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The government wants to know the shareholders' true identity

June 13, 2019

Following the adoption of Bill C-86, which amends certain provisions of the *Canada Business Corporations Act* ("CBCA"), corporations will now need to compile a list of "individuals with significant control" in the corporation in a new register, to be maintained by the corporation. The purpose of these amendments is to create greater transparency in the ownership and control of business corporations, in order to contribute to the fight against money laundering and tax evasion.

The new CBCA provisions, which will come into force on June 13, 2019, will apply to all corporations governed by this law and that are private issuers.

Who is an "individual with significant control"?

An "individual with significant control of a corporation" is defined as:

1. An individual who is the registered holder of a "significant number of shares";
2. An individual who is the beneficial owner of a significant number of shares;
3. An individual who has direct or indirect control or direction over a significant number of shares;
4. An individual who has any direct or indirect influence that, if exercised, would result in control in fact of the corporation; and/or
5. An individual to whom prescribed circumstances apply.[1].

What is a "significant number of shares"?

A significant number of shares is defined as:

> Any number of shares that carry 25% or more of the voting rights attached to all of the corporation's outstanding voting shares; or
> Any number of shares that is equal to 25% or more of all of the corporation's outstanding shares measured by fair market value.

If a "significant number of shares" is held jointly by many individuals, or if one of the above-mentioned rights is subject to any agreement or arrangement under which the right or rights are to be exercised jointly or in concert by those individuals (such as a unanimous shareholder agreement, for example), each of those individuals will be considered to be an "individual with significant control". The name of the individual(s) and the other information mentioned below must then be recorded in the register.

What Information Must the Register Contain?

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Bill C-86 provides that, in addition to the other registers currently maintained by corporations with respect to directors, shareholders and securities, corporations must now also maintain a register of "individuals with significant control". This register must include the following information with respect to each of the "individuals with significant control" :

> Name, date of birth and last known address;
> The jurisdiction of residence, for tax purposes;
> The date on which the individual became an "individual with significant control" of the corporation and, if applicable, the date on which the individual ceased to have significant control;
> A description of how the individual is an "individual with significant control" and, as applicable, a description of his or her rights and interests with respect to the shares of the corporation;
> Any other prescribed information; [2];

Another section of the register must provide a description of each step taken by the corporation to update the information.

Corporations must ensure that the information recorded in the register is accurate, complete and up-to-date at least once during each financial year. However, it should be noted that the corporation must also update the register within 15 days after becoming aware of any changes to the information mentioned above.

Who Can Access the Register?

The information contained in this new register will not be accessible to the public. Only the Director of Corporations Canada, the shareholders, or the creditors of the corporation (as well as their representatives) can, upon request, consult the register. However, the information obtained by the corporation's shareholders or creditors may only be used in connection with:

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

The shareholder or the creditor must provide an affidavit to the corporation to this effect.

Federal Bill C-97, which also amends the CBCA, will require a corporation, at the request of an investigative body (such as police forces and the Canada Revenue Agency or its provincial counterparts) that has reasonable grounds to suspect that an offence has been committed, to provide the investigative body with a copy of its register of individuals with significant control, or any information specified by that investigative body that appears in the register[3].

What are the Consequences of a Failure to Comply?

The legislative provisions provide for several penal sanctions which can be severe:

1. A corporation that, without reasonable cause, contravenes these new provisions is guilty of an offence and is liable to a fine not exceeding $5,000;
2. A person that, without reasonable cause, uses the information recorded in the register for purposes other than those described above is guilty of an offence and is liable to a fine not exceeding $5,000 or to imprisonment for a term not exceeding 6 months, or to both;
3. 3) Directors or officers of a corporation who, knowingly, (i) authorize, permit or acquiesce in the contravention by the corporation of these new provisions relating to the maintenance of a register, (ii) record, or authorize, permit or acquiesce in the recording of false or misleading information in the register, (iii) provide, or authorize, permit or acquiesce in the provision of false or misleading information in relation to the register to any person or entity, are liable to a fine not exceeding $200,000 or to imprisonment for a term not exceeding 6 months, or to both;
4. 4) Shareholders of a corporation who provide or authorize the provision of false or misleading information to any person or entity, or refuse to disclose the requested information, are liable to a fine not exceeding $200,000 or to imprisonment for a term not exceeding 6 months, or to both.

And in the Canadian Provinces?

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Most Canadian provinces, including Quebec, have already announced that they will follow Parliament's lead. British Columbia is the first province to propose an amendment to the *Business Corporations Act (BC)*. The *Business Corporations Amendment Act* of 2019 introduced the "Transparency Register", which is the equivalent of the federal register of individuals with significant control and its application criteria. This bill also contains a provision enabling police forces to access the register in specific situations.

And in Other Countries?

The requirement to maintain a register of individuals with significant control was introduced, in particular, in the United Kingdom, in April 2016, with the ultimate objective of deterring money laundering and tax evasion by promoting corporate transparency. Moreover, the register implemented in the United Kingdom is accessible to the public. The legislation in the United Kingdom also includes penal sanctions for non-compliance with its provisions.

To date, there have been no references in the media of the United Kingdom to penal charges against corporations that failed to complete the People with Significant Control (PSC) register, or recorded false information in the register. Instead, the Companies House agency seems to be focused on intervening in minor deficiencies of the register in order to reduce the number of incorrect statements about individuals with significant control over a corporation. Companies House also states that the compliance rate of corporations — ranging from 97% to 99% — is excellent.

Conclusion

The intentions behind these new provisions are laudable, but several questions remain unanswered on reading the legislative provisions that will soon come into force.

Difficulties in interpretation and application will inevitably arise, at least until regulations are enacted or the courts can provide some guidance. For example, in cases where corporate structures involve several corporations and/or trusts, the calculation of voting rights or fair market value may be complex. Similarly, when a corporation has issued both preferred and common shares, how will the fair market value of those shares be determined?

And what about the concept of "direction" over a significant number of shares, which is not defined in the new legislation? How should this concept be interpreted? Finally, with respect to the "control in fact" of the corporation, will it be necessary to refer to the tax legislation and to the courts' interpretation of this concept?

All these questions will have to be assessed in the coming months.

We invite you to communicate with our team in order to implement the measures required by this new legislation.

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1. Note that no regulation has been adopted and no draft regulations have been published as of the date hereof.
2. Note that no regulation has been adopted and no draft regulations have been published as of the date hereof.
3. Bill C-97 was adopted by the House of Commons in 3rd reading on June 6, 2019 and is in first reading before the Senate as of the date hereof.

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