

## ***Shareholders in the Crosshairs? Register of Individuals with Significant Control could have Implications for Environmental Regulatory Liability***

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As of June 13, 2019, the *Canada Business Corporations Act*<sup>1</sup> (“CBCA”) requires certain federal corporations<sup>2</sup> to keep a register of individuals with “significant control” of the corporation (the “ISC Register”). The ISC Register is intended to provide greater transparency about who owns and controls a corporation. The goal is to help law enforcement agencies expose activities like money laundering and tax evasion.<sup>3</sup>

The question is whether the ISC Register may also have implications for regulatory liability for orders issued under the Ontario *Environmental Protection Act*<sup>4</sup> (“EPA”) and other provincial environmental laws.<sup>5</sup> Under the EPA, the Ministry of Environment, Conservation and Parks (“MECP”) can order persons with “management and control” of a corporation to investigate and potentially remediate environmental contamination.<sup>6</sup>

Upon request by an investigative body (listed in the CBCA, s. 21.31(2)), a corporation must provide the investigative body with a copy of the ISC Register or disclose information in the ISC Register.

The MECP is not an “investigative body” listed in the CBCA, s. 21.31(2). However, the implications of being named on a corporation’s ISC Register are important to consider. Could the ISC Register provide evidence of the individuals within a corporation who have management and control and could therefore be subject to EPA orders? Directors and officers are presumed to have management and control. Shareholders, however, are usually shielded from liability for a corporation’s actions. That said, since shareholders are “owners”, their names could certainly be listed on the ISC Register if they have “significant control”.

<sup>1</sup> RSC 1985, c C-44 [CBCA].

<sup>2</sup> This provision does not apply to a corporation that is: (a) a reporting issuer or an *émetteur assujéti* 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 (CBCA, s 21.1(7)).

<sup>3</sup> Government of Canada, “Notice – Register of individuals with significant control”, online: <https://www.ic.gc.ca/eic/site/cd-dgc.nsf/eng/cs08219.html>.

<sup>4</sup> RSO 1990, c E 19 [EPA].

<sup>5</sup> For example, the *Ontario Water Resources Act*, RSO 1990, c O40.

<sup>6</sup> EPA, *supra* note 4, s 18(1).

## 1 ISC REGISTER

Section 21.1 of the CBCA requires corporations to prepare and maintain a register of individuals with significant control over the corporation.<sup>7</sup> The register must contain the following information for each individual with significant control:

- a) name, date of birth, and address
- b) jurisdiction of residence for tax purposes
- c) day on which the individual became or ceased to be an individual with significant control, and
- d) description of how the individual meets the definition of significant control.<sup>8</sup>

An individual has “significant control” over a corporation if he or she has direct or indirect control over, or is a registered holder or beneficial owner of, a “significant number of shares”.<sup>9</sup> Beneficial ownership includes ownership through any trustee, legal representative, agent or mandatary, or other intermediary.<sup>10</sup>

A “significant number of shares” is defined as:

- a) 25% or more of the voting shares, or
- b) 25% or more of the fair market value of the corporation’s outstanding shares.<sup>11</sup>

An individual also has significant control over a corporation if he or she has any “direct or indirect influence that, if exercised, would result in control in fact of the corporation”, even if he or she does not own any shares.<sup>12</sup> The term “control in fact” is not defined in the CBCA.

## 2 SIGNIFICANCE FOR LIABILITY UNDER THE EPA

While the purpose of the ISC Register is to catch money laundering and tax evasion,<sup>13</sup> the ISC Register may have significant implications for environmental regulatory liability.

Under the EPA, the MECP can order a “person who owns or owned or who has or had management or control” of an undertaking or property to do various things, such as implement plans to prevent or reduce the risk of discharge of a contaminant into the natural environment.<sup>14</sup>

<sup>7</sup> CBCA, *supra* note 1, s 21.1(1).

<sup>8</sup> *Ibid.*

<sup>9</sup> *Ibid.*, s 2.1(1)(a).

<sup>10</sup> *Ibid.*, s 2(1).

<sup>11</sup> *Ibid.*, s 2.1(3).

<sup>12</sup> *Ibid.*, s 2.1(1)(b); Innovation, Science and Economic Development Canada, “Individuals with Significant Control”, online: <https://www.ic.gc.ca/eic/site/cd-dgc.nsf/eng/cs08216.html>.

<sup>13</sup> Innovation, Science and Economic Development Canada, “Individuals with Significant Control”, online: <https://www.ic.gc.ca/eic/site/cd-dgc.nsf/eng/cs08216.html>.

<sup>14</sup> EPA, *supra* note 4, s 18(1).

Directors and officers are presumed to have management and control of a corporation.<sup>15</sup> Where directors and officers are named in an MECP order, the burden falls on the director or officer to rebut the presumption that they had management and control.<sup>16</sup>

Determining whether individuals who are not directors or officers have “management or control” of a corporation is not as straightforward. “Management” within the meaning of the EPA, s. 18 means to organize, regulate, or be in charge of a business.<sup>17</sup> “Control” is the power to direct, command, or restrain.<sup>18</sup> The Environmental Review Tribunal (“ERT”) has held that “management or control is not limited to formal legal control in the hands of corporate officers and directors but can also include de facto control.”<sup>19</sup>

The MECP’s record of issuing orders suggests that the MECP interprets “management and control” broadly. For example, in *Tembec Industries Inc v Director, Ministry of the Environment*,<sup>20</sup> the MECP issued an order against Tembec Industries Inc. to address historic contamination. Tembec was a non-controlling, indirect shareholder of a bankrupt pulp mill. Tembec and the MECP reached a settlement in the matter, which the ERT approved.

A corporation’s ISC Register could be used as evidence of individuals, including those with substantial share holdings, who have management or control for the purpose of orders under the EPA. This could have significant implications for shareholder environmental liability.

The new requirements in the CBCA for corporations to keep a list of “individuals with significant control” raises questions as to whether the authority granted to the MECP in the EPA, s. 18 to issue orders to those with “management and control” provides the MECP with authority to pierce the corporate veil that protects shareholders from liability.

The concept of the “corporate veil” is that corporations have a separate legal identity from their directors, officers, and shareholders.<sup>21</sup> In certain situations, courts will “pierce” the corporate veil to attach liability to a shareholder.<sup>22</sup> One such situation is where legislation provides for the piercing of the corporate veil.<sup>23</sup>

<sup>15</sup> *Alizadeh v Ontario (Ministry of Environment, Conservation and Parks)*, [2019] OERTD No 32 at paras 28–29 [Alizadeh].

<sup>16</sup> *Caltex Petroleum Inc v Ontario (Ministry of Environment and Energy)*, 1995 OEAB No 75, aff’d 1998 OJ No 825 (Div Ct) at 7–8.

<sup>17</sup> *Rocha v Ontario (Environment and Climate Change)*, 2015 CanLII 43581 (ON ERT) at para 116.

<sup>18</sup> *Ibid.*

<sup>19</sup> *Alizadeh*, supra note 15 at para 28.

<sup>20</sup> 2011 CarswellOnt 11752 (ERT).

<sup>21</sup> *Saloman v Saloman*, [1896] UKHL 1, [1897] AC 22; *Transamerica Life Insurance Co of Canada v Canada Life Assurance Co.*, [1996] 28 OR (3d) 423 [Transamerica]; *Yaiguaje v Chevron Corporation*, 2018 ONCA 472.

<sup>22</sup> *Transamerica*, supra note 21.

<sup>23</sup> *R v 113749 Ontario Ltd (operating as Pro-Teck Electric)*, 2018 ONCJ 502 at para 51 [Pro-Teck].

In *R v 113749 Ontario Ltd (operating as Pro-Teck Electric)*,<sup>24</sup> the Ontario Court of Justice considered whether a Justice of the Peace sentencing a defendant pursuant to the *Provincial Offences Act*<sup>25</sup> had the power to pierce the corporate veil despite the absence of explicit authority in the *Provincial Offences Act* to do so.<sup>26</sup> The Court held that it would be “inconceivable” that a Justice of the Peace conducting a provincial offences trial lacks the power to pierce the corporate veil where it is essential to avoid a flagrant circumvention of justice.<sup>27</sup> In a footnote, the Court stated that there is no principled reason to distinguish piercing the corporate veil in the context of private litigation from the context of quasi-criminal litigation.<sup>28</sup>

Whether the EPA, s. 18, grants the MECP authority to hold shareholders responsible for the actions of a corporation remains to be determined by the courts and the ERT. In the meantime, individuals named on a corporation’s ISC Register will want to keep an eye on the corporation’s compliance with its environmental obligations and press for sound environmental management.

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<sup>24</sup> *Ibid.*

<sup>25</sup> RSO 1990, c P33.

<sup>26</sup> *Pro-Teck*, *supra* note 23 at para 59.

<sup>27</sup> *Ibid* at para 60.

<sup>28</sup> *Ibid* at para 60, fn 7.