

Ontario's New Record-Keeping Requirements for Private Corporations Now in Effect

As of January 1, 2023, private corporations regulated under the *Business Corporations Act* (Ontario) (the "Act") are required to prepare and maintain a register of individuals with "significant control" over the corporation.

Individual with Significant Control

The new requirements mean that all individuals with significant control must be put on the register. The Act gives a detailed definition of what an "individual" is. It is defined as a natural person, which does not include a partnership, unincorporated association, unincorporated syndicate, unincorporated organization, trust, or a natural person in his or her capacity as a trustee, executor, administrator, or other legal representative. This definition provides greater clarification than the definition in the *Canada Business Corporations Act* (the "CBCA"), which only defines individual as a natural person. As such, the two acts may not align regarding trusts and incapable persons holding shares, and whether such people/entities are included in the definition of "individual".

For the purposes of the Act, an individual has significant control over a corporation where:

1. The individual is the registered holder of, the beneficial owner of, or has direct or indirect control or direction over a "significant number of shares of the corporation"; or
2. Has any direct or indirect influence that, if exercised, would result in control in fact of the corporation. This determination is to take into consideration all relevant factors but does not need to include whether the individual has a legally enforceable right or ability to effect a change in the board of directors, or its powers, or to exercise influence over the shareholders with such ability.

A "significant number of shares" can be: (a) any number of shares carrying 25% or more of the voting rights of the corporation's outstanding voting shares, or (b) any number

of shares equaling 25% or more of the corporation's outstanding shares measured by fair market value.

Two or more individuals will each be considered to be an individual with significant control if they jointly are the registered holders of, the beneficial owners of, or have direct or indirect control or direction over a "significant number of shares of the corporation". Of note is that unlike the CBCA, the Act deems certain "related persons" to be individuals with significant control if, on a collective basis, they meet the 25% threshold described above. This includes spouses, children, and other relatives living with the person.

Record Keeping Requirements

The register of individuals with significant control over the corporation must include:

1. The names, dates of birth, and last known addresses of each individual with significant control;
2. The jurisdiction of residence, for tax purposes, of each individual with significant control;
3. The day each individual became or ceased to be an individual with significant control;
4. A description of how each individual is an individual with significant control, including a description of their interests and rights in respect of shares of the corporation;
5. Any information prescribed in the future; and
6. A description of each step taken to comply with the corporation's obligation to update the information each financial year of the corporation.

At least once during each financial year of the corporation, the corporation is required to take “reasonable steps” to ensure that it has identified all individuals who should be included on the register, and that the information included in the register is accurate and complete. The corporation is required to update the register within fifteen days of becoming aware of any changes to the information contained in the register.

Our best practice recommendation to ensure compliance with the “reasonable steps” obligation is that the corporation should review its register of shareholders annually and canvass shareholders to determine whether any individuals other than the shareholders could constitute individuals with significant control over the corporation. Shareholders who are asked for information for the register must provide the information promptly to the best of their knowledge.

Access to the Register

With personal information being included in the register, there may be some concern about who has access to the register. The register is not available to the public, but police forces and First Nations Constables, tax authorities, and certain regulatory bodies may request disclosure for the purpose of conducting investigations or for providing the register information to similar authorities in other jurisdictions for similar purposes. While the CBCA provides shareholders and creditors with the right to access the register, the Act offers no such right.

Consequences for Breach

A corporation that, without reasonable cause, fails to prepare and/or properly maintain a register of individuals with significant control over the corporation, fails to properly disclose information, or fails to respond to proper inquiries may be liable to a fine not exceeding five thousand dollars.

The directors and officers of a corporation may face a fine not exceeding two hundred thousand dollars and/or imprisonment for a term not exceeding six months, for knowingly authorizing, permitting or acquiescing to any of the following:

- a. Failing to prepare the register, failing to properly maintain the register, failing to properly disclose, or failing to respond to proper inquiries;
- b. Allowing false or misleading information into the register; or
- c. Providing any person or entity with false or misleading information related to the register.

Finally, shareholders of a corporation that do not provide information requested by a corporation to comply with its record keeping obligations accurately or in a timely manner may also be liable to a fine not exceeding two hundred thousand dollars and/or to imprisonment for a term not exceeding six months.



Cassie Wasserman
Lawyer

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Contact Cassie Wasserman by e-mail cwasserman@pallettvalo.com or phone 905.247.4923.



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