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"Top 20" Decisions of 2016

These are, in our view, the decisions published in 2016 in the Telemark deserving our special attention. Although it is highly subjective, this list contains twenty unavoidable decisions in corporate law. There are others, but it was necessary to make choices.

20. *Air Algérie* v. *SM Group Inc.*

July 20, 2016, Superior Court, EYB 2016-268240

Air Algérie asks the Superior Court to cancel the certificate attesting the cancellation of the articles of amalgamation between GSM and SMI.

The application, as worded, is similar to the remedy of a paulian action in order to have the certificate of cancellation that GSM allegedly obtained in violation of its rights within the meaning of section 1631 CCQ. As stated in section 1634 CCQ, this remedy is opened only to the creditor possessing a certain claim which must exist at the time of the filing of the application and must be prior to the contested juridical act.

The fact that Air Algérie may lose the opportunity that existed only during the period of the merger in order to satisfy its claim with the assets of SM is not the type of situation contemplated by section 266 QBCA.

Air Algérie is not one of the creditors covered by the provisions of section 266 of the QBCA. Air Algerie's claim is contentious and speculative. Consequently, Air Algérie can not appear as an interested party within the meaning of section 461 of the QBCA and thus compel GSM to obtain the authorization of the Superior court to cancel its articles of amalgamation. The application is dismissed.

19. *Organisme d'autoréglementation du courtage immobilier du Québec* v. *Brousseau*

18 November 2016, Court of Québec, EYB 2016-273535

A partnership may be the subject of a criminal prosecution under the *Real Estate Brokerage Act*. However, the prosecutor filed a statement of offense alleging that the partnership had acted as a real estate broker without holding a permit, an offense for which only a natural person may be found guilty. However, an auctioneer is not necessarily a "liquidator" within the meaning of the law. It all depends on the context. The person responsible in the partnership has not established by balance of probability that he benefited from the liquidator's exception provided for in subsection 2 of section 2 of the *Real Estate Brokerage Act*.

18. *Rouhani* v. *GMR CPA inc.*

October 31, 2016, Superior Court, EYB 2016-272143

Plaintiff's application for an interim order seeking access to the documents to which she would normally be entitled as director and shareholder of the chartered accountants firm she allegedly founded with the Defendant, while they formed a couple, is granted. Defendant's objection to the effect that Plaintiff does not qualify as an "Applicant" within the meaning of sections 450ff. of the *Business Corporations Act* is, *prima facie*, contradicted by his own actions and by documents that he issued and executed since the creation of the corporation. For instance, the business bank account opening form not only bears his signature, but the Plaintiff's as well. The bank form also reveals that Defendant declared holding 75% of the shares while the Plaintiff held 25% of them that both could act as signatories of all banking documentation, and those parties were both directors of the corporation.

At this interim stage of the proceedings, Plaintiff must only establish, on a prima facie basis, that if in fact she is not actually a registered holder of the shares of the corporation (an information that she cannot confirm, being denied total access to the corporation's records), she can be considered to be a beneficial owner of said shares and be treated as a person eligible to avail herself of the remedies offered by sections 450, 451ff. of the Act. Plaintiff's appearance of a right that she is a shareholder of the corporation is, on a *prima facie* basis, serious and compelling. Moreover, based on the allegations of her original application, Plaintiff would also qualify under subsection 439(3) of the Act, as "any other person who, in the discretion of the court, has the interest required to make an application under this division". There is also *prima facie* evidence that Defendant has behaved in an oppressive manner that was and still is prejudicial to Plaintiff: his manoeuvres to suppress Plaintiff's name from all public corporate records and his refusal to give her any access to the information to which she is rightfully entitled as director and shareholder constitute blatant illustrations of an oppressive conduct. If the interim order sought is not granted, Plaintiff risks sustaining irreparable prejudice in her quest to get the Defendants to purchase her shares at their fair market value.

Postponing until the trial the issues of Plaintiff's shareholding and of the value of said shares would be counterproductive; the Court's limited resources must not be used to allow Plaintiff and her expert to analyze various corporate documents in the presence of the judge.

Considering indications of Defendant's attempts to exhaust Plaintiff financially, provisional execution is ordered notwithstanding appeal.

17. *Hotte* v. *Réparaphone inc.*

November 13, 2015, Superior Court, EYB 2015-272048

It is not necessary for the applicant to be impecunious for a provision for costs to be granted to him under section 443 of the *Business Corporations Act*. We have to apply the reasonable person test. However, a reasonable person would not take the risk of jeopardizing the financial security of his family to finance a legal battle. Thus, the fact that the applicant has $82,000 in an RRSP and that his spouse owns a cottage with a net value of $250,000 does not deprive him of the right to obtain a provision for costs of $10,000.

16. *Sovell* v. *2727901 Canada inc.*

September 28, 2016, Superior Court, EYB 2016-271220

In execution of a shotgun clause, the defendant "2727", controlled by the defendant Choueke offers to buy back the shares owned by Sovell in the applicant C-IN2. It is necessary to determine whether C-IN2 is indebted to 2727 and whether to correct an unfair situation regarding Sovell.

Expert evidence shows that 2727 has not advanced any money to C-IN2. The alleged loan of $1,961,079 is only the result of a journal entry in which an artificial debt has been created for 2727. The result is an injustice to Sovell. As an officer of C-IN2, Choueke exercised its powers unfairly *vis-à-vis* Sovell and failed in its duty to act in the best interest of C-IN2, favoring the interests of its other corporations and his. The argument that Sovell has been willfully blind cannot be accepted. Directors must, in the exercise of their duties, act in good faith in the best interests of the corporation, without the shareholders having to be wary of them. However, it is clear that Choueke sought to deprive Sovell of his right to know the details of the affairs of C-IN2 and prevented him from reacting earlier. At the moment Sovell questioned the financial statements, he received explanations in dribs and drabs. 2727 also published a conventional hypothec without delivery against the property of C-IN2 on the basis of a loan of nearly $2 million, which is not due by C-IN2. There is abuse and a remedy is needed. Sovell must be authorized, on behalf of C-IN2, to require based on receipt of payment not due, the reimbursement for expenses that were charged to him in double by Choueke's corporation. The notice to exercise the shotgun clause must also be adjusted so that any reference to a debt of C-IN2 2727 be withdrawn. As for mortgage securities issued against the property of C-IN2, they must be written off. Damages of $25,000 are awarded to Sovell for the damage suffered. Sovell is also entitled to reimbursement of $74,165 of the $99,165 he paid to the expert.

15. *Québec (Autorité des marchés financiers)* v. *Drouin*

18 July 2016, Québec Court, EYB 2016-269053

The exemption from the requirement to file a prospectus and to be registered as a broker that applies to a "closed company" or a "private issuer" shall not apply if the investment is made through a public offering. To determine whether an investment is made to the public, two tests apply, cumulative: the presumed knowledge and that of the "association". The first test is based on the premise that the people to whom a prospectus would be addressed, have access to information that would be disclosed in said prospectus and therefore do not need the protection afforded by the legislation on securities to make an enlightened investment decision. The second test relates to the association between the seller and the buyer of securities, which must be such that the seller will not be tempted to use unfair, improper or fraudulent practices to a purchaser with whom he has such a link, and that the buyer is in a better position to assess the honesty and integrity of the seller or persons associated with the issuer.

14. *Lapointe* v. *Gingras*

August 24 2016, Court of Québec, EYB 2016-270482

Even if he knew that the corporation's funds were insufficient to fully pay all creditors of the latter, the director and shareholder acted so as to benefit himself. He is the initiator of the payments made on his behalf and he cannot hide behind his mandate. He acted intentionally to deprive the applicant of his due

(a lawyer who has rendered professional services to the corporation). These preferential payments may not be set up against the applicant.

13. *Société immobilière Soutana inc.* v. *6027377 Canada inc.*

September 2, 2016, Superior Court, EYB 2016-270323

The request to exercise a right of first refusal in respect of a large lot is rejected. The sale of this land by the defendant Canada to a related corporation, the defendant Alberta, may be set up against the plaintiff and the corporate veil can not be lifted since the sale was not made in order to thwart the agreement that bound the plaintiff to Canada. However, the defendants Canada, Alberta, and Iacovelli are ordered to pay a compensation of $812,483 to the plaintiff for the damage they have caused it in the offending resale of the building, made for the sole purpose of favoring the defendant Iacovelli over the rights of the plaintiff.

Iacovelli and Alberta knew that the sale of the building and the benefit it would provide Iacovelli would result in a loss for the plaintiff and they acted in bad faith. A majority shareholder and director of a corporation can be held personally liable if he commits an extracontractual fault himself under a contract to which the corporation is a party. This tort is distinct from liability which may be held with the lifting of the corporate veil.

12. *Abdalla* v. *Kassis*

February 16, 2016, Superior Court, EYB 2016-262297

In 2012, Mr. Kassis sold 50% of the shares of his corporation to Mr. Adballa. The deed of sale provided that Mr. Kassis was to provide financial statements confirming that the corporation did not have any debt, which was not done. Afterwards, the financial statements showed a debt of over $400,000. The relationship deteriorated and both shareholders filed for oppression remedy. The Court joined the two actions.

The Court first concludes that the shareholders both committed acts that may be considered oppressive. The deadlock is total, the loss of confidence is definite and the obligation of the Court to redress the situation is imperative.

The conflict arose at the time of the signature of the deed of sale of the shares. There was no meeting of the will of the parties on an essential element of the contract. The latter must therefore be cancelled and the parties placed in the same situation as before the contract. The Court also grants the reimbursement of the additional investment of Mr. Adbella based on the concept of enrichment without cause.

11. *Sa.D* v. *R.E.*

April 11, 2016, Superior Court, EYB 2016-264460

The minority shareholder filed a motion for the issuance of a safeguard order against the director. The minority shareholder must demonstrate the appearance of right, the existence of irreparable harm, balance of inconvenience and the urgency of such an order. Based on all the evidence, it is clear that this is a situation where there is an urgent need for action to avoid aggravating the damage that the corporation's shareholders can undergo and, in particular the minority shareholder. Therefore, it is

urgent that the remedies requested be rendered now to prevent serious or irreparable harm to this shareholder.

10. *Fers et métaux américains, s.e.c.* v. *Gilbert*

February 29, 2016, Superior Court, EYB 2016-264720

Fers et métaux américains is a Québec subsidiary of a global corporation (AIM) operating in the field of recycling of metal and other materials. It has been doing business for a number of years with 9183-8268 Québec inc., a corporation doing business under the name Pièces d'auto universelles (PAU). PAU filed a notice of intent in September 2012. AIM is claiming from its two shareholders and directors the balance of cash advances made to PAU. AIM is basing its action on their conduct and their personal undertaking to guarantee the debt.

The Court analyses the provisions of sections 317, 1457, 1458, 2333 and 2335 C.C.Q. The evidence shows that AIM was not a lender but a purchaser of scrap metal. The advances are accounts on material. PAU's sole obligation is to make the material available following the cashing of the advances. The advances from AIM are not related to PAU's financial situation. The directors did not commit any extracontractual fault.

Regarding the personal guarantee, the Court indicates that the testimonies are not sufficient evidence of its existence.

9. *Basha* v. *Singh*

April 11, 2016, Superior Court, EYB 2016-264413

Mr. Basha was hired by 8378975 Canada inc. (Pro Global), a transport corporation, in February 2011. He claims that he was to become an equal shareholder (25%) from day one. The other three shareholders claim that he was to become an equal shareholder (25%) once the corporation would have reimbursed its loans.

Mr. Basha has since left the corporation and his now claiming oppression under the CBCA. He is asking that his shares be purchased by the other shareholders and he is also asking for $50,000 for moral damages.

Mr. Basha was appointed director and treasurer of Pro Global. His name does not appear on the enterprise register as a shareholder since the format of the report does not allow for more than the name of the three principal shareholders of a corporation.

The Court must determine:
Does Mr. Basha qualify as complainant under the CBCA?
Does Mr. Basha hold 25% of the shares of Pro Global?
If he is a shareholder, is he entitled to be paid the value of his shares?
What is the value of his ownership?
Are the defendants entitled to be compensated for their alleged damages.

The Court finds that Mr. Basha qualifies as complainant since he received a verbal promise that he would receive 25% of the shares of the corporation. The parties also acted as if he was a shareholder. The Court also finds that Mr. Basha was to become a shareholder and a director of Pro Global immediately upon joining the corporation. The Court is unable to find any conduct that would be characterized as oppressive. There are no legal grounds that would allow the Court to order the defendants to buy his shares.

With respect to Defendants' claim for damages, the Court finds that Mr. Basha did not use the procedures abusively and there is no ground to claim punitive damages.

8. *Sarrapuchiello* v. *Marzoli*

March 17, 2016, Court of Quebec, EYB 2016-264220

Mr. Sarrapuchiello invested $50,000 in Mazcorp Oil & Gas Inc. (Mazcorp) and received 200,000 common shares. He signed a Subscription Agreement. He claims that Mr. Marzoli, president of Mazcorp, guaranteed him principal repayment within six months in addition to a return of 20%.

Mr. Sarrapuchiello is now claiming the amount from Mazcorp and from Mr. Marzoli. He also alleges that the Subscription Agreement is null and void in the absence of a prospectus.

The Court finds that Mr. Sarrapuchiello has not established a commencement of proof that would enable him to contradict or vary the terms of the written and signed Subscription Agreement, pursuant to Article 2863 C.C.Q. The Subscription Agreement cannot be ignored and binds Mr. Sarrapuchiello.

With respect to the allegation that the Subscription Agreement is null and void in the absence of a prospectus, the Court finds that the exemption for an accredited investor provided by Regulation 45-106 respecting Prospectus Exemption (CQLR, c. V-1.1, r. 21) applies. In the Appendix A of the Subscription Agreement, Mr. Sarrapuchiello declared that he was an accredited investor, i.e. a person who, with his wife, has financial assets in excess of $1,000,000.

7. *Placements Michel Foix inc.* v. *Mérineau*

February 18, 2016, Superior Court, EYB 2016-262777

After seing Ms. Mérineau and Mr. Gauvreau present their brewing business on the show "Dragons", Mr. Foix, sole director and shareholder of Placements Michel Foix inc., contacts them to indicate his interest in investing in their business and becoming a shareholder. As the financing needs are urgent, Mr. Foix makes an advance of $100,000. The letter accompanying the disbursement indicates that the investment is fully conditional to a satisfying due diligence and includes the personal undertaking of Ms. Mérineau to reimburse the amount if Mr. Foix decides not to invest. The shareholder agreement is being prepared.

A few months later, not having any development regarding the shareholder agreement, Mr. Foix ends the negotiations and wishes to recover his investment. Ms. Mérineau alleges that she does not owe anything because her undertaking was limited in time and that Placement invested the money in the business. She files a cross-demand claiming damages.

The Court indicates that the evidence shows that there never was any agreement. It is clear that a satisfying shareholder agreement was essential for Mr. Foix to invest. The personal undertaking of Ms. Mérineau is clear.

6. *Montplaisir* v. *Agence du revenu du Québec*

February 3, 2016, Court of Quebec, EYB 2016-262494

The Québec Revenue Agency (QRA) issued an assessment to Ms. Montplaisir for source deductions that Centre de formation en entreprise inc. (CFE) failed to remit. Ms. Montplaisir alleges that although her name appears on the enterprise register, she did not play any role in the business and was only acting as nominee for her brother. She also alleges that she acted with reasonable diligence.

The evidence reveals that Ms. Montplaisir's signature appears on numerous declarations and resolutions, as well as on cheques and payment slips in the name of CFE. Moreover, jurisprudence establishes that the notion of reasonable diligence is based on an objective standard. The Court concludes that Ms. Montplaisir did not succeed in contesting the validity of the assessment.

5. *Livernois* v. *9270-0152 Québec inc.*

January 22, 2016, Superior Court, EYB 2016-262332

Defendants and mises-en-cause are asking the Court to ratify a transaction they allege was concluded with the plaintiffs on the use of a common expertise regarding the value of the shares. The expert was appointed by the Court. The evidence reveals that the defendants kept a right of veto on the documents they deemed relevant to remit to the expert and they had a parallel dialog with the expert, to the exclusion of the plaintiffs. The Court concludes that the integrity of the transaction is no longer assured. Defendants did not respect either the letter or the spirit of the agreement. Therefore, there is no transaction between the parties.

4. *Cabanes* v. *Archambault*

June 29, 2015, Superior Court, EYB 2015-254944

Olivier Cabanes, Cabanes Family Trust and OC Holdings inc. (collectively Cabanes), minority shareholders of Wajam Internet Technologies inc. (Wajam), filed for an oppression remedy under the CBCA and are asking for an interim order.

In April 2015, a resolution of the board of directors passes with a majority and pays a bonus to Mr. Archambault, declares dividends to the shareholders and sells two assets of Wajam to two corporations held by Mr. Archambault, approves the corporate credit card and authorizes the transfer of Ms. Janvier's shares from her trust to her holding corporation. Mr. Cabanes contests the legality of the resolutions, alleging insufficiency of the notice of meeting, addition of elements to the agenda, non-communication and unfounded essential documents. On June 4, 2015, the board of directors approves the resolutions adopted on April 9, notwithstanding Mr. Cabanes' dissidence.

The Court notes the acute conflict between the parties but cannot find in the allegations nor in the exhibits a strong prima facie evidence of oppression. It concludes that the resolutions of the board of

directors of April 9, 2015 were validly passed with respect to the required formalities. Mr. Cabanes fully participated in the meeting, thus waiving by his active presence his right to raise the irregularity of the notice of meeting, if there was any. These resolutions were also approved by the majority at a new meeting held on June 4. In addition, Mr. Archambault has, at all relevant times, disclosed his interest before voting on the resolutions, in a sufficiently precise manner.

The Court is of the opinion that the inquiry requested by Cabanes, with all its costly and fastidious steps, does not constitute in this case a proportioned or timely means to examine Mr. Archambault's expense account. It does not appear to be in the interest of Wajam to make it bear important inquiry expenses.

3. *Canada (Procureur général)* v. *Hôtels Fairmont Inc.*

December 9, 2016, Supreme Court of Canada, EYB 2016-273668

Both courts below erred in holding that the parties' intention of tax neutrality could support a grant of rectification. A common continuing intention does not suffice. Rectification is an equitable remedy designed to correct errors in the recording of terms in written legal instruments. It is limited to cases where a written instrument has incorrectly recorded the parties' antecedent agreement. In other words, rectification is not available where the basis for seeking it is that one or both of the parties wish to amend not the instrument recording their agreement, but the agreement itself.

On rectification, both equity and the civil law are ad idem, despite each legal system arriving at it by different paths — the former being concerned with correcting the document, and the latter focusing on its interpretation. This convergence is undoubtedly desirable.

These principles are to be applied in a tax context just as they are in a non tax context. This is to avoid impermissible retroactive tax planning. Appeal granted.

2. *Groupe Jean Coutu (PJC) inc.* v. *Canada (Procureur général)*

December 9, 2016, Supreme Court of Canada, EYB 2016-273667

A general intention of tax neutrality, in the absence of a precise juridical operation and a determinate or determinable prestation or prestations within the meaning of art. 1373 C.C.Q., cannot give rise to a common intention that would form part of the original agreement and serve as a basis for modifying the written documents expressing that agreement under art. 1425 C.C.Q. Contractual interpretation focuses on what the parties actually agreed to do, not on what their motivations were in entering into an agreement or the consequences they intended it to have. Therefore, when unintended tax consequences result from a contract whose desired consequences, whether in whole or in part, are tax avoidance, deferral or minimization, amendments to the expression of the agreement can be available only under two conditions. First, if the unintended tax consequences were originally and specifically to be avoided, through sufficiently precise obligations which objects, the prestations to execute, are determinate or determinable; and second, when the obligations, if properly expressed and the corresponding prestations, if properly executed, would have succeeded in doing so.

There was a mistake in the transactions agreed to, not in the way they were expressed.

Although rectification under Quebec civil law and in equity stems from different legal sources, they share similar principles and lead to similar results. Such similar results are particularly welcome in the

tax context, where the same federal tax legislation applies throughout the country. Both have the same purpose: to ascertain that the true agreement between the contracting parties is accurately expressed in the written instruments reflecting either the terms of the agreement or the execution of the obligations themselves. Both are strict: only the expression or transcription of the contract can be amended; the contract itself cannot be. Further, in both legal systems, the true agreement is paramount, not its intended consequences or effects. Appeal dismissed.

1. *Mennillo* v. *Intramodal inc.*

November 18, 2016, Supreme Court of Canada, EYB 2016-272834

The trial judge's factual findings are not reviewable on appeal because no palpable and overriding error is present here. M's oppression claim must accordingly be approached on the basis of the trial judge's factual findings to the effect that from May 25, 2005 onwards, M did not want to be a shareholder, did not want to be treated as such and, as a result, transferred his shares to R.

There are two elements of an oppression claim. The claimant must first identify the expectations that he or she claims have been violated and establish that the expectations were reasonably held. Then the claimant must show that those reasonable expectations were violated by conduct falling within the statutory terms, that is, conduct that was oppressive, unfairly prejudicial to or unfairly disregarding of the interests of any security holder.

In the present case, M's oppression claim is groundless. M could have no reasonable expectation of being treated as a shareholder: he no longer was and expressly demanded not to be so treated. As against the corporation, the most that can be said is that it failed to carry out M's wishes as a result of not observing certain necessary corporate formalities. But in light of these findings, it cannot be said that the corporation acted oppressively or that it illegally stripped him of his status as a shareholder. What happened is that the corporation failed to make sure that all the legal formalities were complied with before registering the transfer of shares to R. The acts of the corporation which M claims to constitute oppression were in fact taken, albeit imperfectly, in accordance with his express wishes.

The fact that a corporation fails to comply with the requirements of the CBCA does not, on its own, constitute oppression. What may trigger the remedy is conduct that frustrates reasonable expectations, not simply conduct that is contrary to the CBCA. In the present case, the failure to observe the corporate formalities in removing M as a shareholder in accordance with his express wishes to be so removed cannot be characterized as an act unfairly prejudicial to the extent that this omission deprived him of his status as a shareholder. The corporation failed to observe the formalities of carrying out his wish not to be a shareholder. Nor can the failure to properly remove him as a shareholder in accordance with his express wishes make it just and equitable for him to regain his status as a shareholder. Appeal dismissed.