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News

Corporations Canada – Notice: New online service – Amending the articles of a not-for-profit corporation

As of May 17, 2017, Corporations Canada will be offering a new service that allows not-for-profit corporations created under the Canada Not-for-profit Corporations Act to submit a request online to amend the articles of the corporation.

This service is available through the Online Filing Center.

The service standard for an online application to amend the articles is "Same day/Next Day Service".

Article

The importance of keeping the corporate records up to date

The decision *Letendre* v. *Québec (Registraire des entreprises)* (October 12, 2016, Administrative Tribunal of Quebec - Economic Affairs Section ("TAQ"), EYB 2016-276047) is interesting in several aspects. It reiterates the role of the enterprise registrar and the shareholders of a corporation and the importance of keeping a corporation's records up to date.

Without going into the details of this case, which we strongly urge you to read, the issue is relatively straightforward: one of the people involved – Mr. Michot – claims that he is not a director of the corporation. Following a request under sections 132 and 133 of an *Act respecting the legal publicity of enterprises* ("ALPE"), the registrar removed his name from the enterprise register ("REQ"). The Applicant challenges the registrar's decision before the TAQ.

The issue in this case is whether the statutory process leading to the declaration or registration on the REQ in respect of that person has been complied with.

Under the ALPE, an entity carrying on business in Québec is subject to the registration requirement. The declaration of registration contains a number of information, including information about directors and officers, their date of entry into office and the date of cessation of office, and the duties they hold.

This information must be updated by filing an updating declaration within 30 days of the date of a change and when filing the annual updating declaration.

This information may be set up against a third party as of the date on which they are registered in the REQ and is proof of its content for the benefit of third persons in good faith. However, third persons may submit any proof to refute this information.

Under sections 132 and 133 ALPE, an interested person may apply to the registrar to cancel an entry in the REQ where the statement was made without a right or where the information is inaccurate.

In *Piciacchia* v. *Doroudian*, 2011 QCCQ 1843, EYB 2011-187825, the Court of Québec clarified that the ALPE is a technical law whose main purpose is to ensure the reliability of information relating to enterprises.

In this respect, the role of the registrar in relation to the control of declarations is limited and essentially aims at verifying the legality of the information contained in the REQ:

[130] Nowhere in the relevant statutes is the will of the legislator to establish the registrar as a "tribunal" responsible for resolving corporate disputes of this nature, especially when the registrant in question is no longer in operation. On the contrary, the latter "*must engage exclusively in the work and duties relating to those functions and responsibilities*" (section 1, *An Act respecting the enterprise registrar*). In this respect, its role is mainly technical and legalistic, so as to control the reliability of the information deposited in the register.

[131] It is essential to ensure, to the extent possible, that reliability that a person who declared the information can, upon request, demonstrate that the legal process to give it authority has been respected.

[132] Recognizing to anyone the right to file declarations in the registry without legal boundaries and requirements would be likely to open the door to confusion.
[Underlining added]

To ensure this reliability, it is therefore essential that the person filing a return can demonstrate that the requirements of the *Business Corporations Act* ("QBCA") and its regulations have been met by the production of legal documents:

[135] In noticing the absence of a resolution authorizing Mr. Piciacchia to act and the absence of the legal documents attesting to the transfer of the shares to Mr. Doroudian in order to conclude that these declarations were null and void, the Registrar fulfilled his duties under the laws that govern it. Its decision is motivated, transparent and the decision-making process is intelligible.

[136] The registrar's conclusions that the statutory requirements for validating the declaration at issue have not been fulfilled suffer no weakness.
[Underlining added]

This approach was followed by the TAQ in three ways:

1. Shareholder Resolution

Section 110 QBCA provides that directors are elected by shareholders:

110. The directors are elected by the shareholders, in the manner and for the term, not exceeding three years, set out in the by-laws.
[…]
[Underlining added]

The power of shareholders to elect and remove directors is a fundamental power. Their will can only be expressed through a duly adopted resolution.

185. At a shareholders meeting, unless a vote is demanded, a declaration by the chair of the meeting that a resolution of the shareholders has been carried and an entry to that effect in the minutes of the meeting constitute, in the absence of any evidence to the contrary, proof of that fact, without it being necessary to prove the number or proportion of the votes recorded for and against the resolution.

178. A resolution in writing signed by the sole shareholder of the corporation or by all the shareholders entitled to vote on the resolution is as valid as if it had been passed at a shareholders meeting.
[…]
[Underlining added]

In the present case, the applicant does not produce any of these legal documents, namely minutes of the meeting or a written resolution signed by all the shareholders.

The minutes of November 23, 2010 that he produces do not constitute minutes of the meeting of November 24, 2010.

Pursuant to section 107 of the *Companies Act*, a provision applicable on that date, all the minutes entered in such books shall be certified by the president of the company or the chairman of the meeting or by the secretary of the company. Here, the document does not contain any mention to that effect.

Secondly, this document does not constitute conclusive evidence that a shareholders' resolution would have been adopted that day in order to appoint Mr. Michot as director.

First, the date it bears is anterior to that of the meeting. It then refers to the election of the directors Plante, Letendre and Michot unanimously. The testimony of Messrs. Plante and Letendre are rather to the effect that the election was directed at the two missing directors and not three directors. Finally, in his amended introductory request, the applicant refers to the fact that Mr. Michot was appointed by the minority shareholders and not unanimously.

2. Directors' Register

According to the corporation directors' register, Mr. Michot's mandate would have started on October 24, 2010 and would have ended on January 1, 2012.

Section 31 QBCA provides that the corporation shall keep at its head office records including the name and domicile of the directors, stating, for each of them, the dates of the beginning and end of their term of office.

Section 38 QBCA stipulates that the records of the corporation are proof of their contents in the absence of any evidence to the contrary, in any action or proceeding against a corporation or any shareholder.

In addition, section 12 of the corporation's by-laws provides that the books of the corporation shall include, in particular, a record of directors showing the name and address of each director, the date of the beginning and, if applicable, end of the term, as well as the mandate acceptance form for each director.

In this case, the date entered in the register regarding the commencement of Mr. Michot's term of office, on October 24, 2010, is without merit. No evidence was produced showing that a meeting of shareholders was held that day and that Mr. Michot was appointed as a director.

The fact that the applicant entered November 11, 2011 on the REQ and different dates for the beginning of Mr. Michot's term as director in the register of directors, demonstrates the insignificant nature of these entries.

Moreover, the court is surprised that a document mentions that Mr. Michot was appointed director at the shareholders' meeting of November 24, 2010, but is asked to declare that his mandate began on October 24, 2010.

The TAQ therefore finds that the reference to Mr. Michot's name in the register of directors, as well as the dates of commencement and termination of his term of office, does not constitute evidence that may be set up against him.

3. Banking Resolutions

The applicant claims that the banking resolution and the signing of checks by Mr. Michot constitute proof that the latter was indeed a director.

Are filed for evidence, the resolutions of the board of directors of the corporation dated September 27, 2011, in which Messrs. Letendre and Michot are authorized to sign for and on behalf of the corporation all checks and other documents required by the corporation's banking institution and that a copy of the resolution is inserted in the corporation's minute book.

At the bottom of this document are the names of Messrs. Plante, Letendre and Michot as signatories to this resolution of the Board of Directors.

However, this document is not signed and does not constitute a certified copy of the resolution.

In addition, the document states:

Validity
The resolutions set forth above are adopted by the sole director of the corporation entitled to vote, as evidenced by his signature hereunder, and have the same force and effect as if they had been adopted at a meeting of the board of directors of the corporation, in accordance with section 140 of the Québec Business Corporations Act.
[Underlining added]

If, under the terms of this resolution, only one director is qualified to vote, one can only be surprised by the fact that three signatories are present.

This document is also contradicted by the various certifications filed in the registrar's record concerning the bank account of the corporation at its banking institution.

Finally, paragraph 54 of the corporation's general by-laws stipulates that the directors also appoint one or more persons to carry out the banking operations on behalf of the corporation. There is therefore no requirement that such person be a director or officer of the corporation.

The fact that Mr. Michot was able to sign checks before or after November 11, 2011 does not have the effect of making him a director. According to the QBCA, this status can only come from the express will of the shareholders.

In *Ahmaranian* v. *Enterprise registrar*, 2015 QCTAQ 0963, a decision summarized during the Éditions Yvon Blais webinar on "Interesting decisions regarding directors' liability" held on June 15, 2016, the court recalled that a corporation speaks through its writings and that rigor and formalism are the foundation of the Québec *Business Corporations Act*.

The TAQ therefore upheld the decision of the enterprise registrar as to the cancellation of the name of Mr. Michot as a director of the corporation in the Enterprises Register.

This litigation is in the context in which the personal liability of the directors of a corporation is involved in claims for tax debts and wages owed. We note that applications based on sections 132 and 133 of the ALPE are becoming less and less rare... and it's understandable. As the REQ is proof of its content, the reliability of the information it contains is paramount, as is the importance of duly adopting resolutions and keeping the corporation's records up to date. To claim that a person was a director of a corporation on a particular date must be supported by a resolution of the shareholders to the same effect.

Jurisprudence

Pièces d'auto économiques inc. c. 9343-6137 Québec inc.

3 March 2017, Superior Court, EYB 2017-276946 (name confusion)

There is a real risk of confusion between the trade name used by the plaintiff for more than 40 years and that used by the defendant, its competitor for less than one year. Both entities operate tires and automotive parts and accessories businesses in the same region. Their names, "Pièces d'auto économiques" and "Pièces d'auto écono", look very similar, even if their graphic presentation is different. The potential loss of clientele for the plaintiff that results from this usage constitutes a risk of serious and irreparable harm. An interlocutory injunction ordering the defendant to cease to use the name "Pièces d'auto écono" is granted.

Sainte-Adèle (Ville de) c. Société en commandite Sommet Bleu

16 January 2017, Municipal Court, EYB 2017-277202 (legal personality of a limited partnership)

The City's application to substitute the name of the general partner of the limited partnership prosecuted for contraventions of a municipal by-law to that of the limited partnership on the ground that the partnership is dissolved must fail. Indeed, the *Code of Penal Procedure* (CPP), which applies in the present case, prohibits the substitution of one defendant for another. As section 2.1 CPP enacts that the provisions relating to legal persons also apply to partnerships, with the necessary modifications, but does not define "legal persons" and "partnerships", it is necessary to refer to the *Civil Code of Québec* in order to interpret them. The Court of Appeal and the doctrine teach that, even if the limited partnership is not a legal person, it must be considered as a separate legal entity from its partners, limited partners and general partners.

9261-5194 Québec inc. c. Granby (Ville de)

22 February 2017, Québec Court, EYB 2017-277300 (duties on transfers of immovables)

Transactions involving three corporations belonging to the same legal persons are exempt from payment of transfer duties. Indeed, section 19(d) of the *Act respecting duties on transfers of immovables* (ADTI) exempts any transfer between "closely related" legal persons from the payment of transfer duties. Paragraph 2(c) of said section states that "a corporation is closely related to a particular corporation if at the time of the transfer ... at least 90% of the fair market value of all the issued and outstanding shares of the capital stock of the corporation and of the particular corporation are owned by the same corporation or by the same body of legal persons". Although shareholders in this case do not necessarily hold the same number or type of shares of legal entities involved in the transfers of properties, there is no need for expertise to establish fair market value, It could only conclude that the group of legal entities owns 100% of the fair market value of the shares of the vendor and the purchasers. The phrase "same group of legal persons" is not limited to holding shares vertically as opposed to holding shares horizontally. Indeed, the ADTI does not make such a distinction. Moreover, in paragraph 2(a) of section 19, the legislator was careful to specify that this exception applied only to the legal persons listed therein and to their subsidiaries. Not only did it not do so for paragraph 2(c), but before the entry into force of this provision, in 2002, the concept of "closely related legal persons" was more restricted. Finally, the ADTI does not define the term "group". Jurisprudence and doctrine teach that the term includes a subsidiary, a sister corporation or the parent corporation of another corporation. The use of the adverb 'same' before 'group of legal persons' does not mean that a legal person with more than one parent can not benefit from the exemption provided for in section 19(d) ADTI. The transfer duties collected were not due and must be reimbursed to purchasers by the City.

Québec (Agence du revenu) c. 9229-6722 Québec inc.

30 March 2017, Superior Court, EYB 2017-277875 (pre-incorporation contract)

The opposing party is the sole shareholder and director of the debtor corporation. He claims to own the goods seized by Revenu Québec. The evidence shows that these assets were acquired in 2010 by the opponent for the benefit of the debtor prior to the debtor's incorporation. They were given to him without the opponent claiming rent. The debtor had used them for the operation of a restaurant. The opponent and the debtor thus tacitly ratified a pre-incorporation contract within the meaning of sections 319 and 320 CCQ. Only the debtor can therefore claim title to the assets. Even if the debtor had to cease her activities following the revocation of her certificate, her legal personality remains. As for the corporation which continued to operate the restaurant with the same goods after the debtor had ceased operations, no contract, whether pre-incorporation or not, was binding to the debtor, even if the opponent was the only shareholder and director of this new corporation. The fact that the opponent questioned a trustee in bankruptcy on how to recover the property in dispute confirms that the property belongs to the debtor.