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PRÆVENTIO

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My father always used to say, Don't raise your voice. Improve your argument.

Desmond Tutu

SETTLEMENT CONFERENCES AND "SETTLER'S REMORSE"

You participate with your client in a settlement conference in order to try to resolve the dispute between your client and another party. After a long day of negotiations, the dispute is finally settled. Because it's late, you and the other party agree that you will draft the settlement agreement the next day so it can then be homologated by the court. The next day, you contact your client to follow up on the agreement and, to your great surprise, he refuses to follow through, because he thinks you gave up too quickly and didn't get enough money.

Some of the claims the Insurance Fund receives concern the services rendered by lawyers during a settlement conference. In an environment in which settlement conference are increasingly favoured, we cannot overemphasize the importance of being properly prepared. Good preparation is an essential ingredient for the success of a settlement conference, just as it is for a trial. This implies that you have an in-depth understanding of the case and, of course, that you leave no room for improvisation.

In addition to proper preparation, it is also important to ensure good communication with clients and to document all appropriate warnings, because dealings with clients still constitute the greatest source of claims. Indeed, clients sometimes complain that they did not receive the information, explanations or advice they needed in order to properly manage their case or make an informed decision on a settlement offer. Your client must understand that the settlement entered into is an acceptable alternative to the dispute with the other party. If your client has doubts regarding the settlement, he may refuse to go through with it, thereby jeopardizing the settlement.

Negotiation involves compromises, with each party seeking to assert its position. Inadequate preparation, resulting in a mistake, can lead to a poor outcome for your client, for which your client won't hesitate to blame you.

TABLE OF CONTENTS

Here are some ways to avoid malpractice in the context of a settlement conference:

When Preparing for the Settlement Conference

- ☑ Meet with your client and explain the settlement conference process so the client understands the dynamics and what will be expected of him as well as the role you will play;
- ☑ Although judges often begin with an explanation of the process, clients are often too nervous at the beginning of the settlement conference to take in all the information provided or understand its consequences;
- ☑ Good preparation entails examining the strengths and weaknesses of the case with the client so he will be willing to present certain arguments during the settlement conference. It's important to give the client a realistic assessment of the case;

continued on page 2

- ☑ Explain to your client that your role will be to collaborate rather than confront, because the process involves settling differences. The settlement process seeks a solution, not a judgment;
- ☑ Inform your client about the weak points of his case and confirm everything in writing. Resist the temptation to soften the impact of the negative aspects of a case. The relationship of trust implies that you must have the courage to tell the client things he may not necessarily want to hear. In this way, he will be in a position to make informed decisions and will not be surprised to hear the other side's arguments;
- ☑ Get clear instructions from your client. These instructions should be in writing so as to avoid any ambiguities. This will minimize the risk of misunderstandings. You should establish realistic objectives and have the client accept and confirm them in writing before the settlement conference. Imagine what will happen if you don't do this and your client sues you, alleging you acted against his wishes. It will be up to you to prove you followed his instructions. If you have nothing in writing to support your position, you'll find yourself in a very delicate situation in which everything will hinge on the credibility of the parties;
- ☑ Don't let your desire to please the client cloud your professional judgment. Be honest and realistic. Nothing will be gained by trying to keep up unrealistic hopes;
- ☑ Discuss the possible solutions with your client and, especially, what he expects if no settlement is reached: the length and cost of a trial, the inability to enforce the judgment if the other party is insolvent, etc.

During the Settlement Conference

- ☑ During the settlement conference, the other party's attitude or strategy, or the discovery of new facts, can require you to rethink your position. If this happens, you have to discuss it with your client, explain what is at stake and get his approval of this reassessment;
- ☑ Be flexible with your negotiating strategy. Being unnecessarily stubborn can have regrettable consequences and result in a lost opportunity to settle the case;
- ☑ Provide the client with all the necessary explanations allowing him to make informed decisions which, after all, are his to make;
- ☑ Take notes regarding your client's settlement instructions;
- ☑ Plan ahead and bring draft settlement documents with you (Discontinuance, Declaration of Out-of-Court Settlement, Receipt, Transaction and Acquittance);
- ☑ If a settlement is reached, put it in writing immediately, and have the parties and their lawyers sign the settlement documents;
- ☑ Be calm and keep your cool!

The Day After the Settlement Conference

- ☑ Make sure you're available if your client has questions. By taking the time to answer his questions, you may avoid your client having second thoughts about the settlement agreement and suing you for malpractice.

Remember this rule: As the Honourable Mr. Justice André Roy of the Superior Court stated at the 2013 Conference of the *Association des Avocats et Avocates de Province* held in Trois-Rivières, when speaking about preparing for a successful settlement conference: *The lawyer's role is essential, and failing to prepare means preparing to fail.*

Don't run the risk of "settler's remorse". After all, as a lawyer, it's your liability that is at risk!

— Adapted from the article entitled *The morning after mediation/*, LAWPRO Magazine "Delivering on the client service promise", Winter 2006 (Vol. 5, no. 1). Available at www.lawpro.ca/magazinearchives.

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

PART I

On June 13, 2019, amendments to the *Canada Business Corporations Act*[1] (hereinafter the "CBCA") regarding beneficial ownership will come into force. These amendments will undoubtedly impact business lawyers and in-house counsel, who will have to advise their clients or employers about these new obligations. We are therefore providing an overview of the main requirements imposed on private corporations by *A second Act to implement certain provisions of the budget tabled in Parliament on February 27, 2018 and other measures*[2] (hereinafter "Bill C-86").

1 – *Canada Business Corporations Act*, R.S.C. 1985, c. C-44.

2 – *A second Act to implement certain provisions of the budget tabled in Parliament on February 27, 2018 and other measures*, S.C. 2018, c. 27.

Bill C-86 is part of an effort to improve the transparency of private corporations. As a result, they will henceforth have to maintain a register of "individuals with significant control over the corporation".[3]

What is Significant Control?

Significant control may include any person who holds interests and/or rights "in respect of a significant number of shares of the corporation".[4] As regards the meaning of a significant number of shares, the CBCA sets out two specific cases:

- Any number of shares that carry 25% or more of the voting rights attached to the corporation's outstanding voting shares; and
- Any number of shares that is equal to 25% or more of the corporation's outstanding shares measured by fair market value.[5]

Moreover, a person who has a direct or indirect influence on the corporation may be considered to have *de facto* significant control.[6]

Lastly, individuals who jointly hold or exercise rights and/or interests over a number of shares equal to or greater than the 25% threshold mentioned above will be considered to have significant control.[7]

What Must the Register Contain?

A corporation's register must contain the following information:

- The names, dates of birth and latest known address of each individual with significant control;
- The jurisdiction of residence for tax purposes of each individual with significant control;
- The day on which each individual became or ceased to be an individual with significant control;
- A description of how each individual is an individual with significant control over the corporation (what rights and/or interests they hold in respect of the shares);
- Any other prescribed information; and
- A description of the steps taken by the corporation to ensure that it has identified the individuals with significant control and that the information in the register is accurate, complete and up-to-date.[8]

This information must be updated each financial year. All information noted during the update must be recorded in the register within 15 days of the corporation becoming aware of it. A corporation that, without reasonable cause, does not fulfil its obligation to maintain a register is liable to a maximum fine of $5,000.

Who Can Access the Register?

The CBCA provides that shareholders and creditors of the corporation as well as their personal representatives can access the register, insofar as they provide an affidavit stating that the information they obtain will only be used for purposes of the affairs of the corporation.[9]

Are Directors and Officers of the Corporation Immune If They Fail to Respect the New Requirements Under the CBCA?

Important: Whether or not the corporation is prosecuted or convicted, directors and officers who knowingly provide, permit or acquiesce in the recording of false

3 – *Id.*, s. 182 and 183.
4 – *Id.*, s. 182.
5 – *Id.*
6 – *Id.*
7 – *Id.*
8 – *Id.*, s. 183.
9 – *Id.*

continued on page 4

or misleading information in the register are liable to a maximum fine of $200,000 and imprisonment for a maximum of 6 months.

Lastly, although the requirements set out in the CBCA apply only to corporations incorporated under the CBCA, it is expected that Québec will follow suit and impose similar requirements pursuant to an agreement in principle entered into between the provinces and the federal government.[10]

This concludes Part I of this article dealing with the main requirements imposed on private corporations by *A second Act to implement certain provisions of the budget tabled in Parliament on February 27, 2018 and other measures*.

In the next edition of *Praeventio*, we will look at Bill C-97 (*An Act to implement certain provisions of the budget tabled in Parliament on March 19, 2019 and other measures*), which also amends the CBCA.

References:

- *A second Act to implement certain provisions of the budget tabled in Parliament on February 27, 2018 and other measures,* S.C. 2018, c. 27.
- *Agreement to Strengthen Beneficial Ownership Transparency*. Found at https://www.fin.gc.ca/n17/data/17-122_4-eng.asp.
- Bruce Ball, *New beneficial ownership rules are coming in June. Are you ready?,* CPA Canada, April 9, 2019. Found at https://www.cpacanada.ca/en/business-and-accounting-resources/taxation/blog/2019/march/beneficial-ownership-rules-start-preparing-now.
- Me Julie-Anne Archambault, *New CBCA obligation: record of individuals with a significant control,* LJT Lawyers, January 29, 2019. Found at http://ljt.ca/en/nouvelles/nouvelle_2276.sn.
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APPOINTMENTS TO THE INSURANCE FUND

Me Maria De Michele, Executive Director of the Professional Liability Insurance Fund of the Barreau du Québec, is pleased to announce the appointment of two new lawyers to the Insurance Fund.

10 – *Agreement to Strengthen Beneficial Ownership Transparency*. Found at https://www.fin.gc.ca/n17/data/17-122_4-eng.asp.

Me Judith Guérin, a lawyer working in the Claims Department, joined the team at the Insurance Fund after completing a temporary replacement contract. Me Guérin acts as a risk prevention analyst and lawyer. She is a graduate of the Université de Montréal and was called to the Barreau du Québec in 2011. She also holds a Graduate Diploma in Management from the HEC and is currently a candidate for a dissertation-based Masters in Industrial Relations. Before joining the Insurance Fund, she worked in private practice, primarily in the areas of civil litigation, insurance and civil and professional liability.

Me Caroline Tremblay was admitted to the Barreau in 2001 and worked in private practice, primarily in the areas of civil litigation, and commercial, property, transportation and professional liability insurance. She also handled litigation involving various type of insurance in the construction industry and worked on class actions involving a city after the floods of 1997 and two class actions involving tobacco companies. Me Tremblay is also known for the numerous articles she has written in the field of insurance.

Service de prévention

NOTICE

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