[Are Corporate Directors Liable for Company's Payroll Debts After They Resign?]

Many provinces make corporate directors personally liable for the company's payroll and other debts. **Example:** Section 81 of the Ontario *Employment Standards Act* says directors may be jointly and severally liable for wages in certain situations. "Joint and several liability" means that any one director can be made to pay any part or all of the amounts owed (plus penalties for nonpayment). Directors may still be on the hook even after they resign if they're found to be "de facto" directors, that is, directors that continue to act like directors after the resignation takes effect. Here are two cases illustrating how courts determine if a director who's resigned is liable as a de facto director.

Former Director Is a De Facto Director

Here's a case where a director who resigned was found liable as a de facto director.

Situation

The Canada Revenue Agency penalized a small Ontario engineering firm $13,000 for failing to remit the right amount of GST in June. The agency demanded that one of the firm's directors pay the entire penalty out of his own pocket, claiming he was jointly and severally liable under (Sec. 323 of) the *Excise Tax Act*). The director denied liability noting that he officially resigned on March 31, three months before the failure to remit took place.

Ruling

The Tax Court found the director liable as a de facto director.

Reasoning

Although the director officially resigned on March 31, his subsequent actions made him a de facto director, including:

- Making telephone calls to subcontractors.
- Sending company payroll records to the accountant.
- Filling out deposit stubs.
- Remitting and signing the actual June GST cheque that led the CRA to fine the firm.

However, the court went on to rule that the director had exercised due diligence while acting as a de facto director to ensure that the firm made the proper GST remittance and wasn't to blame for the inaccuracy in the amount remitted. So, he didn't have to pay the assessment after all.

Parisien v. The Queen, 2004 TCC 276 (CanLII)

Former Director Is Not a De Facto Director

Here's a similar case with a different outcome.

Situation

Hours after the entire board resigned *en masse*, a Manitoba mining company shut down operations and terminated 288 employees without notice. The government found the company owed the employees $3.4 million in wages in lieu of notice. Under Manitoba employment standards law, directors are jointly and severally liable for the unpaid wages of the corporation's employees. So, the government ordered one of the company's directors, named Shier, to pay the entire $3.4 million. Shier contended he wasn't liable because he resigned before the employees were terminated.

Ruling

The Manitoba Court of Appeal ruled that Shier wasn't liable as a de facto director.

Reasoning

As in *Parisien*, the government argued that Shier was a de facto director because he performed the functions of a corporate director after his resignation took effect. Specifically, he sent a letter to the Minister of Labour stating that "it is with deep regret that **we** must advise you of our decision" to shut down (emphasis added). And he signed the letter as "VP Finance & CFO" of the corporation. But the court wasn't impressed. Using "we" in the letter and signing it as an officer after having resigned wasn't enough to make Shier a de facto director, it reasoned. *Shier (Re)*, 2007 MBCA 63 (CanLII)