

# Director's liability for source deductions where no consent to serve was given

19 novembre 2020

A recent decision from the Ontario Superior Court of Justice (the Court) confirms the importance of a director's written consent to serve for protection against liability.

In *Bunton v. FTA Logistics Inc. and Ikenouye*<sup>1</sup> (Bunton), the Court dealt with a situation where the Canada Revenue Agency (the CRA) claimed unremitted source deductions from an individual who was listed as a director of a corporation without her consent.

## What you need to know

- Various statutes, including the Canada Business Corporations Act<sup>2</sup> and the Business Corporations Act (Ontario)<sup>3</sup> (the OBCA), provide circumstances in which a serving director may be personally liable for the obligations of the corporation.
- In Bunton, the issue raised was whether Ms. Bunton was a director of FTA Logistics Inc. (FTA), such that she was liable for FTA's unremitted source deductions that were required under the Income Tax Act (Canada) (the ITA).
- Subsection 227.1(1) of the ITA provides that where a corporation fails to deduct, withhold, remit or pay source deductions in respect of salaries, wages, or other remuneration, the directors of the corporation at the time are jointly and severally, or solidarily, liable, together with the corporation, to pay that amount and any interest or penalties relating to it.

## Director's liability and consent to serve

FTA was governed by the OBCA, and as such, section 119(9) of the OBCA was applicable, pursuant to which, an election or appointment of a director is not effective unless the person consents in writing within 10 days following the date of the election or appointment.

In Bunton, the Court dealt with a situation where the CRA demanded payment of unremitted source deductions from the applicant, Ms. Bunton, as a result of her being listed as a director of FTA.

Several years before the CRA demanded payment of the unremitted source deductions from Ms. Bunton, Ikenouye had asked Ms. Bunton for permission to add her as a **director of FTA. Ms. Bunton declined the request, but unbeknownst to her, her name was added as a director, as it appeared in two letters from the CRA claiming Ms. Bunton's liability for the unremitted amounts.**

**Ms. Bunton's defence was to seek a declaration by the Court that she had never been a director of FTA due to a lack of written consent to serve on her part, and to seek an order that the records of FTA be rectified to remove her name.**

In the absence of contradictory evidence presented by the respondents, the Court had **no issue to conclude that Ms. Bunton's election as a director of FTA was not effective. As the Court stated, "[t]here must be something more than the mere appearance of an individual's name in the list of directors as evidence of consent to the appointment or election to that position".<sup>4</sup>** The Court also stated that Ms. Bunton is entitled to file a Notice of Change Form with the appropriate provincial ministry to remove her from the list of directors of FTA going forward.

As an additional relief, Ms. Bunton requested that FTA compensate her for any future losses, which may result from her being listed as a director.

## Discussion

Directors may be found personally liable for monetary amounts by virtue of holding **office pursuant to a broad range of legislation. The requirement that directors consent to their election in writing is a fundamental principle of corporate law.<sup>5</sup> In the words of the Tax Court of Canada (the TCC), "[t]his presumably relates to the liability issues which directors face in assuming such a role within a corporation and establishes the requirement of personal knowledge by that director of his election or nomination to that role."<sup>6</sup>**

Hence, since in Bunton the respondents presented no evidence in support of the fact that Ms. Bunton had consented to act as director of FTA, the Court had no difficulty **ordering the rectification of FTA's registers and records. Consequently, the Court's order cleared Ms. Bunton of the liability to pay to CRA the unremitted source deductions.**

**It must be noted that a director's election without written consent can be viewed as effective, hence engaging the director's personal liability.<sup>7</sup>** The TCC has identified the following situations where a director's election may be effective de facto despite the lack of their written consent:

- directors who are duly elected but may lack some qualification under the relevant corporate law that disqualifies them from legally being directors;
- former directors whose term of office has expired but who have continued to act as directors (the holding-over principle); or
- directors who simply assume the role of director without any pretence of legal qualification.<sup>8</sup>

However, Canadian courts have acknowledged that the de facto director doctrine should be applied with caution in situations where it imposes liabilities.<sup>9</sup> **The CRA's position is**

that officers, employees, and others who are not legally appointed or elected as directors, but who perform the functions that directors would perform, may be liable.<sup>10</sup>

While the Court was open to ordering compensation for losses already incurred, Ms. Bunton failed to demonstrate such losses. As for future losses, the Court adjourned this aspect of the application for lack of authorities to support Ms. Bunton's entitlement to such relief. The Court took issue with the forward-looking approach to compensation, which in the opinion of the Court, is equivalent to granting Ms. Bunton indemnity by FTA.

A corporation may enter into an indemnification agreement with the director or officer, but there currently are no authorities that support a court's ability to order it.<sup>11</sup>

## Takeaway

Corporate directorship comes with significant responsibilities and liabilities, which may arise from a wide array of legislation. Except for limited circumstances, the effectiveness of a director's election or appointment depends on the director's written consent to serve. As recently confirmed in Bunton, a director's liability is unlikely to be engaged in cases where a person is listed in the registers and records of the corporation without their written consent.

For further information, please contact the author.

<sup>1</sup> 2020 ONSC 5463, 2020 CarswellOnt 13047.

<sup>2</sup> RSC, 1985, c C-44 (CBCA)

<sup>3</sup> RSO 1990, c B.16 (OBCA).

<sup>4</sup> Same, at para 19.

<sup>5</sup> Section 106(9) of the CBCA and section 119(9) of the OBCA.

<sup>6</sup> Pereira v. R., 2007 TCC 737, [2008] 3 C.T.C. 2154.

<sup>7</sup> Canada v. Corsana, [1999] FCJ No. 401 (FCA).

<sup>8</sup> Re Lo-Line Electric Motors Ltd., [1988] 2 All ER 692, as cited in Mosier v. The Queen, [2001] TCJ No. 692 (TCC).

<sup>9</sup> Hay v. Canada, [2004] TCJ No. 29 (TCC) at para 29.

<sup>10</sup> CRA, Director's Liability, Income Tax Information Circular.

<sup>11</sup> Section 124 of the CBCA and section 136 of the OBCA.

[Ivan Boiarski](#)

## Services

[Droit des sociétés et droit commercial, Gouvernance](#)

## BLG | Vos avocats au Canada

Borden Ladner Gervais S.E.N.C.R.L., S.R.L. (BLG) est le plus grand cabinet d'avocats canadien véritablement multiservices. À ce titre, il offre des conseils juridiques pratiques à des clients d'ici et d'ailleurs dans plus de domaines et de secteurs que tout autre cabinet canadien. Comptant plus de 725 avocats, agents de propriété intellectuelle et autres professionnels, BLG répond aux besoins juridiques d'entreprises et d'institutions au pays comme à l'étranger pour ce qui touche les fusions et acquisitions, les marchés financiers, les différends et le financement ou encore l'enregistrement de brevets et de marques de commerce.

[blg.com](http://blg.com)

## Bureaux BLG

### Calgary

Centennial Place, East Tower  
520 3rd Avenue S.W.  
Calgary, AB, Canada  
T2P 0R3

T 403.232.9500  
F 403.266.1395

### Ottawa

World Exchange Plaza  
100 Queen Street  
Ottawa, ON, Canada  
K1P 1J9

T 613.237.5160  
F 613.230.8842

### Vancouver

1200 Waterfront Centre  
200 Burrard Street  
Vancouver, BC, Canada  
V7X 1T2

T 604.687.5744  
F 604.687.1415

### Montréal

1000, rue De La Gauchetière Ouest  
Suite 900  
Montréal, QC, Canada  
H3B 5H4

T 514.954.2555  
F 514.879.9015

### Toronto

Bay Adelaide Centre, East Tower  
22 Adelaide Street West  
Toronto, ON, Canada  
M5H 4E3

T 416.367.6000  
F 416.367.6749

Les présents renseignements sont de nature générale et ne sauraient constituer un avis juridique, ni un énoncé complet de la législation pertinente, ni un avis sur un quelconque sujet. Personne ne devrait agir ou s'abstenir d'agir sur la foi de ceux-ci sans procéder à un examen approfondi du droit après avoir soupesé les faits d'une situation précise. Nous vous recommandons de consulter votre conseiller juridique si vous avez des questions ou des préoccupations particulières. BLG ne garantit aucunement que la teneur de cette publication est exacte, à jour ou complète. Aucune partie de cette publication ne peut être reproduite sans l'autorisation écrite de Borden Ladner Gervais S.E.N.C.R.L., S.R.L. Si BLG vous a envoyé cette publication et que vous ne souhaitez plus la recevoir, vous pouvez demander à faire supprimer vos coordonnées de nos listes d'envoi en communiquant avec nous par courriel à [desabonnement@blg.com](mailto:desabonnement@blg.com) ou en modifiant vos préférences d'abonnement dans [blg.com/fr/about-us/subscribe](http://blg.com/fr/about-us/subscribe). Si vous pensez avoir reçu le présent message par erreur, veuillez nous écrire à [communications@blg.com](mailto:communications@blg.com). Pour consulter la politique de confidentialité de BLG relativement aux publications, rendez-vous sur [blg.com/fr/ProtectionDesRenseignementsPersonnels](http://blg.com/fr/ProtectionDesRenseignementsPersonnels).

© 2025 Borden Ladner Gervais S.E.N.C.R.L., S.R.L. Borden Ladner Gervais est une société à responsabilité limitée de l'Ontario.