

Docket: 2015-4361(GST)G

BETWEEN:

ESTATE OF GAÉTAN GAGNÉ,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

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Appeal heard on November 14, 2019, at Montreal, Quebec.

Before: The Honourable Justice Réal Favreau

Appearances:

Counsel for the appellant: Etienne Paradis  
Dominique Zaurini  
Counsel for the respondent: Alnashir Tharini

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**JUDGMENT**

The appeal from the assessment made against Gaétan Gagné pursuant to the *Excise Tax Act*, notice of which is dated May 22, 2013, and bears the number F-044781, for the period December 31, 2006, to September 30, 2010, is dismissed with costs to the respondent in accordance with the attached reasons for judgment.

Signed at Ottawa, Canada, this 17th day of November 2020.

"Réal Favreau"

\_\_\_\_\_  
Favreau J.

Translation certified true  
on this 8th day of April 2021.  
François Brunet, Revisor

Citation: 2020 TCC 111  
Date: 20201117  
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**REASONS FOR JUDGMENT**

Favreau J.

[1] On May 22, 2013, the Agence du revenu du Québec (the Agency), as agent of the Minister of National Revenue, made an assessment against Gaétan Gagné pursuant to subsection 228(2) of the *Excise Tax Act*, R.S.C., 1985, c. E-15, (the ETA), which bears the number F-044781 and relates to the Period from December 31, 2006, to September 30, 2010 (the Period).

[2] Mr. Gagné was assessed a net tax of \$162,696.42, as well as interest and penalties that 9129-7903 Québec Inc. (9129 Inc.) should have remitted to the Agency pursuant to the ETA when Mr. Gagné was a director of this company.

[3] When assessing Mr. Gagné, the Agency relied on, among other things, the following findings and assumptions of fact:

**APPELLANT'S ASSESSMENT PURSUANT TO SECTION 323 OF THE  
ETA**

- (a) The facts admitted above;
- (b) The company is a corporation created pursuant to the *Quebec Companies Act*, QCA, chapter C-38;
- (c) The company is registered for the purposes of Part IX of the ETA, and its GST account number is 87705806 RT0001;

- (d) The company failed to remit amounts of collected taxes that it was required to withhold or collect and pay to the Agency;
- (e) The Agency assessed the company for the amount of net tax not remitted for quarterly periods that should have been paid from December 31, 2006, to September 30, 2010, including penalties and interest;
- (f) On February 7, 2012, in ETA 1883-12, the Agency obtained a certificate pursuant to section 316 of the ETA;
- (f.1) On December 10, 2012, the Federal Court issued a writ of execution. This writ was returned unsatisfied, by a bailiff on January 11, 2013;
- (g) On October 23, 2012, in ETA-7978-12, the Agency obtained a certificate pursuant to section 316 of the ETA;
- (g.1) On November 30, 2012, the Federal Court issued a writ of execution. This writ was returned unsatisfied, by a bailiff on January 11, 2013;
- (h) The company did not pay the net tax due;
- (i) As required under subsection 323(1) of the ETA, if a corporation, in this case the company, fails to remit an amount of net tax as required, the directors of a corporation are jointly and severally, or solidarily, liable, together with the corporation, to pay this tax and any interest on, or penalties relating to, the amount;
- (j) The appellant was a director of the company from June 26, 2006, to February 9, 2012. He is, inter alia:
  - (j.1) Registered as a director with the Registraire des entreprises du Québec (REQ), replacing Jean-François Gagné on June 26, 2006;
  - (j.2) Registered as a director with the REQ, replacing Jean-François Gagné on November 22, 2006, for the second time;
  - (j.3) Registered as a director with the Agency starting in January 2007;
- (k) Signed a form filed in October 2009;
  - (k.1) He lent money to the company;
  - (k.2) Remitted a \$20,000 cheque to the Quebec Minister of Revenue on November 18, 2010, for debts owed by the company;
  - (k.3) Signed a power of attorney on October 20, 2009, as director of the company in favour of Dufour Charbonneau Brunet et ass (*sic*) authorizing it to deal with the Agency. The power of attorney expired on August 31, 2012;
  - (k.4) Made a statement indicating that he was a director, a fact that his counsel confirmed during the Objections process to an Agency representative, Simon Rocheleau;
- (l) In addition, according to the information available to the REQ, the applicant (*sic*) was a director of the company and its majority shareholder until February 9, 2012;
- (m) For the entire period during which the company was required to remit net tax to the Agency, the appellant acted as a director of the company;
- (n) As a director of the company, the appellant failed to exercise the degree of care, diligence and skill to prevent the failure that a reasonably prudent person would have exercised in comparable circumstances;
- (o) The appellant failed to take any concrete and positive steps to prevent the company's failures;

- (p) The appellant failed to take appropriate steps to implement an effective system to ensure that the company paid amounts owed to the Agency pursuant to the ETA.

#### **THE COMPANY'S ASSESSMENT**

- (q) During the period in issue, the company operated a restaurant under the name Restaurant Bar Nuevo Mexicain;
- (r) The company was registered for the purposes of Part IX of the ETA;
- (s) The company underwent a tax audit for the period from March 1, 2008, to August 31, 2010 (the audit period);
- (t) All supplies provided by the company in operating its business, a commercial activity, during the audit period, constitute taxable supplies for which a 5% tax on the value of the consideration for the supply was payable by the purchasers to the company, which was required to collect the tax;
- (u) More specifically, the \$49,874.25 of goods and services tax collected or collectible that was not remitted. The assessment was based on the difference between the tax amounts reported and the amounts of supplies of services reported in the company's financial statements for the audit period;

[4] Gaétan Gagné died on October 3, 2017, after having filed a Notice of Appeal in this Court challenging the validity of the assessment from May 22, 2013. Until his death, Gaétan Gagné was the appellant in this appeal. Following his death, the estate of Gaétan Gagné took up Gaétan Gagné's defence in this appeal.

[5] The amended Notice of Appeal filed by counsel for the estate of Gaétan Gagné, dated November 11, 2019, alleged, *inter alia*, that:

- a) Gaétan Gagné had never been an *ex officio* director of 9129 Inc. and that, if he had, it was by mistake;
- b) if Gaétan Gagné had at some point been an *ex officio* director of 9129 Inc., he resigned as a director of the company on January 1, 2008; and
- c) Gaétan Gagné was never a *de facto* director of 9129 Inc. from the time the company started its operations until it wound up its affairs in December 2009.

[6] To support the said allegations, the appellant called the following persons to testify: Sylvain Dorais, lawyer; Sylvain Brunet, chartered accountant; Léa D'Amboise, Jean-François Gagné's ex-spouse; Hélène Goulard, administrative assistant of the late Gaétan Gagné; and Jean-François Gagné, the late Gaétan Gagné's son.

[7] Mr. Dorais testified at the hearing after being released from his duty of confidentiality under the solicitor-client privilege by 9129 Inc. and by the estate of Gaétan Gagné. In 2006, he represented 9129 Inc., which operated a restaurant bar known as the “Nuevo” on Mont-Royal Avenue in Montreal. His mandates covered civil and commercial litigation and labour relations.

[8] On November 22, 2006, he completed and filed an amended return with the Registraire des entreprises du Québec in order to add (a) the new names under which 9129 Inc. wished to do business and to withdraw the former names, (b) the names of the shareholders, Gaétan Gagné, Léa D’Amboise and Aldo Raffo, and (c) the names of Gaétan Gagné and Aldo Raffo as directors of 9129 Inc., replacing Jean-François Gagné.

[9] Mr. Dorais signed a sworn statement dated May 31, 2019, stating that Gaétan Gagné’s name was mistakenly added as director of 9129 Inc. on November 22, 2006. According to Mr. Dorais, Gaétan Gagné had loaned money to his son to replenish 9129 Inc.’s coffers, but the latter was not acting as a director. The sworn statement and a copy of the amended return filed with the Registraire des entreprises du Québec, dated November 22, 2006, were adduced in evidence.

[10] During his examination, Mr. Dorais said he had followed Jean-François Gagné’s verbal instructions as to the filing of the amended return with the Registraire des entreprises du Québec and that he did not then conduct any audits on his records, 9129 Inc.’s internal documents or the 9129 Inc. minute book. Mr. Dorais stated that he did not have the mandate to file annual updates with the Registraire des entreprises du Québec. His only involvement in this regard was to prepare and file the amended return of November 22, 2006.

[11] According to Mr. Dorais, the facts alleged in his sworn statement are true based on the information he had at his disposal at the time. However, he admitted that he was unable to consult 9129 Inc.’s records or those of Gaétan Gagné and Jean-François Gagné because they had all been destroyed.

[12] Sylvain Brunet testified at the hearing as 9129 Inc.’s external accountant from 2004 to 2010. As such, he prepared the financial statements (notices to readers) of the said company to be signed by Jean-François Gagné. He also prepared and filed the 2004, 2005 and 2006 annual returns with the Registraire des entreprises du Québec.

[13] Mr. Brunet stated that, from 2004 to 2010, he did not know Gaétan Gagné personally and that he never spoke to him. However, at one point, Mr. Brunet noted that Gaétan Gagné was a director of 9129 Inc.

[14] Mr. Brunet explained that he maintained 9129 Inc.'s General Ledger and kept track of the bank account and purchases. Mr. Brunet's office also prepared the tax returns to be signed by Jean-François Gagné.

[15] Mr. Brunet indicated that 9129 Inc.'s tax returns and financial statements for the 2009 and 2010 taxation years were filed late in 2013 after financial statements for the 2010 taxation year were filed with the tax authorities. Mr. Brunet explained that the said financial statements for the 2010 taxation year did not accurately reflect 9129 Inc.'s financial position because they had been prepared by another firm of accountants to secure financing or to sell the business.

[16] Mr. Brunet confirmed that the restaurant operated by 9129 Inc. ceased to operate in December 2009, i.e., in the fiscal year ending February 28, 2010, and that the assets of 9129 Inc. were sold on July 21, 2010. The contract of sale of 9129 Inc.'s business was signed by Jean-François Gagné.

[17] Léa D'Amboise also testified at the hearing. She is Jean-François Gagné's former spouse. The couple separated in 2008 after having lived together for seven years. She started working at the "Nuevo" restaurant in 2003. At the time, she was in charge of managing the employees and helped with the accounting by paying supplier invoices. Jean-François Gagné was solely in charge of making bank deposits, signing cheques and preparing income tax returns with his accountant.

[18] 9129 Inc.'s 2004 annual return, filed with the Registraire des entreprises du Québec on May 25, 2006, reported that Léa D'Amboise was a shareholder and director of the company. 9129 Inc.'s 2005 annual return, filed with the Registraire des entreprises du Québec, also reported that Ms. D'Amboise was a shareholder and director of the company.

[19] On June 26, 2006, Ms. D'Amboise signed the amended return filed with the Registraire des entreprises du Québec. The return stated that Gaétan Gagné was a shareholder, holding more than 50% of 9129 Inc.'s shares, and a director replacing Jean-François Gagné. During her testimony, Ms. D'Amboise confirmed that the signature on the said amended return was hers and that Mr. Dorais had prepared the said amended return.

[20] Léa D'Amboise stated that she did not speak to Gaétan Gagné about this change of director of 9129 Inc. To her knowledge, Gaétan Gagné did not come to the restaurant very often. He would occasionally drop in for a beer.

[21] Hélène Goulard, Gaétan Gagné's administrative assistant for 34 years, testified at the hearing to confirm Mr. Gagné's signature on certain documents. She confirmed Gaétan Gagné's signature on the Notice of Objection to Notice of Assessment No. F-044781 dated June 26, 2013. However, she did not recognize his signature on 9129 Inc.'s amended return filed with the Registraire des entreprises du Québec dated October 6, 2009, in which Mario Bourgoïn was reported to be a shareholder of the company and a director of the company, replacing Léa D'Amboise and Aldo Raffo.

[22] Ms. Goulard did not recognize Gaétan Gagné's signature on an information return for the Québec Business Register signed on August 28, 2008. The information return was blank and did not contain any information.

[23] Jean-François Gagné testified at the hearing. After obtaining a technical diploma in civil engineering, Mr. Gagné operated restaurants all his life. In 2003, he opened the restaurant known as "Restaurant Bar Nuevo Mexicain," and in 2006, he recruited new partners, Léa D'Amboise and Aldo Raffo. After a change of concept, the restaurant operated under the corporate names "Nuevo Resto Bar" and "Nuevo Resto Bar Supperclub Tapas."

[24] To overcome the restaurant's financial difficulties, Mr. Gagné obtained loans from his father, who had to mortgage his home and a duplex. To ensure the repayment of these loans for an undetermined amount, Mr. Gagné assigned his shares to his father and made him a 9129 Inc. shareholder. Mr. Gagné testified that he was unaware that his father had also been appointed a director of the company.

[25] Mr. Gagné explained the circumstances of his father's resignation as director of 9129 Inc. He had called his father to have him sign documents relating to the financing of the restaurant. According to the testimony, his father did not know that he was a director of the said company. His father was apparently very angry and then allegedly gave him a handwritten resignation letter. That letter was not adduced in evidence, and Mr. Gagné said he was surprised to find that formal documents had been prepared. These included a typed notice of resignation in effect from December 8, 2007, but dated January 1, 2008, and a resolution of the 9129 Inc. Board of Directors dated January 1, 2008, formalizing Gaétan Gagné's resignation as director of the company and appointing Jean-François Gagné as president of the

company, to replace Gaétan Gagné. The said resolution was prepared by Mr. Dorais and signed by Jean-François Gagné. However, the change was not made in the Québec Business Register.

[26] Gaétan Gagné's replacement as director of 9129 Inc. by Jean-François Gagné was only filed with the Québec Business Register on February 9, 2012, following a current annual updating declaration from 9129 Inc. for 2011, which was produced and signed by Adrian Popovici, a partner of Mr. Dorais.

[27] Mr. Gagné also explained that the *pro forma* financial statements for the fiscal year ending February 28, 2010, were prepared by Luc Dubé, an accountant who specialized in securing financing. The financing would be used to expand the restaurant, and the expansion would cover the entire rear terrace of the restaurant, which generated about half of the restaurant's income. According to Mr. Gagné, these *pro forma* financial statements were submitted to the Caisse de dépôt et placement du Québec, which, indeed, loaned 9129 Inc. the funds. However, the said *pro forma* financial statements were mistakenly sent to the Agency, which assessed 9129 Inc. on the basis of this document. According to Mr. Gagné, the Agency's assessment was based on a clearly exaggerated and unrealistic turnover.

[28] Valérie Casgrain, Team Leader, Advanced Collection with the Agency; Chantal Thériault, Team Leader, Income Tax Audit with the Agency; and Simon Rocheleau, Objection Officer with the Agence du Revenu du Québec, testified on behalf of the respondent.

[29] Ms. Casgrain provided background information on the 9129 Inc. case and on the late Gaétan Gagné. Following a tax audit, 9129 Inc. was assessed pursuant to the ETA for the periods from November 30, 2006, to August 31, 2010. Through the Agency, the Canada Revenue Agency exercised its remedies against 9129 Inc. and obtained two certificates under section 316 of the ETA (ETA-1883-12 and ETA-7978-12) and two writs of execution issued by the Federal Court. The writs were respectively dated November 30, 2012, and December 10, 2012, and were returned unsatisfied, by a bailiff on January 11, 2013.

[30] Since the remedies against 9129 Inc. were exhausted, on January 8, 2013, the Agency sent Gaétan Gagné a letter of Notice of Intent to assess him as a director of 9129 Inc. registered in the Québec Business Register during the period from December 1, 2006, to August 31, 2010. A questionnaire to be completed by Gaétan Gagné was attached to the letter. Gaétan Gagné acknowledged receipt of this letter but did not complete and return the questionnaire as requested.



[31] On May 22, 2013, Gaétan Gagné was assessed a net tax of \$162,696.42 as well as related interest and penalties that 9129 Inc. should have paid pursuant to paragraph 228(2) of the ETA while he was a director of that company.

[32] According to the information of record, during their discussions with the representatives of the Agency, neither Gaétan Gagné and his representatives, nor Jean-François Gagné ever mentioned that Gaétan Gagné was not a director of 9129 Inc.

[33] Chantal Thériault testified at the hearing. Ms. Thériault explained that she audited 9129 Inc.'s income tax returns for the periods from March 1, 2008, to July 31, 2010. The auditor indicated that no income tax returns were filed after March 1, 2010, and that she did not have access to the accounting records for the years that were audited. The income tax returns could not be reconciled. The auditor noted substantial discrepancies between the estimated taxes to be remitted and the income reported in the financial statements. Accordingly, 9129 Inc. was assessed on the sales tax discrepancies, and all the input credits claimed were denied because the auditor did not have access to the invoices or any accounting records.

[34] The auditor's report also noted that 9129 Inc. had undergone a prior audit for the period from September 1, 2004, to November 30, 2006, and that taxes collected and not remitted had been assessed at that time. This was therefore a repeat offence warranting the imposition of the penalty under section 285 of the ETA.

[35] The auditor indicated that the difference between the computation of taxes to be remitted and taxes to be paid was based on the *pro forma* financial statements of February 28, 2010, and that, for the following year, the difference was computed according to an estimate because there were no accounting records.

[36] The auditor stated that, while conducting her audit, she never saw the financial statements for the 2008, 2009 and 2010 taxation years that were produced by Gaétan Gagné at the objection stage.

[37] Simon Rocheleau testified at the hearing. He dealt with Gaétan Gagné's case at the objection stage. He explained that, according to the Québec Business Register, Gaétan Gagné was a director of 9129 Inc. until 2012. Gaétan Gagné's Notice of Resignation as director of 9129 Inc. came into effect on December 8, 2007, but was signed on January 1, 2008. Mr. Rocheleau did not accept the Notice of Resignation because of the inconsistencies in the dates and the lack of follow-up to formalize the resignation.

[38] Mr. Rocheleau further explained that the resolutions of the company's Board of Directors, adopted on January 1, 2008, formalizing Gaétan Gagné's resignation as director of 9129 Inc. and appointing Jean-François Gagné president of 9129 Inc., were only submitted to him by Mr. Dorais on May 1, 2014, that is, 11 months after Gaétan Gagné filed the Notice of Objection.

[39] Mr. Rocheleau also indicated that the resolutions of the Board of Directors referred to in the previous paragraph were signed by Jean-François Gagné when he was not even a director of 9129 Inc.

[40] Mr. Rocheleau testified that Gaétan Gagné's representatives and advisers never denied that Mr. Gagné was the *ex officio* director of 9129 Inc. Their position was rather that Mr. Gagné never acted as a *de facto* director of 9129 Inc. Rather, the *de facto* director of 9129 Inc. was Jean-François Gagné, who managed all of the restaurant's operations.

#### Positions of the parties

##### The appellant

[41] The appellant made the following arguments:

- a) Gaétan Gagné was never validly appointed *ex officio* director of 9129 Inc. and, if he had been, he validly resigned on January 1, 2008. As a result, the assessment is time-barred within the meaning of subsection 323(5) of the ETA;
- b) Gaétan Gagné has never been a *de facto* director of 9129 Inc. and, if at some point in time he was, he ceased to be in the two years preceding the Notice of Assessment of May 22, 2013. As a result, the assessment is time-barred within the meaning of subsection 323(5) of the ETA;
- c) Gaétan Gagné is entitled to a due diligence defence because he exercised the degree of care, diligence and skill that a reasonably prudent person would have exercised in comparable circumstances. As a result, he could not have been aware of any omission on the part of 9129 Inc.;
- d) the assessment against 9129 Inc. is ill-founded given that it was made on the basis of *pro forma* financial statements when the actual income of the restaurant for the relevant periods was much lower and that 9129 Inc. ceased its operations in December 2009.

The respondent's position

[42] The respondent's position was based on the following:

- a) Gaétan Gagné never personally claimed that he was not a director of 9129 Inc. In the Notice of Objection that he signed while alive, Gaétan Gagné did not deny that he was the director of 9129 Inc. Rather, he cited the two-year time limit following his resignation in January 2008. In addition, since three notices of resignation as director of 9129 Inc. have been adduced in evidence, it is difficult to argue that Gaétan Gagné was never a director of this company;
- b) Gaétan Gagné provided \$150,000 to fund the operations of 9129 Inc.'s restaurant. It was therefore to be expected that he was appointed director of the said company to oversee his financial interests;
- c) entries in the Québec Business Register are proof of their content with respect to third parties in good faith;
- d) Mr. Dorais admitted to Simon Rocheleau that Gaétan Gagné was an *ex officio* director of 9129 Inc.;
- e) the appellant did not refute the Minister's assumptions of fact that Gaétan Gagné was a shareholder and director of 9129 Inc. during the period at issue, and the appellant did not prove the facts alleged in its Notice of Appeal on a balance of probabilities. The appellant did not provide any evidence that Gaétan Gagné performed his duties with the degree of diligence and prudence that a reasonably prudent person would have exercised in comparable circumstances.
- f) the Minister correctly used 9129 Inc.'s *pro forma* financial statements for the fiscal year that ended on February 28, 2010, because they were the only financial statements available at the time of the audit. For the subsequent fiscal year, 9129 Inc.'s tax numbers were used by 9225-0729 Québec Inc., a company controlled by Mario Bourgouin, a friend and former employee of the restaurant. This use of 9129 Inc.'s tax numbers after December 2009 shows that 9129 Inc. continued its operations through an agent.

Applicable law

[43] The relevant sections of the statutes applicable to this case are as follows: subsections 299(1), (3) and (4), subsections 323(1), (2), (3), (4) and (5) of the ETA, sections 123.31, 123.32, 123.76, and 123.81 of Part 1A of the *Quebec Companies Act* and section 82 of the *Act respecting the legal publicity of sole proprietorships, partnerships and legal persons*.

[44] The relevant sections of the ETA read as follows:

**Minister not bound**

299(1) The Minister is not bound by any return, application or information provided by or on behalf of any person and may make an assessment, notwithstanding any return, application or information so provided or that no return, application or information has been provided.

...

**Assessment valid and binding**

(3) An assessment, subject to being vacated on an objection or appeal under this Part and subject to a reassessment, shall be deemed to be valid and binding.

...

**Assessment deemed valid**

(4) An assessment shall, subject to being reassessed or vacated as a result of an objection or appeal under this Part, be deemed to be valid and binding, notwithstanding any error, defect or omission therein or in any proceeding under this Part relating thereto.

**Liability of directors**

323(1) If a corporation fails to remit an amount of net tax as required under subsection 228(2) or (2.3) or to pay an amount as required under section 230.1 that was paid to, or was applied to the liability of, the corporation as a net tax refund, the directors of the corporation at the time the corporation was required to remit or pay, as the case may be, the amount are jointly and severally, or solidarily, liable, together with the corporation, to pay the amount and any interest on, or penalties relating to, the amount.

**Limitations**

(2) A director of a corporation is not liable under subsection (1) unless

- (a) a certificate for the amount of the corporation's liability referred to in that subsection has been registered in the Federal Court under section 316 and execution for that amount has been returned unsatisfied in whole or in part;
  - (b) 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 in subsection (1) has been proved within six months after the earlier of the date of commencement of the proceedings and the date of dissolution;
- or

(c) 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 in subsection (1) has been proved within six months after the date of the assignment or bankruptcy order.

### **Diligence**

(3) A director of a corporation is not liable for a failure under subsection (1) where the director exercised the degree of care, diligence and skill to prevent the failure that a reasonably prudent person would have exercised in comparable circumstances.

### **Assessment**

(4) The Minister may assess any person for any amount payable by the person under this section and, where the Minister sends a notice of assessment, sections 296 to 311 apply, with such modifications as the circumstances require.

### **Time limit**

(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.

[45] The relevant sections of the *Quebec Companies Act* are:

123.31. Third persons may presume that

- (1) the company exercises its powers within the scope of its articles and by-laws and the unanimous agreement of the shareholders or the statement referred to in section 123.91;
- (2) the documents deposited in the register under this Part contain true information;
- (3) the directors and officers of the company validly hold office and lawfully exercise the powers arising therefrom;
- (4) the documents of the company issued by one of its directors, officers or other mandataries are valid.

123.32. Sections 123.30 and 123.31 do not apply to third persons in bad faith or to persons who ought to have knowledge to the contrary by virtue of their position with or relationship to the company.

123.76. Notwithstanding the expiry of his term, a director remains in office until he is re-elected, replaced, or removed.

A director may resign from office by giving notice to that effect.

123.81. Within 15 days after a change is made to the composition of the board of directors, the company must give a notice of a change by filing a declaration to that effect in accordance with the Act respecting the legal publicity of enterprises (chapter P-44.1).

[46] Section 82 of the *Act respecting the legal publicity of sole proprietorships, partnerships and legal persons* reads as follows:

82. Information relating to a registrant may be set up against third persons from the time it is entered in the statement of information. Third persons may submit any proof to refute the information contained in a declaration or in a document transferred to the enterprise registrar under section 72, 72.1 or 73.

That information shall include:

- (1) the registrant's name and, if previously registered, its business number;
- (2) any other name used by the registrant in Québec;
- (3) an entry indicating the fact that the registrant is a natural person operating an enterprise or, as the case may be, an entry indicating the registrant's juridical form and the Act under which the registrant is constituted;
- (4) the registrant's domicile;
- (5) the domicile elected by the registrant for the purposes of this Act with an entry indicating the name of the addressee;
- (6) the names and domiciles of the directors, with an entry indicating the position held by each;
- (7) the names and domiciles of the president, secretary and principal officer, where they are not members of the board of directors, with an entry indicating the positions they hold;
- (8) the name and address of the registrant's attorney;
- (9) the name, address and capacity of the person mentioned in section 5;
- (10) the address of the principal establishment possessed by the registrant in Québec;
- (11) the name and domicile of each partner, with an entry indicating that no other person is a member of the partnership, and distinguishing, in the case of a limited partnership, the general partners from the special partners known at the time the contract is entered into;
- (12) the object pursued by the partnership;
- (13) the name of the State in which the registrant was constituted as a legal person and the date of constitution;
- (14) the name of the State in which the amalgamation or division giving rise to the legal person took place, the date of the amalgamation or division and the name, domicile and business number of any legal person that was a party to the amalgamation or division;
- (15) the date of its continuation or other transformation.

For the purposes of article 2195 of the *Civil Code*, only the information described in the second paragraph is that required in a declaration of partnership or an amending declaration.

### Analysis

[47] The first issue to be resolved in this case is whether, according to the Québec Business Register, Gaétan Gagné was a director of 9129 Inc. between the time he was registered as a director, i.e. on June 26, 2006, and the time he was removed as a director, i.e. on February 9, 2012.

[48] Gaétan Gagné was registered in the Québec Business Register as the majority shareholder and sole director of 9129 Inc., replacing Jean-François Gagné pursuant to an amended return signed by Léa D'Amboise on June 26, 2006.

[49] Gaétan Gagné was again registered in the Québec Business Register as a shareholder and director of 9129 Inc., replacing Jean-François Gagné pursuant to a mandate (agency agreement) given to Mr. Dorais by Jean-François Gagné. Jean-François Gagné's motivation seems to have been to protect his father as creditor, who had loaned him money to finance the restaurant's operations. According to the evidence, the corporate formalities to make Gaétan Gagné a shareholder and director of 9129 Inc. were not observed, and there is no evidence that Gaétan Gagné agreed to become an 9129 Inc. shareholder and director.

[50] Mr. Dorais' affidavit stating that Gaétan Gagné was mistakenly appointed director of 9129 Inc. cannot have probative value in the circumstances because Mr. Dorais did not conduct an audit of his records and simply relied on what Jean-François Gagné told him.

[51] In the circumstances, it seems to me to be very plausible that Gaétan Gagné was appointed director of 9129 Inc. because he held more than 50% of the 9129 Inc. voting shares.

[52] Since the information on 9129 Inc. contained in the Québec Business Register is proof of its content and is binding on third parties in good faith, the Agency was fully justified in considering Gaétan Gagné a director of 9129 Inc.

[53] Moreover, Gaétan Gagné's status as director of 9129 Inc. has been confirmed by the various resignation documents adduced in evidence. First, there was the Notice of Resignation, dated January 1, 2008, signed by Gaétan Gagné, announcing

his resignation effective December 8, 2007. Second, there were the resolutions of the 9129 Inc. Board of Directors adopted on January 1, 2008, pursuant to which Gaétan Gagné's resignation as director of 9129 Inc. was accepted, and Jean-François Gagné's appointment as president of 9129 Inc., replacing Gaétan Gagné, was confirmed. These resolutions were adopted on January 1, 2008, and signed by Jean-François Gagné when he was not elected director of the said company. Gaétan Gagné's resignation was not entered in the Québec Business Register until February 9, 2012.

[54] In view of the foregoing, it is appropriate to find that Gaétan Gagné was a *de jure* director of 9129 Inc. until February 9, 2012, i.e. during the two years preceding the Notice of Assessment of May 22, 2013. Therefore, the assessment of May 22, 2013, was not time-barred within the meaning of subsection 323(5) of the ETA.

[55] Having found that Gaétan Gagné was a *de jure* director of 9129 Inc. during the Period, it is not necessary to consider whether he was a *de facto* director of 9129 Inc. According to the evidence of record, it is clear that Jean-François Gagné was acting as a *de facto* director of 9129 Inc. during the period in issue.

[56] Although Gaétan Gagné took certain steps to help 9129 Inc. meet its financial obligations, there is no evidence that Gaétan Gagné performed his duties with the degree of diligence and prudence to prevent 9129 Inc. from failing to meet its tax obligations that a reasonably prudent person would have exercised in comparable circumstances. Concretely, Gaétan Gagné did not take such steps, although he was aware of 9129 Inc.'s financial difficulties.

[57] In conclusion, all the criteria according to which Gaétan Gagné was liable as director of 9129 Inc. were met:

- a) Gaétan Gagné was a *de jure* director of 9129 Inc. during the period in issue;
- b) the assessment of May 22, 2013, against Gaétan Gagné was not time-barred;
- c) certificates for the amounts owed by 9129 Inc. were registered in the Federal Court under section 316 and execution for that amount was returned unsatisfied in whole or in part; and
- d) Gaétan Gagné is not entitled to a due diligence defence.

[58] Use of 9129 Inc.'s *pro forma* financial statements for the fiscal year ended February 28, 2010, was warranted in the circumstances because they were the only financial statements available during the tax audit performed by the Agency and



because the auditor did not have access to accounting records for the years audited. A taxpayer cannot invoke his own turpitude and subsequently seek adjustments.

[59] Be that as it may, as specified in subsection 299(1) of the ETA, the Minister is not bound by any return of a taxpayer and may make an assessment regardless of whether 9129 Inc. filed its income tax return and its financial statements for the fiscal year ended February 28, 2010, following the completion of the audit. It should also be noted here that under subsection 299(4) of the ETA, an assessment shall be deemed to be valid and binding, notwithstanding any error, defect or omission therein.

[60] For all of these reasons, the appeal is dismissed with costs.

Signed at Ottawa, Canada, this 17th day of November 2020.

"Réal Favreau"

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Favreau J.

Translation certified true  
on this 8th day of April 2021.  
François Brunet, Revisor

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