



© Work of Claude Théberge

Assurance
responsabilité
professionnelle

Barreau



PRÆVENTIO

July 2019 | Volume 20 | n° 4

TABLE OF CONTENTS

Allegation of Ineffective Assistance of Counsel	1
Postponement of the Provisions of the New Legislation Affecting Insurance Funds	2
Lawyers: Are You Aware of the Amendments to the CBCA Regarding Beneficial Ownership?	2
A Few Essentials Before Going on Vacation	4

I never lose. Either I win, or I learn.

Nelson Mandela

ALLEGATION OF INEFFECTIVE ASSISTANCE OF COUNSEL

By *M^e Tristan Desjardins,*
CARETTE DESJARDINS, s.n.a.

Since January 1, 2019, the allegation of professional incompetence of counsel provided for in section 26 of the former *Rules of the Court of Appeal of Quebec in Criminal Matters* has been replaced by the allegation of ineffective assistance of counsel (section 61 of the new *Rules of the Court of Appeal of Quebec in Criminal Matters*).

Beyond any procedural considerations, alleging that another lawyer has acted incompetently has significant consequences. It is a serious allegation that can have a devastating effect on the career of the lawyer in question. To avoid being hoisted by your own petard, it is important to confirm the basis for the allegation of incompetence before acting. As we will see, given the heavy burden that must be met, in general an allegation of inadequate assistance of counsel is liable to be well founded only where there are external factors corroborating the accused's version of the situation.

That being said, it is well established that, in criminal and penal matters, every accused has the right to be represented by a competent lawyer. In the ruling in *G.D.B.*, the Supreme Court of Canada referred to it as the right to effective assistance of counsel.¹

Three criteria must be met in order to establish that an accused has been deprived of this right.² First, the accused must establish, on a balance of probabilities, the facts on which the allegation of ineffective assistance of counsel is based. Second, he must prove that these facts establish that the lawyer did not represent him effectively. Third, he must prove that the foregoing resulted in a miscarriage of justice. To do so, the accused must prove that counsel's conduct resulted in procedural unfairness or that, were it not for the ineffective assistance, the verdict might have been different.³

The third criterion is decisive, because if it cannot be shown that the accused suffered irreparable harm or that there was procedural unfairness due to the lawyer's conduct, the court will not intervene. Absent such harm,

a well-founded allegation of ineffective assistance will be a matter for consideration under the rules of professional conduct.⁴ This is why appellate courts first determine whether the lawyer's impugned conduct resulted in irreparable harm or procedural unfairness.


It is important to remember that there is a strong presumption that the lawyer acted in a reasonably competent manner.⁵ There is no room for the wisdom of hindsight, and appellate courts will give great deference to the decisions of the court of first instance.⁶ An accused who is dissatisfied with the outcome of the trial should not view an allegation of ineffective assistance as a second chance.

In its judgment in *Delisle*,⁷ the Court of Appeal of Quebec indicated the procedure

the accused must follow when appealing on the basis of ineffective assistance. Unless the trial record contains all the required elements, which is rarely the case, the accused will have to seek the right to adduce fresh evidence to support his allegation. The fresh evidence will generally consist of the accused's detailed affidavit. In this regard, it should be noted that the traditional criteria pursuant to which an appellate court can admit fresh evidence do not apply when an allegation of ineffective assistance is at issue, because the objective of such evidence is to enlighten the court on the conduct of the lawyer in question. The admissibility of the fresh evidence is therefore guided primarily by the interests of justice.⁸

Moreover, the procedure set out in section 61 of the *Rules of the Court of Appeal of Quebec in Criminal Matters* requires that the accused notify the written pleadings to the lawyer in question.⁹ The lawyer, who has the right to respond, must act in accordance with the procedure set out in that provision. Recently, Justice Marcotte of the Court of Appeal of Quebec specified that not only does the lawyer in question have the right to defend against the allegation, he has the duty to do so.¹⁰

It should be noted that an accused who alleges the ineffective assistance of his lawyer necessarily waives the attorney-client privilege with respect to his communications with the lawyer. The *Code of Professional Conduct of Lawyers* provides that a lawyer against whom such an allegation is made is released from his duty of professional secrecy to the extent necessary to defend himself.¹¹


Lastly, it should be noted that the lawyer in question must inform the Professional Liability Insurance Fund of the Barreau du Québec forthwith, that is, at the earliest opportunity. The Insurance Fund must be notified of any fact or circumstance which may give rise to a claim as soon as the lawyer has knowledge thereof. To do so, the lawyer can use the form entitled *Claim Notice Report* available on the Insurance Fund's website at www.assurance-barreau.com. 

1. *R. v. G.D.B.*, [2000] 1 S.C.R. 520.
2. *R. v. W.E.B.*, [2014] 1 S.C.R. 34.
3. *R. v. G.D.B.*, [2000] 1 S.C.R. 520, paras. 26-28; *Alipoor c. R.*, 2017 QCCA 636, paras. 47-55; *Agnant c. R.*, 2015 QCCA 465; *R. v. Slatter*, 2018 ONCA 962, para. 79.
4. *R. v. G.D.B.*, [2000] 1 S.C.R. 520, paras. 29 and 33.
5. *R. v. G.D.B.*, [2000] 1 S.C.R. 520.
6. *Desmarais c. R.*, 2018 QCCA 1459, para. 23; *R. v. P.R.*, 2018 SKCA 27, paras. 42-44.
7. *R. c. Delisle*, [1999] R.J.Q. 129 (C.A.).
8. *Ben Hariz c. R.*, 2019 QCCA 267, para. 13; *Huchette c. R.*, 2013 QCCA 1501, para. 37.
9. *Rules of the Court of Appeal of Quebec in Criminal Matters*, SI/2018-96, (2018) 152 Can. Gaz. II, 3955.
10. *Chagnon c. Maurer*, 2018 QCCA 1287, para. 15.
11. *Code of Professional Conduct of Lawyers*, CQLR, c. B-1, r. 3.1, s. 65.

POSTPONEMENT OF THE PROVISIONS OF THE NEW LEGISLATION AFFECTING INSURANCE FUNDS

In the 2018 management report published in the March 2019 edition of the *Praeventio* bulletin, we discussed the *Act mainly to improve the regulation of the financial sector, the protection of deposits of money and the operation of financial institutions*, which was assented to on June 13, 2018.¹ As mentioned, several

provisions of that Act deal with the governance and functioning of insurance funds. These provisions were to come into force on June 13, 2019.

However, by order in council number 553-2019 dated June 5, 2019, the Government of Québec enacted the *Regulation to amend the Regulation respecting certain transitional measures for the carrying out of the Act mainly to improve the regulation of the financial sector, the protection of deposits of money and the operation of financial institutions*. This Regulation postpones the application of the new provisions affecting insurance funds to April 1, 2020. The Fund will continue to collaborate with the Barreau du Québec with respect to the implementation of the new Act. 

1. S.Q. 2018, c. 23.

LAWYERS: ARE YOU AWARE OF THE AMENDMENTS TO THE CBCA REGARDING BENEFICIAL OWNERSHIP?

PART 2

In this column, we continue to discuss the amendments to the *Canada Business Corporations Act*¹ (hereinafter the "CBCA") regarding beneficial ownership, by examining Bill C-97.² In short, the Bill requires every private corporation to provide to an investigative body that requests it, a copy of its register of individuals with significant control or information contained in the register. It also requires investigative bodies to keep a record of the requests they make.

Obligation to Disclose

First, the corporation must disclose to the Director appointed under section 260 of the CBCA, on request, any information in its register of individuals with significant control.³

Moreover, on request by an investigative body, a corporation must, as soon as feasible after the request is served on the corporation or deemed to be received by it, and in the manner specified by the investigative body:

- Provide the investigative body with a copy of the corporation's register of individuals with significant control; or
- Disclose any information specified by the investigative body that is in the corporation's register of individuals with significant control.⁴

Investigative Bodies

Bill C-97 states which entities are investigative bodies for purposes of applying the amendments to the CBCA, namely:

- Any police force;
- The Canada Revenue Agency and any provincial body that has responsibilities similar to those of the Canada Revenue Agency; and
- Any prescribed body that has investigative powers in relation to offences referred to in the schedule.⁵

Conditions for the Disclosure of the Register of Individuals With Significant Control or the Information Contained Therein

Bill C-97 regulates the disclosure of the register or the information it contains. Consequently, an investigative body may obtain the register or the information it contains only if it has reasonable grounds to suspect that the copy of the register or the specified information would be relevant to investigating an offence referred to in the schedule and it also has reasonable grounds to suspect that:

- The corporation that is the subject of the request committed the offence or was used to:

- Commit the offence,
- Facilitate the commission of the offence, or
- Protect from detection or punishment a person who has committed the offence;⁶

■ An individual with significant control over the corporation that is the subject of the request is also an individual with significant control over a corporation that committed the offence or was used to commit one of the offences mentioned in the preceding paragraph; or⁷

■ An individual with significant control over the corporation that is the subject of the request is also an individual who, directly or indirectly, influences the affairs of an entity, other than a corporation, that committed the offence or was used to commit one of the offences mentioned above.⁸

In addition, the investigative body must serve its request by leaving the request at the corporation's registered office as shown in the last notice filed under section 19 of the CBCA.⁹ It may also send its request by registered mail to that registered office; in such a case, the corporation is deemed to have received the request at the time it would be delivered in the ordinary course of mail, unless there are reasonable grounds for believing that the corporation did not receive it at that time or at all.¹⁰

Offences

A corporation that, without reasonable cause, contravenes its obligation to disclose a copy of its register of individuals with significant control or the information contained therein is liable to a maximum fine of \$5,000.

What about the directors and officers? Whether or not the corporation is prosecuted, every director or officer who knowingly authorizes or permits the contravention by the corporation of its obligation to maintain a register of individuals with significant control, the provision of false or misleading information or the failure by the corporation to disclose its register or the information requested by the investigative body, is liable to a maximum fine of \$200,000 or imprisonment for a term not exceeding 6 months, or both.¹¹

Obligation of the Investigative Body to Keep a Record

Every investigative body authorized to obtain a copy of the register of individuals with significant control or the information contained therein must keep a record containing the following information:

- The name of the corporation that was the subject of the request;
- The reasonable grounds on which the request was based;
- Information respecting what was requested;
- The date the request was served or deemed to have been received;
- Information respecting the service or the sending of the request;
- All information received from the corporation in response to the request; and
- Any prescribed information.¹²

The investigative body must also, within 90 days after the end of the calendar year in which the request was made, provide a report setting out the total number of requests made by it in that year and, in the case of the Royal Canadian Mounted Police and the Canada Revenue Agency, the number of requests made in each province.¹³

This completes our overview of the new amendments to the CBCA regarding beneficial ownership. We hope our two articles have given you a clearer picture of the amendments so you can determine how best to advise your clients on the means for satisfying the new CBCA requirements. ☂

1. *Canada Business Corporations Act*, R.S.C. 1985, c. C-44.
2. Bill C-97, *An Act to implement certain provisions of the budget tabled in Parliament on March 19, 2019 and other measures*, 1st Sess., 42nd Parl., 2019 (passed by the House of Commons on June 6, 2019). As at June 17, 2019, Bill C-97 was before the Senate for its 3rd reading.
3. *Id.*, s. 98.
4. *Id.*, s. 99.
5. *Id.*, s. 99.
6. *Id.*, s. 99.
7. *Id.*, s. 99.
8. *Id.*, s. 99.
9. Section 19 of the CBCA requires every corporation to send the Director a notice of its registered office, together with any articles that designate or change the province where the registered office of the corporation is located.
10. Bill C-97, *supra*, note 2, s. 99.
11. *Id.*, s. 100.
12. *Id.*, s. 99.
13. *Id.*

A FEW ESSENTIALS BEFORE GOING ON VACATION

It's high time to close up shop for a well-deserved vacation, but with a vacation comes the danger of what's left behind if you're not well prepared.

The last few weeks have no doubt been busy as you try to predict the unpredictable and organize your files before leaving. Since it's better to be safe than sorry, here are some practical tips collected over the years and through experience:

- ☑ Don't take on urgent mandates before your departure;

- ☑ Inform your clients and adversaries of your absence;
- ☑ Make sure no deadlines will expire during your absence;
- ☑ Set up an out-of-office message in your voicemail and email program, and don't forget to mention your return date and a contact person in case of emergency. Don't forget to deactivate the messages upon your return!
- ☑ Make sure a member of your staff or a colleague reads your mail and responds to any emergencies (this person can, among other things, handle any pleadings that are notified while you're away and return phone calls to find out how urgent a matter is);
- ☑ Make sure this person can access your voicemail, email and agenda;
- ☑ Let your colleague know how to contact you in case of emergency;
- ☑ Clearly identify how far you have progressed in your files so that your colleague can easily find his way around them.

By taking these precautions, you'll be able to relax during your vacation and make sure it doesn't turn into a nightmare. Remember: *An ounce of prevention is worth a pound of cure*. It's much less painful and costly to avoid errors than it is to correct them after the fact.

Enjoy your well-deserved vacation! ☂

Service de prévention

NOTICE

M^e Guylaine LeBrun
Claims Prevention Coordinator
and Counsel

M^e Judith Guérin
Claims Analyst and
Claims Prevention Counsel

Professional Liability Insurance Fund of the Barreau du Québec

445 Saint-Laurent Blvd., Suite 300

Montreal (Québec) H2Y 3T8

Telephone: 514-954-3452

Fax: 514-954-3454

E-mail: guylaine.lebrun@farpbq.ca

E-mail: judith.guerin@farpbq.ca

Visit our web site at: www.farpbq.ca

Une version française est aussi disponible sur demande. / A French version is available upon request.

All published Praeventio bulletins are available at the following address: www.farpbq.ca/en/bulletin.html



This publication is an information tool which has been compiled for the purpose of minimizing the risks of legal claims for professional fault. Its content shall not be considered to be an exhaustive study of the topics covered, legal advice, nor as suggesting minimum standards of professional conduct. Where the context permits, the masculine gender includes women as well as men.

This Loss Prevention Bulletin is published by the Professional Liability Insurance Fund of the Barreau du Québec.