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The entire team at Marque d'or wishes you a Happy New Year 2018. Love, prosperity and health for you and your loved ones. For a 59th year, we are here to serve you with enthusiasm and professionalism.

Nouvelles

New rates in effect at the REQ

In recent years, every January 1, the Entreprise Registrar of Québec establishes a new fee schedule and this year is no exception.

To access the new rates in effect at the REQ for 2018, please click on the following link:

http://www.registreentreprises.gouv.qc.ca/documents/tarifs/re-101(2018-01).pdf

Notice - REQ

The REQ informs us that Ms. Valérie Dran will assume the position of acting enterprise registrar as of January 22, 2018. Certificates will therefore bear her signature as of that date.

Article

Changes to the Canada Business Corporations Act: to better understand the new rules surrounding the election of directors

Bill C-25, An Act to amend the *Canada Business Corporations Act*, the *Canada Cooperatives Act*, the *Canada Not-for-profit Corporations Act*, and the *Competition Act* (Bill C-25) received third and final reading in the House of Commons on June 21, 2017. If passed and enacted into law, Bill C-25 proposes to adopt US-style majority voting, this may be summarized into three new rules:

- Shareholders will be able to vote for or against a director (a change from the for/withhold vote choice that prevails today).
- If, in an uncontested election, a candidate fails to receive more votes for than votes against, she is not elected as a director and that position on the board remains open.
- The failed candidate is not eligible to be appointed to fill this or any other vacancy on the board before the next meeting of shareholders at which an election of directors is required.

These amendments would displace the need for Canadian-style majority voting by-laws or policies that have prevailed to date.

Plurality Voting

In plurality voting, a director is elected to a corporation's board if she receives the most votes in favour (as compared to other candidates) in a directors' election. The number of votes in favour of her election need not amount to a majority of the votes (50% + 1). The amount of votes in favour need only be greater than the number of votes withheld or votes cast for other director candidates.

For example, in a directors' election, if there is one seat available on a board and one candidate standing for election, this candidate will be elected to the board even if she only received 10 shareholder votes in favour of her election where 11 shareholders withheld their votes and 29 votes were not cast at all for a total of 50 votes.

Theoretically, in an uncontested election with plurality voting, a candidate can be elected to the board if he receives at least one vote in favour, regardless of the number of votes withheld or votes not cast at all.

Majority Voting

In majority voting, an individual who receives a plurality of the votes, but who fails to receive more votes in favour of her election than votes withheld, must resign from the board.

Using the above example, a director must tender her resignation for acceptance by the board because the 10 votes in her favour do not exceed the 11 votes withheld. In this example (where 29 votes out of 50 were not cast at all), a candidate must receive at least 12 votes in favour of her election (which is greater than the 11 votes withheld) to avoid the obligation to resign.

Contested Elections

In general, directors will be elected by a majority of the votes cast by shareholders. However, if there is a contested election, such as when shareholders propose nominees to run against management's candidates (and as a result there are more candidates for director than there are seats for director), majority voting will not apply. Instead, when there is a contested election, plurality voting will apply. The candidates that receive the most votes in favour, regardless of the number of votes withheld or whether those votes exceed the votes in favour of the director's election, will be elected to the board.

Note that only reporting issuers are affected by these amendments.

The most interesting corporate law decisions of 2017

As a review of the most interesting corporate law decisions of the past year, this edition of the *Telemark* perpetuates a tradition that is over twenty years old.

Each of these decisions is interesting and every Quebec corporate law practitioner should take a look at them. They are not the only ones, but let's say that it is the minimum required, keeping in mind that this annual exercise is above all subjective, in spite of all the professional rigor that one can apply. They are not ranked by importance or date. Note that these decisions were published in 2017 in one of the *Telemark*'s issues, but may have been rendered in 2016 by the courts.

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.

Korex inc. c. Poloniato-Lee

29 May 2017, Québec Court, EYB 2017-281203

It is the contractor who has retained the services of the subcontractor and that must pay him the amount claimed of $29,524.61. However, the evidence, including an email, shows that the contractor's directors engineered to avoid paying it. They fraudulently subtracted the entrepreneur's asset for the benefit of other corporations they control. In doing so, they committed an extracontractual fault committing their personal responsibility. They are therefore sentenced jointly and severally with the contractor to pay the amount due. For having abused the procedure, the directors are also required to reimburse the subcontractor the extrajudicial fees she incurred. Indeed, they have produced a defense which is manifestly ill-founded, frivolous and dilatory and therefore abusive.

Moose International Inc. c. Moose Knuckles Canada Inc.

15 June 2017, Superior Court, EYB 2017-282805

It is not sufficient to allege that the defendant Pohoresky was pressured to sign the shareholder agreement to conclude that it was void; a proof is required, absent in this case, that the agreement was signed as a result of false representations, threats or violence on the part of its co-shareholders. The oppression invoked by Pohoresky, in particular that its financial expectations as a shareholder have not been met, does not have any impact on the validity of the agreement. In addition, since Pohoresky was represented by counsel when negotiating and signing the agreement, he is presumed to have understood and accepted the terms.

However, the validity of the non-competition and non-solicitation clause (the covenant) in the agreement is questionable. On the one hand, with a protected territory covering Canada, the United

States, Mexico, Korea, China, Japan, Europe and Russia, the clause is far too broad. Worldwide online sales alleged by the Applicants have not been demonstrated. The period for which the clause applies, that is, for a period of one year after MKCI ceases to be a shareholder of the plaintiff Moose, or that Pohoresky ceases to provide services to the plaintiff, is problematic. The argument that MKCI can sell its shares to a third party if it wishes to compete with Moose can not be accepted. Not only would a new purchaser be subject to existing shareholder agreements, but this litigation is likely to discourage potential buyers. To claim that MKCI has only to surrender its shares in exchange for their book value, even if it means seeking legal redress to recover the difference between that value and the market value, if any, is also not reasonable. In these circumstances, it cannot be concluded that plaintiffs have a clear right to an injunction enjoining the defendants to respect the restrictive covenant.

However, it is clear that the plaintiffs will suffer irreparable harm if they lose sales or customers because of the illegal competition that the defendants would give them. As for the balance of convenience, it favors the defendants. Not only has Pohoresky not played a role in the administration of Moose's affairs since the litigation began in July 2015, but MKCI's shares are held by Moose's attorneys, who request that they be transferred to Moose in compensation for the harm it would have suffered. Thus, neither MKCI nor Pohoresky have exercised their rights as shareholders or officers of Moose for more than one year, the period provided by the covenant. There is therefore no need to issue an interlocutory injunction prohibiting defendants from competing fairly with Moose.

Pohoresky and MKCI are not entitled to interim costs under subsection 242 (4) of the *Canada Business Corporations Act*. When Pohoresky felt oppressed by the other shareholders in Moose, instead of opting for oppression, he decided to counterfeit his merchandise and resell it for his own benefit. The plaintiffs replied by this action for an injunction and damages. By their claim for interim costs, Pohoresky and MKCI seek to finance the costs incurred to defend themselves until now and a possible oppression remedy. However, interim costs are not used to reimburse past expenses, particularly if they have been incurred to defend themselves against claims of illegal competition and trademark infringement.

Boyer c. Loto-Québec

June 13 2017, Court of Appeal, EYB 2017-281040

(Defamation of a legal person established in the public interest. Appeal dismissed.)

The mere fact that the respondents, Loto-Québec and the Société du jeu virtuel du Québec Inc., are legal persons established in the public interest, does not ensure that they do not possess a right to a reputation. The defamation lawsuit brought by the plaintiffs following the presentation of a video and blog posts by the appellants did not violate their right to freedom of expression. This right is not absolute and competes with the right to safeguard the reputation of others. It was not necessary for the respondents to prove that they had suffered a loss of profit in order to be entitled to compensation. The video and the articles damaged the respondents by creating some controversy and a loss of confidence to some of their customers. The $30,000 award for reputation and moral damages is not completely disproportionate or unreasonable, as are the punitive damages of $20,000.

The judge did not err in convicting the appellants personally. However, he erred in condemning them jointly for punitive damages, the Supreme Court instructing that such a conviction is not possible.

Punitive damages must be allocated equally among the appellants.

Cuscuna c. Ferrarelli

June 6, 2017, Superior Court, EYB 2017-280898

(Excessive expenses paid by the corporation. Excessive wages. Wages received as a shareholder. Reduction in the value of shares. Breach of duties as a director causing personal loss to the shareholder. Oppressive remedies. Reasonable expectations of shareholders. Order to redeem the shares.)

The parties are the only two shareholders of the corporation, which operates a daycare center. The evidence shows that excessive expenses were paid by the corporation to the defendant. However, the plaintiff also took advantage of the corporation's lax administration and made considerable withdrawals from petty cash, which are difficult to assess due to lack of documentation. As such, the credibility, objectivity, and impartiality of the Applicant's expert, who is the lawyer's father, is seriously questioned as the Applicant has refused to consider benefits granted to the plaintiff. An amount of $50,000 is subtracted from the total amount claimed in this regard, and the defendant is ordered to pay the plaintiff $42,197.72.

It is true that the defendant did not work as assiduously as the applicant at the daycare, but her involvement was of a different nature and deserved a salary. The defendant ensured the growth of the business and made it more profitable. As for her spouse, the latter also provided work, even if it was not equal to the wage paid to her. The amount of wages paid in excess to the defendant is set at $430,000. These excessive wages reduced the value of each share by $52.91, for a total of $264,550. Although it is the corporation that would normally be claiming this loss of value of the shares, the plaintiff's claim in this respect is accepted. Indeed, a claim by the directors would be unrealistic since the parties are the only two shareholders of the corporation. Furthermore, the attempt by the Applicant to act in the name of the corporation was not permitted. It would, therefore, be unfair, in the circumstances, to deprive the plaintiff of her appeal. The conduct of the Respondent and the breach of his duties as a Director have caused a personal loss which the Applicant is entitled to claim. The plaintiff was entitled to expect a management of the corporation that would provide for the 50% of its interest as a shareholder. The defendant's oppressive conduct violated these legitimate expectations. He invented a false debt in order to be reimbursed to the detriment of the plaintiff. There were also several accounting irregularities at the plaintiff's disadvantage for which the defendant is responsible. In addition, he and his family received excessive wages to the detriment of the plaintiff. The Respondent is therefore ordered to pay the Applicant a total of $306,747.72.

Since the parties are unable to re-establish a functional working relationship, the corporation's redemption of the shares of the defendant is ordered, as is the partition of the immovable.

Wilson c. Alharayeri

July 13, 2017, Supreme Court of Canada, EYB 2017-282247

(APPEAL from a judgment of the Court of Appeal of Quebec (Morissette, Dufresne and Gagnon JJ.A.), confirming a decision of Hamilton J. Appeal dismissed. Criteria governing the imposition of personal liability on directors of a corporation. Refusal of the board of directors of the corporation to permit the conversion of the preferred shares held by a former director before proceeding with a private investment of convertible notes thereby diluting the portfolio of the former director. Discussions at the board of directors that resulted in the refusal led by a director whose preferred shares were subsequently converted so that he could withdraw a personal benefit from the private investment by increasing his control over the corporation.)

The trial judge has a broad discretion to "make the interim or final orders that he considers relevant" under s. 241 (3) of the *Canada Business Corporations Act*. In order to determine whether a director has incurred personal responsibility, a two-part test is required. On the one hand, the misconduct must be truly attributable to the director because of his involvement in the abuse. On the other hand, the imposition of personal liability must be relevant in the circumstances.

In this case, A was president, chief executive officer, important minority shareholder, and director of the corporation. He resigned after the board of directors and W., one of its members, had blamed him for not disclosing a potential conflict of interest. He was also prevented from participating in a private investment following the conversion of preferred shares into common shares. The value of A's shares and the proportion thereof in the corporation thus substantially decreased and the trial judge was right to find the abuse and personal liability of W. W and B, another member of the board, have greatly influenced the decision of the board of directors not to convert A's A and B shares and thus participated in the abusive conduct. In addition, the abuse had the effect of increasing W's control over the company, thereby providing him with a personal advantage, to the detriment of A.

The redress which was equivalent to the value of the common shares prior to the private investment did not provide more than was necessary to remedy the loss of A and was therefore appropriate. It has been adequately set in light of A's reasonable expectations that his A and B Shares should be converted if the Corporation meets the applicable financial tests set out in its articles and the Board of Directors takes account of its rights in any transaction that impacts on his A and B shares.

Finally, the procdural documents in support of A's appeal were sufficient to establish the imposition of personal liability. These documents make specific allegations against the directors and demand that they be personally sentenced to payment of damages.

3209725 Canada inc. c. Aluminium Amtek inc.

18 May 2017, Superior Court, EYB 2017-279974

The parties have joined forces to form a corporation to provide a bundled supply of aluminum for the benefit of its shareholders. The plaintiffs are seeking, among other things, damages for breach of the duty of loyalty and the implied non-compete obligation under the partnership agreement. There is no basis for concluding that such a non-competition or loyalty clause (even implicit) forms part of the agreement. Moreover, the protocol even stipulates that the parties agree not to include such a clause in view of the nature of the undertaking and the fact that the partners retain the possiblity to obtain supplies elsewhere. Finally, when the agreement was negotiated, the parties even refused to limit their

commercial activities to certain specified territories. The only objective of the agreement is to provide supply to members of the partnership only. The latters are subsequently free to carry out their activities in any territory.

In light of the foregoing, there is no need to retain the personal liability of shareholders and directors or to grant the oppression remedy. The application for a permanent injunction, accountability and for damages is therefore rejected.

Pham c. Ngo

29 May 2017, Superior Court, EYB 2017-280248

In the case of the dissolution of a private issuer, a shareholder claims to the other one, half of the contributions made in the corporation. The shareholder invokes a verbal agreement to share profits and losses equally. Even if this agreement is denied by the defendant, the overwhelming evidence establishes the existence of a verbal agreement between the shareholders, invoked by the plaintiff. However, the corporation's declaration of dissolution, completed and signed by the plaintiff, indicates that the corporation no longer has any debt. In that case, can the defendant put forward a plea of peremptory exception? No, because there is no obvious intention on the part of the plaintiff to discharge the defendant from her debt to her, that debt arising from the shareholders' agreement.

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.

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, Québec Court, 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.

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.

4312678 Canada inc. c. 7295979 Canada inc.

February 2, 2017, Superior Court, EYB 2017-275854

- Did the director breach his duty of loyalty?
- Is the claim on reputation as a business founded?
- Does the director have to reimburse part of his remuneration?
- Is the director entitled to his counterclaim for termination of employment?

By concluding a sublease on behalf of the plaintiff with another corporation in which he was also the majority shareholder and principal officer, for a ridiculous price and just before the arrival of new shareholders of the corporation, the director improperly favored the subtenant and breached his duty of loyalty to the plaintiff. He is, together with the subtenant, jointly and severally liable for the loss sustained by the plaintiff, for $88,671.51.

The plaintiff did not, however, demonstrate that the director had infringed his reputation, or that he unduly retained his mail. However, he used the applicant's Dicom courier account without right and is

required to reimburse the amount of $742.80. He is also ordered to pay the plaintiff $380 for appropriating the reward points of the plaintiff's credit card.

Moreover, even if the director was not working full-time as stipulated in his contract of employment, he is not required to repay part of the remuneration received. The evidence demonstrates that this situation has been known since 2014, without the applicant taking disciplinary action against him. However, the director is not entitled to the termination indemnity stipulated in his contract of employment, since he was not dismissed but had rather resigned.

Letendre c. Québec (Registraire des entreprises)

October 12, 2016, Administrative Tribunal of Québec — Economic Affairs division, EYB 2016-276047

The enterprise registrar rightly struck off the registration of the name of the mis en cause Michot as a director of the corporation. Under the *Business Corporations Act* ("QBCA"), the will of the shareholders to elect and remove the directors can only be expressed by a resolution recorded by minutes of meetings or by a written resolution signed by all shareholders. None of these documents was produced. Prior summary of the meeting, which is not certified by the chairman or by the secretary and whose content is partly contradicted by certain testimonies, does not constitute valid minutes of meetings. The fact that the applicant, who was a director and legal counsel for the corporation, had entered different dates in the corporate records and in the directors' ledger concerning the commencement of Michot's term as a director demonstrates the inconclusive nature of these entries.

Since it is not a matter of deciding whether Michot was a *de facto* director of the corporation, but rather of verifying whether the legal process leading to the declarations and entries in the register of enterprises was respected, the evidence relating to the exercise of the decision-making control of the corporation is irrelevant. The fact of having signed checks does not make Michot a director.

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, Québec Court, 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.