Docket: 2017-2569(IT)G

BETWEEN:

ANDREW FERRI,

Appellant,

and

HIS MAJESTY THE KING,

Respondent.

Appeal heard on March 14, 15 and 16, 2023, at Toronto, Ontario

Before: The Honourable Justice Patrick Boyle

Appearances:

Counsel for the Appellant:	Jeff Warwick
Counsel for the Respondent:	Khalid Tariq

JUDGMENT

The appeal is dismissed without costs.

Signed at Ottawa, Canada, this 28th day of February 2024.

"Patrick Boyle"

Boyle J.

Citation: 2024 TCC 25
Date: 20240228
Docket: 2017-2569(IT)G

BETWEEN:

ANDREW FERRI,

Appellant,

and

HIS MAJESTY THE KING,

Respondent.

REASONS FOR JUDGMENT

Boyle J.

[1] Andrew Ferri has appealed the assessment of him under section 227.1 of the *Income Tax Act* (Canada) (the "Act") for the unremitted withholdings of 381922 Ontario Limited operating as North American Tool and Die of which he was a director.

[2] The issues to be decided in this case are:

1. Whether Mr. Ferri was a director of the corporation when the remittances were due and not made during the years 2007 to 2014; and
2. Whether Mr. Ferri had resigned as a director more than two years before the assessment was issued on September 26, 2014.

[3] There had been a third issue raised in the pleadings that would have required the need to determine whether Mr. Ferri exercised the required due diligence to avoid the corporation's failure to remit and avoid personal director liability under subsection 227.1(3) of the Act if Mr. Ferri was a director at any relevant time period. This was raised as an issue in Mr. Ferri's Notice of Appeal. His testimony was that he took no active steps to prevent the company's failure to remit. There wasn't even evidence that in 1997 to 1999, when he admits to having been a director, systems were in place to ensure regular reporting to the board that all remittances were made when due and continued to be up to date.

[4] In this appeal the appellant has the burden of proof to satisfy the Court on a balance of probabilities that the answer to at least one of the two questions above absolve him from director's liability under section 227.1.

I. The Relevant Jurisprudence

[5] The purpose of the directors' liability provisions of Canadian tax legislation has been described in *Deakin* 2012 TCC 270 as:

> [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.
>
> [17] The Federal Court of Appeal most recently had the occasion to consider the due diligence defence of directors for unremitted source deductions and GST in Her Majesty the Queen v. Buckingham, 2011 FCA 142. In that case, the Court wrote:
>
> …

[33] On the other hand, subsection 227.1(1) of the Income Tax Act and subsection 323(1) of the Excise Tax Act specifically provide that the directors "are jointly and severally, or solidarily, liable, together with the corporation, to pay the amount and any interest or penalties relating to" the remittances the corporation is required to make. Subsection 227.1(3) of the Income Tax Act and subsection 323(3) of the Excise Tax Act do not set out a general duty of care, but rather provide for a defence to the specific liability set out in subsections 227.1(1) and 323(1) of these respective Acts, and the burden is on the directors to prove that the conditions required to successfully plead such a defence have been met. The duty of care in subsection 227.1(3) of the Income Tax Act also specifically targets the prevention of the failure by the corporation to remit identified tax withholdings, including notably employee source deductions. Subsection 323(3) of the Excise Tax Act has a similarly focus. The directors must thus establish that they exercised the degree of care, diligence and skill required "to prevent the failure". The focus of these provisions is clearly on the prevention of failures to remit.

…

[40] The focus of the inquiry under subsections 227.1(3) of the Income Tax Act and 323(3) of the Excise Tax Act will however be different than that under 122(1)(b) of the CBCA, since the former require that the director's duty of care, diligence and skill be exercised to prevent failures to remit. In order to rely on these defences, 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.

…

[49] The traditional approach has been that a director's duty is to prevent the failure to remit, not to condone it in the hope that matters can be rectified subsequently: Canada v. Corsano, 1999 CanLII 9297 (FCA), [1999] 3 F.C. 173 (C.A.) at para. 35, Ruffo v. Canada, 2000 CanLII 15199 (FCA), 2000 D.T.C. 6317, [2000] 4 C.T.C. 39 (F.C.A.). Contrary to the suppliers of a corporation who may limit their financial exposure by requiring cash-in-advance payments, the Crown is an involuntary creditor. The level of the Crown's exposure to the corporation can thus increase if the corporation continues its operations by paying the net salaries of the employees without effecting employee source deductions remittances, or if the corporation decides to collect GST/HST from customers without reporting and remitting these amounts in a timely fashion. 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 continuation of the operations of the corporation. It is precisely such a situation which both section 227.1 of the Income Tax Act and section 323 of the Excise Tax Act seek to avoid. The defence under subsection 227.1(3) of the

Income Tax Act and under subsection 323(3) of the Excise Tax Act should not be used to encourage such failures by allowing a due diligence defence for directors who finance the activities of their corporation with Crown monies on the expectation that the failures to remit could eventually be cured.

…

[52] Parliament did not require that directors be subject to an absolute liability for the remittances of their corporations. Consequently, Parliament has accepted that a corporation may, in certain circumstances, fail to effect remittances without its directors incurring liability. 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 concerned amounts.

…

[56] A director of a corporation cannot justify a defence under the terms of subsection 227.1(3) of the Income Tax Act where he condones the continued operation of the corporation by diverting employee source deductions to other purposes. The entire scheme of section 227.1 of the Income Tax Act, read as a whole, is precisely designed to avoid such situations. In this case, though the respondent had a reasonable (but erroneous) expectation that the sale of the online course development division could result in a large payment which could be used to satisfy creditors, he consciously transferred part of the risks associated with this transaction to the Crown by continuing operations knowing that employee source deductions would not be remitted. This is precisely the mischief which subsection 227.1 of the Income Tax Act seeks to avoid.

…

[57] Once the trial judge found as a matter of fact that the respondent's efforts after February 2003 were no longer directed towards the avoidance of failures to remit, no successful defence under either subsection 227.1(3) of the Income Tax Act or subsection 323(3) of the Excise Tax Act could be sustained.

[Emphasis added]

…

[23] Given the specific wording of the subsections and the Federal Court of Appeal’s comments in *Buckingham*, it appears somewhat difficult to imagine circumstances in which an informed and active owner-manager and director of a corporation will not be liable for unremitted employee source deductions and unremitted GST amounts. As mentioned above, the scope of the *Worrell*

> exception post-*Buckingham* remains to be developed in other cases than the Deakins'.
>
> [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.

[6] The Federal Court of Appeal in *HMQ v. Chriss* 2016 FCA 236 wrote about the requirement, at least under Ontario law, that a resignation is not effective in the absence of a written resignation to the corporation. That Court wrote:

> [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 directions. 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.

…

[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.
>
> …
>
> [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.
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> …
>
> [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.
>
> (emphasis added)

[7] More recently the Federal Court of Appeal wrote in *Cliff* v. *HMQ* 2022 FCA 16 at paragraph 15:

> [15] Form 1 is not a resignation; rather, it is a notice entitled "Initial Return/Notice of Change". Nor is it a communication to the corporation; rather it is a communication from the corporation to the Ministry of Consumer and Commercial Relations. While Form 1 indicates that the appellant ceased to be a director on December 12, 2003, there is no evidence as to when Form 1 was completed and there is no place on the Form 1 for a director's signature, physical or digital or otherwise. For a resignation to be effective, there must be evidence that the corporation received a written resignation confirming that the appellant has resigned. While Form 1 may reflect something that may have happened, it is not a substitute for a written resignation.

II. Findings and Conclusion

[8] For the reasons that follow, Mr. Ferri's appeal is dismissed.

[9] I have concluded that Mr. Ferri's evidence on the two issues above do not rise to the level needed to establish on a balance of probabilities that he was not still a director when the requisite remittances were not made, or that he had not been a director in the two years prior to the assessments being issued.

[10] Mr. Ferri acknowledged that he was a director starting in May 1997 but maintained that he resigned as director on October 31, 1999 when he said that he delivered his written resignation to the corporation's lawyer, Paul Leon. Mr. Ferri said Mr. Leon told him that the requisite Ontario Form 1 Notice of Change had been filed.

[11] When Mr. Ferri became aware in 2007 that the Ontario provincial registry continued to show him as a director, Mr. Ferri said that he mailed a second Form 1 Notice of Change to the Ontario provincial authorities again with an effective date of October 31, 1999 — even though he said he had obtained a copy of the original Form 1 from Mr. Leon in 2005 for some reason.

[12] Provincial corporate registries are not determinative on the issue of whether a person is or is not a director for purposes of the director liability provisions of the Act. However, it is clear that neither of the 1999 or 2007 Form 1 notices of resignation were reflected in the Ontario registry.

[13] Mr. Leon testified and acknowledged that he was the corporation's lawyer. He had been able to find the 1999 Form 1 in his file but nothing else and has no specific recollections. His file did not have a copy of a resignation (draft or signed), a cover letter or email to the provincial registrar for the Form 1, or a note from him or his assistant that it was ever sent. He did not have any corporate resolution or other communication acknowledging or accepting the resignation or appointing any new director, nor any communication from him to his client (the corporation) regarding one of its directors resigning. He did not have the minute book nor did he know what his office had done with it even though he continued for a period of time as the corporation's lawyer.

[14] Neither Mr. Leon or Mr. Ferri satisfied me they had used their best efforts to try to locate such potentially important evidence, even after the Court noted this and offered to reopen evidence if efforts were made, whether successful or not. This offer was not taken up.

[15] Mr. Leon said he would have instructed his secretary to prepare and file a Form 1 upon receiving Mr. Ferri's 1999 resignation. He said he was contacted years later by Mr. Ferri concerned that his resignation had not been filed and that is when he faxed Mr. Ferri a copy of the Form 1 and confirmed that it had been sent to the Ontario Ministry. I take it from Mr. Ferri's evidence that this was in 2005. There is no evidence that Mr. Leon had or had sent Mr. Ferri anything other than the Form 1. The Court was not provided with any other evidence from the Ontario Ministry than printed out corporate profile pages. It appears no actual file records were sought from the Ontario Ministry.

[16] Mr. Ferri acknowledged he did not send a copy of his resignation or any communication about it to the corporation, to the individual he said replaced him as a director, or to the corporation's shareholders, the largest of which he said he represented. He did not ask anyone at the corporation to have him removed as director — even after his concerns that Mr. Leon might not have done so.

[17] No one was identified by Mr. Ferri or was called as a witness by him who knew more about the corporation than himself, or who understood or knew who really ran at. Mr. Ferri maintained that after October 1999 he was merely a financial consultant to the company, but was guarded and I believe less than candid about who else he knew to be running the corporation. The evidence was clear that Mr. Ferri was operating at a functional level well above Ms. Karen Chambers, who was the corporation's office manager throughout the relevant period up until 2014 or 2015 when she bought the business in an asset purchase and continues to run it. Her role as office manager was described as essentially being the chief operating officer for the corporation.

[18] Ms. Chambers also testified. I found her answers to be relatively forthcoming and credible. Ms. Chambers told Canada Revenue Agency ("CRA") during the relevant years that Mr. Ferri was a director. She had replied on Mr. Ferri's behalf to CRA communications directed to the corporation or Mr. Ferri about the unremitted withholdings. She said she would not have done this, or negotiated the repayment schedule with CRA for these years without Mr. Ferri's knowledge. She was certain she would have asked for and obtained his advice and opinions on that topic. She said Mr. Ferri was involved in all big decision-making such as financial statements, books and records, shareholder dividends, and bonuses. She said she always assumed Mr. Ferri was a director even though she was not privy to the corporate minute book, and she may have obtained this information from a corporate profile. Ms. Chambers said she had never met Sam Mingle, the person Mr. Ferri said replaced him as director in 1999. In answer to

one of my questions to her following redirect, Ms. Chambers shared that her new metal stamping company, which continued the North American Tool and Die business, rented its premises from Mr. Ferri — that he was her landlord, and that Mr. Ferri or his counsel had, since 2017, approached her to clarify her understanding of events. She said this possibly extended beyond the information in the corporate profile she was given to prove she was in error thinking and telling others that Mr. Ferri was a director. She said she was given the corporate profile but had still never seen the minute book or other corporate records. She did not receive the corporate minute book as part of her asset purchase of the business, which is understandable.

[19] I infer from Ms. Chambers' evidence and her letter that she had been informed as office manager that Mr. Ferri was a director following his 1997 appointment and that she never had reason to believe he had ceased to be a director when she sent her letter to CRA based on his involvement and interaction with her, the corporaton and its new shareholder that he represented.

[20] The fact that Sam Mingle was not called as a witness to corroborate that he was appointed to the board to replace Mr. Ferri in 1999, nor was any other witness associated with the corporation's ownership or governance, is strongly suggestive that would not be their testimony. Nor was any witness called from whichever law firm acted as corporate counsel after Mr. Leon ceased to represent it in 1999. The testimony of Mr. Ferri and Mr. Leon was somewhat light on their efforts to locate it, or why it may have perished in a house fire.

[21] I did not find Mr. Ferri to be an entirely candid and credible witness. He frequently said he did not recall things, even though he remembered other things very clearly from the same period. He was at best guarded in disclosing who was behind the new shareholder of the corporation, even though he represented them and was paid by them. Mr. Ferri was at times non responsive in his answers, or evasive, and was instead inclined to repeat his version of events when questioned about other things. Mr. Ferri only acknowledged in cross-examination that he had lost his Chartered Accountant designation for moral turpitude, unacceptable behavior and professional misconduct for his role in the Astra Trust Company financial scandal of the early 1980s. Mr. Ferri was charged, convicted and incarcerated for his role in the Astra Trust scandal. He says he was later pardoned. He was not initially forthcoming about having subsequently been charged with extortion, fraud or theft involving another financial institution, though he testified those later charges were dismissed.

[22] He was notably evasive, difficult and avoidant when asked about the nature of his later business consulting. He didn't recall if he ever owned a business, and if he could have been a shareholder of any private companies, nor did he recall which corporations he was ever a director of, acknowledging only that he had held directorships at various periods of time, and could not recall if he had been a director of any since 1999.

[23] There are inconsistencies within Mr. Ferri's testimony and his notice of appeal. He appears to have tried to file a Form 1 removing himself as director but leaving himself as President and Secretary even though he said he did not hold those roles.

[24] With respect to Sam Mingle replacing Mr. Ferri as director in October 1999, it is noteworthy that the Ontario provincial registry shows Mr. Mingle was recorded to have been added as director by 2014, but Mr. Ferri still remained recorded as director. This was not explained. Further, provincial records show entries that Mr. Ferri continued to file the corporation's Annual Returns with the province after October 1999.

[25] In these circumstances, there is simply insufficient credible, consistent, reliable evidence to allow the Court to conclude on a balance of probabilities that Mr. Ferri delivered a written resignation as director to the corporation effective October 31, 1999. Similarly, the Court is unable to conclude on a balance of probabilities that any of the Form 1s reporting Mr. Ferri's removal as director were filed with the Ministry prior to 2017.

[26] A Form 1, even accepting the date on it, that was the sole relevant document in the corporate counsel's file is not evidence sufficient to establish on a balance of probabilities that Mr. Ferri ceased to be a director on that date, especially where there are reliability and/or credibility concerns with both Mr. Leon and Mr. Ferri. The probative value of Ms. Chambers' evidence was impaired as a result of communications and material being provided to her by Mr. Ferri about this case.

[27] I need emphasize that I place little to no reliance on the CRA's Report on Objection in evidence as it clearly contains significant overstatements about what Mr. Ferri wrote to CRA and an even greater overstatement about the results of the Canada Border Service Agency's test for dating the ink used to sign Mr. Ferri's Form 1. These were completely unacceptable, and, unsurprisingly, led to a waste of public resources in this proceeding and hearing. Mr. Ferri, like any other Canadian, was entirely reasonable in responding very fully to an unsubstantiated

allegation and untruth about CBSA's initial suspicions, which is the highest they could be described as. CRA did not act on that suspicion and pursue it with any expert analysis, but wrote accusing Mr. Ferri of essentially forging or evidence tempering. What the CRA Officer wrote was not at all what the CBSA reported to it, nor was it what CBSA was asked to do. This must be most strongly discouraged, especially at the objection stage as a taxpayer's sole remedy after that is to formally appeal to this Court.

[28] That is not what CBSA reported CRA. If anything, the fact that CRA chose not to actually have the ink dated indicates CRA did not make any relevant assumption regarding when the Form I was signed and I make no finding in that regard as that would have required an expert report from the respondent. I can note that there is absolutely no evidence of any probative value that the Form 1 was in fact signed on any other date. That Report and the respondent's reliance on it in this proceeding is the sole reason I am not awarding costs at Tariff level.

[29] The appeal is dismissed without costs.

Signed at Ottawa, Canada, this 28th day of February 2024.

"Patrick Boyle"

Boyle J.

CITATION:	2024 TCC 25
COURT FILE NO.:	2017-2569(IT)G
STYLE OF CAUSE:	ANDREW FERRI AND HIS MAJESTY THE KING
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	March 14, 15 and 16, 2023
REASONS FOR JUDGMENT BY:	The Honourable Justice Patrick Boyle
DATE OF JUDGMENT:	February 28, 2024

APPEARANCES:

Counsel for the Appellant:	Jeff Warwick
Counsel for the Respondent:	Khalid Tariq

COUNSEL OF RECORD:

For the Appellant:

Name:	Jeff Warwick
Firm:	

For the Respondent:	Shalene Curtis-Micallef Deputy Attorney General of Canada Ottawa, Canada