Toronto Law Journal

Greater Corporate Transparency on the Horizon: Non-Public CBCA Corporations to be Required to Keep Securities Register of Individuals With "Significant Control"

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Bill C-86, *Budget Implementation Act, 2018, No. 2* is amending the *Canada Business Corporations Act* ("**CBCA**") to require **private federal corporations** to maintain a register of "individuals with significant control" over the issued capital of the corporation. Failure to implement the regime imposed by these amendments could expose officers, directors and shareholders of the corporation to fines of up to $200,000. It is imperative that directors, officers, and shareholders are aware of and understand how their duties, obligations, and potential exposure to personal liability is about to change. These amendments come into force on **June 13th, 2019**.

OVERVIEW

Consistent with global efforts to curb the misuse of corporate vehicles for illicit purposes, Bill C-86 amends the CBCA to create greater transparency and disclosure of individuals who possess "significant control" over private federal corporations (private corporations incorporated under the CBCA) ("**Private Federal Corporations**"). Public corporations are exempt from these requirements. Additionally, these requirements do not apply to corporations incorporated under the *Business Corporations Act* (Ontario). Bill C-86's amendments to the CBCA expand current record keeping obligations for Private Federal Corporations, now requiring them to maintain a register of "individuals with significant control".

REGISTER OF "INDIVIDUALS WITH SIGNIFICANT CONTROL"

Beginning June 13th, 2019, Private Federal Corporations will be required to create and maintain a securities register of individuals with "significant control" over the corporation. Under the new section 2.1, the term "Individual" refers to any individual person, or any group of individuals acting jointly or in concert that holds registered or beneficial title to shares in the corporation, either directly or indirectly. The term "significant control" refers to the ownership or control of 25% or more of the voting rights attached to the corporation's shares, or 25% or more of the corporation's shares by value. Each Private Federal Corporation must maintain a register of individuals with significant control over the corporation, effective as of June 13th, 2019.

[1] This publication is intended for general information purposes only and should not be relied upon as legal advice.

NEW RECORD-KEEPING REQUIREMENTS

The following is a summary of the amendments to the CBCA:

1. **Components of the Register of Individuals with Significant Control** — While the precise form of the securities register is yet to be finalized, the amendments state that the register must contain the following information with respect to each individual with significant control of the corporation:

    - Name, date of birth, and latest known address;
    - Jurisdiction of residence for tax purposes;
    - The day which the individual obtained or ceased to have significant control;
    - A description of how the individual has "significant control", including a description of the individual's interests and rights in respect to the shares of the corporation; and
    - A description of the steps taken by the corporation to ensure the securities register is accurate, complete, and up-to-date.

2. **Maintenance of Securities Register** — Private Federal Corporations are obligated to take reasonable steps at least once every financial year to ensure that the securities register is accurate, complete and up-to-date. If a corporation becomes aware of any amendments that must be made to the securities register, it will have 15 days to make the appropriate changes. If a corporation is unable to identify any individuals with significant control over the corporation, the corporation must follow the prescribed steps that will be set out in the regulation.

3. **Obligations of Shareholders** — Individual shareholders have an obligation to respond to the best of their knowledge, accurately and completely as soon as feasible to a corporation's request for information to be recorded in the securities register.

4. **Access to Securities Register** — On application, shareholders and creditors of the corporation are entitled access to the securities register for certain purposes.

5. **The Corporation: Penalties for Non-Compliance** — Failure of a corporation to comply with the reporting obligations without reasonable cause can result in the corporation being liable on summary conviction to a fine not exceeding $5,000.

6. **Directors, Officers and Shareholders: Penalties for Non-Compliance** — Similarly, directors, officers, or shareholders who knowingly authorize, permit or acquiesce in a contravention of these provisions or the recording of false or misleading information in

the register can be subject to fines of up to $200,000 or imprisonment for a term of up to six months (or both).

Be prepared for the implementation of these amendments by June 13, 2019 to ensure compliance and prevent exposure to liability.

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Debarment Proposals Loosen Their Grip But Reach Out Farther

Ken Jull, Gardiner Roberts LLP[1]

When a corporation is convicted of serious offences such as bribery of foreign officials, the Government of Canada debars that corporation from federal government work. The existing Integrity regime sets the period of debarment at ten years, which may be reduced to five years if the corporation has cooperated with law enforcement authorities or undertaken remedial efforts to address the wrongdoing.

Debarment has been in the news in the SNC-Lavalin affair, as this was cited as one of the key reasons that the company sought a deferred prosecution agreement. The Chief Executive Officer of SNC-Lavalin, Neil Bruce, said that if the engineering firm is convicted and barred from bidding on federal contracts here at home its workers would end up working for the Montreal-based company's foreign rivals.

Revision of the debarment rules may be another route to mitigate the collateral impact on jobs of innocent workers, apart from a deferred prosecution agreement.

The Government of Canada has released a very comprehensive document which describes a proposed new debarment regime.[2] This policy is effective as of a date to be determined. This date is expected to be in 2019.[3] The proposals to revise the debarment regime loosen their grip, but reach out farther.

Maximum ceilings but no minimum floors

The most important change is that the 10-year ban category is no longer a floor, but rather is a ceiling (hence the reference to a maximum period but no reference to a minimum period). The guidelines state that ineligibility dates are "no more than ten (10) years from the delivery of the Notice of Ineligibility."[4]

The new programme is complex and relies on material event charts and an appendix that sets out balancing criteria. It is therefore possible to have a debarment period as short as one or two years under the new proposals.

Loosened Grip

The proposed amendments will also add a degree of leniency to those affected by the debarment policy.

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[2] https://www.tpsgc-pwgsc.gc.ca/ci-if/pp-pd-eng.html
[3] https://www.tpsgc-pwgsc.gc.ca/ci-if/pp-pd-eng.html
[4] https://www.tpsgc-pwgsc.gc.ca/ci-if/pp-pd-eng.html, section 6.3.1.3.

Contractors who have been debarred may request an administrative agreement after 36 months from the delivery of a Notice of Ineligibility. It may be granted, at the registrar's discretion, if the contractor can demonstrate cooperation with authorities and has undertaken adequate remedial action.[5]

In terms of the numbers, an application for an administrative agreement would only apply to those cases where debarment exceeded three years (36 months).

Matrix analysis of factors based on two axis

For most offences, the criteria that will apply are set out in Appendix 3, which require a balancing of factors that is amenable to matrix analysis.

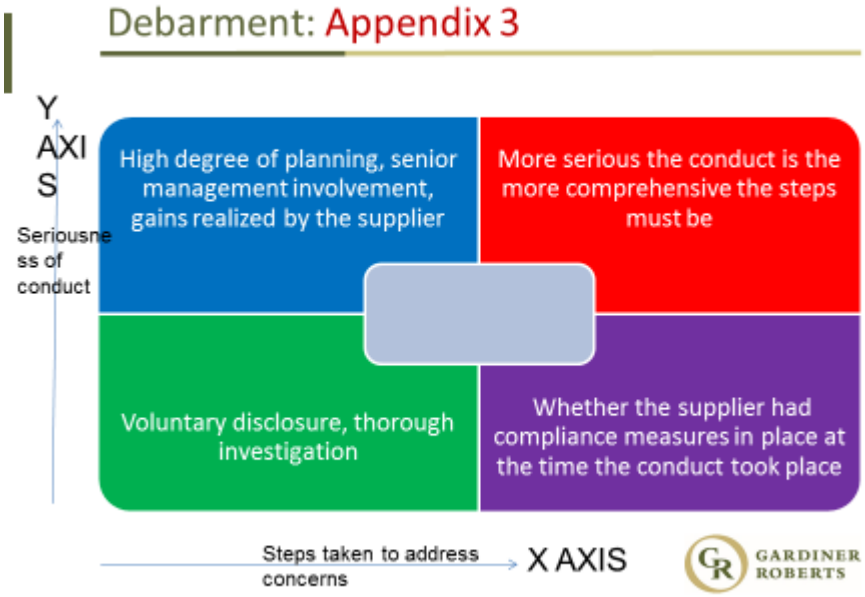
An excerpt from Appendix 3 is reproduced below:

> In determining the length of a supplier's ineligibility period, the Registrar will take into account the seriousness of the conduct engaged in, balanced against the steps taken by the supplier to ensure that similar conduct does not recur. The more serious the conduct that resulted in the determination of ineligibility, the more comprehensive the steps taken to address it will need to be. The Registrar will need to be convinced that the circumstances leading to the debarment have been addressed.
>
> Factors that the Registrar may take into account include the following:
>
> **Seriousness of the conduct engaged in**
>
> - the supplier's role in the conduct
> - the degree of planning involved in carrying out the offence and the duration and complexity of the offence
> - the extent of senior management involvement
> - the gains realized by the supplier as a result of the offence
> - the cost to public authorities of the investigation and prosecution of the offence
> - known membership in or associations with organized crime and money laundering
> - Whether the supplier is a repeat offender, or was previously warned about such behaviour, will also be a serious consideration as it indicates an unwillingness or inability to address compliance issues effectively and credibly
>
> **Steps taken to address concerns**
>
> - voluntary disclosure of involvement in the offence
> - whether the supplier has completed a thorough investigation of the circumstances that led to the debarment and cooperated with the investigating authorities
> - steps taken to address the wrongdoing, including addressing any criminal, civil or administrative sanctions and paying compensation for damage
> - appropriate disciplinary action against the individuals involved in the conduct
> - whether the supplier had compliance measures and internal control systems in place at the time the conduct took place

[5] https://www.tpsgc-pwgsc.gc.ca/ci-if/pp-pd-eng.html#s6, section 10 Administrative Agreements.

- the adoption and implementation of a credible and effective compliance program that demonstrates the supplier's commitment to complying with the law
- whether the supplier has implemented or agreed to implement remedial measures, including through personnel changes and the adoption of new procedures and training and having regard to any measures that might be recommended by the Registrar or the investigating authority
- whether the supplier's management appears to recognize and understand the seriousness of the conduct and is committed to taking serious steps to ensure that it does not recur

Matrix analysis[6] is perfectly suited to balance the above categories on a vertical and horizontal axis, as follows:



The red quadrant represents the area where the debarment period will be most stringent. In this quadrant, the seriousness of the conduct in issue is high and the steps that must be taken to address the misconduct must be the most rigorous. In the opposite green quadrant, where the seriousness of the conduct is low, the level of steps taken to address the concerns is proportionately lower. The blue and purple quadrants are variations of these combinations.

There are many proposed changes to the debarment program that will also expand its reach. I would like to highlight five areas.

[6] See Archibald and Jull, *Profiting From Risk Management and Compliance* 2018 (Thomson Reuters).

1. Application to AMPs if conduct is serious, repetitive or otherwise egregious

Under the proposed amendments, if a supplier has, within the past three years, been assessed an Administrative Monetary Penalty ("AMP") and/or has been publicly named for having committed a violation pursuant to Part IV of the Canada Labour Code, the supplier may be debarred if the Registrar determines the actions to be serious, repetitive and/or otherwise egregious.[7]

This is a quantum leap, as AMPs are assessed on a balance of probabilities rather than the more rigorous proof beyond a reasonable doubt as required by criminal law. Perhaps this is a policy reaction to a poor track record of convictions against corporations for white collar crimes in Canada. Corporate in-house counsel may have become complacent in believing that their companies are unlikely to be convicted and therefore risk management systems are less important. If these proposals are passed, that complacency will be dangerous.

2. Conviction of a provincial offence relating to fraud, collusion or insider trading

A supplier may be debarred if the supplier, or an affiliate, has been convicted of or pled guilty to a provincial offence which is analogous to a fraud-based offense, or in relation to insider trading.[8]

This is a major extension as companies may now face federal consequences for provincial convictions.

3. Commercial integrity

Even if a supplier is not convicted of a listed offense, they may still be suspended from engaging in contracts. The proposed amendment will allow for suspensions where, at the Registrar's discretion, the acts or omissions of a supplier adversely reflect on the supplier's commercial integrity.

4. Application to foreign offences

Further proposed changes expand the regime to cover "foreign offences" which means a civil judgment, regulatory offence, decision, decree, directive, order or consent agreement or criminal judgment in a jurisdiction other than Canada or such other similar enforceable decision pursuant to the authority of such other jurisdiction.[9]

5. Actions or omissions of affiliates: acquiescence and an objective test

The Registrar will also consider the actions or omission of affiliates only if the Registrar determines, in the Registrar's discretion, that the supplier directed, influenced, authorized, assented to, acquiesced to, or participated in those actions or omissions.[10] This expands the

[7] https://www.tpsgc-pwgsc.gc.ca/ci-if/pp-pd-eng.html Appendix 2, section l.
[8] https://www.tpsgc-pwgsc.gc.ca/ci-if/pp-pd-eng.html, Appendix 2, section g.
[9] https://www.tpsgc-pwgsc.gc.ca/ci-if/pp-pd-eng.htm, Appendix 1.
[10] https://www.tpsgc-pwgsc.gc.ca/ci-if/pp-pd-eng.html, section 8.

scope of the prior rules which was restricted to "participation or involvement". The new test moves into the wider scope of acquiescence.

If a supplier's affiliate (defined by a control test) in the past three (3) years was convicted of or pleaded guilty to listed offences, and the Registrar determines that the supplier "directed, influenced, authorized, assented to, acquiesced in or participated in any action or omission, which directly or indirectly enabled the underlying action(s) or omission(s) that relate to the offence, where the supplier knew or ***ought to have known*** that its affiliate was involved in the offence", this may lead to debarment. The new test is analogous to the standard imposed on senior officers (in the *Criminal Code* provisions on corporate liability) with respect to employees under their supervision and the taking of all reasonable steps, but extends the test to the purely objective "ought to have known". This represents a significant extension from criminal law principles to civil law concepts of negligence.

Conclusion

The new debarment regime is a step forward in providing greater flexibility to meet the facts of specific cases. The proposals significantly extend the reach of debarment to areas never covered before.

The proposals underscore the importance of risk management systems. Similar to the ads that show a fast car with the caution "Professional driver, do not attempt this on your own", corporations should hire law firms with expertise in risk management.

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Employee or Franchisee (Independent Contractor)? Definitive Guidance from the Supreme Court of Canada

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A. Introduction

In a recent decision of the Supreme Court of Canada, the analysis of whether an individual is considered an employee or independent contractor is given a thorough review, bringing into question the interplay of previous cases that have considered the nature of this relationship in a franchise context.

B. *Modern Cleaning Concept Inc. v. Comité paritaire de l'entretien d'édifices publics de la région de Québec*

The *Modern Cleaning*[2] case relates to a claim for unpaid wages and benefits arising out of cleaning services provided via a franchise, brought by the statutory committee (the "**Committee**") responsible for overseeing compliance with the collective agreement (the "***Decree***") that governs cleaning services in public buildings in the Québec region.

Modern Cleaning Concept Inc. ("**Modern**") is a franchisor that provides cleaning and maintenance services via a network of franchisees, including Mr. Francis Bourque ("**Mr. Bourque**"). Modern negotiates the cleaning contracts and assigns contracts specific to a particular location to a franchisee, who then performs the actual cleaning work. In each instance, Modern remained on the contract and was responsible to the client for the performance of the services.

In 2013, Mr. Bourque engaged in cleaning work as a subcontractor for Modern, until, in January 2014, Mr. Bourque became a franchisee, and was termed an 'independent contractor' pursuant to the terms of the franchise agreement. Only five (5) months later, Mr. Bourque terminated his franchise agreement due to his frustration with the lack of profits and inability to develop his business.

Among other things, the franchise agreement stipulated that Mr. Bourque agreed to perform cleaning services exclusively through the franchise relationship, not to compete with Modern, and to use his own tools and equipment. Clients were billed directly by Modern, but in Mr. Bourque's name. Mr. Bourque was then paid by direct deposit, after Modern had deducted its

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[2] *Modern Cleaning Concept Inc. v. Comité paritaire de l'entretien d'édifices publics de la région de Québec*, 2019 SCC 28 ("***Modern Cleaning***").

fees, royalties, etc. (which could amount to up to 43% of Mr. Bourque's revenue). Mr. Bourque had limited interaction with the clients.

After termination of the franchise agreement, Mr. Bourque returned to his own independent cleaning business and the Committee began investigating the relationship between Modern and Mr. Bourque. Concluding that Mr. Bourque was in fact an "employee", despite the language of the franchise agreement, the Committee determined that Mr. Bourque was entitled to the mandatory wages and benefits set out in the *Decree*.

As a result of this determination, the Committee commenced proceedings against Modern for $9,219.32 in unpaid wages and other benefits in relation to the cleaning services provided by Mr. Bourque and his wife, who had assisted him in providing such cleaning services.

The trial judge found that the following factors were determinative of the relationship between Mr. Bourque and Modern, such that Mr. Bourque could be found an independent contractor:

1. he owned his own cleaning business;
2. he acted as a subcontractor for Modern prior to becoming a franchisee; and
3. he was attempting to grow his business.

However, the trial judge also considered the following factors as supporting a finding that Mr. Bourque was an employee:

1. he was unable to negotiate the terms of the franchise agreement;
2. Modern supervised his work; and
3. Modern collected money from the clients before passing it on to Mr. Bourque.

The trial judge also emphasized Mr. Bourque's intention — that Mr. Bourque entered into the franchise relationship with the aim of expanding his own cleaning business. This intent, coupled with the language of the franchise agreement, led the trial judge to conclude that there was a common intention that Mr. Bourque would be an independent contractor (and therefore would not be entitled to the benefits claimed by the Committee on his behalf).

On appeal, the Quebec Court of Appeal reached a different conclusion, finding that the trial judge had misunderstood the nature of the relationship between Modern, its clients and Mr. Bourque. In particular, the Court was swayed by the nature of the assignments of the cleaning contracts from Modern to Mr. Bourque, noting the fact that Modern remained contractually liable to its clients as a strong indicator of an employment relationship, rather than that of an independent contractor. Ultimately, the control and involvement exhibited by Modern in the cleaning contracts was sufficient for the Court of Appeal to find that Mr. Bourque was in fact an employee and therefore was entitled to the benefits claimed.

On further appeal to the Supreme Court of Canada, the issue of employee vs. independent contractor was placed under strict scrutiny. Reviewing the development of case law on this topic, the Supreme Court established that the analysis "demands a highly contextual and fact-specific inquiry into the nature of the relationship in order to determine which party bears the business risk",[3] and that the terms or labels used in the relevant agreement are themselves superfluous to the analysis. The Court highlighted that "the question is not one of comparative risk; rather, it is which party actually assumes the risk of the business."[4]

The Court reiterated the importance of looking behind contracts to uncover the true nature of the relationship between parties, stating that:[5]

> The presence of a franchise agreement cannot function to disguise the presence of a relationship between an 'employee' and 'professional employer' […] This is consistent with the general principle that the desire to evade the application of a decree cannot overcome the reality of the contractual relationship.

In assessing the controls that Modern exercised over Mr. Bourque arising from the franchise agreement, the Court viewed a number of factors as indicative of the level of control an employer would exercise over its employees, including the following:

1. the terms of the franchise agreement limited Mr. Bourque's ability to transfer his cleaning contracts to third parties, despite the fact that he had paid to obtain them;
2. upon termination, Modern re-assigned the contracts that Mr. Bourque had paid to obtain;
3. Modern had the option of repurchasing the cleaning contract if a franchisee decided that he/she wanted to cease operating a particular franchise or leave the Modern network altogether;
4. Modern retained the right to oppose the transfer or sale of a cleaning contract to a third party;
5. any new cleaning contracts Mr. Bourque sought to obtain had to be submitted to Modern, and Modern would then negotiate the contract with the new client before offering the contract for sale to the franchisees;
6. at any time, Modern could access the locations serviced by Mr. Bourque;
7. Mr. Bourque was required to document the work he completed;

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[3] *Modern Cleaning*, at para 36.
[4] *Ibid*.
[5] *Ibid*., at para 38.

8. if a client complained to Modern about Mr. Bourque's services, it was Modern which had the ability to deduct Mr. Bourque's pay without discussing the complaint with Mr. Bourque; and
9. Despite the invoice being issued in Mr. Bourque's name, Mr. Bourque received no direct payment from the clients, who instead paid Modern. Modern paid Mr. Bourque through direct deposit, after deducting amounts for franchising fees, the loans and the products sold by Modern to Mr. Bourque.

All of the above factors, according to the majority of the Supreme Court, were "extensive supervision and limits imposed on Mr. Bourque through the franchise agreement, restricting his ability to control, organize and expand his own business" that were essentially "designed to protect Modern from the possibility of liability generated by Mr. Bourque's conduct".[6]

Clearly, certain of these controls appear to align with that of a typical franchise agreement. This issue was addressed by the Court, where they admit that although these factors seem standard to the franchise relationship, "the fact that the relationship between Modern and Mr. Bourque was one of franchisor-franchisee does not answer the question of who assumed the acceptance of and remuneration for business risk".[7]

The Court then canvassed the differences between perfect and imperfect assignments, finding that the tripartite agreements into which Modern would enter with its clients and Mr. Bourque constituted imperfect assignments, since Modern would remain contractually bound after adding Mr. Bourque to the agreements. In this regard, the Court highlighted that:[8]

> The provisions of the service contract indicated that despite any subcontracting, assignment or franchising, Modern remained responsible for ensuring that the services were performed and for the quality of the cleaning services. The inclusion of an indemnity clause in the franchise agreement between Modern and Mr. Bourque does not change the fact that Modern remained liable to its clients if the cleaning services were not delivered in accordance with the contract between Modern and its client.

The Court framed the issue of whether it was Modern or Mr. Bourque who assumed the acceptance of, and remuneration for, the business risk of the cleaning contracts, as Modern's attempts to balance liability and control, stating as follows:[9]

> Modern's ongoing liability to its clients by virtue of the imperfect assignments is inexorably linked to the controls it placed on Mr. Bourque through the franchise agreements. Modern, at all times, remained liable to its clients. The controls it

[6] *Modern Cleaning*, at para 54.
[7] *Ibid.*, at para 56.
[8] *Ibid.*, at para 42.
[9] *Ibid.*, at para 49.

> placed on Mr. Bourque aimed to limit this liability. Modern's strategy to strictly control its franchisees, like Mr. Bourque, is the context for examining Modern's assumption of risk.

The Court concluded that Modern's business model was governed by both the cleaning contracts and the franchise agreement. As a result of the tripartite agreement, Mr. Bourque really did not assume any of the business risk which would result in him being an independent contractor. The majority thus reached the conclusion that it was Modern that continued to bear the business risk:[10]

> the effect of Modern's business model was that it, not Mr. Bourque, assumed the "risk and profit" of the business. Because of its tripartite business model and ongoing liability to its clients, Modern placed extensive controls on Mr. Bourque to limit its own business risk. Mr. Bourque did not assume the business risk and therefore it cannot be said that he was an independent contractor.

Ultimately, the majority of the Supreme Court found that Mr. Bourque was entitled to wages and other benefits owed to employees when he terminated his franchise agreement with Modern Cleaning Concept Inc., as he was an employee and not an independent contractor.

In dissenting reasons, Justice Suzanne Côté, writing for justices Russell Brown and Malcolm Rowe, found that the proper analysis is whether the subject in question assumed a *real* business risk, whether they intended to assume the risk and the extent to which other secondary factors, including the ownership of the work tools, the method of compensation and the degree of freedom in performing the work, reflect the risk assumed by the subject.

Though agreeing with the majority that a franchise agreement cannot disguise the reality of an employment relationship, the minority of the Supreme Court reasoned that the imperfect assignment of the cleaning contracts did not diminish the risk and liability attributable to the franchisee. The minority stated:[11]

> The fact that the assignment was imperfect simply meant that the assigned party, Mr. Bourque's client, obtained a second debtor that was also liable to it for everything under the contract. If the contractual obligations were breached, the client had the choice of suing both debtors, or just one of them, as it wished.

Concluding their analysis, the minority of the Supreme Court reasoned that the very same factors raised by the majority were indicators that Mr. Bourque was not an employee but instead an independent contractor:[12]

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[10] *Modern Cleaning*, at para 58.
[11] *Ibid.*, at para 108.
[12] *Modern Cleaning*, at para 114.

> In the case at bar, despite the tripartite relationship among Modern, the franchisees and their clients, it was open to the trial judge to find that Mr. Bourque had assumed a business risk in order to make a profit. He remained liable to his clients under the cleaning contracts, he sought out potential clients […], he could, in principle, sell his franchise or his contracts and hope to make a profit […], he acquired the necessary tools and products himself […], he subcontracted certain tasks […], and he planned to hire staff […]. It is true that Mr. Bourque paid a substantial share of his income to Modern, but contrary to what our colleague suggests […], it cannot be inferred from this that Modern alone assumed the business risk.

Ultimately, the minority concluded that Mr. Bourque was an independent contractor, citing the business risk that he retained pursuant to the imperfect assignment, coupled with the fact that the supervision exercised by Modern was typical of that of a franchisor:[13]

> In sum, it would be an error to confuse Modern's powers as a franchisor, with the relationship of subordination that characterizes a contract of employment.

C. Prior Decision on the Employee vs. Franchisee Analysis

The Ontario Labour Relations Board came to a similar conclusion in respect of the issue of whether certain individuals were considered employees (or dependent contractors) or franchisees (independent contractors) in the *Canada Bread* decision.[14] Both the *Modern Cleaning* and the *Canada Bread* decisions are fact-based treatises on the hallmarks of the employee (or dependent contractor) vs. franchisee (independent contractor) analysis — in these cases, the respective courts highlighted indicia that swayed the scales one way or the other, despite the language of the relevant franchise agreements.

In *Modern Cleaning*, the analysis of whether the franchisee assumed sufficient business risk to be considered an independent contractor fell short because of the tripartite agreement, where the franchisor maintained liability, and in light of the controls exhibited by the franchisor over the franchisee's business.

In *Canada Bread*, the analysis was similar, as the franchisor owned and controlled access to the customers, while manifesting a level of control over the franchisees' work such that their work was indistinguishable from how an employee would fulfill the same role.

One of the more significant factors in the control analysis — that of the control of the flow of funds and collection of payments — was present in both *Canada Bread* and *Modern Cleaning*, demonstrating that the emphasis on certain aspects of the relationship in *Canada Bread* has now been validated by the Supreme Court of Canada.

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[13] *Ibid.*, at para 135.
[14] *Canada Bread Company Limited*, 2017 Canlii 62172 (OLRB).

One key difference between the two cases is that, in *Canada Bread*, the franchise agreements did allow for the purchase and sale of territorial rights amongst the franchisees (drivers), whereas in *Modern Cleaning*, such transfers were strictly monitored by the franchisor. However, this difference pales in comparison to the array of similarities that appear in two cases decided by different judicial institutions — one decided by the Ontario Labour Relations Board and the other decided by the Supreme Court of Canada.

In the authors' view, the import of the *Modern Cleaning* decision, at least for the purported employer in *Canada Bread*, is that the chance of success on appeal has been considerably diminished. Given the similarities in the analysis conducted by the Ontario Labour Relations Board and the Supreme Court, it will be a significant challenge for any appellate court to overturn the decision in *Canada Bread*.

D. Conclusion

The *Modern Cleaning* case is a flagstone in the employee vs. franchisee (independent contractor) analysis, with a definitive confirmation of the appropriate test for such analysis — whether the subject party assumed business risk in the relationship — and the relevant factors of control and liability that will dictate whether a relationship fits the mold of that of an employer-employee.

Furthermore, the overlap of the 'control' analysis with the consideration of the degree of controls exercised by a franchisor pursuant to the franchise agreement is a warning to all franchisors that too much control over a franchisee may have wider-reaching consequences than just a franchise-law claim.

Indeed, this case highlights that a franchise relationship is not mutually exclusive from that of an employment relationship, and that a court may view the status of a franchise in such a way that it falls within the scope of non-franchise legislation. As is typical in the franchise-law analysis, the terms of the agreement, and the related conduct of the parties, are far more determinative than how the parties describe, or the name that they give to, their relationship.

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Is There Absolute Confidentiality in Mediation?

Oren Weinberg, Boulby Weinberg LLP[1]

Your client's family law case has settled by minutes of settlement following a mediation. It is possible that at some point in the future the parties may disagree about the terms of settlement and need judicial intervention. How will enforcing or interpreting minutes of settlement play out in court after a mediation? To what extent will the court puncture the confidentiality of the mediation process? Mediation is a valuable alternative dispute process because it is confidential. Without protecting the confidentiality of the process mediation would have little value as an alternative process for resolving disputes. The courts strive to protect the mediation process, but case law has evolved to permit exceptions to settlement privilege in mediation in order to prove the scope of an agreement. It is important to consider the confidentiality of going into a mediation as it is conceivable that mediation briefs, submissions, or communications within the process may come to light after minutes of settlement are signed. To protect your client, it is important to consider the scope of the mediation contract and the confidentiality terms.

In the recent family law trial of *Reiss v. Garten*, the parties settled a complex property dispute in mediation.[2] As part of the settlement, certain corporations and underlying corporate assets were to be valued and then divided. After the valuation process concluded, the parties disagreed about whether or not the professional retained to value certain corporate entities should have applied a net present value discount of the contingent taxes to the shareholder personally, as required in equalization calculations under the *Family Law Act* by the Court of Appeal in *Sengmueller v. Sengmueller*.[3] The minutes of settlement did not prescribe the discount and the valuator was not expressly instructed in the minutes to undertake that particular calculation. In this case, the value of the contingent taxes would have swung the notional equalization payment by a very significant number in the wife's favour. The wife was of the view that a term should be implied into the minutes of settlement requiring the valuator to undertake the *Sengmueller* discount. Her position was that she bargained for the discount. The husband's position was that he did not.

A trial of the issue about whether a term could be implied into the minutes of settlement was conducted. In the trial, both parties sought to adduce evidence of the parties' presumed intentions leading to the agreement. In doing so and in light of the decision of the Supreme Court of Canada in *Creston Moly Corp. v. Sattva Capital Corp.*,[4] both parties sought to tender evidence of the surrounding circumstances leading up to the signing of the minutes of

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[2] *Reiss v. Garten*, 2018 CarswellOnt 15657 (S.C.J.).
[3] *Sengmueller v. Sengmueller*, 1994 O.J. No. 278 (C.A.).
[4] *Creston Moly Corp v. Sattva Capital Corp.*, 2014 CarswellBC 2267 (S.C.C.).

settlement. They did so by trying to adduce into evidence the parties' mediation briefs, despite the settlement privilege and confidentiality that attached to that material. To attempt to have this privileged and confidential material admitted in evidence seems in keeping with the requirements of *Sattva*. In *Sattva*, the Supreme Court of Canada held that a contract interpretation exercise requires an analysis of the parties' intent and scope of their understanding. When determining the parties' presumed intentions, the trier of fact must consider the factual matrix at the time the parties entered the contract.[5]

In *Reiss v. Garten*, the trial judge requested submissions from counsel on the appropriateness of this evidence. The trial judge correctly viewed his role in part as the protector of the mediation process. Both parties made submissions on the issue addressing the application of the Supreme Court of Canada case of *Bombardier Inc. v. Union Carbide Canada Inc.*[6] In *Bombardier*, the court grappled with the problem of whether an absolute confidentiality clause in a mediation contract displaces the exception to common law settlement privilege that arises when a party seeks to prove or interpret a contract. If the absolute confidentiality clause in the mediation contract were to prevail, then it would be impossible for a party seeking to prove the existence of an agreement to make its case. *Bombardier* stands for the proposition that there is an exception to settlement privilege such that "protected communications may be disclosed in order to prove the existence or scope of a settlement". The court explained that a "communication that has led to a settlement will cease to be privileged if disclosing it is necessary in order to prove the existence or scope of the settlement."[7] Even though the court agreed that parties' agreements to contract out of common law rules like settlement privilege should be respected, on the facts of that case, it found that the parties did not intend to override the exception to settlement privilege when they entered their contract to mediate.[8]

The court in *Bombardier* held that a mediation contract may provide for a confidentiality clause that is broader than that provided for by common law settlement privilege, but that clause does not automatically preclude the parties from tendering evidence of communications made in the mediation to prove the terms of the settlement. The court held that it is open to parties to contract for confidentiality in the mediation process and limit their ability to prove the terms of a settlement, that is, limit the exception to settlement privilege. However, "it must be clear, on applying principles of contract interpretation […] that that is what the parties intended."[9] As a practice point, it is therefore incumbent on the lawyer to consider this issue with his or her client when entering mediation.

In *Reiss v. Garten*, the trial judge decided that the mediation briefs should not be used as evidence in their entirety. His view was that the briefs were delivered in advance of the mediation as an opening position and could not be relied upon as conclusive of the parties' closing position. The trial judge did however permit cross-examination on certain paragraphs

[5] *Sattva, supra* at para. 47-50.
[6] *Bombardier Inc. v. Union Carbide Canada Inc.*, 2014 CarswellQue 3600 (S.C.C.).
[7] *Bombardier, supra* at para. 35.
[8] *Bombardier, supra* at para. 29.
[9] *Bombardier, supra* at para. 67.

of the mediation briefs to adduce evidence of the parties' opening positions in the brief and whether or not the parties changed their positions during the course of the mediation.

Many mediators' contracts have confidentiality clauses that are broader in scope than the confidentiality provided by the common law settlement privilege. The purpose of the clause is to protect the process. It follows that the documents produced by the parties for the mediation and the positions taken by them in the mediation are privileged, as are the mediator's notes and records. While the latter remain sacrosanct (the trial judge in *Reiss v. Garten* did not permit access to the mediator's notes and records concerning the minutes of settlement), the former are vulnerable to disclosure even in the face of a broad confidentiality clause in the mediation agreement.

Reiss v. Garten raises a number of considerations, particularly for family law lawyers and mediators because many family law disputes are resolved in that process, family law mediation briefs are customarily extensive and detailed, and family law litigants are often vulnerable participants in mediation. As a practice consideration, it is important to consider the terms of confidentiality provisions in a mediation contract and how careful you should be about exposing material that may surface in a court at a later date

If your client's goal is to use mediation more as a tool or a strategy to suss out your opponent's case in the context of litigation, then the settlement privilege is less of an issue. If your client's goal in mediation is more legitimate, that is to participate in an interest-based exploration with a view to achieving settlement, then you will want to turn your mind to the scope of confidentiality in the mediation agreement in case there is a future challenge to any possible settlement. You will also want to consider how you frame your client's negotiation and settlement position in your client's written materials and communications within the process as your client may have to prove his or her intentions at the time of the contract down the road should a dispute arise over the minutes.

A good method for capturing the parties' intentions at the time of the contract is to carefully draft recitals or background facts in the minutes of settlement. This is especially so if one of the parties is vulnerable. Well-drafted background facts will ensure that the minutes of settlement capture the parties' contemporaneous factual matrix for the future reader and protect your client.