

Canada: Tax implications of *Canada Business Corporations Act* changes

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Executive summary

Private corporations incorporated under the *Canada Business Corporations Act* (CBCA) are required, as of 13 June 2019, to maintain a register of shareholders who, directly or indirectly, exercise "significant control" over a corporation. These amendments (Amendments) are expected to be followed by similar amendments to the counterpart legislation in the Canadian provinces and territories.

The Amendments are intended to improve corporate transparency, a goal that the Canadian federal, provincial and territorial finance ministers committed to when they signed an *Agreement to Strengthen Beneficial Ownership Transparency* in 2017.

Detailed discussion

Background

Under the old CBCA record-keeping regime, only *registered* shareholders had to be recorded in a private corporation's securities ledger – often an easy task, as the legal shareholder's name is the name that appears on the share certificate. As of 13 June 2019, the Amendments require a private corporation incorporated under the CBCA to maintain an expanded register

detailing all shareholders, whether beneficial or registered, who have *significant control*, directly or indirectly, over the corporation.

Contravention of the rules can result in a number of offenses including fines or imprisonment for corporations, directors, officers and significant control shareholders.

What constitutes “significant control”?

An individual is considered to exercise significant control over a corporation when one of the following criteria is met:

- ▶ The individual has any of the following interests or rights in respect of a “significant number of shares”:
 - The individual is the registered holder of them
 - The individual is the beneficial owner of them
 - The individual has direct or indirect control over the shares
- ▶ The individual has direct or indirect influence that, if exercised, would result in control of the corporation
- ▶ The individual is an individual to whom prescribed circumstances apply

A “significant number of shares” refers to either:

- ▶ Any number of shares that carry 25% or more of the voting rights attached to all of the corporation’s outstanding voting shares
- ▶ Any number of shares that is equal to 25% or more of all of the corporation’s outstanding shares measured at their fair market value

Individuals acting jointly are also deemed to exercise significant control if together, by working in concert with one another, they trigger the 25% threshold noted above.

What must be included in the register?

The Amendments require that the following information be included in the shareholders’ register:

- ▶ The name, date of birth and latest known address of the individual with significant control
- ▶ The jurisdiction of residence for tax purposes
- ▶ The day on which the individual became or ceased to be an individual with significant control
- ▶ A description of each individual’s rights and interests in respect of the shares it holds in the corporation
- ▶ Any other prescribed information

The Amendments also require that a corporation take “reasonable steps,” at least once each fiscal year, to both identify the individuals with “significant control” and ensure that the information in their register is accurate. If a corporation becomes aware of any information that should be included in the register, it must be added within 15 days of the corporation becoming aware of it. Shareholders with significant control have a positive obligation to provide the information accurately, completely and as soon as feasible.

Who is exempt from the Amendments?

Reporting issuers (i.e., public companies) are exempt, as are companies that are listed on a designated stock exchange. Publicly traded companies have an existing obligation to disclose shareholders who have at least a 10% ownership/control interest.

Implications

The Amendments may prove to be onerous for private CBCA corporations, especially those with multi-tiered or complicated ownership structures. Deciphering whether a particular shareholder or beneficial owner triggers the 25% threshold is not only complicated but can also be costly. Private corporations will have to spend time factoring in and evaluating outstanding option rights, default rights, veto rights and pre-emptive rights when making their “significant control” determination. Having to take into account all of these considerations likely means that valuable time and resources will be spent on a corporation’s share register moving forward.

Given these additional corporate requirements, private CBCA corporations should consider whether any of the following actions is appropriate in their circumstances:

- ▶ Carefully evaluate the purpose of each entity in their group
- ▶ Conduct a legal entity rationalization to reduce and/or realign legal entities with the corporation’s or corporate group’s goals
- ▶ Remove dormant entities that are no longer necessary (through dissolution or other methods)

Further, the new register will likely contain considerable (and sometimes sensitive) information that was not previously recorded or kept by the corporation. While the new register is not public, it can be accessed by shareholders

and creditors of the corporation, as well as the Director of the CBCA, for permitted purposes. “Permitted purposes” include accessing the information to influence voting of shareholders, accessing information to assist with an offer to acquire securities of the corporation and any other matter relating to the affairs of the corporation. The interpretation of each of these purposes is uncertain. Only time will tell if the Amendments allow for greater access to information for shareholders and creditors in any meaningful way.

In addition, Canadian tax authorities may seek this information for purposes of administering and enforcing certain tax legislation in Canada (such as the *Income Tax Act*, RSC 1985 c1 (5th Supp), as amended (the Act)). Such information will, if obtained, afford the tax authorities an unprecedented level of transparency into the control of

private CBCA corporations and allow them to more easily identify not only those with de jure control of a corporation (e.g., through beneficial ownership), but also those with de facto control. De facto control is relevant for various purposes under the Act, for example in determining whether corporations are associated and whether a corporation is a Canadian-controlled private corporation (which, among other things, impacts that corporation’s tax rate).

While the Amendments do not apply to provincial-incorporated corporations, it is expected that similar amendments to each provincial and territorial corporate statute are likely to follow. Accordingly, private corporations incorporated under Canadian corporate statutes other than the CBCA should start to gather the relevant information now in order for a smoother transition in the future.

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