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News

Canada Day

Our offices will be closed on Monday July 3rd. Be sure to check our National Holiday schedule and get all your critical documents in on time.

Training activities for lawyers and notaries

Discover this fall's training program in estates, commercial, civil and real estate law (in French).

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Jurisprudence

Rioux c. Pharmacie Frédéric Martin, Marie-Chantale Côté et Denis Rioux inc.

April 6, 2017, Superior Court, EYB 2017-278219 (s. 450 QBCA – Safeguard order – Forced sale of a pharmacy)

In the context of oppression remedy (Rectification of abuse of power or iniquity), shareholder Rioux requires a safeguard order in which he seeks to force shareholders Martin and Côté to sign the Offer to purchase of the assets of a pharmacy that they operate together, and at the latest on the date of expiry of the offer.

It is possible, where appropriate, to issue a safeguard order despite the ultimate consequence of the order. This is the case here. Rioux has established an appearance of right to obtain the conclusions he seeks since he has established the existence of a reasonable expectation resulting from an abuse of power or, at the very least, an inequitable act that is harmful to him caused by the corporation or a director. Thus, it appears that the three shareholders of the pharmacy have agreed to put it up for sale, given its precarious financial situation. They looked for buyers and a third party was interested. They negotiated with this third party for several weeks. As the deal seemed to be on its way to close, Martin and Côté changed their minds and turned down the offer. The evidence allows inference of unfair and harmful behaviour for the applicant. Indeed, the pharmacy is heading for bankruptcy. It is insolvent and the only reasonable solution is to sell its assets to a third party. The $1.7 million offer from this third party is acceptable and Martin and Côté are directed to sign the Offer to purchase.

Sauvageau Hanley CPA inc. v. Gestion Global-Canada inc.

April 13, 2017, Superior Court, EYB 2017-279018 (Relief of failure to appear – Service at head office)

Québec's enterprise register indicates the address of a law firm as the head office of the four defendant corporations. However, the evidence shows that the firm no longer represented the corporations at the

time of service. The bailiff was therefore entitled to note this fact in his service report and to conclude that it was impossible to serve the proceedings to an officer or director of the corporation. The e-mail service authorized by a previous judgment is valid with respect to Gestion Global-Canada Inc. and its officer Bergonzi. However, this is not the case for the other three corporate defendants. There was no indication that an attempt had been made to serve the proceedings to the director of the latter at the address of his domicile indicated in the enterprise register or that the bailiff had attempted to trace it. The delays to appear are not strict, and the *audi alteram partem* rule requires that the defendants be relieved of their failure to appear.

Cloutier c. Lortie

January 19, 2017, Superior Court, EYB 2017-279455 (Redemption of shares based on the fair market value of the corporation

Following the breakup of the relationship formed by the parties, it was agreed that Mister will buy back the share of Madam she holds in the aviation business they hold in common. It is now necessary to determine the fair market value (FMV) thereof, that is to say, that a well-informed third party would be willing to pay for the acquisition of this business without constraint.

The role of the tribunal is not to restore a balance between the shareholders: the mandate entrusted to it by the parties is to determine the value of the corporation, regardless of an "oppression remedy" situation. It is therefore appropriate to retain an expertise that takes into account a "key employee discount", which takes into account the fact that a potential buyer would reduce the price he would be willing to offer if he feared that Mister may leave the corporation. Indeed, Mister is a key employee. He holds a key position within the corporation and no one is able to replace him at short notice unless he is given one-year training. The business continuity would be compromised in the event of his departure. Thus, a 30% discount is applied to the capitalized value of the corporation's reported net income, which is $4.2 million to $4.6 million. As for the capitalization rate used, it is 3.75 to 4, given the risky nature of the corporation's activities, the demanding regulatory environment in which it operates, the corporation's economic dependence to its sole client (ATAC), the uncertainty surrounding the number of hours flown by the corporation's aircraft, and the risk associated with the continuing business relationship between ATAC and the US Navy.

The corporation's FMV is therefore set at $22.2 million. There is no need to update Fortin's calculations in 2016. It is true that revenues may have increased in 2015 and 2016, but spending has surely also been doing the same. In addition, Madam received dividends of more than $1 million for each of these years.

Mister will have to pay the amount of $ 11.1 million. Since neither the corporation nor Mister has the cash to pay this amount, the corporation will borrow $1.1M. $5 million will come from the disposal of the corporation's assets, while the balance will be paid out from the amounts it receives for the hours of flight performed on behalf of ATAC.

Commission des normes du travail c. Truchon

November 23, 2016, Court of Québec, EYB 2016-279804 (Establishment of the employee's claim due date to calculate the delay provided for in section 154 QBCA)

The liability of the director of the employee's employer who claims unpaid wages is only incurred if a claim against the employer is brought within the one-year period provided for in section 154 QBCA. This period begins when the employee's claim has become due. Here, the employee Bernier was laid off on June 25, 2010, before being able to take advantage of the vacation leave that would have been his remuneration for the overtime worked. In accordance with section 55 of the *Act respecting labour standards* ("LSA"), when the contract is terminated before the employee has been granted vacation leave, overtime must be paid at the same time as the last payment of wages. The date on which the delay began to be counted is not the date of the layoff, since the layoff was temporary. It became permanent six months later, on December 25, 2010, as enacted by section 83 LSA. However, section 55 LSA specifies that accumulated overtime that has not been taken on leave within 12 months of said-overtime must be paid in cash. This means that the employee's claim becomes due as of that date.

The action brought against the employer on August 4, 2011 gives rise to a claim against the employer's director only if the claim is still due after August 4, 2010. The claim which became due before that date is therefore the overtime work that was completed more than 12 months before August 4, 2010, that is, all overtime worked before August 4, 2009. The fact that the term set forth in section 154 QBCA is one of forfeiture and not one of prescription means that the notice of suspension of the prescription on March 8, 2011 sent by the Commission des normes du travail to the employer, which had the effect of suspending the prescription of the employee's claim did not, however, have the effect of suspending the forfeiture of the term in section 154 QBCA.

Fiducie résidentielle LRSTM c. Constructions Masy inc.

May 30, 2017, Court of Appeal, EYB 2017-280352 (Is a judicial proceeding instituted on behalf of a trust, whether registered or not, rather than on behalf of its trustees, void? Can such a defect be remedied by the trustees by means of an amendment? Can the amendment be made once the extinctive prescription is acquired?)

It is true that, as a patrimony by appropriation, a trust does not have juridical personality. The names of the persons acting in their capacity as trustees must therefore appear in the proceeding's title. When this is not the case, the procedure is not for that reason alone, incorrect, especially where, as in the present case, the proceedings or documents produced in support thereof identify the trustees and no harm has been done to anyone, the respondents having always known the identity of the trustees. There is no need to give precedence to form at the expense of the merits. The trial judge erred in holding that the action under the name of the trust alone was void. He also erred in refusing to authorize the amendment to add the names of the trustees as plaintiffs.