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In this issue

News

Holiday schedule

	24-12-18	**25-12-18**	**26-12-18**	**31-12-18**	**01-01-19**	**02-01-19**
Marque d'or	Open until 12:00 pm	**Closed**	**Closed**	Open until 12:00 pm	**Closed**	Open
Registraire des entreprises	**Closed**	**Closed**	**Closed**	**Closed**	**Closed**	**Closed**
Corporations Canada	Open	**Closed**	**Closed**	Open	**Closed**	Open

New register in the corporate records of a federal corporation

As part of the 2018 budget, the Minister of Finance of Canada announced several measures as usual. These measures are beginning to take shape with the filing of Bill C-86, last October.

We would like to draw your attention to the proposed amendments to the *Canada Business Corporations Act* (CBCA). Indeed, it is proposed to create a new register in the corporation's Corporate records to name "individuals with significant control" within the corporation. This concept was first introduced in the United Kingdom in April 2016. The goal of implementing this concept in the UK companies' law is to create greater transparency in the ownership and control of UK companies, to contribute to helping in the fight against money laundering while building and maintaining confidence in British companies. It seems that the Canadian government has embraced this goal. It goes without saying that this notion is linked to that of effective control.

We enclose all the relevant sections below (the underlines are from us). It should be noted that the definition of "individuals with significant control" goes beyond the mere holding of shares and includes indirect control of the shares, as well as the exercise by such individual of any direct or indirect influence

that, if exercised, would result in control, in fact, of the corporation. We believe, subject, among other things, to regulatory provisions, that this includes the conditions and terms of a shareholders' agreement, whether unanimous or not, as well as resolutions relating to the organizational proceedings and the annual meetings of the corporation. The proposed amendments apply to a private issuer.

It is only at the first reading stage.

BILL C-86

A second Act to implement certain provisions of the budget tabled in Parliament on February 27, 2018 and other measures

FIRST READING, OCTOBER 29, 2018

DIVISION 6
R.S., c. C-44
Canada Business Corporations Act
Amendments to the Act

182 The *Canada Business Corporations Act* is amended by adding the following after section 2:

Individual with significant control
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.

Joint ownership or control
(2) Two or more individuals are each considered to be an individual with significant control over a corporation if, in respect of a significant number of shares of the corporation,

(a) an interest or right, or a combination of interests or rights, referred to in paragraph (1)(a) is held jointly by those individuals; or
(b) a right, or combination of rights referred to in paragraph (1)(a), is subject to any agreement or arrangement under which the right or rights are to be exercised jointly or in concert by those individuals.

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.

183 The Act is amended by adding the following after section 21:

Register
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).

Updating of information
(2) At least once during each financial year of the corporation, the corporation shall take reasonable steps to ensure that it has identified all individuals with significant control over the corporation and that the information in the register is accurate, complete and up-to-date.

Recording of information
(3) If the corporation becomes aware of any information referred to in paragraphs (1)(a) to (e) as a result of steps taken in accordance with subsection (2) or through any other means, the corporation shall record that information in the register within 15 days of becoming aware of it.

Information from shareholders
(4) If the corporation requests information referred to in any of paragraphs (1)(a) to (e) from one of its shareholders, the shareholder shall, to the best of their knowledge, reply accurately and completely as soon as feasible.

Disposal of personal information
(5) Within one year after the sixth anniversary of the day on which an individual ceases to be an individual with significant control over the corporation, the corporation shall — subject to any other Act of Parliament and to any Act of the legislature of a province that provides for a longer retention period — dispose of any of that individual's *personal information*, as defined in subsection 2(1) of the *Personal Information Protection and Electronic Documents Act*, that is recorded in the register.

Offence
(6) A corporation that, without reasonable cause, contravenes this section is guilty of an offence and liable on summary conviction to a fine not exceeding five thousand dollars.

Non-application
(7) This section does not apply to a corporation that

(a) is a reporting issuer or an émetteur assujetti under an Act of the legislature of a province relating to the regulation of securities;
(b) is listed on a designated stock exchange, as defined in subsection 248(1) of the Income Tax Act; or
(c) is a member of a prescribed class.

Inability to identify individuals
21.2 A corporation to which section 21.1 applies shall take prescribed steps if it is unable to identify any individuals with significant control over the corporation.

Disclosure to Director
21.3 (1) A corporation to which section 21.1 applies shall disclose to the Director, on request, any information in its register of individuals with significant control.

Access — affidavit
(2) Shareholders and creditors of the corporation or their personal representatives, on sending to the corporation or its agent or mandatary the affidavit referred to in subsection (3), may on application require the corporation or its agent or mandatary to allow the applicant access to the register of the corporation referred to in subsection 21.1(1) during the usual business hours of the corporation and, on payment of a reasonable fee, provide the applicant with an extract from that register.

Affidavit
(3) The affidavit required under subsection (2) shall contain

(a) the name and address of the applicant;
(b) the name and address for service of the body corporate, if the applicant is a body corporate; and
(c) a statement that any information obtained under subsection (2) will not be used except as permitted under subsection (5).

Application by body corporate
(4) If the applicant is a body corporate, the affidavit shall be made by a director or officer of the body corporate.

Use of information
(5) Information obtained under subsection (2) shall not be used by any person except in connection with

(a) an effort to influence the voting of shareholders of the corporation;
(b) an offer to acquire securities of the corporation; or
(c) any other matter relating to the affairs of the corporation.

Offence
(6) A person who, without reasonable cause, contravenes subsection (5) is guilty of an offence and liable on summary conviction to a fine not exceeding five thousand dollars or to imprisonment for a term not exceeding six months, or to both.

Offence — preparation and maintenance of register
21.4 (1) Every director or officer of a corporation who knowingly authorizes, permits or acquiesces in the contravention of subsection 21.1(1) by that corporation commits an offence, whether or not the corporation has been prosecuted or convicted.

Offence — recording of false or misleading information
(2) Every director or officer of a corporation who knowingly records or knowingly authorizes, permits or acquiesces in the recording of false or misleading information in the register of the corporation referred to in subsection 21.1(1) commits an offence.

Offence — provision of false or misleading information
(3) Every director or officer of a corporation who knowingly provides or knowingly authorizes, permits or acquiesces in the provision to any person or entity of false or misleading information in relation to the register of the corporation referred to in subsection 21.1(1) commits an offence.

Offence — subsection 21.1(4)
(4) Every shareholder who knowingly contravenes subsection 21.1(4) commits an offence.

Penalty
(5) A person who commits an offence under any of subsections (1) to (4) is liable on summary conviction to a fine not exceeding $200,000 or to imprisonment for a term not exceeding six months, or to both.

184 Section 250 of the Act is amended by adding the following after subsection (3):

Register of individuals with significant control
(4) For greater certainty, a register referred to in subsection 21.1(1) or an extract from it is not a report, return, notice or other document for the purposes of this section.

185 Subsection 261(1) of the Act is amended by adding the following after paragraph (c):
(c.01) prescribing the form of the register referred to in subsection 21.1(1) and the manner of preparing and maintaining it;
(c.02) respecting steps to be taken by a corporation for the purposes of subsection 21.1(2);

Coming into Force
Six months after royal assent
186 Sections 182 to 185 come into force on the day that, in the sixth month after the month in which this Act receives royal assent, has the same calendar number as the day on which it receives royal assent or, if that sixth month has no day with that number, the last day of that sixth month.

Article

The Supreme Court renders an important and long-awaited decision on the renegotiation of commercial contracts.

***Churchill Falls (Labrador) Corporation Limited* v. *Hydro Québec*, 2018 SCC 46**

The Supreme Court had to decide whether a party to a contract can require the other party to renegotiate the contract because of allegedly unforeseeable changes in the market since it was signed. Here is a summary of the decision summary.

In 1969, the Churchill Falls (Labrador) Corporation Limited and Hydro Québec signed a contract that set out a legal and financial framework for the construction and operation of a hydroelectric plant on the Churchill River in Labrador. In the contract, Hydro-Québec undertook to purchase, over a 65-year period, most of the electricity produced by the plant, whether it needed it or not, which allowed Churchill Falls to use debt financing for the construction of the plant. In exchange, Hydro Québec obtained the right to purchase electricity at fixed prices for the entire term of the contract. After the contract was signed, there were changes in the electricity market, and the purchase price for electricity set in the contract is now well below market prices. Hydro Québec sells electricity from the plant to third parties at current prices, and this generates substantial profits for Hydro Québec.

In the circumstances, Churchill Falls is asking the courts to order that the contract be renegotiated and that its benefits be reallocated. Churchill Falls seeks to have the fixed rate being paid by Hydro Québec replaced with a new rate so as to ensure that the contract reflects the equilibrium of the initial agreement and in order to enforce Hydro Québec's alleged duty to cooperate with Churchill Falls on the basis of its general duty of good faith.

The Quebec Superior Court concluded that the intervention sought by Churchill Falls was not warranted, and the Court of Appeal dismissed Churchill Falls' appeal. The appeal is dismissed.

In Quebec civil law, there is no legal basis for Churchill Falls' claim. The Court cannot change the content of the contract, nor can it require the parties to renegotiate certain terms of the contract or to share the benefits otherwise than as provided for in the contract.

The interpretation and characterization of the contract in this case are questions of mixed fact and law. The contract cannot be characterized as a joint venture contract or a relational contract. A joint venture contract is formed where businesses choose to become partners and to cooperate in a project by each investing resources and by sharing any profits from the project. In this case, the evidence does not show that the parties intended to enter into a partnership or to jointly assume financial or logistical responsibility for the project beyond the simple co-operation required to perform their respective prestations.

Each party's participation is clearly quantified and defined, and no important prestations are left undefined. This shows that the parties intended for the project to proceed according to the words of the contract, not on the basis of their ability to agree and cooperate from day to day to fill any gaps in the contract.

The contract does not contain implied clauses that impose on Hydro Québec a duty to cooperate and to renegotiate the agreed on prices. An implied duty may, within the meaning of article 1434 of the *Civil Code of Québec*, be incident to a contract according to the nature of the contract if the duty is consistent with the general scheme of the contract and if the contract's coherency seems to require such a duty. However, such an implied clause must not merely add duties to the contract that might enhance it, but must fill a gap. In this case, there is no gap or omission in the scheme of the contract that requires that

an implied duty to cooperate and to renegotiate the agreed on prices be read into the contract in order to make it coherent.

The doctrine of unforeseeability cannot serve as a basis for requiring Hydro Québec to renegotiate the contract. However, unforeseeability cannot be relied on where it is clear that the party who was disadvantaged by the change in circumstances had accepted the risk that such changes would occur, and it applies only where the new situation makes the contract less beneficial for one of the parties, and not simply more beneficial for the other. It does not apply where the parties receive the prestations and benefits that are provided for or are allocated to them in the contract. And this doctrine is not recognized in Quebec civil law at this time. The parties intentionally allocated the risk of electricity price fluctuations to Hydro Québec, and the changes in the market did not have the effect of increasing the cost of performing Churchill Falls' prestations or diminishing the value of the prestations it received from Hydro Québec. On the contrary, Churchill Falls has continued to receive exactly what it was owed under the contract, as well as the related benefits.

The principles of good faith and equity do not impose a duty to renegotiate on Hydro Québec. However, good faith cannot be used to violate that equilibrium and impose a new bargain on the parties to the contract. The concept of good faith cannot be expanded to include the possibility of penalizing a party whose conduct has not been unreasonable, or a duty to renegotiate the principal obligations of a contract in all circumstances.

Hydro Québec is entitled to insist on adhering to the words of the contract and maintaining the equilibrium of the prestations the contract establishes for the benefit of the parties, which bound themselves knowing full well what they were doing. Hydro Québec is not breaching its duty of good faith in exercising its right to purchase electricity from Churchill Falls at fixed prices. Nor does its insistence on adhering to the contract despite the unforeseen change in circumstances constitute unreasonable conduct. Hydro Québec has no duty to cooperate with Churchill Falls to mitigate the effects of the contract. The magnitude of the profits it earns under the contract does not justify modifying the contract so as to deny it that benefit.

As to equity, it cannot be relied on in support of the relief being sought, since its effect would then be to indirectly introduce either lesion or unforeseeability into Quebec law in every case. Equity is not so malleable that it can be detached from the will of the parties and their common intention. There is neither inequality nor vulnerability in their relationship. Both parties to the contract were experienced, and they negotiated its clauses at length.

The relief being sought cannot be granted. There is no legal basis on which a judge could impose a new bargain on Hydro Québec to which it has not agreed. Allowing a contract to be modified by a judge at the request of a single party would conflict seriously with the principles of the binding force of contracts and freedom of contract that underlie Quebec civil law. In any event, Churchill Falls' action is prescribed since the end of 2000 at the latest.

Jurisprudence

Vanier* v. *Lucien Vanier et Fils Inc.
May 15, 2018, Court of Appeal, EYB 2018-294240

APPEAL from a judgment of the Superior Court dismissing an application for wrongful dismissal, oppression and damages. Granted in part. Cross-appeal rejected.

The judge does not err in concluding that Lucien terminated Roger for cause. As to oppression, the judge makes errors of law as well as overt and decisive errors on mixed questions of law and fact. The oppression remedy under section 241 of the CBCA is a remedy in equity that must take into account the commercial reality and the interests at stake. This corporate law remedy is distinct from the civil law remedy for dismissal.

The case law also recognizes that there may be a reasonable expectation for repurchase of shares during a dismissal.

It is therefore appropriate to order the purchase of Roger's shares. The valuation of the shares should be carried out on December 31, 2011. A "minority discount" of 5% is also justified because of the behavior of Roger who contributed to his exclusion.

Attorney General of Québec v. Tribunal administratif du Québec
November 30, 2017, Superior Court, EYB 2017-294440

Application for judicial review. Rejected.

The Tribunal is seized of an application for judicial review in which the Attorney General of Québec ("AGQ") requests that the decisions rendered by the Tribunal administratif du Québec on June 23, 2015 ("TAQ-1") and August 25, 2016 ("TAQ-2"), under revision, be overturned.

For the AGQ, the application of the aggravating factor of the related enterprise "*is not to disregard the veil of the legal personality in order to seek the personal responsibility of a director or that of another corporation that the offender, but to punish the actual perpetrator of the breach.*"

According to the latter, a breach of the *Environment Quality Act* ("EQA") previously committed by a legal person related to the offender may be taken into account in the decision whether or not to impose an administrative monetary penalty ("AMP") on the offender without there being any contravention to the principle of the distinct legal personality of legal persons, since it is simply a question of sanctioning the actual perpetrator of the breach.

However, according to the AGQ's own admission, questioned by TAQ-1, this aggravating factor of the tied company "*aims to lift the "corporate veil" to prevent corporations from evading their obligations or responsibilities in setting up another corporation*."

In the name of the legal persons' principle of distinct legal personality, TAQ-1 concludes that the aggravating factor of the related undertaking is inapplicable or, in other words, that a prior breach committed by a person other than the offender itself cannot be recognized as an aggravating factor in AMP.

In the view of the Tribunal, these conclusions appear reasonable. They result from serious legislative interpretation and factual analysis.

The principle of the independence of the legal personality of the corporation is well established in our law and, with some exceptions, it is not possible to attribute to one legal person the facts and actions of another, whether the latter is a member or not.

There is no evidence in this case that CFL corporation was used as a ploy to hide fraudulent, abusive or contrary to public order acts, or that it was used for unjust, dishonest purposes, or to evade legal obligations or be the instrument or *alter ego* 9232 to the point of constituting a single entity.

Côté* v. *Landry
May 17, 2018 Superior Court, EYB 2018-294635

Derivative action. Granted.

When the directors of a corporation refuse or neglect to act, the CBCA provides for the possibility for a complainant to bring an action on behalf of the corporation. Such an appeal is, however, only possible if the complainant obtains prior authorization from the court. To obtain it, he must demonstrate:

(1) that he has given a 14-day advance notice to the directors of the corporation of his intention to submit such an application;
2) he acts in good faith;
3) that it appears to be in the interest of the corporation to bring the action.

The Tribunal is of the view that the analysis of the behaviour of directors must be made at the time the Application is filed and not at the time the Application is presented. To do otherwise could have the effect of depriving the corporation of an effective remedy while the Application was filed within the prescription period. Indeed, if the Tribunal rejected the Application, as the respondents request it, the corporation could be opposed to a prescription argument by bringing a separate action without being able to benefit from the interruption of prescription resulting from the filing of the present Application.

The Tribunal is satisfied that the criteria set out in section 239 of the CBCA are met. Indeed, the proposed action is based on a reasonable basis to achieve *prima facie* its goals.

Allard* v. *Domaine de la Rivière-aux-Pins inc.
June 22, 2018, Superior Court, EYB 2018-295866

Application for rectification of abuse of power or iniquity under the *Business Corporations Act*. Rejected. Counterclaim for damages. Rejected.

The applicants are shareholders and tenants of Domaine de la Rivière-aux-Pins inc. (the corporation), in addition to having a real right of use on the leased land. Considering the significant increase in property taxes payable by the corporation, the directors decide to revise the method of allocating land charges. A special meeting is held, but the shareholders who oppose this review do not succeed in having the votes deferred on the budget and on the amendments. The annual general meeting then takes place and the amendments are approved. The plaintiffs complain that the corporation did not postpone the vote on

the adoption of the budget. They also argue that the adoption of the amendments goes against the principle of equality between shareholders and that section 191 of the *Business Corporations Act* (QBCA) has not been complied with.

A remedy under section 450 QBCA may be obtained where the corporation is acting improperly or unfairly to certain shareholders, violating their reasonable expectations and causing them harm. Past practices can help determine a shareholder's reasonable expectations, but they may evolve and reasonable expectations must reflect the circumstances. The corporation could change the distribution of taxes, its decision does not constitute bad faith, an abuse or a fault. The process has been transparent and the refusal to postpone for a few months a crucial vote for the corporation is not illegal or unreasonable. Moreover, this is not a case where majority shareholders undermine the reasonable expectations of minority shareholders. Rather, it is a situation where a majority of minority shareholders have ratified amendments to by-law that do not target specific shareholders. The claim for rectification of abuse of power or iniquity must therefore be dismissed.

The corporation's counterclaim must also be dismissed, since it is impossible to find an abuse of the process in an application dealing with complex issues as to the rights and obligations of the parties.