Federal Court of Appeal | Cour d'appel fédérale

Date: 20220707

Docket: A-246-20

Citation: 2022 FCA 126

CORAM: **GLEASON J.A.**
RIVOALEN J.A.
MONAGHAN J.A.

BETWEEN:

RYAN EDMOND SOULLIERE

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Heard at Toronto, Ontario, on April 26, 2022.

Judgment delivered at Ottawa, Ontario, on July 7, 2022.

REASONS FOR JUDGMENT BY: GLEASON J.A.

CONCURRED IN BY: RIVOALEN J.A.
MONAGHAN J.A.

Federal Court of Appeal  Cour d'appel fédérale

Date: 20220707

Docket: A-246-20

Citation: 2022 FCA 126

CORAM: **GLEASON J.A.**
RIVOALEN J.A.
MONAGHAN J.A.

BETWEEN:

RYAN EDMOND SOULLIERE

Appellant

and

HER MAJESTY THE QUEEN

Respondent

REASONS FOR JUDGMENT

GLEASON J.A.

I. Introduction

[1] The appellant appeals from the judgment of the Tax Court of Canada in *Soulliere v. The Queen*, 2020 TCC 67 (*per* Jorré, D.J.) in which the Tax Court upheld assessments against the appellant as a director of Metro Catering & Vending Services (2010) Inc. (Metro 2010), for

unremitted income tax source deductions, levied under section 227.1 of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) (the ITA), and unremitted net GST/HST, levied under section 323 of the *Excise Tax Act*, R.S.C. 1985, c. E-15 (the ETA).

[2] For the reasons that follow, I would dismiss this appeal, with costs.

II. Background and Reasons of the Tax Court

[3] Metro 2010 was incorporated under the Ontario *Business Corporations Act*, R.S.O. 1990, c. B.16 (the OBCA) on November 1, 2010 and ran substantially the same operations as another family business, Metro (Windsor) Enterprises Inc. (Metro Windsor), while Metro Windsor was in receivership.

[4] The Tax Court assumed for purposes of its Reasons that the appellant's father was responsible for overall management of the business of Metro 2010, but did not make a factual finding on this point, which was unnecessary to the Tax Court's analysis.

[5] The appellant was also involved in the operation of both Metro Windsor and Metro 2010. The Tax Court accepted the appellant's testimony that he ran the day-to-day operations of both companies, "… with much of his time devoted to, metaphorically, fire fighting" (Reasons at para. 21).

[6] The appellant was not a shareholder of Metro 2010, but was its sole incorporating director. No other directors were ever appointed or elected. The appellant accepted the position of incorporating director, at the behest of his father, who told the appellant that he needed to sign the documents naming him as an incorporating director of Metro 2010 because this was necessary to allow Metro 2010 to carry on the business of Metro Windsor after Metro Windsor was placed into receivership. According to Metro 2010's corporate profile report, the appellant was also the president and the secretary of Metro 2010.

[7] Metro 2010 did not ever hold a first meeting of shareholders.

[8] A few weeks after he accepted the role of incorporating director, the appellant signed a letter, addressed to Metro 2010, stating that he was resigning as a director, effective the date of the letter. He provided the letter to his father. The appellant tendered his resignation after he realized that, as sole director, he could be liable for the debts of Metro 2010. The Tax Court assumed that the appellant's resignation letter was delivered to Metro 2010 on December 10, 2010, when the appellant gave the letter to his father, although, once again, it was not necessary for the Tax Court to decide on this point.

[9] Before the Tax Court, the sole issue was whether the appellant's resignation was effective. The Tax Court held that it was not by virtue of the combined effect of subsections 115(4) and 119(2) of the OBCA. They provide:

115 (4) Where all of the directors have resigned or have been removed	115 (4) Si tous les administrateurs démissionnent ou sont destitués par

by the shareholders without replacement, any person who manages or supervises the management of the business and affairs of the corporation shall be deemed to be a director for the purposes of this Act.	les actionnaires sans être remplacés, quiconque dirige ou supervise les activités commerciales et les affaires internes de la société est réputé un administrateur pour l'application de la présente loi.
…	[…]
119 (2) Until the first meeting of shareholders, the resignation of a director named in the articles shall not be effective unless at the time the resignation is to become effective a successor has been elected or appointed.	119 (2) Jusqu'à la première assemblée des actionnaires, la démission d'un administrateur désigné dans les statuts ne prend effet que si, au moment où sa démission doit prendre effet, un successeur a été élu ou nommé.

[10] The Tax Court held that the appellant remained a director of Metro 2010 after delivery of his letter of resignation for two reasons: first, because, sequentially, the deeming provision under subsection 115(4) of the OBCA can only operate if all the directors have previously resigned or been removed without replacement; and, second, because the operation of the deeming provision in subsection 115(4) does not constitute an appointment under subsection 119(2) of the OBCA. Thus, because a first shareholders' meeting had not taken place, the appellant's resignation was ineffective and he was subject to liability for the unremitted amounts under section 227.1 of the ITA and section 323 of the ETA.

III. Analysis

[11] Before us, the appellant submits that the Tax Court erred in its interpretation of subsections 115(4) and 119(2) of the OBCA because a deemed director may be said to be

"appointed" within the meaning of subsection 119(2) of the OBCA and, accordingly, the appellant's resignation was effective when it was tendered.

[12] The Tax Court's interpretation of the OBCA raises a legal issue and is therefore reviewable by this Court for correctness (*Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235 at para. 8).

[13] There have been relatively few cases where the interplay of subsections 115(4) and 119(2) of the OBCA has been examined and none of them are from this Court or the Ontario Court of Appeal. In *Goicoechea v. The Queen*, 2010 TCC 539 and *Doncaster v. The Queen*, 2015 TCC 127, the Tax Court interpreted subsections 115(4) and 119(2) of the OBCA in the same way as the Tax Court did in the case at bar. Contrary to what the appellant alleges, the Tax Court did not endorse his interpretation in *Grupp v. The Queen*, 2014 TCC 184. Given the paucity of binding authority on the point, it is necessary to undertake a statutory interpretation exercise.

[14] The principles of statutory interpretation are well known and were summarized by the Supreme Court of Canada in *Canada Trustco Mortgage Co. v. Canada*, 2005 SCC 54, at para. 10, [2005] 2 S.C.R. 601 as follows:

> It has been long established as a matter of statutory interpretation that "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament": see *65302 British Columbia Ltd. v. Canada*, [1999] 3 S.C.R. 804, at para. 50. The interpretation of a statutory provision must be made according to a textual, contextual and purposive analysis to find a

> meaning that is harmonious with the Act as a whole. When the words of a provision are precise and unequivocal, the ordinary meaning of the words play a dominant role in the interpretive process. On the other hand, where the words can support more than one reasonable meaning, the ordinary meaning of the words plays a lesser role. The relative effects of ordinary meaning, context and purpose on the interpretive process may vary, but in all cases the court must seek to read the provisions of an Act as a harmonious whole.

[15] I turn first to consider the text of the provisions and conclude that the Tax Court's interpretation respects the ordinary meaning of the subsections 115(4) and 119(2) of the OBCA. On its plain meaning, a deeming provision does not constitute an "election" or "appointment", supporting the interpretation of the Tax Court.

[16] This textual interpretation is also supported by the interpretive presumption of consistent expression, which would require, unless the context dictates otherwise, that the terms "elected" and "appointed" be given a meaning in subsection 119(2) that is consistent with other provisions in the OBCA where these terms are used: R. Sullivan, *Sullivan on the Construction of Statutes*, 6th ed. (Markham: LexisNexis 2014), at 11.2-11.3.

[17] The other provisions in the OBCA dealing with election and appointment of directors are inconsistent with the appellant's proposed interpretation but entirely consistent with the Tax Court's interpretation.

[18] More specifically, directors may be elected under subsection 119(4) and section 120 of the OBCA at a shareholder meeting called by the directors or under subsection 124(4) of the OBCA at a meeting called by the shareholders to fill a vacancy on the board of directors. These provisions state:

119 (4) Subject to clause 120 (a), shareholders of a corporation shall, by ordinary resolution, elect, at the first meeting of shareholders and at each succeeding annual meeting at which an election of directors is required, directors to hold office for a term expiring not later than the close of the third annual meeting of shareholders following the election.

119 (4) Sous réserve de l'alinéa 120 a), les actionnaires, à leur première assemblée, ainsi qu'à toute assemblée annuelle subséquente à laquelle il faut élire des administrateurs, élisent, par voie de résolution ordinaire, des administrateurs dont le mandat expire au plus tard à la clôture de la troisième assemblée annuelle qui suit l'élection

120 Where the articles provide for cumulative voting,

120 Si les statuts prévoient le vote cumulatif :

(a) each shareholder entitled to vote at an election of directors has the right to cast a number of votes equal to the number of votes attached to the shares held by the shareholder multiplied by the number of directors to be elected, and the shareholder may cast all such votes in favour of one candidate or distribute them among the candidates in any manner;

a) l'actionnaire qui a le droit d'élire les administrateurs dispose d'un nombre de voix égal à celui qui se rattache à ses actions, multiplié par le nombre d'administrateurs à élire. Il peut exprimer ses voix en faveur d'un seul ou de plusieurs candidats;

(b) a separate vote of shareholders shall be taken with respect to each candidate nominated for director unless a resolution is passed unanimously permitting two or more persons to be elected by a single resolution;

b) chaque poste d'administrateur fait l'objet d'un vote distinct de la part des actionnaires, sauf adoption à l'unanimité d'une résolution permettant à deux personnes ou plus d'être élues par la même résolution;

(c) if a shareholder has voted for more than one candidate without specifying the distribution of the shareholder's votes among the candidates, the shareholder is deemed to have distributed the shareholder's votes equally among the candidates for whom the shareholder voted;

c) l'actionnaire qui a voté pour plus d'un candidat, sans autres précisions, est réputé avoir réparti ses voix également entre les candidats;

(d) if the number of candidates nominated for director exceeds the number of positions to be filled, the candidates who receive the least

d) si le nombre de candidats est supérieur à celui des postes vacants, les candidats qui recueillent le plus petit nombre de voix sont éliminés

number of votes shall be eliminated until the number of candidates remaining equals the number of positions to be filled;

jusqu'à ce que le nombre des candidats restants soit égal à celui des postes vacants;

(e) each director ceases to hold office at the close of the first annual meeting of shareholders following his or her election;

e) le mandat de chaque administrateur prend fin à la clôture de la première assemblée annuelle des actionnaires qui suit son élection;

(f) a director may not be removed from office if the votes cast against the director's removal would be sufficient to elect him or her and such votes could be voted cumulatively at an election at which the same total number of votes were cast and the number of directors required by the articles were then being elected;

f) un administrateur ne peut être destitué lorsque les voix exprimées contre cette mesure suffiraient à assurer son élection et que ces voix pourraient être cumulées lors d'une élection où le même nombre total de voix seraient exprimées et où le nombre d'administrateurs exigé par les statuts serait alors élu;

(g) the number of directors required by the articles may not be decreased if the votes cast against the motion to decrease would be sufficient to elect a director and such votes could be voted cumulatively at an election at which the same total number of votes were cast and the number of directors required by the articles were then being elected; and

g) le nombre d'administrateurs exigé par les statuts ne peut être réduit lorsque les voix exprimées contre la motion à cet effet suffiraient à assurer l'élection d'un administrateur et que ces voix pourraient être cumulées lors d'une élection où le même nombre total de voix serait exprimé et où le nombre d'administrateurs exigé par les statuts serait alors élu;

(h) the articles shall require a fixed number and not a minimum and maximum number of directors.

h) les statuts doivent exiger que soit élu un nombre fixe, et non un nombre minimal ou maximal, d'administrateurs.

124 (4) Where the holders of any class or series of shares of a corporation have an exclusive right to elect one or more directors and a vacancy occurs among those directors,

124 (4) Si les détenteurs d'une catégorie ou d'une série d'actions ont le droit exclusif d'élire un ou plusieurs administrateurs, les vacances survenues parmi ces administrateurs peuvent être comblées :

(a) subject to subsection (5), the remaining directors elected by that

a) sous réserve du paragraphe (5), et à l'exception des vacances résultant du

class or series may fill the vacancy except a vacancy resulting from an increase in the number of directors for that class or series or from a failure to elect the number of directors for that class or series; or	défaut d'élire le nombre requis d'administrateurs de cette catégorie ou série ou d'une augmentation de ce nombre, par les administrateurs en fonction élus par cette catégorie ou cette série;
(b) if there are no such remaining directors, any holder of shares of that class or series may call a meeting of the holders thereof for the purpose of filling the vacancy.	b) en l'absence d'administrateurs en fonction, à l'assemblée que les détenteurs d'actions de cette catégorie ou série peuvent convoquer pour combler les vacances.

[19] A person can be appointed as a director under the OBCA either by a quorum of directors, under subsection 124(1), or, in certain circumstances, by the Ontario Superior Court of Justice under paragraphs 186(3)(b) and 248(3)(e) of the OBCA. These provisions state:

124 (1) Despite subsection 126 (6), but subject to subsections (2), (4) and (5) of this section, a quorum of directors may fill a vacancy among the directors, except a vacancy resulting from,	124 (1) Malgré le paragraphe 126 (6), mais sous réserve des paragraphes (2), (4) et (5) du présent article, les administrateurs peuvent, s'il y a quorum, combler les vacances survenues au sein du conseil d'administration, sauf celles qui résultent :
(a) an increase in the number of directors otherwise than in accordance with subsection (2), or in the maximum number of directors, as the case may be; or	a) soit d'une augmentation du nombre fixe d'administrateurs autrement qu'aux termes du paragraphe (2), ou du nombre maximal d'administrateurs, selon le cas;
(b) a failure to elect the number of directors required to be elected at any meeting of shareholders.	b) soit du défaut d'élire le nombre d'administrateurs à élire à une assemblée d'actionnaires.

186 (3) Where a reorganization is made, the court making the order may also,	(3) Dans le cadre d'une réorganisation, le tribunal qui rend l'ordonnance peut également :
…	[…]
(b) appoint directors in place of or in addition to all or any of the directors then in office.	b) nommer d'autres administrateurs ou remplacer ceux qui sont en fonction.
248 (3) In connection with an application under this section, the court may make any interim or final order it thinks fit including, without limiting the generality of the foregoing,	248 (3) Le tribunal peut, dans le cadre d'une requête visée au présent article, rendre l'ordonnance provisoire ou définitive qu'il estime opportune pour, notamment :
…	[…]
(e) an order appointing directors in place of or in addition to all or any of the directors then in office;	e) faire des nominations au conseil d'administration, soit pour remplacer tous les administrateurs en fonction ou certains d'entre eux, soit pour en augmenter le nombre

[20] The foregoing provisions regarding the appointment or election of directors all require deliberate acts. They are thus inconsistent with the notion that an appointment could result from the deeming provision contained in subsection 115(4) of the OBCA.

[21] Additional context in the OBCA also supports the Tax Court's interpretation. Relevant context includes subsections 115(1), 117(1), 119(1), 119(9) and 119(10), paragraph 121(1)(a) and subsection 121(2) of the OBCA. They state:

115 (1) Subject to any unanimous shareholder agreement, the directors shall manage or supervise the management of the business and affairs of a corporation.

115 (1) Sous réserve de toute convention unanime des actionnaires, les administrateurs dirigent ou supervisent les activités commerciales et les affaires internes de la société.

117 (1) After incorporation, a meeting of the directors of a corporation shall be held at which the directors may,

117 (1) Après la constitution de la société se tient une réunion du conseil d'administration au cours de laquelle les administrateurs peuvent :

(a) make by-laws;

a) adopter des règlements administratifs;

(b) adopt forms of security certificates and corporate records;

b) adopter des formules de certificats de valeurs mobilières et de registres sociaux;

(c) authorize the issue of securities;

c) autoriser l'émission de valeurs mobilières;

(d) appoint officers;

d) nommer des dirigeants;

(e) appoint one or more auditors to hold office until the first annual or special meeting of shareholders;

e) nommer un ou plusieurs vérificateurs dont le mandat expire à la première assemblée annuelle ou extraordinaire des actionnaires;

(f) make banking arrangements; and

f) prendre avec les banques toutes les mesures nécessaires;

(g) transact any other business.

g) traiter toute autre question.

119 (1) Each director named in the articles shall hold office from the date of endorsement of the certificate of incorporation until the first meeting of shareholders.

119 (1) Le mandat des administrateurs désignés dans les statuts commence à la date d'endossement du certificat de constitution et se termine à la première assemblée des actionnaires.

…

[…]

(9) Subject to subsection (10), the election or appointment of a director

(9) Sous réserve du paragraphe (10), l'élection ou la nomination d'un

under this Act is not effective unless the person elected or appointed consents in writing before or within 10 days after the date of the election or appointment.	administrateur en vertu de la présente loi ne prend effet que si la personne élue ou nommée y consent par écrit avant le jour de l'élection ou de la nomination ou dans les 10 jours qui suivent.
(10) If the person elected or appointed consents in writing after the time period mentioned in subsection (9), the election or appointment is valid.	(10) L'élection ou la nomination est valide si la personne élue ou nommée y consent par écrit après le délai visé au paragraphe (9).
121 (1) A director of a corporation ceases to hold office when he or she	121 (1) Le mandat d'un administrateur prend fin lorsque se produit l'un des événements suivants :
(a) dies or, subject to subsection 119(2), resigns;	a) il décède ou, sous réserve du paragraphe 119(2), il démissionne;
…	[…]
(2) A resignation of a director becomes effective at the time a written resignation is received by the corporation or at the time specified in the resignation, whichever is later.	(2) La démission d'un administrateur prend effet à la date de réception par la société d'un écrit à cet effet ou à la date postérieure qui y est indiquée.

[22] Subsection 115(1) of the OBCA sets out the general duty of directors to manage or supervise the management of the affairs of a corporation – an important duty. In discharge of this duty, directors owe fiduciary obligations to the corporation.

[23] Subsection 117(1) of the OBCA sets out the steps that the directors of a corporation will typically take to properly set up the affairs of a corporation. The subsection requires that a directors' meeting be held during which these steps may be taken.

[24] As the respondent rightly notes, those who are deemed to be directors by virtue of subsection 115(4) of the OBCA may often be unaware that they have been deemed to hold that office. If incorporating directors were allowed to resign before the first meeting of the corporation's shareholders where permanent directors are elected, the person deemed to be a director could well be unaware of their fiduciary obligations to the corporation and the steps mentioned in subsection 117(1) of the OBCA may not be completed. The OBCA, however, contemplates that a meeting must be held at which the steps mentioned in subsection 117(1) may be taken. This favours the Tax Court's interpretation of subsections 115(4) and 119(2) of the OBCA under which the likelihood of failing to meet the requirements of subsection 117(1) of the OBCA is substantially lessened.

[25] The combined effect of subsections 119(1), 119(2), 119(4), 119(9) and 119(10) of the OBCA is that directors who replace the incorporating directors must be aware of their nomination by the shareholders at the first shareholders' meeting and must consent to their election or appointment. This, once again, favours the Tax Court's interpretation.

[26] Subsection 119(1) further supports this interpretation. The subsection uses the mandatory expression "shall" to indicate that incorporating directors must hold office until the first meeting of the shareholders. This mandatory language also appears in subsection 119(2), which prevents resignations before the first shareholders' meeting unless a replacement for the incorporating director has been appointed or elected. This mandatory language is consistent with a narrow interpretation of "appointment" to exclude deemed nominations made under subsection 115(4) of the OBCA.

[27] Paragraph 121(1)(a) of the OBCA makes it clear that it is superceded by subsection 119(2) such that a resignation cannot be effective until after the first shareholders' meeting. Carving out incorporating directors from the ability to resign in subsection 121(2) also favours a narrow interpretation of "appointment" in subsection 119(2) of the OBCA.

[28] In sum, a contextual analysis supports the Tax Court's interpretation of subsections 115(4) and 119(2) of the OBCA.

[29] As concerns the purpose of the provisions, subsection 119(2) of the OBCA was introduced as part of a bill with the stated goal of improving investor protections: *Ontario Legislative Assembly*, 32:1 (April 24, 1981) discussing *An Act to Revise the Business Corporations Act, 1982*, S.O. 1982, c 4. When the bill was introduced, the Minister responsible for its introduction advised the Ontario Legislative Assembly as follows:

> I am vitally interested in investor protection in this province. I want everyone to get a fair shake in the marketplace. This bill has several provisions which will enhance that protection…

[30] It would be inconsistent with investor protection if incorporating directors could resign without a guaranteed replacement. This would leave investors vulnerable at the outset of a corporation's life, before subsequent directors were named and consented to act as directors. As the respondent notes at paragraph 61 of its Memorandum of Fact and Law, under the appellant's interpretation, "[t]here would be no continuity of corporate management and no way to ensure that the corporation would have a director *de jure* in the early days after incorporation".

[31] Subsection 119(2) of the OBCA was amended in 1994 to limit its application to purported resignations where no first shareholders' meeting takes place. At the same time, subsection 115(4) was added to the OBCA (*Statute Law Amendment Act (Government Management and Services), 1994*, S.O. 1994, c. 27). There is nothing in the legislative record to indicate that subsection 115(4) was intended to override or circumscribe subsection 119(2). Rather, subsection 115(4) serves to provide additional protection to investors and debtors.

[32] I therefore conclude that the text, context and purpose of these provisions supports the Tax Court's interpretation.

IV. Proposed disposition

[33] I accordingly see no error in the decision of the Tax Court and therefore would dismiss this appeal, with costs.

"Mary J.L. Gleason"
J.A.

"I agree.
Marianne Rivoalen J.A."

"I agree.
K. A. Siobhan Monaghan J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-246-20
STYLE OF CAUSE:	RYAN EDMOND SOULLIERE v. HER MAJESTY THE QUEEN
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	APRIL 26, 2022
REASONS FOR JUDGMENT BY:	GLEASON J.A.
CONCURRED IN BY:	RIVOALEN J.A. MONAGHAN J.A.
DATED:	JULY 7, 2022

APPEARANCES:

Craig J. Allen	FOR THE APPELLANT
Meaghan Mahadeo Jason Stober	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Craig Allen Law Windsor, Ontario	FOR THE APPELLANT
A. François Daigle Deputy Attorney General of Canada	FOR THE RESPONDENT