

## NEW RULES REQUIRING ONTARIO PRIVATE CORPORATIONS TO MAINTAIN A REGISTER OF INDIVIDUALS WITH SIGNIFICANT CONTROL TOOK EFFECT ON JANUARY 1, 2023

### IMMEDIATE COMPLIANCE REQUIRED

“This register must look behind the registered owners of shares and contain information about any individuals who ultimately beneficially own, or have control or direction over, sufficient shares of the corporation to have significant control, or who have a controlling influence over the corporation.”

By W. Fraser McDonald

On January 1, 2023, amendments to the Business Corporations Act (Ontario) (the “OBCA”) came into effect requiring certain private corporations incorporated under the OBCA to prepare and maintain, at their registered offices or at another place in Ontario designated by the directors of the corporation, a register of individuals with significant control over the corporation. This register must look behind the registered owners of shares and contain information about any individuals who ultimately beneficially own, or have control direction over, sufficient shares of the corporation to have significant control, or who have a controlling influence over the corporation.

These new rules are similar to those that have applied to certain corporations incorporated under the Canada Business Corporations Act (the “CBCA”) since June 2019. Similar rules have also been enacted in British Columbia, Saskatchewan, Manitoba, Québec, Nova Scotia, PEI, and Newfoundland and Labrador.

The new rules under the OBCA apply only to private Ontario corporations (other than private corporations that are wholly-owned subsidiaries of offering corporations, corporations that offer their securities to the public and are subject to an act of the Ontario legislature relating to the regulation of securities, and corporations whose shares are listed on a designated stock exchange within the meaning of subsection 248(1) of the Income Tax Act (Canada), and corporations that are a member of a prescribed class).

### Individuals with Significant Control of a Corporation

For the purposes of the new rules, the following individuals are deemed to have significant control over a corporation:

- (a) an individual who is the registered or beneficial owner of, or has direct or indirect control or direction over, any number of shares that:
  - (i) carry 25% or more of the voting rights attached to all of the corporation’s outstanding voting shares; or
  - (ii) is equal to 25% or more of all of the corporation’s outstanding shares measured by fair market value;
- (b) an individual who has any direct or indirect influence that, if exercised, would result in control in fact of the corporation; and
- (c) an individual to whom circumstances prescribed by regulation (which have yet to be enacted) apply.

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While the new rules do not specify in what circumstances an individual will be considered to have beneficial ownership of, or direct or indirect control or direction over, shares that he or she does not own, they do allow for regulations to be enacted in these respects.

The determination of whether an individual has direct or indirect influence that, if exercised, would result in control in fact of the corporation is required to take into account all factors that are relevant in the circumstances. The new rules do not provide any indication as to what will be considered relevant factors, but they do expressly state that they are not limited to, and such factors need not include, whether the individual has a legally enforceable right or ability to effect a change in the board of directors of the corporation or the powers of the board of directors of the corporation, or to exercise influence over the shareholder or shareholders who have that right or ability.

The new rules also provide that, for the purpose of determining whether an individual has direct or indirect influence that, if exercised, would result in control in fact of a corporation, where the corporation and the individual are dealing with each other at arm's length and the influence is derived from a franchise, licence, lease, distribution, supply or management agreement or other similar agreement or arrangement, the main purpose of which is to govern the relationship between the corporation and the individual regarding the manner in which a business carried on by the corporation is to be conducted, the corporation is not to be considered to be controlled, directly or indirectly in any manner whatever, by the individual by reason only of that agreement or arrangement.

In addition, two or more individuals are each considered to be an individual with significant control over a corporation if the interests or rights, or combination of interests or rights, referred to in (a) above are:

- (a) held jointly by those individuals;
- (b) to be exercised jointly or in concert by those individuals pursuant to an agreement or arrangement; or
- (c) held by individuals who are related persons with each other as defined in the OBCA, which includes spouses and children.

In addition, regulations may be enacted providing that any other interest or right, or combination of interests or rights, held by two or more individuals in such manner as may be prescribed will result in each of them being considered to be an individual with significant control over a corporation. No such regulations have yet been enacted.

Creating and maintaining the register will, therefore, require corporations to consider whether the threshold of share ownership is met and whether there are individuals who, despite not holding a significant number of shares, are in a position to exercise significant influence over the corporation. Further guidance on these definitions may be provided in regulations which are yet to be enacted.

## Information Required to be Included in the Register of Individuals with Significant Control

The new rules provide that the register of individuals with significant control must include the following information about each individual with significant control of the corporation:

- (a) name, date of birth and last known address;
- (b) jurisdiction of residence for tax purposes;
- (c) the day on which the individual became and ceased to be an individual with significant control, as the case may be;

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- (d) a description of how the individual is an individual with significant control of the corporation, including, as applicable, a description of the individual's interests and rights in respect of shares of the corporation;
- (e) any other information as may be prescribed by regulations to be enacted; and
- (f) a description of the steps taken by the corporation to ensure that it has identified all individuals with significant control.

At least once during each financial year of the corporation, the corporation is required to take reasonable steps, in accordance with any regulations as may be enacted, 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.

If the corporation becomes aware of any information referred to in (a) through (e) above as a result of the steps referred to in the immediately preceding paragraph, the corporation is required to record that information in the register within 15 days. Shareholders are required to comply with requests from the corporation for the information required to be included in the register promptly and to the best of their knowledge.

## Access to the Register of Individuals with Significant Control

The new rules provide that certain law enforcement agencies, taxation authorities and regulatory bodies may request disclosure of a corporation's register for the purposes of conducting certain investigations and administering or enforcing certain laws and for investigatory and enforcement purposes. The corporation is required to respond to such a request within the time period specified in the request by providing a copy of the register of individuals with significant control or with the information contained in the register that is specified in the request. The corporation's response will be required to comply with any requirements, conditions or restrictions prescribed by regulations that may be enacted.

## Potential Consequences of Non-Compliance

The failure to comply with the requirements to prepare and maintain a register of individuals with significant control over the corporation or to provide certain law enforcement agencies, taxation authorities and regulatory bodies with the required disclosure of the register will expose the corporation to a fine of not more than \$5,000.

Further every director or officer of a corporation who knowingly authorizes, permits, or acquiesces in (a) the corporation's failure to prepare and maintain the register or to provide certain law enforcement agencies, taxation authorities and regulatory bodies with the required disclosure of the register, (b) the recording of false or misleading information in the register, or (c) the provision to any person or entity of false or misleading information relating to the register, is guilty of an offence under the OBCA. Similarly, every shareholder who knowingly contravenes its obligation to reply accurately and completely to a request from the corporation for information required to prepare and maintain the register of individuals with significant control over the corporation is guilty of an offence under the OBCA. Upon conviction of such an offence, the director, officer or shareholder, as applicable, is liable to a fine not exceeding \$200,000, or to imprisonment for a term not exceeding six months, or both.

## What the Future Holds

As noted above, the new OBCA rules are similar to those that have applied to certain corporations incorporated under the CBCA since June 2019 and that have also been enacted in British Columbia, Saskatchewan, Manitoba, Québec, Nova Scotia, PEI, and Newfoundland and Labrador. Further, new rules have been enacted under the CBCA that will come into force at a later date requiring private corporations to regularly report beneficial ownership information to Corporations Canada.

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These amendments will also authorize Corporations Canada to disclose all or part of the information in the register of individuals with significant control to the Financial Transactions and Reports Analysis Centre of Canada, investigative bodies, such as the police, the Canada Revenue Agency and other prescribed entities. A second planned phase of these new rules will see the information in the register of individuals with significant control collected by Corporations Canada made available through a searchable, publicly accessible database.

The CBCA changes are part of the federal government's efforts to enhance transparency of corporate ownership and control, the absence of which helps those looking to hide their identity and launder money through the international financial system, evade taxation or engage in criminal and other serious wrongdoing. Given these ongoing efforts at the federal level to combat the misuse of shell corporations for illegal activities, we expect to see more movement in this direction for OBCA-incorporated corporations along the lines of the recently enacted and proposed rules under the CBCA.

## Conclusion

Clearly, every corporation governed by the OBCA will want to prepare a register of individuals with significant control over the corporation as quickly as possible so that it is in compliance with the new rules under the OBCA, and develop processes to allow it to comply on a continuous basis with the requirement to maintain such register under the OBCA, both as a matter of good governance and to avoid the commission of offences as outlined above.

The lawyers at Allen McDonald Swartz LLP have significant experience advising on corporate matters of all types. If your organization needs more information about the impact of these amendments to the OBCA or assistance in preparing your initial register of individuals with significant control, please contact Fraser McDonald by phone at 416.704.2964 or by email at [wfmcdonald@amsbizlaw.com](mailto:wfmcdonald@amsbizlaw.com) or any member of the AMS team.

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