



Corporate Control Transparency in Canada: CBCA Amendments Require Registers of “Individuals with Significant Control” as of June 13, 2019

May 09, 2019

Stikeman Elliott

As of June 13, 2019, private companies incorporated under the *Canada Business Corporations Act* (“CBCA”) will be subject to a new requirement to prepare and maintain a register of “individuals with significant control” (“ISC Register”). This transparency initiative is part of a global effort to improve corporate transparency and combat serious financial crime.

In brief, the key aspects of the legislation, as discussed below, include:

- A requirement that CBCA corporations, other than public companies, maintain an ISC Register that includes the name of each person who is an “Individual with Significant Control” (“ISC”), in addition to each ISC’s birthdate, address, tax jurisdiction, the reason that he/she is an ISC and certain other information.
- A two-part test for deciding if an individual is an ISC:
 - Does he or she have a 25% interest in the corporation – under either a “votes” or “value” test, as defined; or
 - Does he or she have “influence” that, if exercised, would give him or her “control in fact” of the corporation.
- Provisions governing access to the ISC Register and use of the information by those who are entitled to access (such access being primarily limited to Corporations Canada, the CRA, provincial tax authorities, police forces, other investigative bodies and the corporation’s shareholders and creditors). The ISC Register is not a public document.
- Requirements relating to the regular and timely updating of ISC Register information.
- Fines (up to \$200,000) and prison sentences (up to 6 months) for directors and officers who authorize, permit or acquiesce in a corporation’s failure to maintain a compliant ISC Register. Shareholders are subject to the same fines and prison sentences should they fail to answer ISC Register-related questions from the corporation to the best of their knowledge and in a timely manner (directors and officers are presumably unlikely to be liable for deficiencies in the ISC Register caused by an uncooperative shareholder, if a reasonable process is followed). There are also fines (up to \$5,000) and prison sentences (up to 6 months) for shareholders and creditors who misuse information obtained from the ISC Register.

Legislative Background

The ISC Register requirement is the product of recent [amendments](#) to the CBCA that are in force as of June 13, 2019. Since the amendments were passed, there have been two additional developments:

- On April 2, Corporations Canada released [Guidance](#) that deals with some issues relating to the ISC Register.
- On April 30, several additional amendments that more clearly identify the investigative bodies that can request ISC Register information, and the circumstances in which they can request it, received Second Reading as part of [Bill C-97](#).

While only a minority of Canada's business corporations are incorporated under the CBCA, Canada's provincial and territorial governments have agreed to introduce similar provisions into their respective equivalents of the CBCA, with **British Columbia** and **Manitoba** being the first provinces to introduce the necessary legislation, as discussed below.

The ISC Register: Key Questions

Which corporations need one?

The requirement to maintain an ISC Register applies to "private corporations" – not to public companies (specifically, "reporting issuers," "*émetteurs assujettis*" (in Québec) and corporations "listed on a 'designated stock exchange' as defined by s. 248 of the [Income Tax Act](#)") Additional exemptions may be made by regulation but none are anticipated in the near term.

All CBCA corporations that do not fall under this exemption should prepare and maintain an ISC Register.

Where is the ISC Register kept, and in what format?

Like the central securities register required under s. 50 of the CBCA, the ISC Register may be kept at the **corporate registered office** or any other place in Canada that the board designates. The information in the ISC Register does not need to be submitted to Corporations Canada or any other agency, other than when it is requested in accordance with the new law.

There is no prescribed format: the Corporations Canada [Guidance](#) indicates that a physical ledger, a database and a spreadsheet would each be acceptable.

Whose names go into the ISC Register?

The ISC Register lists ISCs, who include any individual whose interest in a CBCA corporation meets either of two tests – the **25% Interest Test** or the **Influence/Control in Fact Test** – as follows:

1. To be an ISC under the **25% Interest Test**, an individual must have an interest or rights in a number of shares that meets at least one of the following criteria:
 - a. The shares carry **25% or more of all voting rights** attaching to the corporation's outstanding voting shares; **or**
 - b. The shares have a fair market value equal to **25% or more of the total FMV** of the corporation's outstanding shares.

Key points relating to the 25% Interest Test:

- Under the 25% Interest Test, the “**interest**” of an individual can take any one of three forms (alone or in combination):
 - i. shares that he or she holds as a **registered shareholder**;
 - ii. shares that he or she **beneficially owns**; or
 - iii. shares over which he or she has **direct or indirect control or direction**.

Any combination of (i), (ii) and (iii) that adds up to 25%, under either of the above criteria (i.e. 25% of votes or 25% of FMV), will make the individual an ISC.

- “**Indirect control or direction**” could, for example, exist when the individual sits at the top of a chain of corporate ownership and is able to control how an intermediate entity votes its own shares in the CBCA corporation.
- In the case of a **joint holding** of interests or rights in the corporation that meets the 25% Interest Test, all individuals who are joint holders will generally be considered ISCs. In the case of an **agreement or arrangement** between one or more individuals, under which individuals agree to exercise any rights that they hold in the corporation “**jointly or in concert**”, and those rights collectively meet the 25% Interest Test, all individuals who are party to the agreement will generally be considered ISCs. (The term “jointly or in concert” is not specifically defined in the CBCA, although interpretations of the term in other legal contexts may be of assistance.)

2. To be an ISC under the **Influence/Control in Fact Test**, an individual must have direct or indirect **influence** that, if exercised, would give the individual **control in fact** of the corporation.

Key points relating to the Influence/Control in Fact Test

- The term “**control in fact**” is not specifically defined in the CBCA, but interpretations of the term in other legal contexts may be of assistance.
- This second test is **not dependent upon share ownership** and will require analysis of a combination of factors that could allow for factual control on a case-specific basis.

Note that additional categories of ISCs may be prescribed by regulation, although no regulations are anticipated in the near term.

What information must the ISC Register contain?

The ISC Register must provide the following information about each ISC:

- Name;
- Date of birth;
- Address;
- Jurisdiction of residence for tax purposes;
- Date that the individual became an ISC;
- Date that the individual ceased to be an ISC, if applicable; and
- Explanation of why the person is considered an ISC, including a description of his or her interests and rights in the corporation’s shares.

The [Guidance](#) issued by Corporations Canada includes the following example of an explanation that might appear in an ISC Register:

“Registered holding of 25% or more of shares measured by fair market value or voting rights in the corporation (individually or jointly).”

In addition to the above, the ISC Register must set out the steps the corporation took in the past year to identify its ISCs and keep the information up-to-date. For that reason, all non-exempt CBCA corporations should maintain an ISC Register, even if no ISCs have been identified.

Situations in which a corporation is unable to identify any ISCs are to be dealt with in future regulations. Until then, advice should be sought from counsel if that situation arises.

Access to the ISC Register

The amendments contemplate inspection of the ISC Register by:

- The **Director under the CBCA**, who must be provided with any information that he or she requests out of the ISC Register; and
- **Shareholders** and **creditors** of the corporation on application (which includes filing an affidavit).

In addition, [Bill C-97](#) (the 2019 federal budget bill) is expected, when passed, to broaden the inspection rights to include:

- Any **police force**;
- The **Canada Revenue Agency** and its **provincial counterparts**; and
- Other investigative agencies (to be prescribed in future).

Significant restrictions are placed on the rights of shareholders, creditors, police forces and the CRA with respect to accessing or using information on the ISC Register.

There is no provision under the amendments for public access to the ISC Register.

Ongoing Obligations

In addition to the initial implementation of the ISC Register, the CBCA amendments create obligations that apply on an ongoing basis to non-public CBCA corporations, their shareholders and creditors. The following are some of the most significant of these:

Corporations

Updating the ISC Register

The corporation must take reasonable steps in each financial year to ensure that the ISC Register is “accurate, complete and up-to-date” and that it includes everyone that it is legally required to include.

If, in the course of an annual review or otherwise, the corporation becomes aware that the ISC Register contains incorrect or outdated information (if an ISC has a new address, for example), the corporation must record the new information in the ISC Register within 15 days.

Providing ISC Register information as requested

The corporation is required to provide information to those who have access to the ISC Register (see above) in accordance with their respective rights of access.

Personal information retention/destruction

Any “personal information” (as defined under PIPEDA) in the ISC Register relating to a person who is an ISC must generally be retained for six years after that person ceases to be an ISC. The corporation then has one year to dispose of the information.

Shareholders and Creditors

Providing requested information (shareholders only)

Shareholders of private CBCA corporations are legally required, on request, to provide the corporation with information required in the preparation and maintenance of its ISC Register. On receiving a request for such information, shareholders are required to reply accurately and completely, to the best of their knowledge, “as soon as feasible” (an expression that is not defined).

Use of information from the ISC Register (shareholders and creditors)

While shareholders and creditors of a CBCA corporation may review its ISC Register, any information obtained may be used **only in certain circumstances connected to the “affairs” of the corporation** (as defined in the CBCA, “affairs” expressly excludes any purpose relating to the corporation’s “business”).

Penalties

The amendments set out specific penalties with respect to the new provisions.

Against the corporation

A corporation that fails to maintain the ISC Register in accordance with the requirements, or which fails to provide an investigative body with the information that it requests under the legislation, is liable to a **fine of up to \$5,000**. Because the corporation is required to take “reasonable steps” to maintain an accurate ISC Register, having a documented process should assist them in remaining compliant.

Against individuals (directors, officers, shareholders and creditors)

New offences applying specifically to directors and officers include:

- Knowingly authorizing, permitting or acquiescing in the corporation’s failure to maintain the ISC Register as required, or in its failure to provide an investigative body with the information that it requests under the legislation;
- Knowingly recording false or misleading information in the ISC Register (or authorizing, permitting or acquiescing in such recording by another person); and
- Knowingly providing to any person or entity false or misleading information about the ISC Register (or authorizing, permitting or acquiescing in the provision of such information by another person).

In the case of shareholders, there is a new offence for failing to provide accurate and complete information for the ISC Register, to the best of the shareholder’s knowledge, in a timely manner after a request is received. (If a shareholder repeatedly fails to provide the requested information, the directors and officers should ensure that the corporation records the “reasonable steps” that it took to obtain the information in order to reduce their own liability risk.)

Any director, officer or shareholder who commits any of the offences just described is liable to a **fine of up to \$200,000 and/or to imprisonment for up to 6 months.**

In addition, shareholders or creditors who use information obtained from the Shareholder Register for purposes unrelated to the affairs of the corporation are subject to a **fine of up to \$5,000 and/or to imprisonment for up to 6 months.**

The ISC Register is exempted from the existing provision for offences relating to reports in s. 250 of the CBCA.

Going Forward

Because the CBCA amendments will take effect on June 13, 2019, private CBCA corporations should take steps to assemble the required information as soon as practicable.

Provincial Proposals

In accordance with a [2017 accord](#) among the federal and provincial finance ministers, the provinces and territories are expected to introduce similar amendments into their own business corporations statutes. To date, only British Columbia and Manitoba have introduced their parallel legislation.

British Columbia

British Columbia's [Business Corporations Amendment Act, 2019](#) would establish a similar register, known as the "Transparency Register", for companies incorporated under that province's [Business Corporations Act](#). The British Columbia proposal departs from the CBCA model in several significant respects, including (among others):

- Share value (FMV) is not a criterion for determining ISC status;
- Rather than speaking generally about "direct control", it refers specifically to "the right to elect, appoint or remove one or more of the company's directors";
- "Indirect control" is referred to, but its meaning will be specified in regulations (not yet released);
- Individuals added to the Transparency Register will need to be notified within 10 days; and
- The information in the Transparency Register will include citizenship.

There are several other significant differences that BCBCA companies will need to be aware of. The B.C. amendments had second reading on May 1 and are still subject to revisions prior to becoming law.

Manitoba

On April 10, 2019, [amendments](#) to Manitoba's [Corporations Act](#) were introduced that follow the CBCA amendments almost exactly. There do not appear to be any significant substantive differences between the two pieces of legislation, although in their first-reading form, the Manitoba amendments do not pick up on the expanded right of access for investigative bodies that were (as noted above) added to the CBCA amendments by a recent additional amendment.

*Update: Developments since this post was first published include the October 24, 2019 release of regulations under the **British Columbia** legislation, which deal, inter alia, with indirect control and with control of intermediaries such as partnerships and trusts. The B.C. legislation is scheduled to come into force on May 1, 2020. Elsewhere, the amendments to **Manitoba's** Corporations Act referred to in this post have been passed and are scheduled to take effect on April 8, 2020. In addition, amendments to the **Prince Edward Island** Business Corporations Act received royal assent on November 28, 2019 and will*

come into force on proclamation. Meanwhile, **Saskatchewan's** Bill 191, amending that province's Business Corporations Act, received second reading on November 27, 2019. The amendments in Manitoba, Prince Edward Island and Saskatchewan follow the CBCA model. Finally, on October 3, 2019, **Quebec** launched a corporate transparency consultation that is expected to result in the implementation of a requirement for all enterprises registered in Quebec to disclose their beneficial owners. The consultation period ends on December 15, 2019.

DISCLAIMER: This publication is intended to convey general information about legal issues and developments as of the indicated date. It does not constitute legal advice and must not be treated or relied on as such. Please read our full disclaimer at www.stikeman.com/legal-notice