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News

New online service for not-for-profit corporations – Certificates of compliance and of existence

As of October 4, 2018, you can obtain a certificate of compliance or a certificate of existence for a not-for-profit corporation governed by Canada's *Not-for-profit Corporations Act* through the Online Filing Centre. You can, of course, continue to use the services of Marque d'or to obtain these documents for peace of mind.

Article

Jurisprudence recognizes that a non-competition clause in a shareholders' agreement that does not include any territory is invalid because it is contrary to public order

The court reaches this conclusion in *Brousseau* v. *Fortin*, June 19, 2018, Court of Quebec, EYB 2018-296321 below. It is important to remember this principle especially when the agreement provides that the parties undertake not to invoke the nullity of certain provisions.

In this case, the respondent submits that the Tribunal should not dismiss its defense and cross-application at this preliminary stage since the trial judge will have to take into account the context of the relationship between the parties and the actions of the other party before deciding on the scope of the non-competition clause.

Non-competition clauses have been recognized by the Courts as valid according to their duration, the activities concerned and the territory concerned, insofar as they are necessary to protect the interests of the person in favour of whom they have been granted. If it is not considered reasonable, the clause will be deemed unwritten because contrary to public order.

Such a clause is valid or it is not. It is not for the Tribunal to fill in the gaps and rewrite it.

As the Court of Appeal stated in ***Gagnon* v. *Mario St-Pierre*** (EYB 2012-207110) (our translation):

[14] The non-competition commitment must therefore include a reasonable territorial limit, which must not exceed what is necessary to protect the interests of the party benefiting from it, which in practice means that it must generally be limited to the territory where the latter carries on its activities.

[15] However, the non-competition provision 5.0 of the agreement does not include any territorial limit, as found by the judge (paragraph [42]). At first sight, the absence of a territorial limitation is sufficient to invalidate this obligation. (…)

[19] The fact remains that the territorial delimitation is, according to the guidelines developed by the case law, a fundamental condition for concluding that the non-competition obligation is reasonable and, consequently, valid. (…)

[20] Given the invalidity of the provision, it is unnecessary to rule on its alleged violation.

Thus, jurisprudence recognizes that a provision not including any territory is invalid since it is contrary to public order.

In light of these principles, the Tribunal concludes that the non-competition provision contained in the agreement itself is not valid since no territory is indicated. Mr. Fortin argues that the context will clarify the intent of the parties at the time of drafting the agreement. Whatever the intention, the difficulty remains because the Court hearing the merits of the dispute cannot rewrite the provision to take account of it. In the absence of territory, the provision must be considered excessive and declared null.

For this reason, the Tribunal is of the view that the defence and the cross-application, which are entirely based on the non-competition provision, have no chance of success.

Mr. Fortin argued that under 30.5 of the agreement, the parties undertook not to invoke the nullity of certain clauses. This undertaking does not, however, make it possible to remedy a nullity resulting from a breach of public order as in this case.

Thus, even if the parties have agreed among themselves not to invoke the nullity of a provision provided for in an agreement between shareholders, this intention has no legal value facing the nullity of said clause. Public order takes precedence over the intention of the parties.

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Statutory law takes precedence over contractual rights in rectification of abuse of power or iniquity (also called oppression remedy)

In this edition of the *Telemark*, two decisions remind us of this principle, in *Poirier* v. *AEC Symmaf Inc.*, April 9, 2018, Superior Court, EYB 2018-296278 and in *Jack* v. *Jack*, March 16, 2018, Superior Court, EYB 2018-296842.

Despite the presence of an arbitration clause, an oppression action brought in Québec must only be referred to an arbitrator if the parties have expressed the intention to waive the exercise of their statutory rights before a competent court.

Section 622 CCP provides for the referral of a dispute to arbitration where the parties have entered into an arbitration agreement. However, as explained by Mongeon J. in ***Heeg*** (*Heeg* v. *Hitech Piping (HTP)*

Ltd., September 10, 2009, Superior Court, EYB 2009-163654), an arbitrator can rule on an oppression remedy only if the remedies sought are set out in the arbitration clause:

[84] The above jurisprudence also confirms that although a private arbitrator could be entrusted with the responsibility of deciding upon an oppression situation, unless the recourse and relief sought is clearly stipulated in the arbitration provision (which is not the case here), an application for an oppression remedy pursuant to section 241 and following CBCA will not fall within the jurisdiction of the arbitrator.

Moreover, in ***Ferreira*** (*Ferreira* v. *Tavares*, 2015 QCCA 844, EYB 2015-251970), the Court of Appeal concluded that an arbitration clause did not confer on the arbitrator jurisdiction to conclude to the presence of abuse and to make injunctive relief orders:

[29] As noted by the judge, the arbitration clause in issue does not confer on the arbitrator jurisdiction to determine whether there have been abuses or injustices within the meaning of section 241 of the CBCA. Similarly, it does not grant him the power to make injunctive relief orders, as required by Tavares.

If you wish to give this power to the arbitrator and not to resort to the jurisdiction of the Superior Court, your arbitration clause provided for in the shareholders' agreement must clearly and expressly provide for it.

Jurisprudence

Québecor Média inc. v. Groupe Juste pour rire inc.

February 12, 2018, Superior Court, EYB 2018-290335

Application for permanent injunction. Rejected.
Scope of a right of first offer and right of first refusal.

Quebecor Media Inc. (QMI) does have a right of first offer and a right of first refusal. The right of first offer requires Groupe Juste pour rire inc. (JPR), before starting any negotiations with a third party, to make a first offer to QMI and to negotiate exclusively with QMI for a certain period.

QMI, however, has no right of first refusal if JPR plans to sell to a third party on terms less favourable to the buyer.

In this context, it must be concluded that the first offer cannot be considered as establishing a minimum price for any sale of JPR. In addition, QMI cannot require third parties to be informed of the terms of the first offer. Such disclosure is not necessary to ensure QMI's right of first refusal. In the same logic, QMI cannot require third parties to be prevented from submitting offers on terms inferior to those of the first offer to QMI.

***Auger* v. Roy**

April 19, 2018, Superior Court, EYB 2018-293429

Application for a safeguard order made in the course of an oppression remedy. Partially granted.

Shares purchase options under shareholder agreement; Illegal dismissal in a context of oppression; Reinstatement as general manager; Suspension of the calling and holding of meetings.

In 2018, following a deterioration in their relations, Auger confirms its intention to purchase the shares held by Roy. This request is refused and Auger is given a letter of dismissal, which letter contains no reason. As part of his oppression remedy, Auger seeks a safeguard order in order to obtain his reinstatement as Chief Executive Officer, the reinstatement of his compensation and benefits, and the suspension of the calling and holding of any meeting of the Board of directors or the shareholders of the corporation.

The *Business Corporations Act* (QBCA) gives the court broad powers in an oppression remedy. This remedy is also not limited to cases of fraud, bad faith or illegality, it may include abuse of rights and violations of the legitimate expectations of a complainant. Auger must demonstrate that he is a complainant within the meaning of section 439 QBCA. Then he has to prove that his reasonable expectations have been frustrated and that he has been abused or unfairly prejudiced. The unlawful dismissal of an employee with shareholder, director or officer status is generally not sufficient to justify an oppression remedy. Nevertheless, this remedy is possible when the dismissal is part of a context of oppressive conduct aimed at defeating the plaintiff's rights such as exercising share options.

As to his request for reintegration as CEO and the reinstatement of his remuneration and other benefits, Auger has demonstrated a colour of right. Indeed, Auger is a plaintiff within the meaning of section 439 QBCA who appears to have been the victim of oppressive conduct, since his legitimate expectations of his continued employment and the possibility of acquiring Roy's shares were frustrated. The criteria of serious and irreparable prejudice, the balance of inconvenience and urgency also militates in favour of the reintegration of Auger. This part of the application for a safeguard order is therefore allowed. Auger did not, however, demonstrate a colour of right to obtain the suspension of the calling and holding of any meeting of the board of directors or the shareholders of the corporation.

Lavoie v. Maltais

10 mai 2018, Cour d'appel, EYB 2018-294167

Motion for leave to appeal decisions ordering the stay of proceedings, dismissing applications for safeguard order and dismissing an application for interim costs. Permission to appeal granted, but dismissed.

Under section 32 CCP, the decision to suspend a proceeding cannot generally be appealed. The decision of the trial judge, which respects the governing principle of sound case management under section 19 CCP and which is not likely to cause serious prejudice to Lavoie, is not an unreasonable exercise of his managerial power. Permission to appeal is granted, but the appeal is dismissed.

Lavoie also seeks leave to appeal the dismissal of his applications for safeguard orders. Such authorization is reserved for exceptional situations where there is a *prima facie* weakness of the

judgment and an urgency to avoid significant harm. These conditions are not satisfied. Permission to appeal is granted, but the appeal is dismissed.

Lavoie finally seeks leave to appeal the decision dismissing his claim for interim costs. Discretionary in nature, the provision for interim costs is only granted in exceptional circumstances and the judge properly examined the applicable criteria. Moreover, the provision was for the preparation of the application in the Superior Court, whereas the main part of the litigation will have to be before the arbitrator. Any incidental request for arbitration shall be submitted to the arbitrator. Permission to appeal is granted, but the appeal is dismissed.

Brousseau v. Fortin

June 19, 2018, Court of Quebec, EYB 2018-296321

Issues in dispute:

Is the defence and cross-application inadmissible on the ground that it has no reasonable chance of success since the non-competition provision on which it is based is invalid?

Should the defence and cross-application be dismissed on the ground that Mr. Fortin does not have the legal interest required to claim the liquidated punitive damages provided for in the shareholders' agreement (hereinafter: "agreement") in the event of a breach of the non-competition provision?

The non-competition clauses have been recognized by the Courts as valid according to their duration, the activities concerned and the territory concerned, insofar as they are necessary to protect the interests of the person in favour of whom they have been granted. If it is not considered reasonable, the clause will be deemed unwritten because contrary to public order.

Such a clause is valid or it is not. It is not for the Tribunal to fill in the gaps and rewrite it.

Thus, jurisprudence recognizes that a provision not including any territory is invalid since it is contrary to public order.

In light of these principles, the Tribunal concludes that the non-competition provision contained in the agreement itself is not valid since no territory is indicated.

Moreover, according to the unambiguous wording of section 22.2, only the Corporation may require the payment of liquidated damages: "[...] he must pay to the Corporation, at his request, liquidated damages", a penalty of five thousand dollars ($5,000.00) per day [...])

Mr. Fortin does not personally hold such a remedy and cannot therefore be a cross-applicant to claim damages liquidated under the agreement.

Autorité des marchés financiers v. Bossé

November 7, 2017, Court of Québec, EYB 2017-286699

Charges of committing offences under the Securities Act. Verdicts of guilt on certain counts, and verdicts of acquittal for other counts.

The defendant had a duty as a broker to further investigate the actual financial capacity of the investors. The fact that these investors have voluntarily, or not, lied to him therefore does not matter. Similarly, simply having them initialize boxes in a form without analyzing their overall financial situation is insufficient.

This duty of care was all the more important because the defendant's claim to have been exempted under *Regulation 45-106 respecting Prospectus Exemptions* from preparing a prospectus approved by the AMF in the presence of qualified investors. In the present case, the private financing operation, using the investor exemption, should have provided for questions about their qualification and detailing the answers which qualified them, like secondary sources of income. A simple form requiring an annual income of $200,000 did not fulfill this obligation and is contrary to the protection of the public. In fact, when a securities dealer deals with a person who, as in this case, wants to invest in high-risk investments, he must be careful not to jeopardize his financial position.

In the present case, several statements were false, including investment knowledge that was not high, and no verification was made of the veracity of the secondary income that some of the investors claimed to have. No questions were asked about this specific point during the cross-examination of investors. Accordingly, pursuant to the application of the fairness rule in *Browne* c. *Dunn* (*Browne* v. *Dunn* (1893), 6 R. 67 (H.L.): Application of the fairness rule from the United States Supreme Court), the Court dismisses the respondent's request to conclude that they lied about their income.

This rule is intended to avoid trapping a witness on an important element of the evidence. That is why a party who intends to attack the credibility of a witness with evidence that contradicts certain aspects of its version must cross-examine it in this regard. This witness must have the opportunity to comment on the element that differs from his testimony. Failure to do so affects the weight of this evidence and the trial judge has the discretion to apply it. This absence of cross-examination needs to be linked to a significant element of the evidence for the remedy to apply, and this is the case here.

Defendants are found guilty of committing an offence under the QSA by investing in a form of investment subject to the Act without first holding a prospectus approved by the AMF.

Archambault v. Agence du revenu du Québec

May 9, 2018, Court of Quebec, EYB 2018-294800

The Tribunal must decide whether the prerequisites for Archambault's liability to be incurred have been met by Revenu Québec; Appeal granted.

Revenu Québec could not issue to Archambault, as a director, a notice of assessment for Xcalibur's tax debts since it failed to show "*that a writ of execution against the corporation is reported unsatisfied" in whole or in part as a result of a judgment made under section 13;*".

Poirier v. AEC Symmaf Inc.

April 9, 2018, Superior Court, EYB 2018-296278

Demand as a declinatory exception. Rejected.

Oppression remedy; Recourse based on wrongful dismissal; Interrelated remedies; Arbitration clause in a shareholder's agreement; Request for referral to the arbitrator; Precedence of section 3149 CCQ; Intention of the parties as to the scope of an arbitration clause.

Section 3149 CCQ allows Poirier to file an application for wrongful dismissal before the Court of Québec despite the arbitration clause. Since the jurisdiction of the Court is a question of law, or at least a question of mixed fact and law, the Court may depart from the principle that any discussion of the arbitrator's jurisdiction must first be treated by him.

In addition, an action for oppression brought in Québec must only be referred to an arbitrator if the parties have expressed the intention to waive the exercise of their statutory rights before a competent court. This arbitration clause does not expressly mention oppression remedies.

Jack v. Jack

March 16, 2018, Superior Court, EYB 2018-296842

Application for a stay of proceedings and referral to arbitration. Rejected.

Arbitration clause in a shareholders' agreement; Liquidation request; Jurisdiction of the arbitrator in an oppression remedy; Jurisdiction of the Superior Court not excluded

A transaction took place between the parties to allow a redemption of shares, but the transfer was never made. The defendant, alleging abuse of the plaintiff, relies on section 450 of the *Business Corporations Act* and seeks judicial liquidation. In 2018, the plaintiff invokes the arbitration provision provided for in the agreement between the shareholders and sends a notice of arbitration so that an arbitrator can decide on the valuation of the shares and the right to unequal sharing.

Section 622 CCP provides for the referral of a dispute to arbitration where the parties have entered into an arbitration agreement. However, as explained by Mongeon J. in *Heeg* (*Heeg* v. *Hitech Piping (HTP) Ltd.*, September 10, 2009, Superior Court, EYB 2009-163654), an arbitrator can only rule on an oppression remedy if the remedies sought are set out in the arbitration provision. Moreover, in *Ferreira* (*Ferreira* v. *Tavares*, 2015 QCCA 844, EYB 2015-251970), the Court of Appeal concluded that an arbitration provision did not confer jurisdiction on the arbitrator to conclude to the presence of abuse and to make injunctive relief orders. The present dispute is not related to the interpretation of a provision of the shareholders' agreement and the conclusions sought by the plaintiff are not provided for in the arbitration provision.