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News

Corporations Canada – Purchase of copies of corporate documents

In order to offer a faster service to its clientele, Corporations Canada is adopting a new approach to orders of corporate document copies.

As of May 1, 2017, only full documents will be available. It will no longer be possible to order specific pages of a corporate document (for example, pages 2-5 or a certificate of incorporation without its related articles).

For more information, contact one of our representatives at Marque d'or at mdo.info@marquedor.com or 1-800-668-0668.

Article

The scope of "whitewash"

Whitewash is the remedy to solve small or big issues of the corporation's business and affairs.

In view of the risks associated with the potential

- invalidity of certain transactions or
- internal governance decisions tainted by irregularities,

The regularization of the records of the corporation will be of great use to avoid and prevent any dispute on the part of the directors, shareholders and the corporation itself.

A "whitewash" resolution will therefore have to be adopted by all the actors of the corporation to make sure that these potential irregularities cannot be challenged... by them. This ratification is therefore important for internal purposes and not external purposes.

There are always possibilities to collect missing signatures later on, but sometimes it is not possible (the person can't be found, or is deceased, or there's a litigation going on, etc.).

The nullity of irregular acts or resolutions is relative, which means that these acts and resolutions are capable of confirmation:

C.C.Q., art. 1420. The relative nullity of a contract may be invoked only by the person in whose interest it is established or by the other contracting party, provided he is acting in good faith and suffers serious injury therefrom; it may not be invoked by the court of its own motion.

A contract that is relatively null may be confirmed.

C.C.Q., art. 1421. Unless the nature of the nullity is clearly indicated in the law, a contract which does not meet the necessary conditions of its formation is presumed to be relatively null.

Practically, the directors and the shareholders will adopt a general ratification or "whitewash" to retroactively ratify everything that has happened in the corporation. Everything that has to do with the business and the affairs of the corporation.

Basically, what it does is that the original intent of the parties is confirmed. This resolution will therefore be signed by the current directors as well as the shareholders to ensure that all the actors in the corporations and the corporation as well not only validate everything that has happened in the past but also concretely, they exonerate one another for any breach or irregularity and cannot invoke the nullity of past acts between them. In other words, to make these acts indisputable.

C.C.Q., art. 1423. The confirmation of a contract results from the express or tacit will to renounce the invocation of its nullity.

The will to confirm must be certain and evident.

The buyer, the investor or the lender thus ensures that he will not inherit a quarrel between former partners... In fact, this is the true scope of the "whitewash".

Limits to the "whitewash":
In my view: ratifying / approving acts and decisions before you are old enough to sit as a director on the board or better, before being even born... The mention "since the incorporation of the corporation" is dangerous, it can lead to aberrations;

No general ratification can make an illegal act or operation legal. Using software without rights or in violation of someone's rights is and remains illegal;

Searching for the original intentions of the parties in tax matters is strictly circumscribed and a resolution may not change it (see ***Quebec (Revenue Agency)* v. *Services Environnementaux AES inc.*** where the Supreme Court agreed to revert to the original intent of the parties while recently in the cases of ***Jean Coutu Group (PJC) inc.* v. *Canada (Attorney General)***, 2016 SCC 55 and ***Canada (Attorney General)* v. *Fairmont Hotels Inc.***, 2016 SCC 56, the Supreme Court refused to revert to the original intent of the parties;

If we are the purchaser: in addition to the general ratifications, impose a balance of sale and get signed guarantees from the seller (which is always done in practice);

Finally, read ***Rehn* v. *9245-2317 Québec inc.*** (EYB 2015-262015), 2015 QCCS 6580, where the court retroactively ratifies the records of a corporation point by point. Very interesting decision.

Marque d'or offers a service to update corporate records. For more information, contact one of our representatives at Marque d'or at mdo.info@marquedor.com or 1-800-668-0668.

Jurisprudence

Lamontagne c. Bélanger

January 17, 2017, Superior Court, EYB 2017-275296

The application for a provision for costs is dismissed. Indeed, a transaction was entered into between the parties to avoid litigation in relation to such an application. Furthermore, there are no special circumstances justifying the exceptional exercise of this discretionary power of the court. On the contrary, there is a special circumstance which disadvantages the plaintiff. It is rare for the parties to voluntarily agree to a provision to support a party in asserting its rights, with the addition of a relatively large sum, given the circumstances.

Gestion Marigec inc. c. Immeubles Rimanesa inc.

January 25, 2017, Superior Court, EYB 2017-275448

Although the court's remedial powers in matters of oppression and abuse are broad, it must be verified at the safeguarding order stage whether the criteria for granting an interim injunction are met. However, it is not clear that the plaintiff can obtain the status of complainant in order to avail herself of the provisions of the *Canada Business Corporations Act* (CBCA). In any event, recourse based on section 241 CBCA is not the proper vehicle when the objective is to set aside a contract to which a party has consented. The plaintiff should instead make an application based on the relevant provisions of the *Civil Code of Quebec*. There is therefore no clear appearance of a right to the requested safeguard order.

Québec (Autorité des marchés financiers) c. Gariépy

January 27, 2017, Court of Québec, EYB 2017-275601

The defendant, a notary, was the promoter of a corporate structure whose purpose was to finance the establishment of slot machines in casinos abroad through companies created for this purpose. The contracts thus signed between these companies and the investors, through the defendant, constitute investments considered as forms of investment under section 1 of the *Securities Act*. Indeed, the notion of securities covers all types of plans proposed by those who seek to use the money of others by promising profits, even if there has been no fraudulent solicitation or scheme. Moreover, even if investors were aware that they were involved in risky financial transactions, none of them had a thorough knowledge of the securities market and had no control over the decisions of the companies in which they were shareholders. Similarly, they had no information about the use of their money and had no idea how they would be remunerated. Consequently, they are part of the public that the *Securities Act*, which is a law of public order, seeks to protect by disclosure of all the appropriate information in a prospectus submitted for approval by the Autorité des marchés financiers (AMF). The defendant thus acted as a broker although he was not registered with the AMF. The fact that he was acting in good faith and that he had no intention of committing the alleged offenses is irrelevant since these are strict liability offenses. The performance of the prohibited acts has been proved beyond a reasonable doubt and the defendant could only have rejected the presumption of guilt that weighed on him by demonstrating that he took all necessary precautions to avoid committing these offenses, which he did not do. He is a jurist and a well-informed businessman. He could not be unaware of the existence of the AMF and the provisions of the *Securities Act*.

Mount and River International Ltd. c. Tokyo Y2k Import Export Canada inc.

November 25, 2016, Superior Court, EYB 2016-275645

A request for inadmissibility based on Article 51 CCP is to be judged only in the light of the allegations of the application and the elements of the out-of-court questioning. The present request, by which the plaintiffs claim from the defendants the sums they lent them, alleges that the defendant Chan is the alter ego of the defendants and that, as such, he would be jointly liable for the repayment of a sum of $30,000 USD. Yet, in the absence of other, more specific allegations, this allegation is manifestly ill-founded. It is not sufficient to allege that a person is the alter ego of a company for this to be held to be true. In addition, the plaintiffs learned of Chan only during the out-of-court examination. The mere fact that Chan is a shareholder of the companies sued does not automatically make him liable. There is no evidence that he committed any wrongdoing incurring his personal liability.

As to the allegation under section 313 of the *Canada Business Corporations Act*that Chan is liable as a shareholder for the debt owed by Kanda because it is voluntarily dissolved, it is also unfounded, in the absence of a legal relationship between the plaintiffs and Kanda. Indeed, the fact that a check issued by the latter was given by one of the defendants to repay its debt does not lead to the conclusion that Kanda is a debtor of the plaintiffs.

Since the application is manifestly ill-founded in respect of Chan, it is dismissed. Abuse of process is established and Chan's rights are reserved; the debate on the damage suffered by the latter will take place later.