.[9] The CRA's position is that officers, employees, and others who are not legally appointed or elected as directors, but who perform the functions that directors would perform, may be liable.[10]

While the Court was open to ordering compensation for losses already incurred, Ms. Bunton failed to demonstrate such losses. As for future losses, the Court adjourned this aspect of the application for lack of authorities to support Ms. Bunton's entitlement to such relief. The Court took issue with the forward-looking approach to compensation, which in the opinion of the Court, is equivalent to granting Ms. Bunton indemnity by FTA.

A corporation may enter into an indemnification agreement with the director or officer, but there currently are no authorities that support a court's ability to order it.[11]

Takeaway

Corporate directorship comes with significant responsibilities and liabilities, which may arise from a wide array of legislation. Except for limited circumstances, the effectiveness of a director's election or appointment depends on the director's written consent to serve. As recently confirmed in *Bunton*, a director's liability is unlikely to be engaged in cases where a person is listed in the registers and records of the corporation without their written consent.

For further information, please contact the author.

[1] 2020 ONSC 5463, 2020 CarswellOnt 13047.

[2] RSC, 1985, c C-44 (CBCA)

[3] RSO 1990, c B.16 (OBCA).

[4] *Same*, at para 19.

[5] Section 106(9) of the CBCA and section 119(9) of the OBCA.

[6] *Pereira v. R*., 2007 TCC 737, [2008] 3 C.T.C. 2154.

[7] *Canada v*. *Corsana*, [1999] FCJ No. 401 (FCA).

[8] *Re Lo-Line Electric Motors Ltd*., [1988] 2 All ER 692, as cited in *Mosier v. The Queen*, [2001] TCJ No. 692 (TCC).

[9] *Hay v. Canada*, [2004] TCJ No. 29 (TCC) at para 29.

[10] CRA, *Director's Liability,* Income Tax Information Circular.

[11] Section 124 of the CBCA and section 136 of the OBCA.

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