

The Importance of Directors following Proper Resignation Procedures in order to Minimize their Statutory Liability

By Valérie Boucher

Canadian and Québec legislation, specifically corporate laws, provide that directors of a legal person may, in certain circumstances, be held personally and solidarily liable for certain debts of the legal person incurred while the directors were in office. For example, subsection 96(1) of the *Companies Act* (Québec) (referred to in this note as the “QCA”) and section 119 of the *Canada Business Corporations Act* (referred to in this note as the “CBCA”) both provide that directors are personally liable towards the employees of the legal person for up to six months’ wages for services rendered by the employees during the director’s term of office.

Taxation statutes also provide that directors are personally and solidarily liable should the legal person neglect to remit to the taxation authorities the deductions from source that must be withheld from employee wages or if it does not remit the sales taxes that it may have collected¹. Legal action against the directors may be taken during the two year period following the date on



which the director last ceased to act as a director (subpara. 227.1(4) of the *Income Tax Act*, subsec. 323 (5) of the *Excise Tax Act* and s.24.0.2 of the *Act respecting the Ministère du Revenu*).

All the above-mentioned legislative provisions highlight the importance of determining the exact moment when a director ceased to occupy office, because liability is directly related to the position of director itself.

On the other hand, the QCA and the CBCA impose disclosure obligations on legal persons incorporated under those statutes regarding the composition of their boards of directors at the time of incorporation (s.123.14 QCA and subsec. 106(1) CBCA) and further require that the legal persons advise the relevant government authorities of any change in the composition of their boards within (15) days of any such change (s.123.81 QCA and subsec. 113(1) CBCA). For federally incorporated legal persons, such information must be disclosed to the Corporations Directorate, which keeps a register called *Strategis*. Legal persons

¹ Section 227.1 of the *Income Tax Act*, section 323 of the *Excise Tax Act* and section 24.0.1 of the *Act respecting the Ministère du Revenu* establish the personal liability of directors for, among other things, income tax, contributions to the unemployment insurance plan and the Canada Pension Plan, and sales taxes.

incorporated in Québec must disclose the information to the Inspector General of Financial Institutions, who keeps a register of sole proprietorships, partnerships and companies called *Cidreq*². Information sent to the government authorities is accessible to the public (s. 74 of the *Act respecting the legal publicity of sole proprietorships, partners and legal persons*, referred to in this note as the “*Legal Publicity Act*”, and subsec. 266(1) CBCA). Each of these statutes provides that any third party consulting the public registers is entitled to assume that the information contained therein is accurate³.

Both the CBCA and the QCA provide that a director may resign if he advises the corporation of that fact (s. 123.76 QCA and subsec. 108(1) CBCA). Subsection 108(2) of the CBCA states as follows: “*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*”. A director who wishes to resign should do so by way of a signed written resignation, indicating the date on which his resignation is to

take effect. His notice of resignation should be sent to the legal person and the director should make sure that he keeps proof of delivery.

In the recent case of *Commission de la construction du Québec v. Raymond*, J.E. 2001-951 (C.Q.), the *Commission de la construction du Québec* (referred to in this note as the “*Commission*”) claimed approximately \$22,000 from the defendants, in their capacity as directors of a bankrupt legal person, pursuant to subsection 122 (7) of the *Act respecting labour relations, vocational training and manpower management in the construction industry*. That Act provides that in the case of the bankruptcy, a winding-up order or dissolution of a legal person, its directors are personally and solidarily liable for the payment of up to six (6) months’ wages owing to the legal person’s employees. That provision is similar to QCA and CBCA provisions, with the difference that the employees themselves may not sue the directors, but rather the Commission does so acting on behalf of the employees.

The issue before the Court was to determine whether the defendants were actually directors of the legal person for the period covered by the suit. According to the information in the *Cidreq* register, both defendants were still directors of the legal person. The Commission based itself on the presumption created in sections 62 and 82 of the *Legal Publicity Act* and argued that the resignation of a director is valid as regards third parties only where a change of director has been disclosed by filing an amending declaration with the Inspector General of Financial Institutions.

The Court of Québec rejected the Commission’s argument; it allowed the defendant to prove the exact date of his resignation as director and held that the

²The *Cidreq* register was created by the *Act respecting the legal publicity of sole proprietorships, partners and legal persons* (referred to in this note as the “*Legal Publicity Act*”). The information required, including the name and domicile of each director, is remitted by filing a declaration of registration or an initial declaration (s.10 of the *Legal Publicity Act*) and must be updated on a regular basis by filing annual declarations (s.26 of the *Legal Publicity Act*) and by filing amending declarations should any changes occur during the year (s.33 and following of the *Legal Publicity Act*).

³Section 62 of the *Legal Publicity Act* specifically provides that “*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.*” Section 82 of the same Act states: “*Information relating to a registrant may be set up against third persons from the time it is entered in the statement of information. Third persons may submit any proof to refute the information contained in a declaration.*” Subsection 123.31(2) of the QCA also provides that “*Third persons may presume that the documents deposited in the register under this Part contain true information*”. Lastly, subsection 253(2) of the CBCA is substantially to the same effect and provides that the directors named in the notice sent by a company to the Director of Industry Canada and received and filed in accordance with the provisions of the CBCA are presumed, for the purposes of the CBCA, to be directors of the corporation referred to therein.



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defendant had rebutted the presumption created under the *Legal Publicity Act*. The Court ruled that a director's sole obligation is to send notice of resignation to the legal person. The legal person is then required to deposit notice of that resignation in the appropriate register.

In *Aikens v. St-Pierre*, J.E. 97-1827 (C.Q.), a judgement rendered pursuant to the provisions of the CBCA, the Court held that the omission by the legal person to send the requisite notice gives rise to the presumption that the resigning director is still a director because his name is recorded as such in the strategis register. However, the director must be allowed to submit evidence of his resignation as he would otherwise be held liable for an omission not attributable to him because it is the legal person rather than the director that is required to notify the Director of Industry Canada of the resignation of a director.

The Courts have also sometimes mentioned the fact that the resigning director is in a position similar to that of a third party vis à vis the legal person. Sections 62 and 82 of the *Legal Publicity Act* expressly allow third parties to “submit any proof to refute the information contained in a declaration”. However, even if the courts generally do allow directors to submit evidence to refute the information appearing in the registers, the prudent resigning director can avoid lawsuits and, hence, much of the expense and distress involved by ensuring that his resignation has been disclosed in accordance with the legislative requirements.

A resigning director should therefore obtain assurance from the legal person that it will send the requisite notice to the appropriate government authorities and require that he be given a copy of the document bearing the stamp of the Inspector General of Financial Institutions or of the Corporations Directorate, or else insist on personally filing the relevant notice. Should the legal person neglect to file the requisite notice, the director may take legal action forcing the legal person to comply with its legal obligation (s. 123.81 QCA and subsec. 113(2) CBCA).

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