Telemark • Volume 22 • Issue 10

December 2017

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News

Holiday Schedule – Service Availability

Be sure to check our holiday schedule to get all your critical documents in on time.

Please ensure that we receive all filing requests well in advance, particularly where a specific date is required.

With respect to the return of documents from governmental authorities, we also ask that you take into consideration the reduced schedules and request priority service where necessary to ensure your timelines are met.

The whole team at Marque d'or wishes you all a wonderful Holiday Season!

Corporations Canada has issued this notice:

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You can now buy copies of corporate documents filed under the *Canada Business Corporations Act* or the *Canada Not-for-profit Corporations Act* by using the Online Filing Centre. Your order will be processed within one business day.

Corporations Canada

Jurisprudence

Jolicoeur c. E-RIM Recrutement et mobilité internationale inc.

25 July 2017, Cour supérieure, EYB 2017-283367

At the argument of the three directors who argued that section 119 of the CBCA does not permit an employee to sue the corporation and, concurrently, its directors in the same class of proceeding to recover the unpaid wages, the plaintiff responds by inviting the court to give a broad and liberal interpretation to this provision. It invokes the principles of accessibility and promptness as well as the principle of proportionality provided for in the Code of Civil Procedure. It asks the court to grant it a stay, as permitted by the third paragraph of section 168 CCP, to modify the conclusions of her originating application in order to: (1) remove the finding of solidarity between, on the one hand, the corporate defendants and, on the other hand, the three defendants; and (2) to add a finding asking the court to authorize him to enforce the judgment against the directors six months after delivery of the judgment, if the execution against the defendants could not satisfy the amount awarded.

The court cannot grant this request. It considers that it cannot set aside a condition which is substantive on the basis of the principle of proportionality and sound management of justice. Section 119 refers to "preconditions" for the existence of liability: the liability of the directors is subject to the prior responsibility of the corporation recognized by a court. The plaintiff therefore has no choice: the liability of the defendants and their directors must be incurred in two stages in two separate, consecutive suits.

Bouchard c. Matte

3 August 2017, Superior Court, EYB 2017-283011

Section 241(3) of the CBCA gives the court the power to make "interim or final orders that it considers relevant" and provides a non-exhaustive list of examples of orders it may make. However, it does not provide for any rule regarding interim orders. In 2011, the Court of Appeal set out the principle that an interim order under section 241(3) of the CBCA must, in principle, meet the criteria ordinarily established in the case of an interim interlocutory injunction or safeguard order. It stated, however, that the criteria for the interim interlocutory injunction or the safeguard order should not be applied in full and without nuance at all times.

Certain circumstances may justify a modulation of these criteria, variations or even exceptions. For interim requests for production of documents, the Tribunal finds that the documentation orders are sui generis orders that fall outside the scope of safeguard orders as such. Although they are generally intermingled with requests to do or to commit specific actions often related to the administration of a business, these requests to communicate certain corporate documents are mostly attached to statutory obligations (ex.: provide financial statements to shareholders who request it), because the documents are relevant to the litigation (ss. 398 and 402 CCP) or because of a decision to manage the dispute. It is in this sense that the judicial demands relating to the documentation emanating from corporations must be distinguished. This does not mean that all documentary requests must be granted. In short, everything depends on the reason for the request and the documents requested. Where the plaintiff requires the documents to which he would have a statutory right as a shareholder or director, or a right under the by-laws of the corporation or the unanimous shareholder agreement, the court may order the production thereof without dwelling on the serious or irreparable harm, preponderance of inconvenience or urgency.

On the other hand, where the complainant's shareholder or director status is challenged, the court must decide whether the plaintiff can nevertheless receive the documents before the contestation is decided and the factors of the interim interlocutory injunction may be relevant. A plaintiff may also request documents that are relevant to the dispute and that will serve as evidence. In Groupe Soucy Inc., the parties had agreed to treat the application for a safeguard order for documents as a request for the transmission of documents in the context of an examination and to apply to it the usual criteria for the admissibility of documents, and not the criteria of the interim interlocutory injunction. This leads the court to consider whether it can treat the application for a safeguard order for documents as a request for transmission of documents in the course of an examination without the agreement of the parties. However, in the spirit of the Code of Civil Procedure, it believes it can do it in an appropriate case.

In order to decide whether this is an appropriate case, several factors may be relevant: 1) the relevance of the documents must be clear. If the relevance is unclear, it is prudent to wait to see how the case

develops and to deal with the matter when it occurs in the normal course of the dispute; 2) the documents must be important from the beginning of the file. If the documents are relevant to a remedy-related question (such as determining the value of the shares), it may be better to wait; and 3) production in the ordinary course of litigation must appear to be an ineffective solution because of delays and the multiplication of court vacancies. On the other hand, if the interrogatory process is already underway and is proceeding well, the parties can continue in this direction.

The plaintiff also asks the court to order the defendants to pay her a security for costs. Section 242(4) of the CBCA provides that, by giving effect to any application, action or proceeding under this Part, the court may order the corporation or its subsidiary to pay the complainant interim costs, including legal fees and disbursements, of which he may be accountable at the time of the final adjudication. Such an application can only be directed against the corporation or its subsidiary, and not the shareholders, directors or lawyers of the corporation. However, the plaintiff invokes the inherent power of the Superior Court, which allows it to order the payment of a security for costs even in the absence of an explicit statutory provision. That's what the Supreme Court decided in Okanagan. However, the reading of this decision shows that the exercise of this power is limited to cases where there are "sufficiently special circumstances for the court to be satisfied that the case belongs to this narrow category of causes justifying exceptional exercise of his powers". There is nothing special about oppression. Thus, there is no basis in the circumstances of this case for an order to be made against anyone other than those covered by section 242(4).

Construction CSC inc. c. Japy Électrique inc.

27 June 2017, Superior Court, EYB 2017-283050

Although the legal personality of a corporation is, in principle, distinct from that of its ruling soul, the sole shareholder of a corporation may have its distinct legal personality compromised if it has, in bad faith and through its fault, caused or perpetuated the confusion between him and his corporation, to the point of constituting a fraud. In the present case, the defendant, who is a shareholder of the defendant, a subcontractor retained by the plaintiff to perform work, has created confusion by using in the course of his business either his personal name or the name of a corporation or the numerical name of the latter. Moreover, this corporation did not exist at the time of the completion of the work. In addition, it was registered by two different corporations, one in which the defendant was the sole shareholder and the other in which the sole shareholder was his son. The defendant, by his behaviour, his actions and his registrations, acted with the gross intention to defraud by his lack of clarity as to the use of the name "Japy Electrique". As a result, the lifting of the corporate veil is required and he is ordered, jointly and severally with the two defendants, to reimburse the sums owed to the plaintiff, namely $39,118.93.

Anoutchine c. 9142-3467 Québec inc.

9 August 2017, Superior Court, EYB 2017-283220

The plaintiff asks the court to order the redemption of his shares at market value, which implies an analysis of the value of his contribution in the form of goods and services. He also asks the court to

declare that the defendants acted improperly or unfairly to him and that they must therefore repay misappropriated amounts of Artek's assets and pay him damages.

When commencing a remedy for oppression, the burden of proof rests with the plaintiff. He must not only demonstrate that he is a shareholder, but also that his reasonable expectations as a shareholder have been breached and that the breach is attributable to the actions of the corporation or its directors and constitutes abuse or an injustice.

With respect to the plaintiff's reasonable expectations, there was no evidence that they were compromised. The absence of an annual meeting of shareholders was never previously criticized by the plaintiff and is explained by the fact that the administration of the business was done on a periodic basis. Since access to the corporation's financial statements was never denied, the court does not believe that the receipt of annual audited financial statements was within the reasonable expectations of the applicant. The latter has not, as such, been the victim of an unfair or abusive act, despite the fact that the company has not respected its statutory obligations.

The removal of the plaintiff as a director cannot be considered an abusive or unfair act. It is justified by the disengagement of the plaintiff in the management of the company, by threats made against the other directors, by unauthorized and unjustified withdrawals of sums of money belonging to the company and by the fact that he appropriated the property of society. As for the allegations of embezzlement or cash sales allegedly made by the defendant co-shareholders, they are not supported by the evidence.

The transfer of all the assets of the corporation to a new entity formed by the defendant co-shareholders must be considered as an act of abuse against the plaintiff, who has not been informed, even if the transfer is justified by a desire to protect the commercial interests of society. This transfer was caused by the actions of the plaintiff, who never put forward the interests of the corporation. The plaintiff cannot therefore claim that this transfer was made in violation of his legitimate expectations. However, since the corporation has no more assets, it cannot buy back the plaintiff's shares; this situation justifies a recovery. Considering the sums due by the plaintiff to the corporation as well as the money and the time invested by one of the defendant co-shareholders, and in the absence of an evaluation of the actions made by an expert, the court grants them a face value $1 each.

Since the plaintiff's claim is not entirely frivolous or abusive, the court cannot award damages for abuse of process. Using the discretion under the Business Corporations Act to make any appropriate order, the court orders the plaintiff to pay defendants $15,000 for extrajudicial fees incurred as a result of his conduct during the trial.

Végifruits inc. c. Bras

20 July 2017, Québec Court, EYB 2017-283232

Alleging that the defendants Argirios Bras and Anna Hatzidimitriou bankrupted the corporations with which they operated a restaurant for the sole purpose of purging the debts in order to continue operating it, Végifruits inc. is claiming them, as director or shareholder of the corporations, the balance of $12,003.82 due for the goods delivered. It is also claiming $10,000 in compensation for having forced it to institute the present action and for the reimbursement of the extrajudicial fees paid to assert its

rights. The defendants submit that there is no legal relationship between them and Vegifruits since the merchandise for which it wants to be paid was ordered and delivered to Dora Bras and 7087853 Canada Inc., the defendants of which are neither shareholders nor directors. Stating that the Vegifruits's claim is abusive, they ask the reimbursement of the fees of $12,000 they have paid to defend themselves and $1,000 each for the troubles and inconveniences suffered.

It is admitted in commercial law that the fact that a corporation in insolvency place an order when it cannot pay the purchase price does not make the shareholders personal debtors of the debt contracted, as it is insufficient that the corporation acting through its directors so as not to pay its suppliers to retain the extra-contractual liability of said directors. Admittedly, there is a minority current that advocates interpreting article 317 CCQ so as to prevent anyone who controls a corporation from using it to deflect its reality by committing fraud, abuse of law or transgressing a rule of public order, commonplace that the court does not retain.

As the evidence showed that Argirios Bras is no longer interested in operating the restaurant other than being a salaried cook, the claim against him is dismissed. Végifruits alleges that Anna Hatzidimitriou acted in bad faith, abused her right or committed fraud because she misappropriated the revenues of Dora Bras and 7087853 Canada inc. The argument could have been made if it had been raised against Anna Hatzidimitriou and her corporation because she is clearly the alter ego of Dora Bras and 7087853 Canada inc. Invoked against Anna Hatzidimitriou personally, the argument does not stand up to analysis, as the evidence administered was insufficient to conclude that she diverted the restaurant's income for personal gain. The claim is therefore dismissed as well as the incidental claim for damages and reimbursement of extrajudicial fees.

The counterclaim must also be rejected. Vegifruits's arguments were not far-fetched, and it was not in bad faith or with intent to harm that it brought its action, but with the hope of being paid for the merchandise that allowed a family to continue to operate its business.

9227-7839 Québec inc. c. Charron

27 July 2017, Superior Court, EYB 2017-283347

The plaintiffs, the personal corporations of Dominique, Annie, Martine and Lyne Charron, have served on the defendants, their brother André and their mother Jeannine Marquis, a request for safeguard in the context of a remedy in case of abuse and oppression. This litigation involves the five children of Jacques Charron and his wife Jeannine Marquis. Jacques Charron, now deceased, founded G.C.M. Limited, specialized in the field of high voltage. The mis en cause 9009-1331 Québec inc. specialized in the construction and rental of industrial premises belonging to him. The two corporations were the creation of Jacques Charron, who made an estate planning by creating various personal corporations for his children. The four child applicants have similar interests. As for the defendant, he was associated with his father at 50% in G.C.M.

Under subsequent planning, the other 50% of G.C.M. returned to 9009-1331 Québec inc. itself today the property of the five children. However, the control of the decisions of this corporation is the responsibility of the defendant Jeannine Marquis. The control of G.C.M., on the other hand, belongs to Jeannine Marquis at 60% and André at 30%.

The plaintiffs argue that the defendant is deleteriously influencing his mother to gain her support in critical decisions. Mistrust is now established between the four brothers and sisters who find that André, who with his mother has control of decisions, is acting as he wants, according to them, and without consulting them. They are worried about an imminent sale of G.C.M. to senior employees for a price lower than another sale project that has previously aborted. These concerns led the plaintiffs to seek various safeguarding measures. If there is an appearance of conflict of interest, and it is probably the case, this appearance or even this conflict seems inevitable by the estate structure chosen by the father. He entrusted the destiny of G.C.M. to his wife and his son André who knows the corporation in all its strengths and weaknesses.

There are many fears, speculations and extreme mistrust on the part of the minority shareholders. There is also a lack of knowledge of the business community where competitors will not go out their ways for the Charron family. André still thinks that the solution goes through a sale to key employees and he found two others with whom he would conclude a $300,000 transaction. As for the specialized inventory, it will be necessary to proceed in separate lots and the defendant André Charron hopes that everything can bring between $400,000 and $800,000.

For the moment, therefore, there is no question of issuing the requested safeguard orders.