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RECOURSES SEEKING RECTIFICATION UNDER THE NEW *BUSINESS CORPORATIONS ACT*

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Although it is too early to determine all of the implications of the new *Business Corporations Act*[1] (hereinafter the "BCA"), the courts have, on several occasions, already analyzed the application of this statute, particularly in the area of recourses for rectification. New sections 450 and following strongly resemble the sections of the federal statute concerning this subject.

Henceforth, sections 450 and following clearly give judges the opportunity to rectify the situation in cases of abuse of power or iniquity, with respect to both existing situations and situations that may arise in the future[2]. This recourse is made available to shareholders and directors, whether former or current, and to any other persons who may have an interest, as determined by the court (such as the creditors for example).

Sections 450 and following give the courts wide discretion with respect to the orders they can make. Thus, under the provisions of section 451, judges may order the appointment of a receiver, the revision of the functioning of a corporation by amending its articles or a unanimous shareholder agreement, the purchase or redemption of securities, etc. The list set out in that section is not restrictive.

For example, in the context of dispute heard in July 2011, three plaintiffs (two shareholders of a Quebec corporation incorporated under the BCA and the corporation itself) instituted an action for rectification against the third shareholder of the corporation, who was also the duly authorized representative of a Chinese subsidiary of the corporation. The plaintiffs alleged certain oppressive acts by the third shareholder who had, in particular, refused access to the Chinese subsidiary by the other two shareholders and made certain false statements to some of its customers concerning its problems in delivering products. Apparently, the subsidiary had even ceased its activities due to the delivery problems. The plaintiffs, having been refused access to the plant and to the subsidiary's documents, could not assess the situation or restore normality.

Taking into account the affidavits describing the third shareholder's oppressive actions, and in view of the contradictory version of the facts furnished by that shareholder, the Court, basing itself on section 451 of the BCA, ordered the communication to the plaintiffs of not only the annual financial statements of the corporation (access to which is mandatory under section 228 of the BCA), but also a whole series of documents relating to the financial statements, such as the order forms, invoices, bank statements and all communications relating in particular to the products sold.[3]

This decision shows to what extent the courts can use their discretionary powers to make any order that should enable the persons concerned to rectify a problematic situation. ◂

1 R.S.Q. c. S-31.1.
2 Section 450 BCA.
3 *9229-5518 Québec inc.* v. *Desautels*, 2011, QCCS 4606 (CanLII).

YOU DO BUSINESS IN A PROVINCE OTHER THAN QUEBEC: ARE YOU REQUIRED TO REGISTER YOURSELF?

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With the growth of the globalization phenomenon in recent years, many Quebec corporations are no longer content to carry out on their activities only where they are situated and they now commonly conduct business outside Quebec. It goes without saying that if your firm wishes to conduct business in a foreign country undoubtedly certain formalities will apply in that country; but what if your firm conducts business in Canada in a province[1] other than Quebec? Have you taken the time to make sure your corporation can legally carry out its activities there?

The basic principle in most Canadian provinces is that if a foreign corporation, whether it is a corporation incorporated in a foreign country or in another province of Canada or under the *Canada Business Corporations Act*, conducts business in the province, then it must register itself with the competent governmental authorities of the province. Quebec applies the same rule and requires that such a corporation be registered with the *Registraire des entreprises*.

But how does one know if his firm conducts business in another Canadian province within the meaning of the law? This notion may appear to be obvious at first and yet it is broader than what you might imagine and it may differ slightly from one province to the next. More particularly, your corporation may be deemed or presumed to carry out business in a Canadian province other than Quebec if it has an establishment, a representative or a warehouse there, if its name appears in an advertisement that mentions an address in the province, if it holds a permit that gives it the right to carry out activities in the province, if it solicits there, if it owns a building or land in the province, or if its telephone number appears in a telephone book in the province.

When a corporation is required to register in another province, it must do so within a certain period of time following the commencement of its activities in that province. Generally, governmental fees apply and various documents and information must be provided. Once it is registered, generally the corporation must file an annual declaration and pay annual governmental fees in order to maintain its registration in the province. The corporation may also be required to designate an authorized representative having an establishment in the province to receive service of any legal proceedings instituted against it in the province.

What are the impacts if your corporation conducts business in a Canadian province without being registered there when the law of that province requires that it be registered? Generally, there are two possible consequences: in addition to running the risk of being fined, the corporation may find itself unable to go to court before the courts of the province in question.

Since the necessity to register and the registration conditions vary from one province to the next, we recommend that you be diligent and check with competent professionals whether your corporation is conducting business outside Quebec. If there is any doubt, prevention is the best approach! ◂

1 Note to readers: please read the word "province" so as to include Yukon, the Northwest Territories and Nunavut.

RESALE PRICES AND AUTHORIZED DISTRIBUTORS: A SYNOPSIS

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In the past, in North America, the manufacturer of a product that was distributed through one or more authorized distributors had to deal with the restrictions imposed by Canadian competition law (or under United States antitrust law) concerning resale price maintenance. This was problematic since the circumstances that lead a manufacturer to want to impose a resale price are numerous. The manufacturer may wish, due to the good reputation of the product, to make sure that it will be resold at a price that reflects its value and avoid customers likening it to a low quality product. Also, a manufacturer might have distinct networks of authorized distributors in different countries and want to make sure, especially in the age of e-commerce, that an authorized distributor situated in country A will not start selling the product in country B at a price that is lower than that for which it is usually sold in country B.

However, for a long time, such a manufacturer could not control the resale price within a given territory. As much in US law as in Canadian law, fixing the resale price of a product was considered as illegal in itself (*per se*), which meant that the practice was prohibited whatever the effects on the market might be.

In the United States, the situation changed in 2007 with the Supreme Court's decision in the case of *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*[1] in which it overturned a century of case law and ruled that having a minimum resale price would no longer constitute an offence in itself (*per se*) but rather should be the subject of a reasoned analysis (rule of reason), that is, an analysis based on the anticompetitive effects of the practice.

As is often the case, Canada fell behind in 2009 with amendments to the *Competition Act* that, in particular, caused the criminal offence of resale price maintenance to disappear and be replaced by provisions making this practice susceptible to a review that may result in the issuance of a prohibition order by the Competition Tribunal if it "has had, is having or is likely to have an adverse effect on competition in a market"[2].

Thus, the general rule still remains that a manufacturer must not impose a resale price unless it is only a suggested price and it is clearly stated that the manufacturer's commercial customers are in no way required to accept the suggested price. On the other hand, a manufacturer who does not comply with this general rule can count on the fact that the Competition Bureau or the private party who wishes to have the practice prohibited must show the real or potential anticompetitive effect of the imposition of the resale price. Therefore, the manufacturer may potentially make a series of arguments to justify the practice, which simply would have been illegal under the *per se* regime.

It should be noted that the nature of the justifications that will be judged acceptable by the Competition Tribunal will remain somewhat nebulous until some case law is established under the aegis of the new provision in the *Competition Act*. Normally, these justifications would have to establish effects favouring competition that are greater than the negative effects on free competition. The manufacturer might also be able to invoke the fact that he has only a small market share to argue that the practice at issue does not have an effect on the relevant market.

But undoubtedly it is even more important that, due to the migration in Canada of this offence towards a civil regime (as opposed to a penal regime), a manufacturer can feel relieved by the fact that even if his resale price maintenance practice contravenes the law, no penal sanction (fine or imprisonment) can be imposed on him and no action for damages can be instituted against him[3]. Therefore, the only risk he faces is that the Competition Tribunal issues an order to cease maintaining the price, further to a recourse initiated by the Competition Bureau or a private party.

With these amendments to the *Competition Act*, a manufacturer may henceforth consider adopting a practice aimed at maintaining a resale price without fear of penal consequences and with confidence that he will have an opportunity to defend its legitimacy if it is contested. ◄

1 551 U.S. 877 (2007).
2 See subsection 76(1) of the *Competition Act* (Canada) and particularly paragraph (b).
3 See paragraph 2 of section 76 of the *Competition Act* (Canada).

FRANCE ARMS ITSELF AGAINST TRUSTS

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The Quebec trust and the common law trust have become favourite vehicles in the context of putting into place legal and tax structures.

Although the respective characterizations and legal frameworks of the Quebec trust and of the common law trust (each a "**Canadian Trust**") include significant differences, they are nonetheless treated in a similar way under our Canadian tax law.

The legal systems of certain countries, including France in particular, have not recognized the existence of the trust as we know it in Canadian law, at least until quite recently.

Indeed, certain trusts, including irrevocable and discretionary Canadian Trusts, were not recognized by the French legal regime.

Certain residents of France have put in place legal structures that include Canadian Trusts to hold their assets situated in France or abroad with the aim of reducing their liabilities for *droits de succession et de donations* (estate and gift taxes, hereinafter referred to as "**DSD**") as well as for *l'impôt de solidarité sur la fortune* (a tax on capital, hereinafter referred to as "**ISF**"). However, on July 6, 2011, the French Parliament adopted a new taxation system that makes Canadian Trusts and their French beneficiaries, among others, subject to French tax law (the "**New Rules of July 2011**").

Generally, the New Rules of July 2011 have the effect of dealing with gaps in the French statutory provisions concerning foreign trusts, including Canadian Trusts, and of lifting the veils of these entities in order to subject to DSD and to ISF the persons who would be subject thereto if foreign trusts were not used. In addition, new disclosure obligations have been put in place with respect to the existence and functioning of foreign trusts as well as the value of the property held by them. Failure to comply with the disclosure obligations will lead to the imposition of high penalties for which the trustees, the settlor and the beneficiaries of the foreign trust will be jointly and severally liable.

As mentioned above, many French residents have, over the years, used Canadian Trusts to hold their assets with the aim of reducing the amounts that they must pay in the form of DSD and ISF. With the introduction of the New Rules of July 2011, many of the structures put in place are proving to be ineffective from a French taxation perspective and substantial reorganization is required, possibly including the liquidation of Canadian Trusts.

The liquidation of a Canadian Trust may result in onerous Canadian tax consequences. That is why the analysis and putting into place of a sound and comprehensive tax plan is essential in order to minimize the potential adverse tax consequences. ◂

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