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## **COURTS PROVIDE GUIDANCE ON WHEN A DIRECTOR'S RESIGNATION IS VALID**

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*By Ryan M. Prendergast\**

### **A. INTRODUCTION**

Two recent Ontario decisions have dealt with the perplexing question of when the resignation of a director of a non-share capital corporation becomes effective and whether or not a director can later revoke such resignation after having made the resignation or, alternatively, before the date specified in the resignation. On June 28, 2012, the Ontario Superior Court of Justice released a decision in the matter of *Adams v. Association of Professional Engineers*.<sup>1</sup> This decision then was applied in the decision of *Kandolo v. Kabelu*,<sup>2</sup> which was released on September 7, 2012.

This *Charity Law Bulletin* summarizes these decisions, as well as provides commentary concerning the effective date of resignation of directors under the *Canada Not-for-profit Corporations Act* and the *Ontario Not-for-profit Corporations Act*.

### **B. OVERVIEW OF DECISIONS**

#### 1. *Adams* decision

In *Adams*, a member of Council for the Association of Professional Engineers of Ontario ("PEO") submitted a resignation by email to the other Council members indicating that he had resigned. The following day he sent a further email to the Council of PEO indicating that his resignation would be effective at the next

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<sup>1</sup> 2012 ONSC 3850 (CanLII). View online at: <http://canlii.ca/t/frvhg>

<sup>2</sup> 2012 ONSC 4420 (CanLII). View online at: <http://canlii.ca/t/fskxk>

annual general meeting of PEO. Ten days after sending this resignation the Council member sent a further email indicating that he was revoking his resignation. However, the remaining Council members subsequently voted to accept the resignation.

The court was left to decide when the resignation of a director of a non-share capital corporation becomes effective and whether or not it can be withdrawn by the director without the consent of the remaining directors. PEO was created by an act of legislature under the *Professional Engineers Act* and was therefore governed by that act, its regulations, the *Canada Corporations Act*, and PEO's own by-laws. The by-laws of PEO did not address the resignation of a director. The court examined the *Canada Corporations Act* and determined that the statute was also silent on the matter of a director's resignation. However, the court consulted the *Ontario Business Corporations Act*, as well as the *Canada Not-for-profit Corporations Act* ("CNCA"), which provide that a resignation is effective at the time the resignation is received by the corporation or at the time specified in the resignation, whichever is later.

Adams argued that directors of non-share capital corporations should not be subject to the standards of for-profit corporations under the *Ontario Business Corporations Act*. The court, however, found that there was no principled reason to treat directors of non-share capital corporations differently from other directors. In this regard, the court noted that the rationale that directors of for-profit corporations should be able to effectively resign without having their resignation accepted applied equally to directors of non-share capital corporations. The court adopted the rationale of not requiring the acceptance of a director's resignation by the remaining directors concerning for-profit corporations, and stated as follows:

First, to create certainty for the director as to when any liability he or she has might end and second, because absent some special contractual arrangement or special provision in the articles of incorporation, the corporation is not in a position to refuse the director's resignation and force him or her to stay on. Similarly, if effective resignations could be delivered and then revoked at will by the director, this could create uncertainty and confusion for the corporation and its remaining directors.

Having found that the resignation was unequivocal, the court found that the resigning director could not thereafter revoke his resignation without the consent of the other directors.

## 2. Kandolo decision

This decision concerned the effective date of the resignations of two directors of the Olangi Washo Foundation, a non-share capital corporation under the *Canada Corporations Act* and registered charity, and whether or not the directors could revoke their resignations.

A lawyer for the two directors wrote a letter to the board of directors of the foundation stating that the two directors were resigning and that the foundation was to notify all government agencies that they no longer had any obligations with the foundation. Enclosed with the letter were signed written resignations addressed to the board of directors. Approximately two months later the lawyer for the two directors wrote a letter to the foundation attempting to revoke the resignations of the directors.

The court followed the decision in *Adams* and considered the resignation of the two directors of a corporation under the *Canada Corporations Act* to have been effective when they were sent by letter to the corporation, subject to there being a contrary provision in the by-laws. Of note, the court examined the *Canada Business Corporations Act* (“CBCA”), which differs slightly from the *Ontario Business Corporations Act* (“OBCA”) that had been examined in *Adams*, in that the OBCA states the resignation is effective when it is received, while the CBCA states the resignation is effective when it is sent.

## C. COMMENTARY AND CONCLUSION

These decisions provide guidance for directors of charitable and non-profit corporations incorporated under the *Canada Corporations Act*. In addition, it should also be noted that the *Ontario Corporations Act* is silent on the resignation of a director. As a result, the decisions likely also apply to those charitable and non-profit corporations incorporated under the the *Ontario Corporations Act*. In this regard, subject to any contrary provision in the by-laws of a charitable or non-profit corporation, individuals holding the office of director should be certain they wish to resign from the corporation prior to submitting a written resignation to the corporation. Unlike the schoolyard, for corporate directors there are no "take-backs" for a resignation. In addition, even if it is a general practice of a corporation to accept resignations of directors or not, the acceptance of the resignation by the board of directors is not necessary in order for the revocation to be effective.

As noted in *Adams*, the CNCA will provide some clarity to situations like those discussed in the cases. The CNCA, similar to the CBCA, states at subsection 129(2) that 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. The ONCA, like its OBCA model, states in subsection 25(2) that a resignation of a director becomes effective at the time the resignation is received by the corporation or at the time specified in the resignation, whichever is later. While these cases confirm that a resignation cannot be revoked by a director, a director who is resigning should be aware of the subtle distinction between “sent” and “received” contained in each statute in order to determine when their resignation is effective.



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