

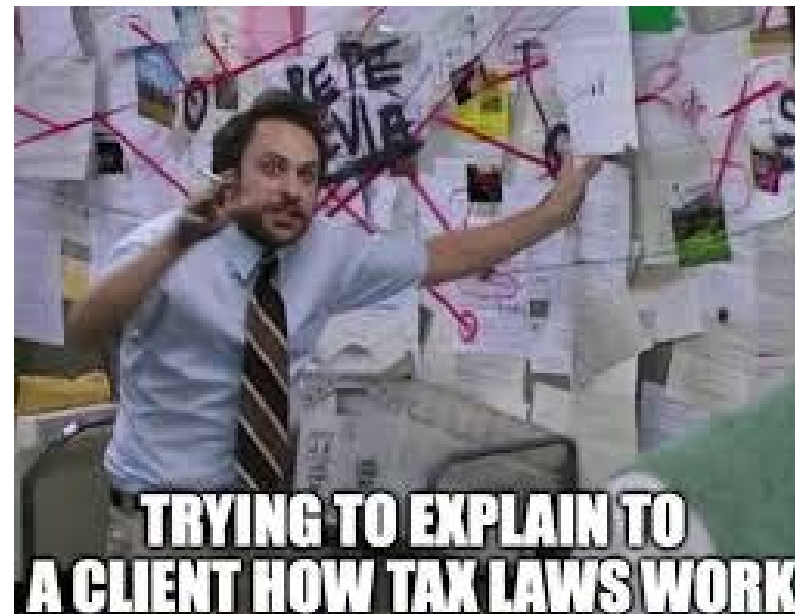


Direction for Directors: Navigating CRA obligations in Insolvency

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Tax Humor





Robbing Peter to Pay Paul (which I approve of) BUT Peter is BACK!

- Many Taxpayers were struggling with cashflow issues over the last several years
- “Classic solution” → don’t remit GST, PST or payroll.
- In our experience, payroll is often not remitted or not reported correctly because that division of CRA is not as “responsive” due to less reporting
- CRA is now back (and MB Finance as well)

Theory Behind Director Liability – *Ferri*, 2024 TCC 25

- [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.

How Director Liability Arises

- Section 323 of the *Excise Tax Act* for GST and section 227.1 of the *Income Tax Act* for source deductions
 - *Where a corporation has failed to ... the directors of the corporation at the time the corporation was required to [deduct, withhold] remit or pay the amount are jointly and severally, or solidarily, liable, together with the corporation, to pay that amount and any interest or penalties relating to it.*
- Deduct / withhold / remit / pay → any one of them catches you
- Collective liability BUT CRA can chase whomever of the “group”
- Taxes AND Penalties AND Interest
- Duplicated in s. 83 of *El Act* and s 21.1 of *CPP Plan*

Who is Liable?

- “Legal” Directors at the time the corporation was required to ...
 - Were they properly made a director in accordance with legislation?
 - Also → over 18?
 - Also → not a bankrupt?
 - Did they know / consent? *Why best to get it in writing!*
 - Did they resign? (also applicable to 2 year rule – see below)
- CRA looks to the Companies Office BUT that is not determinative
 - The above is the basis for CRA sending a “You may be liable” letter.
 - It is always nice to be able to “shut it down”

Who is Liable?

- Resignation

- *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 – 103(2) of MB Corporations Act*
- **Formal notice in writing IS REQUIRED**
 - *For a resignation to be effective, there must be evidence that the corporation received a written resignation confirming that the appellant has resigned – Cliff v. Canada, 2022 FCA 16*
- Deliver to registered office (?other directors/officers/shareholders?)
 - **AFFIDAVIT OF DELIVERY MAY BE KEY PIECE OF EVIDENCE**
 - Send by email / text as well – keep copies
 - Need a clear effective date and time
- Get the corporation to file a change of directors?
 - Can the director do it themselves? – ARGUABLY YES – but they still need to meet requirements of 103(1)

Who is Liable?

- Resignation

Notice of change of directors

108(1) Within 15 days after a change is made among its directors, a corporation shall send to the Director a notice, in the form the Director requires, setting out the change, and the Director shall file the notice.

Application to court

108(2) Any interested person, or the Director, may apply to a court for an order to require a corporation to comply with subsection (1), and the court may so order and make any further order it thinks fit.

- Resignation – Try to avoid
 - *Gariepy v. The Queen*, 2014 TCC 254
 - Directors argued that they were not liable under subsection 227.1(1) of the ITA for \$500,000 in unremitted source deductions on the basis that they had resigned as directors more than two years prior to the assessment
 - **10 day trial of testimony and evidence!**
 - *Bekesinski v. The Queen*, 2014 TCC 245
 - Fact that the appellant only revealed his resignation shortly after the director's liability assessment made the CRA suspicious that the document had been backdated. **The CRA had a forensic document chemist test the authenticity of the resignation by ink date testing.**
 - *Ferri v. The Queen*, 2024 TCC 25
 - CRA assessed on basis that taxpayer was director from 2007 to 2014. TP argued that he resigned in 1999 and supposedly change noticed file with registry and again in 2007. **BUT no record in registry AND no record of actual resignation in lawyer records.**

Who is Liable?

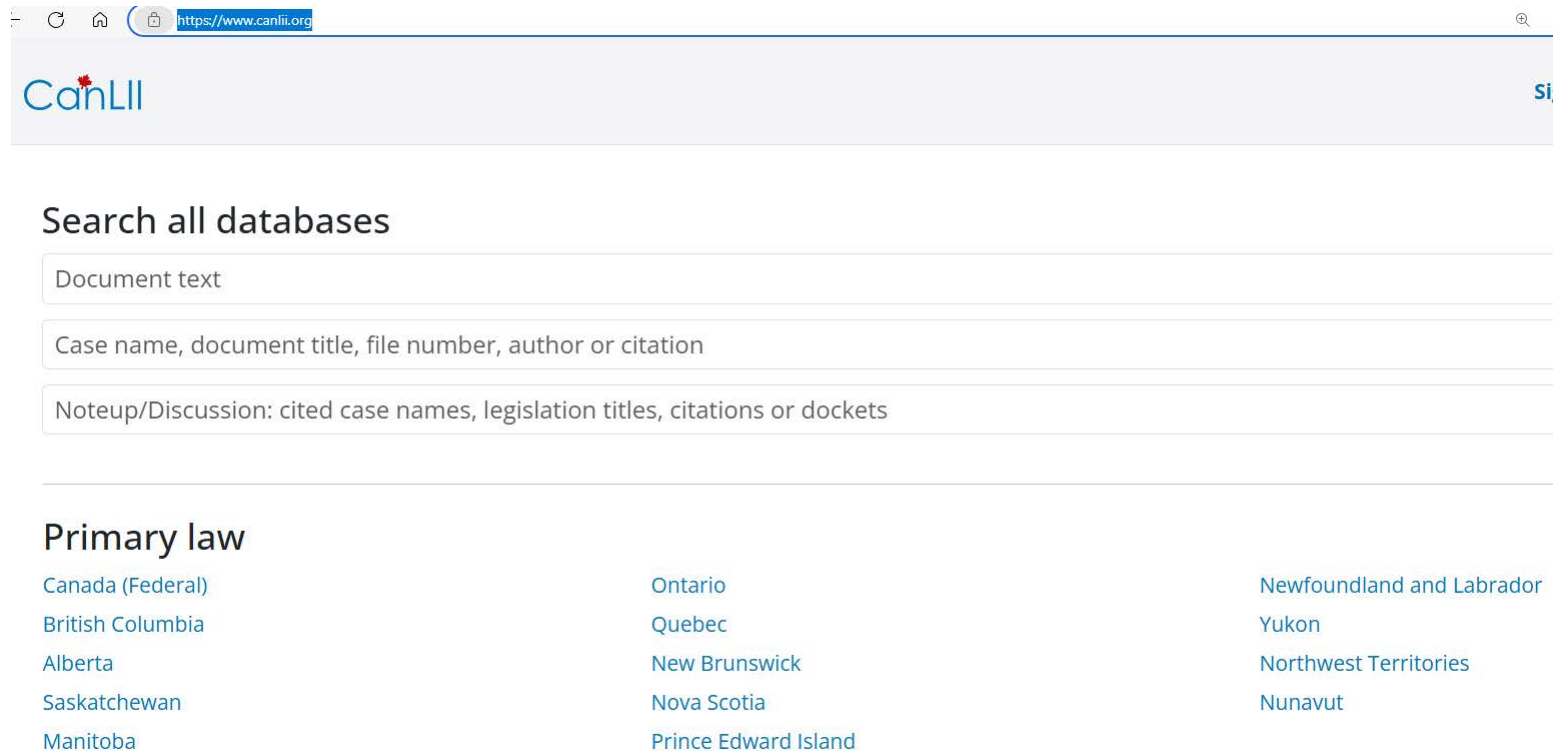
- De Facto Directors – **AKA the Courts doing “right”**
 - *Lamothe v. The Queen*, 2022 TCC 85
 - *In Canada v. Corsano*, [1993] 3 F.C. 173 ... the Federal Court of Appeal stated that by using the term “directors” without qualifications, “Parliament intended the word to cover all types of directors known to the law in company law, including, amongst others, de jure and de facto directors”. A person acting as a director without being elected to or eligible for a director position cannot escape the obligations imposed by the ITA or the [ETA].
 - In numerous decisions, this Court has been called upon to decide on the tests that can be applied to determine whether a person is a de facto director. The following two tests have been established and applied repeatedly: (i) the person has usurped the duties of a director by taking actions that are normally reserved for directors; and (ii) the person has represented himself or herself to third parties as a director of the corporation.
 - Above is an OR test
 - May not be a significant difference with a manager – but who made the “big” decisions?
 - Did the person taking these actions exercised sufficient control over the corporation's “affairs” to be held liable for the corporation's obligations as a de facto director.

Other Director Defences Available

- **Challenge the underlying assessment**
 - CRA does not like this, but the law appears clear that the underlying tax “bill” (assessment) can be challenged (e.g. failure to allow ITCs, math errors, legal errors, etc.)
 - This is the case even if the director was the sole director and could have, arguably, challenged the assessment when it was issued to the corporation
 - *Abrametz* – 2009 FCA 70
 - *Doncaster* – 2012 FCA 38
 - *Gougeon* – 2012 FCA 294

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CanLII

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Sidebar – www.canlii.org

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Abrametz v. Canada, 2009 FCA 70 (CanLII) [EN](#) [French Version](#)

Date:	2009-03-10
File number:	A-338-07
Citation:	Abrametz v. Canada, 2009 FCA 70 (CanLII), < https://canlii.ca/t/22rzb >, retrieved on 2025-05-07

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Federal Court of
Appeal



Cour d'appel
fédérale

Date: 20090310

Docket: A-338-07

Citation: 2009 FCA 70

PELLETIER J.A.
RYER J.A.

CORAM: EVANS J.A.

BETWEEN:

PETER V. ABRAMETZ

Other Director Defences Available

- **Did CRA “jump through its hoops” – 323(2) / 227.1(2)**
 - *A certificate for the amount of the corporation's liability referred to in that subsection has been registered in the Federal Court under section ... and execution for that amount has been returned unsatisfied in whole or in part*
 - **Demand to see the “nulla bona” certificate (?wait for Tax Court?)**
 - The corporation has commenced liquidation or dissolution proceedings or has been dissolved and a claim for the amount of the corporation's liability referred to ... has been proved within six months after the earlier of the date of commencement of the proceedings and the date of dissolution
 - **This arguably becomes moot if corporation is revived by CRA**
 - *A corporation is revived as a corporation under this Act on the date shown on the certificate of revival, and thereafter the corporation, subject to such reasonable terms as may be imposed by the court or the Director and to the rights acquired by any person after its dissolution, has all the rights and privileges and is liable for the obligations that it would have had if it had not been dissolved. - 202(2) of MB Corporations Act*

Other Director Defences Available

- **Did CRA “jump through its hoops” – 323(2) / 227.1(2)**
 - The corporation has made an assignment or a bankruptcy order has been made against it under the *Bankruptcy and Insolvency Act* and a claim for the amount of the corporation's liability referred to ... has been proved within six months after the date of the assignment or bankruptcy order.
 - **CRA can advise a trustee of an amount as opposed to issue assessment**
 - **Some debate whether CRA can amend claim after the six months**

Other Director Defences Available

- **2 year rule** – 323(5) / 227.1(5)
 - *An assessment under subsection (4) of any amount payable by a person who is a director of a corporation shall not be made more than two years after the person last ceased to be a director of the corporation.*
 - *No action or proceedings to recover any amount payable by a director of a corporation under subsection (1) shall be commenced more than two years after the director last ceased to be a director of that corporation.*
- An assessment being “**made**” means the **date the assessment** is sent
- An assessment exactly 2 years after the date of resignation is still valid
- If a director resigns and continues to act as a **de facto director**, this clock does not run
- **It appears clear that a director does NOT resign just because they lose control of the corporation (either because someone was running it or it ceased operations)**
 - *But, this may create a due diligence defence?*



Other Director Defences Available

- **The director assessment was never mailed**
 - While onus is on CRA if this is raised, this is rarely argued as CRA need only show that they mailed it on a balance of probabilities
 - If provided to the wrong address also works (but taxpayer has to show that they provided CRA with their correct address)

Due Diligence Defence

- The “**due diligence**” defence in subsection 323(3) *ETA* (and *ITA* subsection 227.1(3)) is the most common defence that directors raise against a directors' liability assessment.
- The director is not liable if he or she “exercised the **degree of care, diligence and skill** to prevent the failure [of the corporation to remit GST/HST] that a reasonably prudent person would have **exercised in comparable circumstances**”.
- The director's obligation is to **use reasonable care**, not to **guarantee** that there is no failure to remit



Due Diligence Defence

- Same approach under *ITA* and *ETA*
- Standard of due diligence is **Objective** (*Peoples v Wise*)
- Focus is on actions to prevent the failure to remit (as opposed to efforts to address failure after the fact).
- Conduct to be evaluated starts when apparent to a director acting reasonably that the company is entering financial difficulty.
- Liability not absolute
- Requires evidence of specific concern re remittances

Cases – Due Diligence Defence

Hamad v The Queen, 2019 TCC 137

- Company in sudden insolvency situation due to cancelled government funding; directors took meaningful efforts to secure shareholder injections, and only terminated employees after shareholders refused
- Took steps through CCAA and BIA to maximize recoveries – shortfall because part of claim not deemed trust

Hall v The King, 2023 TCC 158

- Sole director of a number of companies
- CRA waived personal liability for companies where assets were seized and operations frozen
- Did not do so for holding company whose only purpose was to receive funds and pay principal; failure to remit in such circumstances was not excusable.

Amb's v The Queen, 2020 TCC 62

- Active, preventative steps are integral to a successful Due Diligence Defence



What Happens when Liability is Found?

- The director becomes personally liable, jointly and severally with the corporation and other directors, for the unremitted GST/HST, interest, and penalties
- CRA can pursue Director's **personal assets** by standard CRA methods: certify, lien, garnish etc.
- CRA policy is to not offer “compromise settlements” for GST/HST liabilities; directors must pay in full or negotiate payment plans



Restrictions and Objections

- 90-Day collection restriction applies to all director's liability assessments under the *ITA* (but not ETA, CPP, EI)
- **Objection and Appeal:** Tax Court appeal if reassessed; no collection during first appeal
- Objection must be filed within 90 Days of assessment



Contribution from Co-Directors

- Under Section 323(8) of ETA and 227.1(7) of ITA, a director who pays the liability can claim contribution from other liable directors
- Must prove **joint responsibility during the relevant period.**
- Issues of disclosure for reasons for assessment/non-assessment against other directors



Directors and Officers (D&O) Liability Insurance

- The Supreme Court of Canada has recognized that protection from liability is necessary to promote entrepreneurialism - *Blair v. Consolidated Enfield Corp.* [1995], 4 S.C.R. 5.
- Indemnifies directors and officers by the corporation
- Covers costs reasonable incurred through the CRA Director Liability process – Legal, administrative, etc.
- D&O's must have acted honestly and in good faith to the best interest of the corporation
- D&O insurance tends to have exceptions for deliberate fraud on the Corp



Further Steps: How to Mitigate/Avoid

- Keep in mind due diligence when ensuring remittances are made
- Delegate remittance tasks responsibly
- Directors should be active in the business – ignorance is not a legitimate defence
- Ensure corporate oversight and monitor compliance
- Keep records
- Get involved and move fast when things go bad

Questions?

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