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SMEs ARE NOT IMMUNE FROM CLASS-ACTION SUITS IN COMPETITION LAW

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In September 2009,[1] we published a first article in these pages on the application of the *Competition Act*[2] (the "Act"), focusing our discussion on the offence of bid-rigging contained in section 47(1). We noted at the time that this offence could lead to criminal sanctions for businesses that are found guilty.

In this issue, we will consider, in particular, the price-fixing conspiracy offense, also provided for in the Act. The subject is of interest to SMEs because, on the one hand, these businesses are obviously not immune from the criminal sanctions that could be imposed on them, but, on the other hand, this is probably one of the rare areas of the law in which small- and medium-sized businesses can be sued for damages, in a civil proceeding, in the context of a class action.

Historically, SMEs have generally been able to avoid being sued in class action proceedings, particularly due to the uncertainty surrounding the ability of such businesses to bear the costs of a potential monetary award.

We need only think of the gas price-fixing case[3] to see that SMEs are definitely not immune from this type of recourse, particularly when there are one or more multinational corporations among the co-defendants, which certainly have the financial ability to defend themselves and pay a potential award, if necessary.

THE *COMPETITION ACT*

It is useful to note that, in addition to specifically setting out named deceptive marketing practices and restrictive trade practices that are prohibited, the Act also lists a series of criminal offences. As in the *Criminal Code*, a person accused of committing an offence under the Act will be found guilty if it is proven that he committed the act (*actus reus*) and had the necessary intention (*mens rea*).

All the elements of the offence must be proven beyond any reasonable doubt.

Among the criminal offences provided for in the Act is the offence of conspiracy, which usually takes the form of a price-fixing conspiracy.

THE OFFENCE OF CONSPIRACY

Section 45 of the Act contains the definition of what constitutes a conspiracy:

> 45. (1) Every person commits an offence who, with a competitor of that person with respect to a product, conspires, agrees or arranges:
>
> (a) to fix, maintain, increase or control the price for the supply of the product;
>
> (b) to allocate sales, territories, customers or markets for the production or supply of the product; or
>
> (c) to fix, maintain, control, prevent, lessen or eliminate the production or supply of the product.

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However, the Act expressly provides for the defences[4] to the charge of conspiracy. In particular, the parties may rely on the defence that the "alleged conspiracy" is ancillary to a broader agreement which does not, on the other hand, contravene section 45. Also, the Act explicitly recognizes the defence of an industry regulated by a province or the federal government.

Finally, one should note that a person found guilty of conspiracy under section 45 is guilty of an indictable offence and liable on conviction to imprisonment for a term not exceeding 14 years or to a fine not exceeding $25 million, or to both.

CIVIL ACTIONS UNDER SECTION 36 OF THE ACT AND CLASS ACTIONS

As indicated above, the Act also provides that a person may institute civil proceedings, under section 36, to try to recover the amount of the damages suffered by him from the alleged

[1] Lavery BUSINESS, number 2, September 2009

[2] R.S.C. 1985, c. C-34

[3] See the judgment authorizing the exercise of the class action against several individuals and several respondent corporations, including several SMEs: *Jacques v. Petro-Canada*, 2009 QCCS 5603

[4] See section 45 of the Act, subsections (4) (5) and (6)

participants in the conspiracy. The amount of these damages is assessed, among other things, on the basis of the difference in the price paid by the consumer had it not been for the conspiracy.

Since these amounts are generally small for each consumer individually, it is usually in such circumstances that the use of the procedural vehicle of the class action becomes meaningful. The total amount of the claims of all the class members then becomes sufficiently large, at least for the plaintiffs, to justify allocating the necessary resources to properly pursue the class action.

CONCLUSION

Several class actions on price fixing were recently instituted in Quebec and Canada. Obviously, these actions require a substantial allocation of resources by the parties being sued, and are often an additional burden to the criminal convictions imposed on the parties for the same facts. While the cumulative burden may be significant for a large business or a multinational corporation, most will agree that it will be critical for the SME for whom the mere involvement in such proceedings will very likely have a negative impact on the company's solvency, or simply compromise its survival in the medium or short term.

One is therefore well advised to be extremely careful in regard to price fixing conspiracies since, as we have seen, the consequences are often much greater than the criminal sanctions contained in the Act.

SMEs AND TRADE-MARKS

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So, just like that, your SME is going to launch a new mark soon!

Your research and development, quality assurance, marketing, sales and finance teams will strive to ensure its success alongside hundreds of other products that will emerge in the marketplace this year. As you already know, the success rate of new products is rather low.

Therefore, stack the deck in your favour by taking a few minutes to plan efficiently all the legal aspects related to your new mark.

The purpose of this short article is not to teach you about trade-marks but rather to persuade you of their importance.

Two weeks after conducting an important national launch, do you really want to have to explain to major distributors that your new product will no longer be available for numerous weeks because a competitor filed an injunction against you? This injunction was granted against you because, according to the Court, your mark created a likelihood of confusion with a competitor's trade-mark, even at the intermediate phase of the legal proceedings.

With this type of injunction, you will have no other choice but to recreate all your packaging, advertisement material and sales literature. Not to mention the image of poor management it will project...

On that note, here are a few tips:

START EARLY!

A few months will pass from starting with a blank piece of paper to putting products on the shelves. New ideas often stem from a strategic direction or a new marketing concept. A direction or concept could (and should) be the source of new marks before even starting to research and develop a new product. There is no need to wait until the product is fully developed to start thinking about its appellation. This also applies to its graphic feature, which should derive from the concept or direction rather than be a last-minute design at the end of the development process.

Likewise, contact your lawyer as soon as you begin to contemplate a new mark so that he or she can research and provide a legal opinion on the use of the mark. New proposed marks can be (and frequently are) not available. It is essential to plan time to redesign the creation of the mark (even, perhaps, more than once), if necessary.

OBTAIN PROTECTION FOR YOUR MARK RIGHT AWAY!

As soon as a new mark is selected and legally approved, begin the application for registration. An application for registration can be filed even if you have not started to use the mark; this is based on proposed use.

STAND OUT! MAKE A DISTINCTION!

Your future mark will be used **to distinguish** your products or services from those of your competitors. Your future mark will not be used **to identify** your products or services. There is a major difference. With this in mind, resist the temptation to give only descriptive or generic appellations to your products or services. The more **original** and **distinctive** the mark, the lower the likelihood of confusion with an existing trade-mark. Moreover, it will be easier to register your new mark and, above all, defend it against infringement from competitors.

PROTECT WHAT REALLY COUNTS!

Trade-marks are registered separately in each country. It is therefore necessary to file an application in each country where your trade-mark needs to be protected. Evidently, this requires a more substantial budget. If this presents a problem, a good starting point is to consider applying the *Pareto's Law*; this means filing an application in 20% of the countries that will represent probably 80% of your market. Numerous SMEs use this pragmatic alternative. Moreover, it will enable you to assess the commercial success of your new mark and possibly proceed to filing applications in other countries later on in keeping with your budget.

The European Union (EU) provides an exception to needing to file an application for each country. In fact, in this territory, a procedure is set up so that it is possible to file a single trade-mark application to cover the entire EU, provided that the proposed mark is available in each country. This procedure is generally more effective and cheaper than filing a separate application for each European country. Manifestly, one must have aspirations for his or her product or services in this entire territory to justify such a step.

CONNOTATIONS IN FOREIGN LANGUAGES

This topic does not typically form a part of legal treaties with respect to trade-marks. Unfortunately, companies often decide to skip this process. However, if your SME plans to sell products to foreign countries, even only in the future, it is preferable to verify, prior to launching the mark, that is does not have a pejorative or even ridiculous connotation in a foreign language. There are famous examples of marks that had to be withdrawn from the market in certain countries not because of legal problems with local authorities or competitors but simply because of its ridiculous connotation in a given language.

JOINT OWNERSHIP

Avoid the joint ownership of a trade-mark. This almost inevitably prevents insoluble problems in the long run. When the mark is being created, certain contractors consider joint ownership. This can occur when several companies create a "joint venture" to launch a product. Joint ownership can be filed later on in the life cycle of a mark; for example, when a division of a company is sold to a third party, each entity preserves a right of joint ownership on the mark. If you resist joint ownership, you will not get stuck in this type of situation.

DIVIDING UP CORPORATE SHARES IN THE EVENT OF DIVORCE, SEPARATION FROM BED AND BOARD, OR DISSOLUTION OF A CIVIL UNION

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INTRODUCTION

While Mrs. X holds shares and options in a public company which she acquired during the marriage, her husband, Mr. X, holds shares in a family-run business which he acquired some time before the marriage. What effect could a separation or divorce have on corporate shares held by one or both parties?

This bulletin is intended to provide readers with the general rules governing the partition of shares owned by either spouse in a company, whether private or public, in the context of a divorce, separation from bed and board, or dissolution of a civil union.

A spouse's entitlement to the partition of the value of the other spouse's shares will depend on the applicable matrimonial regime. In Quebec, the applicable matrimonial regime is determined at the time of the marriage, unless it has been modified by a notarial act during the course of the marriage. The legal regime applicable to all couples who have wed in Quebec since July 1, 1970 without a marriage contract is that of the partnership of acquests[1]. This regime may also apply to couples married prior to this date and who elected to be subject to the partnership of acquests by way of a marriage contract. Since June 24, 2002, this legal regime also applies to civil union spouses who do not have a civil union contract. Spouses who celebrated their union before this date may also have decided to adopt the regime in a civil union contract[2]. This bulletin will deal exclusively with the partition of shares in cases where the applicable regime is that of the partnership of acquests.

One must also note that the following rules do not apply to *de facto* union partners (referred to as common law partners or spouses in other Canadian provinces), since couples who are not married and have not entered into a civil union are not legally entitled to the partition of assets owned exclusively by either partner in Quebec, unless they have freely and voluntarily entered into a *de facto* union contract that expressly provides otherwise, or unless they have an agreement on the division of their assets.

QUALIFYING THE ASSET

Shares held in a company do not form part of the family patrimony, a public order regime that cannot be contracted out of. The family patrimony includes property such as the family residence, the movables that furnish it, the motor vehicles used for family travel, and the benefits accrued during the marriage under a retirement plan, as well as the registered earnings, accumulated during the marriage, of each spouse pursuant to the *Act respecting the Québec Pension Plan* or to similar plans.[3] The assets forming part of the family patrimony are divided according to their own rules[4] which will not be discussed in this bulletin.

To determine how shares in a company would be divided upon the breakdown of the couple's relationship[5], and once it is determined that they have not opted for

[1] Art. 432 of the *Civil Code of Quebec*, hereinafter referred to as the "C.C.Q."

[2] Art. 521.8 C.C.Q.

[3] Art. 415 C.C.Q.

[4] See Arts. 414-426 C.C.Q.

[5] For the sake of simplicity, references to the breakup of a couple's relationship includes divorce, separation from bed and board, death, as well as the dissolution of their civil union.

the matrimonial regime of separation as to property by a notarial act, it is necessary to establish whether same constitutes "private property" or "an acquest" within the meaning of the law. This distinction is crucial since, at the time of the breakdown of the couple's relationship, property and any debt related thereto that are deemed to be private will remain in its owner's hands and are not subject to partition. On the other hand, the net value of the property considered to be an acquest will be partitioned equally between the spouses upon said breakdown.

All property is considered to be an acquest unless the law provides otherwise. The Superior Court of Quebec summarized this principle as follows:

> "In order to qualify as private property, an asset must fall squarely and clearly within one of the various definitions of private property found in the Civil Code of Quebec and if it does not so qualify such asset is presumed to constitute an acquest." [7]

Therefore, for the shares owned by either spouse in a company to be considered private property, such characterization would have to be interpreted as such according to the law.

Paragraph 1 of Article 450 C.C.Q provides that the private property of each spouse consists of "*property owned or possessed by that spouse when the regime comes into effect*" [8]. Shares acquired before the marriage will thus remain that spouse's private property and, consequently, their value would not be subject to partition upon the breakdown of the relationship.

On the other hand, the shares acquired during the marriage are generally considered to be acquests. However, according to paragraph 2 of Article 450 C.C.Q., property, including shares, which devolves to a spouse during the marriage by succession or gift, as well as the fruits and revenues derived from same in the event that the testator or donor has so provided, are considered private property.

Paragraph 3 of Article 450 C.C.Q. further provides that property acquired to replace private property is also considered private. The first paragraph of Article 451 C.C.Q, stipulates that property acquired with both acquests and private property remains private property if more than half of its acquisition cost was paid with private property, save compensation in favour of the acquests [9]. If this is not the case, the shares will be qualified as acquests, also subject to compensation in favour of the private assets. For example, shares acquired during the marriage with an inheritance will be qualified as private property and will not be subject to partition upon breakdown of the relationship [10]. As previously mentioned, the onus of proving that said shares are private property will lie with their owner.

Article 449 C.C.Q. provides that although the shares may be defined as private property, any interest, revenues or dividends accrued thereon during the regime would be qualified as acquests and, therefore, must be shared between the spouses. Revenues are not to be confused with the increase in the value of the shares during the marriage which constitute one spouse's private property. Indeed, said increase in value does not constitute revenues and remains private property [11].

Moreover, certain classes of shares will give their owner a right to dividends in the form of additional shares. The first paragraph of Article 456 C.C.Q. provides that securities that are acquired "*by the effect of a declaration of dividends on securities that are private property of either spouse remain that spouse's private property, save compensation.*"

The same rule applies to "*securities acquired by the effect of the exercise of a subscription right, a pre-emptive right or any other similar right conferred on either spouse by securities that are that spouse's private property*" and to "*redemption premiums and prepaid premiums on securities that are the private property of either spouse*".[12]

Although these rules may seem clear, it is not always easy to qualify the shares or the fruits or revenues of such shares as either private property or acquests. In fact, the Quebec Court of Appeal had difficulty making this determination in the case of *Droit de Famille – 071223* [13] due to a confusing factual caused by the Respondent. Consequently, the Court ruled that the most equitable solution would be to qualify the shares as acquests.

In another case, the Superior Court had to determine how the increase in the value of an unexercised option to purchase shares in a company, which had been acquired by the Husband before the marriage, should be qualified. Following a detailed analysis of the facts, the Court concluded that the partnership of acquests must benefit from this increase in value.[14] Since the basic rule is that all property is acquests, the burden to prove otherwise lies with the party making that assertion.

[6] Arts. 449 and 459 C.C.Q.

[7] *Droit de la famille* – 142, [1984] S.C. 1223, J.E. 84-552.

[8] Paragraph 1 of Art. 450 C.C.Q.

[9] Compensation is a means by which the mass of acquests can recover an investment made using acquests in order to acquire private property (or *vice versa*). The notion of compensation will not be analyzed in this bulletin given the limited space to properly do so.

[10] Save compensation. For example, one acquires shares during the marriage at the price of $1,000, using an inheritance of $600 and the remainder with acquests. At the time of the divorce, the shares will be considered private property as more than half of their cost was paid for using private property. When preparing an inventory of one's acquests and private property at the time of the breakdown of the relationship, $400 (and the added-value acquired on same, as the case may be) will, however, be offset from one's private property and added to one's acquests. This is what is referred to as compensation. The reverse would occur if the inheritance used was of $400 and the remainder came from one's acquests.

[11] Me Christian Labonté, "Chapitre VII: La société d'acquêts", in Barreau du Québec, *Personnes, famille, et successions*, Collection de droit 2009-2010, Vol.3, Cowansville (Qc), Yvon Blais, 2009, p.325-326, citing a decision by the Court of Appeal in *R.(G.)* v. *E.(R.)*, REJB 2004-52494 (C.A.).

[12] Paragraphs 2 and 3 of Art. 456, C.C.Q.

[13] *Droit de Famille – 071223*, May 23, 2007, 500-09-015335-052, 2007 QCCA 735 (CanLII).

[14] *Supra* note 7.

VALUATING THE ASSET

Moreover, the challenge does not always lie in qualifying property as either private or as an acquest. Often, it is in determining the value attached to such property.[15] Where such a determination has to be made, it is generally wise to consult an expert in the field, as was recently highlighted by the Quebec Court of Appeal in the case of Droit de la famille – 10759.[16] In that case, one expert valuated shares at $32,410 while the other, using a completely different valuation method, assessed them at $164,000. Quebec case law also emphasizes the need to consider any tax consequences following the sale or transfer of shares, which again may be best understood by a tax expert.[17]

When the petition for divorce, legal separation or dissolution of the civil union is filed, an inventory is taken of each spouse's property and is divided into two categories: private property and acquests[18]. The C.C.Q. stipulates that acquests will be valued when the petition for divorce, separation from bed and board, or dissolution of the civil union is filed.[19] In exceptional cases, a court may decide that the effects of the dissolution will be retroactive to the date when the couple ceased living together only if, on such date, the separation was complete and irrevocable, and the parties had organized their finances separately.[20] The net value of acquests will then be shared equally between the spouses. For example, if a spouse acquired shares during the marriage that are valuated at $1,000 when the proceedings are introduced, such spouse will owe the other $500, which can be paid either in money or in kind, at the debtor's sole discretion.[21] This right to choose the payment method may, of course, be limited by a shareholders' agreement to which the debtor spouse may be bound.[22]

One must highlight that the rules governing the partition of acquests do not limit a shareholder's right to manage his or her shares during the life of the regime.[23] As such, an individual may freely choose to sell or transfer his or her shares during the marriage or civil union, without having to consult his or her spouse. However, an individual would need his or her spouse's consent to alienate shares gratuitously, with the exception of those of nominal value.[24]

CONCLUSION

In conclusion, the purpose of this bulletin is to provide a general overview of the rules that govern the division of shares owed by either spouse in the event of divorce, separation from bed and board, or dissolution of a civil union. While the rules outlined in the C.C.Q. and interpreted by Quebec courts set the framework for analyzing whether assets, such as shares held in a company, are private property or acquests, the relationship between the parties and the specific facts and history behind the investment sometimes make this analysis more challenging. Therefore, it may be useful to consult a professional when applying these rules to one's specific situation.

[15] Christian Labonté, "L'ABC du partage des entreprises dans le cadre de la société", *Développements récents en droit familiale* (2007), Service de la formation continue du Barreau du Québec, 2007.

[16] *Droit de famille* – 10759, 2010 QCCA 657, J.E. 2010-714.

[17] *Droit de famille* – 142, [1984] C.S. 1223; Y.(B.) c. M.(S.), REJB 1999-11562; H.(J.S.) c. F.(B.B.), 500-12-251821-009, April 17, 2001, REJB 2001-24545.

[18] As discussed above, the net value of the assets constituting the family patrimony would first be established. However, this bulletin deals exclusively with shares and not with the family patrimony or the qualification of other assets as acquests or private property.

[19] Paragraph 2 of Art. 465, C.C.Q.

[20] Art. 466 C.C.Q. ; *Droit de famille – 3291*, (S.C. 1999-03-19), J.E. 99-919; *supra* note 17.

[21] Art. 481 C.C.Q.

[22] *T.(P.) v. B.(E.)*, November 28, 2006, 500-12-273953-046, EYB 2006-111518.

[23] Art. 461, C.C.Q.

[24] Art. 462, C.C.Q.

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