

Private companies in Ontario should prepare for new ownership transparency obligations

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As of Jan. 1, 2023, private corporations governed by the Business Corporations Act (Ontario) (OBCA), will be required to maintain a register (Transparency Register) of “individuals with significant control” (ISCs) over the corporation. There are significant potential penalties for non-compliance to not only the corporation but also the corporation’s directors, officers and shareholders.

The implementation of this requirement is aimed at increasing the transparency of corporate beneficial ownership to mitigate against the use of corporations for money laundering, tax evasion and other illegal activities. Similar requirements have already been instituted for federal and other provincially regulated corporations.

The requirement to establish and maintain a Transparency Register applies to all private Ontario corporations, excluding private corporations that are wholly-owned subsidiaries of a publicly traded corporation.

Private Ontario corporations - particularly those with more complex ownership structures - should identify the individuals who need to be listed on their Transparency Register and collect their information in advance of Jan. 1.

What is an ISC?

You are an ISC if:

1) You have any of the following interests or rights (or any combination of them) in respect of a “significant number of shares” of the corporation:

- You are the **registered holder** of the shares.
- You are the **beneficial owner** of the shares.
- You have **direct or indirect control or direction over the shares**.

A “**significant number of shares**” is any number of shares that either (a) carry 25 per cent or more of the voting rights attached to the corporation’s outstanding voting shares, or (b) represent 25 per cent or more of all the corporation’s outstanding shares measured by fair market value.

As a result of the “indirect control” element, an individual at the “top” of a corporate ownership structure may be an ISC of a subsidiary corporation, despite not holding a direct interest in the subsidiary.

- Two or more individuals will each be an ISC, and must be listed in the Transparency Register if they:
 - jointly hold interests or rights described above that meet the 25 per cent threshold;
 - are parties to a voting agreement or similar arrangement pursuant to which they agree to exercise, “jointly or in concert”, any of the above-noted rights they may have that meet the 25 per cent threshold; or
 - separately hold one or more of the above interests or rights that meet the 25 per cent threshold and are “related persons”, such as spouses, children and possibly other relatives if they live in the same family home.

2) You have any **direct or indirect influence** that, if exercised, would result in “control in fact” of the corporation.

The determination of “control in fact” must take into consideration all factors that are relevant in the circumstances. However, such factors are not limited to and need not include the individual’s legally enforceable right or ability (or lack thereof) to change the directors of the corporation or their powers, or to exercise influence over the shareholder(s) who has that right or ability.

The OBCA also includes certain express exclusions: in an arm’s length relationship between the individual and the corporation, “control in fact” does not exist solely as a result of influence that is derived from a franchise, licence, lease, distribution, supply, or management agreement or arrangement between them.

3) You are an individual to whom prescribed circumstances apply (which permits future regulations to provide for additional classes of ISCs).

If the corporation does not identify any **individual who meets any of the above ISC tests**, then the Transparency Register does not need to list any individual but it must still be (1) prepared and maintained and (2) describe the steps taken by the corporation to identify all ISCs.

Transparency Register requirements

The Transparency Register must include the following information on each ISC:

- name, date of birth and last known address;
- jurisdiction of residence for tax purposes;
- date(s) on which the individual became and ceased to be an ISC;
- description of how the individual is an ISC, including a description of their interests and rights in respect of shares of the corporation;
- any other information that may be prescribed under future regulations; and
- description of each reasonable step taken by the corporation, at least once in each financial year, to ensure that it has identified all ISCs and that the Transparency Register is accurate, complete and up-to-date.

In addition to a required annual review and update, the corporation must update the Transparency Register within 15 days of becoming aware of any new information required to be recorded in the Transparency Register.

The following persons may request access to a corporation's Transparency Register:

- the Ontario Government for compliance purposes;
- police forces “for the purpose of conducting an investigation into an offence under a law of Ontario or Canada” or to provide information to a law enforcement agency outside Ontario for a similar purpose;
- tax authorities of Ontario and Canada “for the purpose of administering or enforcing a law of Ontario or Canada that provides for the imposition or collection of a tax, royalty or duty”, or to provide information to the officials of another jurisdiction to assist in the administration or enforcement of a similar law of that jurisdiction; and
- designated regulators “for the purpose of administering or enforcing a law for which the regulatory body is responsible” or to assist other agencies with similar mandates in Canada and foreign jurisdictions. Such regulators include the Ontario Securities Commission, the Financial Services Regulatory Authority of Ontario and the Financial Transactions and Reports Analysis Centre of Canada (others may be designated by regulation).

The Transparency Register must be kept at the corporation's registered office or another place in Ontario designated by the directors and not generally available to the public.

Penalties for non-compliance

A corporation that, without reasonable cause, fails to comply with any of the requirements to prepare and maintain a Transparency Register, respond to inquiries, or meet disclosure obligations under the OBCA, is liable for a fine of up to \$5,000.

Any director or officer of a corporation who knowingly authorizes, permits or acquiesces in:

- (a) the corporation's failure to prepare and maintain the Transparency Register, respond to inquiries, or meet disclosure obligations; or
- (b) the recording of false or misleading information in the Transparency Register or the provision of false or misleading information relating to the Transparency Register to any person or entity, is for a fine of up to C\$200,000 and/or up to six months imprisonment.

A shareholder who knowingly fails to reply accurately and completely to a request from the corporation for information for the Transparency Register, is liable for a fine of up to C\$200,000 and/or up to six months imprisonment.

If you have any questions about the new ownership transparency requirements for private corporations under the OBCA, please reach out to any of the authors or key contacts below.

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