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News

NOTICE
Important - New register in the Corporate records of a Federal corporation

As we discussed in detail in the November 2018 edition of the Telemark, the Minister of Finance of Canada announced several measures as part of the implementation of the 2018 budget. These measures were reflected in Bill C-86 tabled last October.

On December 13, 2018, Bill C-86 *Budget Implementation Act, 2018, No. 2* received Royal Assent and will come into force June 13, 2019.

As of June 13, all corporations governed by the *Canada Business Corporations Act*, except distributing corporations, will be required to maintain a register of all individuals with significant control over the corporation. Corporations Canada will provide additional information on the creation and maintenance of a register before June 2019.

Article

Key Supreme Court decision on sufficiency interest by shareholders to file claim
***Brunette* v. *Legault Joly Thiffault, s.e.n.c.r.l.*, 2018 SCC 55, EYB 2018-304886**

Do the shareholders have a right of action in respect of wrongdoing against the corporation in which they hold shares?

The courts below did not err in dismissing Fiducie's claim for lack of sufficient interest under art. 165(3) C.C.P. The principles of procedural and corporate law in Quebec bar shareholders from exercising rights of action that belong to corporations in which they hold shares, unless they can demonstrate a breach of a distinct obligation and a direct injury that is distinct from that suffered by the corporation in question.

Article 55 C.C.P. defines the basic rule of standing in Quebec and sets out the requirement that a party bringing an action must have a sufficient interest therein. The interest required must be direct and personal and cannot, barring an exception at law, be premised on another party's right of action. The existence of a sufficient interest is one of the conditions that define whether or not an action is admissible at law and it is one of the preliminary conditions that individuals must fulfill before a court will consider their claim. It is not presumed by the court; rather, it must be established by the claimant,

who must provide a precise statement of facts to underpin the sufficiency of his or her interest in the motion to institute proceedings.

A defendant may challenge the sufficiency of interest of the claimant under art. 165(3) C.C.P. at the preliminary motions stage, but this challenge will only succeed where the plaintiff clearly has no interest. Courts must act with prudence before preliminarily dismissing a claim on this basis; however, since a sufficient interest is a condition of admissibility for all claims, courts must be capable of determining its existence and dismiss claims where the alleged interest is insufficient. The sufficient interest of the claimant must therefore be capable of determination at the stage of preliminary motions. In all actions for civil liability, this requires that the sufficient interest of the claimant be established before the court considers the claim on its merits.

Like other claimants with the capacity to act, the corporation itself must exercise its rights of action in its own name. The corollary is that shareholders may not personally exercise a right of action that belongs to the corporation. In *Houle* v. *Canadian National Bank*, [1990] 3 S.C.R. 122, the Court recognized that in certain circumstances shareholders may possess their own right of action against the same defendant as the corporation if they can establish (1) that the defendant breached a distinct obligation owed to the shareholders, and (2) that this breach resulted in a direct injury suffered by the shareholders, independent from that suffered by the corporation.

In this case, B and M failed to demonstrate that Fiducie had an independent cause of action in civil liability against the professionals. The alleged facts that relate to the first requirement of *Houle* refer primarily to legal obligations owed to the corporations of Groupe Melior and not to Fiducie.

As for the second requirement, the injury alleged by Fiducie to have been caused by the professionals — the bankruptcy and ensuing loss of the seniors' residence — was suffered by the corporations of Groupe Melior, not directly by Fiducie.

These residences belonged to the corporations and not to Fiducie, although as the ultimate shareholder, it inevitably suffered from the bankruptcy.

Per **Côté** J. (dissenting): The appeal should be allowed. The courts below erred in dismissing Fiducie's motion to institute proceedings ("MIP") at the preliminary stage.

Where the allegations are not contradicted, the court must assume them to be true. Given the serious consequences of dismissing an action prematurely, the plaintiff must be given an opportunity to be heard on the merits if there is any doubt.

The shareholder's damage need not be unrelated to that of the corporation. In *Houle*, the Court insisted only on damage that was direct and personal — as required by the *Civil Code of Québec* — and explicitly recognized that a loss in the value of shares may, in exceptional circumstances, constitute such damage. Once the value of shares is at issue, a shareholder's damage cannot be completely dissociated from that of the corporation. The Court of Appeal therefore erred in this case by requiring that Fiducie allege damage that was entirely distinct from and independent of the damage sustained by the Groupe Melior corporations.

At the preliminary stage, the allegations in the MIP are sufficient to establish that Fiducie has the necessary interest to bring an action. According to the uncontradicted allegations, there were separate

contracts of mandate between, on the one hand, Fiducie and the professionals and, on the other hand, the Groupe Melior corporations and the same professionals. It is also alleged in the MIP that the professionals breached their obligations under their mandates with Fiducie, thereby causing direct personal damage to it, that is, the destruction of its trust patrimony. As for the use of the value of the seniors' residences owned by the Groupe Melior corporations as a method of valuation, it is a question that relates solely to the quantum of damages, and not to the very existence of damage. To the extent that there is ambiguity in the allegations with regard to the amount of the damages being claimed, the solution lies in an amendment of the MIP and in the expert evidence that will be presented at trial, not in the death sentence represented by dismissal of the action at the preliminary stage.

In this case, therefore, it is for the trial judge to determine, after reviewing the evidence, whether the alleged breaches, damage and causal connection are sufficient to establish Fiducie's interest on the merits.

The scarcity of judicial resources must not become a pretext for limiting access to the courts to cases in which there is a clear chance of success or to plaintiffs whose interest is not in any doubt.

Jurisprudence

Gervais Lapierre* v. *Yassine
18 June 2018, Court of Québec, EYB 2018-296865

Application for revocation of judgment. Granted. Request for resolution of a contract for sale of shares. Granted in part.

Sales contract for shares already issued; Art. 58 of an *Act respecting the transfer of securities and the establishment of security entitlements*; Non-registration in the registers; Bankruptcy of the corporation; Absence of formal notice to perform the obligations; Sufficient cause.

The contract cannot be resolved under section 1458 C.C.Q. Although Lapierre was never registered as a shareholder in the corporate records of 9267, no resolution was passed to confirm his shareholder status, no share certificates were given to him and he did not receive any dividends, he did become a shareholder upon the conclusion of the contract. None of the shortcomings cited caused him any prejudice since no shareholders' meeting was held after the conclusion of the contract, the shares sold were already issued and no dividends were ever paid to anyone. Although the articles of 9267 include a share transfer restriction clause in the absence of a directors' resolution, the share purchase agreement represents a "security holders' agreement". Since the defendant's non-performance did not cause any injury to Lapierre, he is not entitled to a refund of his initial investment of $30,000.

The contract cannot be resolved under article 1590 C.C.Q. and 9267 cannot be considered a debtor since it was not party to the contract of sale. As signatories of the contract, Lapierre's co-shareholders are his personal debtors. The non-registration of Lapierre in the corporate records constitutes a breach of their obligations by the co-shareholders which cannot be justified by a lack of liquidity. Lapierre has not proved that it has formally notified the other shareholders in default to fulfill their obligations. Thus, he cannot avail himself of the penalties provided for in article 1590 C.C.Q.

The *Act respecting the transfer of securities and the establishment of security entitlements* (TSA) applies to the sale of the disputed shares. The contract is resolved under section 58 LTVM; Lapierre must receive $30,000. In fact, the purchaser of shares has the right to demand from sellers any document necessary for the registration of the transfer of shares in the corporation's registers. The responsibility for registration rests with the purchaser. No prejudice suffered must be proven by the person who invokes a termination of contract under section 58 LTVM. Only the failure to provide, in particular, any document necessary for the registration of the transfer or the failure of the authors of the transfer to proceed with the registration must be demonstrated when they have undertaken to do so. In this case, the sales contract provides that the sellers will take care of the registration, which they did not do subsequently. The co-shareholders of Lapierre never gave him any document, despite his repeated requests to this effect. Since the sale of shares was made in the course of carrying on a business, the co-shareholders' obligation is solidary. Louquit is therefore ordered to pay Lapierre the sum of $30,000. 9267 not being party to the contract, the introductory claim against it is dismissed.

H.R.* v. *Compagnie A
July 31, 2018, Superior Court, EYB 2018-297363

Application for rectification of abuse of power or iniquity under the *Business Corporations Act*. Granted in part. Claim for damages. Rejected.

Shareholder blocking a real estate development plan; Withdrawal of business; Forced redemption; Non-compliance with the rules provided for in the shareholders' agreement; Abusive and oppressive behaviour of other shareholders.

The Applicant was storing garbage in the leased premises of 2597. He could have no reasonable expectation that 2597 would allow him to remain on the premises and render impossible any development plan for the building. The plaintiff's conduct constituted a withdrawal of the business which permitted the redemption of his shares. The redemption made is however not valid. The defendants failed to meet the deadline and, having first personally decided to purchase the plaintiff's shares, retroactively cancelled the transfer in order to make a more financially beneficial redemption. The price fixed for the plaintiff's shares was not in conformity with the provisions of the agreement. The repurchase of the applicant's shares will have to be made at a price calculated under the agreement. In addition, because of their oppressive and abusive behaviour, the defendants will be required to pay the plaintiff $35,000 for inconvenience and inconvenience and $53,086.50 for extrajudicial fees.

Gouverneur inc.* v. *9215-0325 Québec Inc.
July 19, 2018, Court of Québec, EYB 2018-297753

(Excellent review of the legal principles, doctrine and case law establishing the right to guide the Tribunal on the penalty clause and also to determine whether related corporations are in fact alter ego of each other.)

Issues in dispute:

- Has Constructions C.V.K. contravened the commitments and obligations stipulated in the agreement?

- Are the sanctions contained in the agreement unreasonable because of its unreasonableness in its application?

Constructions C.V.K. argues that it is not it, but Group C.V.K. who violated Gouverneur's exclusive rights. However, C.V.K. is not party to the agreement.

In light of the overriding evidence, the Tribunal finds that Constructions C.V.K. and C.V.K. are related corporations which, in the specific context of the use of the LUX mark, are the alter ego of each other, and this, not only in view of the very close relationships they maintain, but also because of their actions following the formal notice, during the negotiations that led to the agreement and after the receipt of the various notices of non-compliance.

The Tribunal concludes that the penalty clause of the agreement becomes unreasonable in its application, in light of the circumstances of this case. It is therefore necessary to reduce the obligation to which Constructions C.V.K. must be bound.

Société d'investissements Rhéaume ltée* v. *Ponce
August 1, 2018, Superior Court, EYB 2018-297841

Motion for damages. Granted in part. Claim for damages for abuse of procedure. Rejected.

Share purchase by directors; Substantial profit; Use of information for personal benefit Appropriation of a business opportunity to the detriment of shareholders.

The directors of two insurance companies purchased shares held by two shareholders. They then resold these shares to another insurance company with profit.

Under the *Canada Business Corporations Act*, directors must, in the performance of their duties, act with integrity and in good faith in the best interests of the corporation.

By putting their personal interests above those of the shareholders, the directors did take a business opportunity to the detriment of the shareholders, which constitutes a violation of their legal and contractual obligations in this case.

The shareholders' request is thus welcomed in part. The directors are, therefore, jointly and severally condemned to pay the shareholders compensation amounting to $7,368,540.60 for one and $4,516,202.40 for the other.

As the shareholders have demonstrated the merits of their action, it is clear that their lawsuit is neither frivolous nor defamatory.