

Federal Court of Appeal



Cour d'appel fédérale

Date: 20220201

**Docket: A-265-19
A-266-19**

Citation: 2022 FCA 16

**CORAM: GAUTHIER J.A.
WEBB J.A.
RENNIE J.A.**

BETWEEN:

ROBIN CLIFF

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Heard at Ottawa, Ontario, on January 26, 2022.

Judgment delivered at Ottawa, Ontario, on February 1, 2022.

REASONS FOR JUDGMENT BY:

RENNIE J.A.

CONCURRED IN BY:

**GAUTHIER J.A.
WEBB J.A.**

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REASONS FOR JUDGMENT

RENNIE J.A.

[1] The appellant appeals two judgments of the Tax Court of Canada (Docket Nos. 2017-22(GST)G; 2016-5465(IT)I *per* Rossiter C.J.). The sole question before the Tax Court was whether the appellant, Robin Cliff, resigned as a director of Cliff Crucibles Inc. more than two years before she was assessed by the Minister of National Revenue under the *Excise Tax Act*, R.S.C., 1985, c. E-15 [ETA] and the *Income Tax Act*, R.S.C., 1985, c. 1 (5th Supp.) [ITA]. The judge found that the appellant did not resign, prompting these appeals.

[2] The facts are few and uncontested. In 2001, the appellant's husband, Mr. Steven Cliff, directed his accountant, Mr. Robert Welsh, to incorporate a company on his behalf. Pursuant to those instructions, Mr. Welsh incorporated Cliff Crucibles Inc. under the Ontario *Business Corporations Act*, R.S.O. 1990, c. B.16 [OBCA]. Mr. Welsh appointed himself as the first director of the corporation and then stepped down. Mr. Cliff and the appellant, who were the shareholders of the corporation, signed documents appointing themselves as the corporation's directors effective May 18, 2001. It is undisputed that the public registry of OBCA corporations maintained by the Ontario Ministry of Consumer and Commercial Relations indicates that the appellant was appointed director as of May 18, 2001.

[3] From the outset, the appellant was adamant that she was only willing to be a director on a temporary basis and that on the day she signed documentation to become a director, she told Mr. Cliff that she wanted to be removed as a director. In her testimony before the Tax Court, the appellant stated that this oral statement constituted her resignation. In cross-examination, the appellant was asked when she resigned as a director. The appellant replied that she resigned the day that she signed the documents necessary to be appointed as a director.

Q. When did you first recall that you had resigned as a director?

A. The day that my husband came and put the piece of paper in front of me, and he says, "Just sign it so we can get this started." The day, I can't even tell you, or the year. And I says to him, "No, I don't want to sign it." And he says, "Just sign it and I'll get" -- and I said, "Then you get me off because I don't want on here. I don't want to be any involvement with it." So the day I signed it, I said to him, "Get me off." And that's what I said to him. And he said he would. And he did.
[Appeal Book at p. 74-75, Transcript of Proceedings]

[4] At some point in time after this conversation, Mr. Cliff telephoned Mr. Welsh and asked that he remove the appellant as a director of the corporation. Mr. Welsh's secretary at the time

then prepared a “Form 1 – Initial Return/Notice of Change”. The document stated that the appellant’s directorship started on September 4, 2003 and ceased on December 12, 2003. A copy was placed in the corporation’s minute book. Mr. Welsh recalled that his office submitted Form 1 to the Ontario Ministry of Consumer and Commercial Relations. Apart from Mr. Welsh’s recollection that Form 1 was sent to the Ministry in 2003, there is no other evidence as to when Form 1 was sent to the Ministry nor do the records of the Ministry reflect the change. In their testimony before the Tax Court, neither Mr. Welsh nor Mr. Cliff could explain the discrepancy between the date of the appellant’s appointment on Form 1 and the OBCA public registry which reflects the date of the resolution in the minute book. To conclude this review of the evidentiary background, Mr. Cliff, the appellant and Mr. Welsh each testified that no written resignation was received by the corporation.

[5] Cliff Crucibles Inc. was dissolved in 2013, at which time it had outstanding tax liabilities under the ETA and the ITA. The Minister of National Revenue assessed the appellant and Mr. Cliff, as directors of Cliff Crucibles Inc., for unremitted net tax under the ETA and for the unremitted source deductions under the ITA of the corporation. The appellant filed notices of objection and subsequently notices of appeal to the Tax Court.

[6] The sole issue in dispute before the Tax Court was whether the appellant had resigned as a director of Cliff Crucibles Inc. in accordance with subsection 121(2) of the OBCA more than two years prior to the date on which she was assessed.

[7] The judge began his consideration of the issue by noting that under subsection 121(2) of the OBCA, to be effective, a resignation of a director from an Ontario corporation must be in

writing and communicated to the corporation. Based on his understanding of this Court's decision in *Canada v. Chriss*, 2016 FCA 236, 403 D.L.R. (4th) 569 [*Chriss*], the judge held that a personal signature of a director was required in order for the resignation to be effective. Since Form 1 did not contain a signature, the appellant remained a director.

[8] Before us, the appellant argues that subsection 121(2) does not impose a requirement for a signature and that the judge erred in understanding *Chriss* to impose the requirement of a personal signature, over and above the statutory requirements of subsection 121(2). Particularly, the appellant argues that subsection 121(2) does not require a resignation to be signed, merely that it be in writing. In support, she points to other provisions in the OBCA that do require signatures on documents, such as security certificates under section 55, resolutions in lieu of a meeting under section 104, and proxies under section 110.

[9] Further, the appellant argues that a written resignation need not be completed by a director personally, and that another person can execute the resignation in writing and communicate it to the corporation. This, it is argued, was achieved by Form 1.

[10] It is axiomatic that a case is only authority for what it decides, and what a case decides is determined by looking at its facts (*Michel v. Graydon*, 2020 SCC 24, 449 D.L.R. (4th) 147 at para. 15; *Eli Lilly Canada Inc. v. Apotex Inc.*, 2021 FCA 126, 2021 CarswellNat 2268 at para. 10; *Quinn v. Leathem*, [1901] A.C. 495 (H.L.), [1901] U.K.H.L. 2 (BAILII) at p. 506). And the facts in *Chriss* are important. A letter of resignation was prepared by the corporation's solicitors. It was neither dated nor signed. It remained in a file in the solicitor's office, awaiting

signature. Thus, the means or manner by which the resignation was to be effected was incomplete.

[11] The *ratio* of *Chriss* is that where the decision to resign is to be communicated by means of a letter, signed by the director, it must be signed to be effective. *Chriss* does not require that all resignations must have a personal, physical signature to be effective. A director may resign via email or text, for example. The facts of *Chriss* may be analogized to an email containing a resignation, but resting in the draft folder, never sent. Whatever factual circumstances arise, there can be no ambiguity regarding whether a written resignation has been received by the corporation, and there must be certainty as to the effective date.

[12] The Tax Court judge erred, therefore, in his understanding of *Chriss* and in imposing the requirement of a physical signature. That said, and for reasons which I will explain, this is an error of no consequence.

[13] The crux of the appellant's argument is that subsection 121(2) only requires that a corporation have written evidence of a resignation, rather than stipulating that the act of resignation itself must be expressed in writing.

[14] I do not agree. This argument is inconsistent with the language of the subsection, and, in any event, it is inconsistent with the evidence that was before the Tax Court.

[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.

[16] There are also irreconcilable difficulties in relying on Form 1 as the appellant's written resignation to the corporation. There is an unexplained gap of two years between the date on which the appellant testified that she resigned and the date indicated in Form 1. I note as well that while Mr. Welsh took steps to formally resign his directorship immediately after incorporation, no steps were taken contemporaneous to the appellant's oral resignation shortly after incorporation. Further, as mentioned, there is no explanation as to why Form 1 lists September 4, 2003 as the date of the appellant's appointment as director, whereas it is undisputed that she was appointed effective May 18, 2001.

[17] For the foregoing reasons, I would dismiss the appeal with costs, which I would fix at the amount agreed to by the parties of \$1,500.00.

“Donald J. Rennie”

J.A.

“I agree.

Johanne Gauthier J.A.”

“I agree.

Wyman W. Webb J.A.”

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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A-266-19

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THE QUEEN

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REASONS FOR JUDGMENT BY: RENNIE J.A.

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

DATED: FEBRUARY 1, 2022

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