

June 2019

Article

Bill C-86 came into force on June 13, 2019, thereby requiring all private issuers subject to the *Canada Business Corporations Act* ("CBCA") to adopt a register for individuals with significant control over property a corporation.

It should be noted that the definition of "individuals with significant control" ("ISC") goes beyond simply holding shares and includes:

- The indirect control of the shares and also
- The exercise of direct or indirect influence resulting in *de facto* control of the corporation.

Definition of an "ISC":

2.1 (1) For the purposes of this Act, any of the following individuals is an individual with significant control over a corporation:

(a) an individual who has any of the following interests or rights, or any combination of them, in respect of a significant number of shares of the corporation:

(i) the individual is the registered holder of them,

(ii) the individual is the beneficial owner of them, or

(iii) the individual has direct or indirect control or direction over them;

(b) an individual who has any direct or indirect influence that, if exercised, would result in control in fact of the corporation; or

(c) an individual to whom prescribed circumstances apply.

Definition of "**Significant number of shares**"

(3) For the purposes of this section, a significant number of shares of a corporation is

(a) any number of shares that carry 25% or more of the voting rights attached to all of the corporation's outstanding voting shares; or

(b) any number of shares that is equal to 25% or more of all of the corporation's outstanding shares measured by fair market value.

The register must contain the following **information**:

21.1 (1) The corporation shall prepare and maintain, at its registered office or at any other place in Canada designated by the directors, a register of individuals with significant control over the corporation that contains

(a) the names, the dates of birth and the latest known address of each individual with significant control;

- (b) the jurisdiction of residence for tax purposes of each individual with significant control;
- (c) the day on which each individual became or ceased to be an individual with significant control, as the case may be;
- (d) a description of how each individual is an individual with significant control over the corporation, including, as applicable, a description of their interests and rights in respect of shares of the corporation;
- (e) any other prescribed information; and
- (f) a description of each step taken in accordance with subsection (2).

The addition of this registry is mandatory and significant penalties have been added to the CBCA for any corporation that does not comply with this requirement.

Marque d'or has updated all of its products and services affected by this change, so you can get them with peace of mind. If you have any questions about this new obligation, please do not hesitate to contact one of our representatives at 1-800-668-0668 or mdo.info@tr.com

Decisions

Centre commercial Innovation inc. v. 9269-5717 Québec inc. , 11 February 2019, Court of Québec, EYB 2019-307928

Claim to the tenant and its surety for unpaid rent. The surety pleads that he signed as a director and that he had resigned from this post thus ending his bond. Granted.

Question in dispute: Did the suretyship of Mr. Gervais end in April 2015 following his resignation as director of the corporation, tenant of the premises?

The suretyship is worded as follows (In French):

“25.0 Cautionnement et garantie

Je, soussigné, Simon Gervais, résidant et domicilié au [...], Montréal [...] après avoir pris connaissance des présentes, je déclare me porter caution de toutes et chacune des obligations ci-dessus contractées par le locataire, notamment du remboursement de la somme due et des intérêts sur celle-ci, m'engageant à cet effet conjointement et solidairement avec le locataire, faisant du tout mon affaire personnelle et renonçant aux bénéfices de division et de discussion. Toutefois, ma caution se limitera à douze mois de loyer brut pendant la durée du bail et de ses renouvellements.

(the Court underlines)

9269 inc. starts its operations but quickly, as the months go by, its financial situation deteriorates. His rent payments are still irregular as of 2013.

On August 31, 2016, 9269 inc. terminate operations and leave the premises. It is then due \$ 39,607.68.

Mr. Gervais explained that he signed the suretyship as director of 9269 inc. and that he resigned from his position on April 1, 2015 following a disagreement with his partners.

He does not produce any document that can support his claim and the REQ, dated April 26, 2018, indicates that he is still a director of 9269 inc. at the time of filing, on April 5, 2018, the Annual declaration of 9269 inc. for the year 2016.

Moreover, he specifies during his testimony to have resigned verbally but that his resignation was not accepted.

He invokes section 2363 CCQ:

2363. Suretyship attached to the performance of special duties is terminated upon cessation of the duties.

In order for this section to be effective, it is up to Mr. Gervais to establish, on the preponderance of the evidence, that the parties have agreed to the suretyship because of his function within 9269 inc.1 and that he has ceased exercising this function in April 2015.

In the opinion of the Court, Mr. Gervais did not discharge his burden of proof.

The suretyship of Mr. Gervais was not attached to the exercise of his duties as a director within 9269 inc.

Just being a director of a corporation is not enough. It would be inappropriate to hold that the director of a corporation can be released from a suretyship by resigning as soon as the corporation is in difficulty or becomes too indebted simply because he holds the title of director.

In this case, the suretyship is distinct from the agreement itself and contains no mention that it is signed by Mr. Gervais as director of 9269 inc.

It is even stipulated that Mr. Gervais makes this suretyship his personal business and that it is limited to twelve months of gross rent during the term of the lease.

Mr. Gervais did not submit any evidence or document that would suggest that the suretyship was attached to the exercise of the position of director.

In addition, Mr. Gervais has not demonstrated that he had validly and in a manner set up against to all, resigned from his position as a director.

Innovation has met its burden of proof with respect to the lease agreement and the amounts still owed to it. If Mr. Gervais fails to show that the suretyship is extinguished, it is still valid and the action must be allowed against him.

Boucher v. Blanchet, 15 March 2019, Court of Québec, EYB 2019-310202 (2019 QCCQ 2174)

Claim for damages. Presumed diversion of sums and equipment. Prescription of the claim. Legal interest. Dismissed.

The plaintiff seeks \$ 50,000 from the defendant and the corporations 9269-9867 Québec inc. and 7199635 Canada inc. of which he is the guiding spirit: he claims that the latter has diverted for his own profit the money in Technoclim's bank account and his goods and equipment, some of which are transmitted in part to one or the other of his corporations.

Is the present claim prescribed? No.

Does the applicant have the legal interest to bring this action? No.

We cannot confuse the interests of the corporation with those of its shareholder, the plaintiff.

Cotnoir v. Ferme Domar inc., 5 April 2019, Court of Québec, EYB 2019-310586

Application for inadmissibility. Sale of a farm; Cancellation of the sales contract because resolution missing from the corporation. Dismissed.

The defendant argues that the plaintiff failed in its duty to verify the existence of a proper defendant resolution authorizing its directors to sell its assets.

In doing so, the plaintiff failed to perform its duties so that the defendant could not be bound by the brokerage contract for lack of a resolution in accordance with the requirements of the law.

The plaintiff argues that the persons with whom she traded are the only two directors of the defendant and that they were both present at the time of the signing of the brokerage contract. In these circumstances, they cannot maintain, *a posteriori*, that they did not have the legal capacity to bind the defendant on 29 September 2016. As a third party in good faith, the plaintiff could reasonably believe that her interlocutors were fully authorized to act on behalf of the defendant.

Section 13 QBCA states that:

Third persons may presume

- 1) [...];
- 2) that the documents relating to the corporation that are deposited in the enterprise register contain accurate information;
- 3) that the directors and officers of the corporation validly hold office and lawfully exercise the powers of their office; and
- 4) [...]

Québec legislation intends to protect third parties in good faith by providing that they are not presumed to have knowledge of the contents of the constituting documents or of internal matter.

By holding the facts alleged to be true - as it should be in the matter of inadmissibility - there was nothing to suggest that those persons were not fully entitled to act on behalf of the defendant.

Société Radio-Canada v. Registraire des entreprises, 11 February 2019, Superior Court, EYB 2019-307620

Appeal in judicial review of decisions rendered by the enterprise registrar. Dismissed.

Terms of use of the online business search service; Compilation of information based on the name and address of a natural person; Search features; Freedom of the press not giving greater access to information than the law allows; Disclosure of personal information that is not necessary for the purpose of carrying out the mission to inform of the organization.

The plaintiff:

- 1) Requests the cancellation of the conditions of use of the online business search service issued by the enterprise registrar;
- 2) Requests the annulment of the Registrar's decision to prohibit aggregations of information based on the name and address of a natural person;
- 3) Denies the rejection of his request for the conclusion of a distribution agreement between the Minister and her; and
- 4) Request a judicial declaration affirming her right to such an agreement.

The registrar interprets its constituting act and the laws closely related to its mandate.

The terms of use do not have to be canceled. First, their cancellation would not give access to the search through the names of natural persons, since it is the search functionalities that make such a search impossible. Secondly, the registrar restricts the search functions to the registry in the respect of the duties to which he is bound.

The purpose of the register is to provide information on entities subject to the Act (registrants) and not to enable search on individuals and their involvement in corporations. The restrictions imposed by the Registrar are consistent with this purpose. The intention of the legislator was to prevent the registry from being used as a search or cross-referencing tool to search by the name and address of individuals.

It is reasonable to conclude that the terms of use do not exceed the Registrar's jurisdiction by prohibiting the use of data from the registry to aggregate information.

The Registrar's final decision with respect to the consolidation of information is not to be rescinded and the order sought to force their surrender is not issued.