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NEW “TRANSPARENCY REGISTER” THAT YOUR BC PRIVATE COMPANY MUST PREPARE BY MAY 1, 2020

By: Douglas G. Cottier

In 2017, Canadian finance ministers agreed to pursue legislative amendments to federal and provincial corporate statutes to ensure that corporations hold accurate and up-to-date information on their beneficial owners. This is an ongoing pursuit across the country, with the stated priority of preventing the misuse of corporations for tax evasion, money laundering, corruption, and other criminal purposes. In line with this, the records setting out accurate beneficial ownership are to be made available, upon request, to law enforcement and financial, tax, and legal authorities.^[1]

The implementation of these measures in British Columbia is now at hand by way of amendments to the province’s *Business Corporations Act* (the “**Act**”). These amendments will take effect on May 1, 2020, the date by which all private companies recognized under the Act are obligated to create and maintain a “Transparency Register”.

The motives, intent, and mechanics of this Transparency Register draw many parallels to those of the *Land Owner Transparency Act* (British Columbia) that is in the pipeline with respect to BC real estate. While both schemes are aimed at increasing the openness of beneficial ownership information, the two are mutually exclusive, involve different disclosure requirements, and compliance with the obligations under one does not satisfy the obligations of the other; separate compliance under both will be required.

Transparency Register: Applicability and Contents

The Transparency Register must catalogue each “significant individual” who is associated with the respective private company. One of the core principles in preparing the register is to trace back through all non-human shareholders to set out the identity of the controlling individuals. In essence, the Transparency Register is a self-reported record of individuals who have an (actual or potential) right or ability to directly or indirectly affect the control of the company.

When it comes to preparing a Transparency Register for your private BC company, consider:

1. *Does my company fall within the scope of “private company”?*





Unless your BC company is (a) a reporting issuer (or equivalent thereof), (b) listed on a designated stock exchange, or (c) within a prescribed class of companies pursuant to the Act's regulations, it will be required to comply with the Transparency Register provisions of the Act as of May 1, 2020.

2. *Who is considered to be a "significant individual"?*

The Act specifies that an individual is a "significant individual" (and must therefore be listed on the Transparency Register) if:

(a) the individual has (direct or indirect) registered or beneficial ownership or control of either (i) 25% or more of the issued shares of the company, or (ii) issued shares of the company that carry 25% or more of the rights to vote at general meetings; and/or

(b) the individual is able to (directly or indirectly) elect, appoint or remove the majority of the directors of the private company by way of any one or more of the following rights or abilities:

(i) the right to elect, appoint or remove one or more of the company's directors;

(ii) indirect control of the right to elect, appoint or remove one or more of the company's directors; and/or

(iii) the ability to exercise direct and significant influence over an individual who has the right or indirect control described in the preceding subparagraphs (i) or (ii).^[2]

Because this "significant individual" threshold captures indirect owners and holders of rights, companies must consider which individuals ultimately control any corporations or trusts that hold its shares, as well as review any agreements (such as shareholders' agreements or financial contracts) that may grant any one or more of the abilities listed above to an individual.

Further, if any two or more individuals have rights or abilities that meet any of the above-noted criteria when exercised jointly, then each such individual must be listed as a "significant individual". It is also important to note that two or more individuals that the Act considers to be "associated" with each other will be presumed to be acting in concert. The Act's definition of "associate" includes spouses, children, and other relatives who share a home.

Some examples of significant individuals are:

- If Richard owns 15% of the company's shares personally, plus another 15% indirectly through a holding company wholly owned by Richard, Richard will be listed as a "significant individual" on the





company's Transparency Register. He ultimately owns or controls an aggregate of 25% or more (30%) of the shares of the company.

- If 25% of the company's shares are registered to Buell as trustee of a family trust and the trust has three discretionary beneficiaries, all of the following must be disclosed as a "significant individual":
 - Buell as trustee, because Buell has direct registered ownership of 25% or more of the shares; and
 - each of the three discretionary beneficiaries, because for the purposes of the Transparency Register, every beneficiary of this trust is treated as having a 25% interest in the company.
- If Sutton and Sutton's spouse each own 15% of the company's shares, neither one of them meets the "significant individual" threshold independently but the Act presumes them (as each other's spouse) to act in concert. Therefore they must each be listed as "significant individuals" because, when taken together to act in concert, they own 25% or more of the shares of the company.

3. What information must be included in the Transparency Register?

The Transparency Register must include the following information for each "significant individual":

- (a) the individual's full name, date of birth, and last known address;
- (b) whether the individual is a Canadian citizen or permanent resident of Canada;
- (c) if the individual is not a Canadian citizen or permanent resident of Canada, every country or state of which the individual is a citizen;
- (d) whether the individual is resident in Canada for the purposes of the *Income Tax Act* (Canada) (the "ITA");
- (e) the date on which the individual became or ceased to be a significant individual in respect of the company;
- (f) a description of the basis upon which the individual is a significant individual; and
- (g) prescribed information, if any.^[3]

Some of this information may not be readily available, so the director(s) of the company will likely need to make inquiries. For instance if a "significant individual" splits their time amongst a number of countries, a director may not know the individual's residency for the purposes of the ITA. Directors should not guess at information, and should put the question of any unknown information to the shareholders of the company





and to the possible significant individuals, and they in turn may need to consult their tax advisors.

Access to the Transparency Register

The Transparency Register may only be accessed by certain authorized persons, and only during statutory business hours (or during a reduced number of hours, as may be passed by ordinary resolution of the company). The persons that will be authorized by the Act to access the Transparency Register are: directors of the company, RCMP or police officers, officials or employees of tax authorities, and officials or employees of regulatory authorities such as the BC Securities Commission, the Financial Institutions Commission, and the Law Society of BC.

Obligations of the Company and Shareholders

Private BC companies must take “reasonable” steps to maintain an accurate and current Transparency Register. This reasonability standard accepts that all of this information may not be provided when requested, in which case the Transparency Register must contain a summary of the steps that the company took to try to obtain the information.

If a private company determines that there are no individuals who qualify as significant individuals, the Act requires the Transparency Register to contain a statement to that effect.

There are key time frames with respect to the maintenance of the Transparency Register of which companies and their directors should be mindful:

1. Upon adding or removing a “significant individual” to or from the Transparency Register, the company must notify said individual within 10 days.
2. Upon receipt of any new relevant information, the company must update the Transparency Register with said information within 30 days.
3. Each year during the 2-month period following the company’s anniversary of being incorporated or recognized in BC, the company must take reasonable steps to confirm that the Transparency Register is accurate, complete, and up to date.
4. After an individual ceases to be a “significant individual”, the company must:
 - (a) continue to record this individual on the Transparency Register for a period of six years showing the date on which they ceased to be a “significant individual”; and





(b) within one year of the sixth anniversary the date on which the individual ceased to be a “significant individual”, delete the individual from the Transparency Register and destroy any records with respect to this individual that relate to the Transparency Register.

The Transparency Register must be kept at either the company’s records office or at another location so long as it is available for inspection and copying at the records office by means of a computer terminal or other electronic technology.

Companies may request “significant individual” information from shareholders at any time. Upon receipt of any such request, shareholders must take reasonable steps to compile the requested information and promptly send it to the company.

Under the Act, it is an offence for private BC companies to fail to take reasonable steps to comply with the obligations listed above. It is also an offence for (a) any director or officer of a private company to authorize, permit or acquiesce to any such non-compliance; or (b) a shareholder to send information to the company that is false or misleading. An individual who commits any of these offences risks penalties of up to \$50,000, and offenders that are non-human entities (such as private companies) risk penalties of up to \$100,000.^[4]

Every private company that is incorporated or recognized under the Act must have its Transparency Register created on or before May 1, 2020. In the coming months, each private BC company that uses Richards Buell Sutton LLP as its registered and records office will be contacted by the firm to assist with the preparation of the Transparency Register.

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The information contained herein is premised on the laws of the Province of British Columbia as at November 21, 2019. This article should not be treated or relied on as legal advice. Detailed legal counsel should be sought prior to undertaking any legal matter.

^[1] Department of Finance Canada “Agreement to Strengthen Beneficial Ownership Transparency”. Web: https://www.fin.gc.ca/n17/data/17-122_4-eng.asp

^[2] s. 119.11 of the Act (as of May 1, 2020)





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^[3] s. 119.2(2) of the Act (as of May 1, 2020)

^[4] s. 428(2.1) of the Act (as of May 1, 2020)



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