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News

Notice from Corporations Canada

Reminder - 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.

Comments are welcome.

Comments received will be treated as part of the public record unless a non-disclosure request is received. Corporations Canada's public consultations will last until 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.

Corporations Canada

Article

The penalty clause provided for in the asset purchase agreement

In the – very interesting – decision ***Soudure LPB inc. v. Mécanique industrielle Fortier et fils***, EYB 2018-293847 (C.S.), the court must rule on the abusive nature of the penalty clause in the asset purchase agreement which ensures that the seller makes the "necessary efforts to transfer the customers "and collaborates with the buyer. The defendant refuses to pay a certain sum to the plaintiff invoking the penalty clause.

According to the court, the evidence shows that the clientele does follow the defendant and that the sales objectives are largely met.

The evidence reveals that the plaintiff's owner may not have made all the efforts the defendant expected, but nothing in the purchase's agreement precisely specifies the type of effort, the method contemplated or the time that must be devoted to the transfer of customers.

In addition, **no employment contract** binds the plaintiff to the defendant and no specific objective, except the one relating to "gross sales" is specified in the written agreements.

The evidence also reveals that all the financial objectives, specifically indicated in the purchase agreement, are not only achieved, but largely **exceeded**. It follows that, **if the penalty clause applies, as provided for in the purchase agreement, the defendant thus acquired the business of the plaintiff**

without paying anything for the transfer of customers, the elimination of a competitor and obtaining the business of its principal client.

This consequence makes **no sense** and appears easily, at first glance, abusive.

Thus, although the situation appears hypothetical, depending on the conclusions reached by the Tribunal as to the lack of a demonstration of the plaintiff's non-cooperation, it is nevertheless appropriate to determine that if this clause had to apply, it would have been reduced if not totally at least declared inapplicable because the defendant has not proved any real damage and the plaintiff has shown that there was no damage because all financial objectives were achieved as well as the main objectives regarding the transfer of customers and goodwill.

The court reiterates that it is therefore necessary that the **creditor have suffered prejudice** to determine the abusive nature or not of a penalty clause provided for in a purchase agreement.

Jurisprudence

Aciers Picard inc.* c. *Compagnie d'assurances Travelers du Canada

15 January 2018, Superior Court, EYB 2018-292265

Application for permission to act on behalf of a corporation. Granted.

Insurance claim by shareholders in the name of a corporation; the conditions are set out in section 239 of the Canada Business Corporations Act.

The plaintiffs are shareholders of a corporation ("corporation") whose purpose is to negotiate competitive rates for the plaintiffs. The plaintiffs want to bring an action on behalf of this corporation to sue the insurer. The president and general manager of the said corporation allegedly made errors in commercial transactions that allegedly caused a loss of approximately $89,000. The plaintiffs wish to obtain an insurance indemnity from the insurer.

The application for authorization is provided for in section 239 of the Canada Business Corporations Act. The plaintiffs must, by prima facie evidence, demonstrate that they meet the conditions set out in that section. The court must, at this stage, take for granted the facts alleged in order not to pronounce itself on the debate that may take place between the parties.

The plaintiffs, as shareholders of the corporation, are plaintiffs within the meaning of the Act. It is not a dispute between shareholders that would require the characterization of a plaintiff as a minority shareholder or as a controlling shareholder. The applicants gave notice of their intention to make the application. Two notices were sent to the president of the corporation to put him on notice to correct the situation. The prolonged silence of the corporation and its failure to produce the minutes explaining its position allow to conclude to the refusal or the omission to act of the corporation. The plaintiffs are in good faith and do not act for their personal interest, but in the interests of the corporation, seeking compensation for it. The request is granted.

Rice* c. *9123-4385 Québec inc.

27 March 2018, Court of Québec, EYB 2018-293209

Declaration of dividends. Violation of the solvency test. Personal liability of the directors. Granted.

The defendants, relying on the judgment of the Court of Appeal in 2323-0220 Québec inc. v. Management Michel Noël Ltée, propose that the solvency test set out in section 104 of the QBCA was respected or satisfied at the time the dividends were paid.

In their mind, there were no reasonable grounds to believe that the corporation could not pay its current liabilities on the various dates on which the dividends were declared and paid.

In fact, they argue that the claim of each plaintiff did not constitute a "probable or real" debt, in the sense that this expression was used in Gestion Michel Noël, to identify a debt that must be considered by the directors of a corporation when applying the mandatory solvency test.

The Tribunal finds that the two directors, both under the general principles of extracontractual civil liability and because of the violation of the solvency test provided for in section 104 of the QBCA, are personally and jointly and severally liable with their respective holding corporation for the loss suffered by each of the plaintiffs.

Rochette* c. *Hébert

23 March 2018, Court of Québec, EYB 2018-293367

Request to condemn the representative of the corporation. Extracontractual fault. Absence of legal relationship between the plaintiff and the defendant invoked. Granted.

Did the defendant commit misconduct resulting in the applicant's lay off? If this is the case, is it then justified to prosecute the defendant directly or should the applicant have applied to the employer instead?

It is quite true that at all times the defendant acted as a representative of the corporation, but that does not relieve her of her personal responsibility when she commits certain acts.

Every individual remains accountable for his actions and must bear the consequences if he acts faultily, regardless of the hat he is wearing at this time. The general principle of civil liability is set out in article 1457 C.C.Q.

The argument raised by the defendant that it is the corporation and not herself that should be seated in the defendant's chair would most likely be admissible if the basis of the action was contractual in nature.

If the breaches alleged against the officer are based on a fault within the meaning of section 1457 C.C.Q., its author, as the corporation if the facts justify it, may be held liable for the damage resulting from his actions.

The obvious conclusion is that the defendant incurred her own responsibility by her actions, although these took place during her duties as vice-president. Consequently, the plaintiff is entitled to claim that there has been fault on her part and that he has the right to claim compensation for the injury suffered.

7531877 Canada ltée (Buckingham Chrysler, Jeep, Dodge)* c. *9531025 Canada inc. (Buckingham Chevrolet Buick GMC)

17 May 2018, Superior Court, EYB 2018-294520

Confusion of names. Application for an injunction. Rejected.

The court finds from the totality of the evidence that the plaintiff has not established that the defendant's trade name is likely to cause confusion to consumers with its trade name and / or trade-marks it uses.

The court considers, after an analysis of the totality of the circumstances and based on the preponderance of evidence, that an ordinary consumer in a hurry who sees the name "Buckingham Chevrolet Buick GMC" with a vague memory of the name and brand "Buckingham Chrysler Jeep Dodge" will not think that the two corporation sell the same products, are operated by the same person and / or that the vehicles sold by the two concessions are sold by the same entity.

The court also considers that the evidence in no way justifies granting the plaintiff a monopoly of the use of the word "Buckingham" in association with motor vehicles of various makes.

Considering the findings with respect to the first two criteria of passing off, which are equally conclusive with respect to an action under the *Legal Publicity Act*, the application for an injunction is dismissed and it is not relevant to consider the question of damages.