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News

Four notices published from Corporations Canada

1. Bill C-25 receives Royal Assent – Immediate and future impact

On April 24, 2018, 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* received Royal Assent.

A number of administrative amendments have come into force, resulting in changes in:

- Forms under the *Canada Cooperatives Act* – The statutory declaration, which is now part of the forms, no longer needs to be added to the application;
- The Guide on amalgamating cooperatives (*Canada Cooperatives Act*) – Changes have been made to the statutory declaration;
- Revival – Liquidators have been added to the list of interested parties who can apply for a revival;
- Exemptions found in the *Canada Business Corporations Act* to facilitate greater use of notice-and-access for documents required for shareholder meetings.

The remaining amendments proposed in the bill generally affect distributing corporations and cooperatives, and regulations will be drafted before they can come into force. They include:

- Election of directors, including majority voting, individual voting and voting for and against;
- Use of notice-and-access for documents required for shareholder meetings, including financial statements, without needing to apply for an exemption;
- Disclosure of diversity amongst directors and members of senior management.

Please refer to the Explanatory note on proposed regulatory amendments for additional details.

The regulatory process will include a period of public consultation. Clients of Corporation Canada will be notified through their website.

2. New direct access service to Corporations Canada's examiners

Starting on June 4, 2018, registered intermediaries will have a better access to Corporations Canada's examiners. When calling the Contact Centre (1-866-333-5556), registered intermediaries will need to identify themselves using their **registered intermediary ID** to be transferred to an examiner.

The examiners will be available to answer questions that require their expertise. Our Contact Centre's information officers will continue to answer general inquiries.

3. Corporations Canada to share valuable information post-incorporation

Since May 10, 2018, Corporations Canada has introduced a new and faster way to provide new federally-incorporated corporations with their business number. The newly-incorporated corporation receives by email, in addition to its business number, a series of helpful hyperlinks. These links lead to information related to the "next steps" following incorporation, tools and resources, as well as information on the corporation's legal obligations. This new practice is implemented in partnership with the Canada Revenue Agency and Innovation Canada at Innovation, Science and Economic Development Canada.

4. Public consultations on proposed service fees for the Canada Business Corporations Act, the Canada Cooperatives Act and the Canada Not-for-profit Corporations Act

Revisions to some of the fees under the *Canada Business Corporations Act* (CBCA), the *Canada Cooperatives Act* (Coop Act) and the *Canada Not-for-profit Corporations Act* (NFP Act) are being proposed.

Fees for services under the CBCA and the Coop Act have not changed since 2001 and under the NFP Act since 2011. Fees under all three statutes have been reviewed to better align with the cost of delivering related services and meet the government's objectives to achieve more efficient service delivery while increasing the uptake of digital services.

Corporations Canada will be conducting public consultations between May 31 and July 13, 2018. For more details on the proposed changes under each statute, as well as the proposed fees and related service standards, see the Consultation document on service fees.

Appointment of a new Entreprise registrar

The Minister of Employment and Social Solidarity, Mr. François Blais, has appointed **Yves Pepin** as the Enterprise Registrar, effective today.

Mr. Pepin was the Regional Director of Services Québec of the Mauricie region since May 2017. Prior to that, he held various coordination and management positions in several Quebec government ministries and agencies, including the Ministère de la santé et des services sociaux, and at the Ministère du Travail, de l'Emploi et de la Solidarité sociale.

Article

An Act respecting the legal publicity of enterprises (LPA) or the importance of complying with the Business Corporations Act (QBCA)...

We have already talked about it, we are talking about it again and will probably talk about it again in the near future!

It is important to keep your corporate records up to date, and it is equally important to formally adopt the resolutions of the directors and the shareholders.

There is not a month that goes by without a client asking us to give him or her arguments to convince his or her client of the importance of adopting resolutions... all resolutions! Because it's the law.

This statutory obligation is confirmed once again in *Mouhad* v. *Enterprise Registrar*, February 3, 2017, Administrative Tribunal of Québec, EYB 2017-281765 (in French).

This dispute is part of the context in which one party removes the other from the REQ by filing an updating declaration, without further formalities. It could just as easily have been the addition of a party to the REQ in the context of claims for tax debts and wages due (see *Letendre* v. *Enterprise Registrar*, October 12, 2016, Administrative Tribunal of Québec - Economic Affairs Section, EYB 2016-276047. See *Télémarque* May 2017).

We note that requests based on Sections 132 and 133 of the LPA are becoming more and more common... with reason. As the REQ is proof of its content, the reliability of the information it contains is paramount, as is the importance of properly adopting resolutions and keeping corporate records up to date. To claim that a person was or was not a director of a corporation at a particular date would have to be supported by a resolution of the shareholders to that effect.

Summary

The impleaded corporation is a private issuer founded by the plaintiff and the impleaded party (mis en cause) who owned the shares equally. A little more than a year after the incorporation, the mis en cause received a cease-and-desist letter demanding that she leave the corporation for failing to meet her contractual obligations. A few days later, the applicant filed the updating declaration at the Register of the Enterprise Registrar (Registrar). This had the effect of removing the name of the mis en cause of the corporation's file as shareholder, vice-president, treasurer, member of the board of directors and director. The Registrar allowed the mis en cause's request for the cancellation of the filing of the updating declaration. The applicant challenges that decision.

The applicant argues that the mis en cause would have authorized her by phone message to make the changes, following an agreement providing for the sale of her shares by the latter. Section 81 of the QBCA provides that the transfer of shares of a corporation is governed by the *Act respecting the transfer of securities and the establishment of security entitlements* (chapter T-11.002) (TSA).

Under the TSA, certificated securities are considered to be delivered as soon as the purchaser takes possession of the securities and those without certificates are delivered as soon as the corporation registers the purchaser as a holder in its securities register. In all cases, the corporation must register in its securities register the transfer of all securities. In this case, the evidence does not contain any document showing that a transfer of shares was made. No document, whether a copy of the securities register or a nominative endorsed certificate or instructions from the mis en cause ordering the registration of the transfer or even a letter of resignation from her or a resolution of the board of directors of the corporation removing her, has not been produced. Rather, it appears from the evidence in the file that the attempted settlement for the transfer of shares failed and that the parties failed to agree on this issue. The filing in the REQ of the updating declaration was therefore done without right. The decision made by the Registrar is well founded.

For these reasons, the application is dismissed and the decision of the Registrar is confirmed.

Commentary

We remind you that in this regard, the role of the Registrar with respect to the control of declarations is limited and essentially aims to verify the legality of the information contained in the REQ. To ensure this reliability, it is therefore essential that the person who produces a declaration can demonstrate that the requirements of the QBCA and its regulations have been met by the production of legal documents.

Courts regularly remind us that a corporation speaks in its writings and that rigour and formalism are the foundation of the *Business Corporations Act*.

Finally, we unequivocally reiterate our support for the dissent of the Honourable Justice Côté in the *Mennillo* case (*Mennillo* v. *Intramodal Inc.*, 2016 SCC 51, EYB 2016-272834, paras. 155 et seq.) that was the subject of a detailed commentary in the Éditions Yvon Blais' webinar: "2016 Corporate Law Review: the top decisions of 2016" (in French) where the judge highlights the importance of formalism in corporate law. Here is a short excerpt from the decision:

[155] Various statutes place considerable value on corporate documents as a way to protect third parties (including creditors) that rely on them to assess the corporation's situation. One such statute is Quebec's *Act* ***respecting the legal publicity of enterprises***, CQLR, c. P 44.1.

[156] The formalities provided for in corporate legislation are not merely a matter of "form" as suggested by the trial judge, the majority of the Court of Appeal and my colleague Cromwell J. Rather, the observance of **such formalities must be viewed as conditions for the validity of the acts of the corporation, its directors and its shareholders**. They are imposed to give effect to the principle that a corporation has a **distinct legal personality** and to the **maintenance of capital** principle, and they are necessary to **protect** the corporation's patrimony, the common pledge of its creditors.
(Our underlines)

We could not say it better.

Jurisprudence

Rivard c. Habitations des Vignobles inc.

February 2, 2018, Superior Court, EYB 2018-290814

Application for payment of a layoff allowance and for damages. Granted in part.

Calculation of the notice period; Layoff followed by termination; Determination of the date of final termination of the employment contract; Termination of an employee; Absence of liability of directors and officers of the corporation;

The plaintiff is laid off in September 2012 for "lack of work / end of season or contract" and the notice provides for a recall at an unknown date. The defendant pays no compensation to the plaintiff. In October 2013, the defendant handed him a new notice of employment, which did not provide for a return date to work. The plaintiff sued the defendant, claiming compensation in lieu of notice of termination and other damages.

The record of employment of October 8, 2013, confirming that there will be no return to work, thus marks the cessation of the employment relationship. The plaintiff's claim, filed on May 13, 2016, is therefore not prescribed. Since they were bound by a contract of indeterminate term, sec. 2091 C.C.Q. provides that the termination of the contract requires a reasonable time. The case law establishes that the duration of this reasonable time is evaluated at the time of the termination of the contract. In this context, the reasonable notice period is five months. In addition, the case law recognizes that EI benefits must not be deducted from the amount awarded.

The employment contract only binds the defendant and the plaintiff. In the absence of abusive and "clearly malicious" conduct, there is no reason to hold the directors or officers of a corporation personally liable for damages suffered by an employee in connection with a breach of employment link.

Cloutier c. Michaud

March 6, 2018, Superior Court, EYB 2018-291480

Application for interlocutory injunction; Duties of loyalty; Appearance of right and balance of inconveniences. Irreparable harm. Granted.

The plaintiff alleges that his business was diverted to the benefit of his co-shareholder, the defendant and his corporation "Neri". He asks the Tribunal to issue an injunction against the defendant and his corporation to stop the misappropriation.

The plaintiff has satisfied the Tribunal that the defendant (co-shareholder and sole director of Refrigeration) ceased to act for the benefit of the corporation, diverted property for the benefit of others and acted in a manner that adversely affected the plaintiff and Refrigeration.

The parties have no shareholder agreement, so no non-compete clause. In the absence of such a clause, freedom to trade and free competition prevail, but subject to the limits set by good faith and the duty of loyalty.

Section 322 of the *Civil Code of Québec* imposes on the defendant, in his capacity as (sole) director of Refrigeration, the obligation to act with honesty and loyalty.

By diverting the funds from Réfrigération to his personal profit, by using Réfrigération's accounts to equip his new corporation with inventories necessary for his operation, by diverting business opportunities, by failing to comply with the requirements of the Régie du bâtiment (which has the effect that Refrigeration loses its entrepreneur's license), the defendant has manifestly failed to act with honesty, loyalty and in the interest of Refrigeration.

In such circumstances, the injunction is the appropriate remedy (to which may be added the accountability and the claim for damages).

Senez v. Coutu

March 6, 2018, Superior Court, EYB 2018-291480

The plaintiffs seek the annulment of a sale by which one of their co-shareholders ("the shareholder") divested himself of his shares. The control of the corporation is at stake.

The parties are governed by a shareholder agreement signed in 1988, which was amended in 2005 (collectively the "Agreement").

According to the plaintiffs, the sale process of the shareholder's shares did not respect the words or the spirit of the Agreement. The defendants have orchestrated a series of steps to deprive plaintiffs of the opportunity to exercise their rights under the Agreement. They also contravened the reasonable expectations of the plaintiffs that the sales process should be conducted properly in accordance with the Agreement.

They ask that the sale of the shares of the shareholder at 9005 Québec be cancelled and that the sale process for these shares be fully resumed.

The Request is based on section 450 of the QBCA.

The court after analyzing each of these expectations concludes that the Agreement between shareholders and its spirit were respected, that the process was fair, that the parties acted in good faith and that the sales process was transparent.

Finally, the plaintiffs emphasize that the various pieces of evidence must not be analyzed in isolation. They argue that the Tribunal must take a more global approach to appreciate their theory that the defendants "orchestrated" a strategy to "grab control" of 2441 Quebec.

However, the overall analysis of the evidence does not support the conclusion that the plaintiffs are the victims of any strategy mounted by the defendants in order to deprive them of the exercise of their rights as shareholders.

Moghrabi v. Lounor Exploration Inc.

March 1, 2018, Superior Court, EYB 2018-291945

Claim for damages resulting from notice of assessment refusing tax credits and tax deductions. Rejected. Counterclaim for abuse of process. Received.

The plaintiff claims $102,000 from the defendant's former president, Lounor Exploration Inc. (Lounor), a corporation that disposed of its property in 2016. The applicant alleges a refusal of tax credits and tax deductions after subscribing to flow-through shares, issued by Lounor to finance a mining exploration. In the subscription agreements, Lounor guarantees that it will incur Canadian exploration expenses (CEE) and renounces tax deductions for investors.

The plaintiff relies solely on the extra-contractual liability of the former president of Lounor. This liability may arise from a failure to comply with section 119 of the *Business Corporations Act*, which provides that the director must act in the best interests of the corporation with prudence, diligence, honesty and loyalty. Under this standard of conduct, directors must make reasonable decisions based on the information available, but not necessarily the best decision. There is no evidence of a separate and independent fault of the latter, misrepresentations or breaches of a duty of care. Lounor's decisions

were taken in good faith by the board of directors following the advice of the professionals, and not only by the chairman. The latter is thus not responsible for the contractual fault of Lounor.

Considering Lounor's financial difficulties, a business decision to ensure Lounor's survival was not unreasonable and is protected by the business judgment rule. Finally, there is no evidence of a fraudulent scheme by which Lounor would have sought investment knowing that it could not meet its commitments under the subscription agreements.

The application is unreasonable within the meaning of Section 51 C.C.P. The plaintiff has not shown that his recourse against the former president is reasonable. He sued this board member for the sole reason that he was the chairman of Lounor. The allegations of fraud have no basis in fact and in law, while other arguments raised at the hearing were not alleged in the application. The application is unreasonable and the plaintiff is ordered to pay damages of $6,000.

Notice of Appeal, C.A. Montreal, No. 500-09-027420-181, April 6, 2018.