B.C. Approves New Legislation That Will Impact Private Companies: What You Need To Know

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The *Business Corporations Amendment Act*, *2019* (the Amending Act) received royal assent on May 16, 2019 and — when certain provisions come into force by regulation — private, non-distributing companies incorporated under British Columbia's *Business Corporations Act* (BCA) will be required to, among other things, create and maintain a "transparency register." This register will provide information about certain shareholders of a company and is intended to mitigate financial crimes, including tax evasion, money laundering and terrorist financing, as it requires subject companies to create and maintain information about the true owners of their shares.

The Amending Act will implement changes similar to those under the *Budget Implementation Act, 2018, No. 2* (the Federal Amending Act), a federal enactment amending the *Canada Business Corporations Act* (Canada), which came into force on June 13, 2019. More information on the Federal Amending Act can found in our bulletin from January 2019. Although British Columbia is the first Canadian province to approve legislation similar to the Federal Amending Act, the remaining provinces have signalled an intention to follow suit.[1]

Consistent with the changes under the Amending Act, but in the context of land ownership, British Columbia has also enacted the *Land Owner Transparency Act*, which is the first legislation of its kind in Canada. Once put into force by regulation, the *Land Owner Transparency Act* will require corporations, partnerships and trusts that hold land in British Columbia to disclose the true owner(s) of that land or face significant fines if they fail to comply. For more information on the *Land Owner Transparency Act,* view our bulletin from June 2019.

Disclosure Requirements

Once the applicable provisions of the Amending Act come into force, private, non-distributing BCA companies will be required to create a document known as a "transparency register" that will identify and describe all significant individuals in respect of the company. The Amending Act describes "significant individuals" as individuals who, individually or jointly:

1. own more than 25 per cent of the issued shares of the company or shares that carry 25 per cent or more of the rights to vote at a general meeting, in each case whether as a registered or beneficial owner and whether directly or indirectly;
2. have the right or ability, directly or indirectly, to elect, appoint or remove one or more of the company's directors, or the ability to exercise direct and significant influence over an individual who has that right or ability, such that the individual is able to cause the election, appointment or removal of the majority of the directors of the company; or
3. have an interest, right or ability set out under any BCA regulations (which have yet to be determined).

The transparency register must include disclosure of the following information in respect of each significant individual of a company:

- the individual's full name, date of birth and last known address;
- whether the individual is a Canadian citizen or a permanent resident of Canada, and if not, every country or state of which the individual is a citizen;
- whether the individual is resident in Canada for purposes of the *Income Tax Act* (Canada);
- the date on which the individual became and stopped being a significant individual;
- a description of how the individual is a significant individual;
- if the company is unable to obtain some or all of the required information, a summary of the steps taken by the company to obtain this information; and
- additional information set out under any BCA regulations (which have yet to be determined).

If a company determines that there are no individuals who are a significant individual in respect of the company, the company is still required to maintain a transparency register, but the register is only required to contain a statement to that effect.

If the company is unable to obtain or confirm all required information in respect of a significant individual, it must set out in the transparency register:

- the information the company was able to obtain or confirm in respect of the individual;
- the information that the company was unable to obtain or confirm and a summary of steps taken by the company; and
- any information required under any BCA regulations (which have yet to be determined).

The transparency register must be kept at the company's records office or may be kept at another location, as long as the register is available for inspection and copying by the directors of the company and any "inspecting officers" (as discussed in greater detail below) at its records office by means of a computer terminal or other electronic technology.

Ongoing Duties of the Company

Each subject company must review its transparency register annually to ensure its contents are current, accurate and complete, and is responsible for complying with the following ongoing duties:

- updating its transparency register within 30 days[2] of becoming aware of any relevant new information;
- notifying each significant individual added to or removed from the transparency register within 10 days of the addition or removal, as applicable, and providing any information required under any BCA regulations (which have yet to be determined); and
- removing all information contained in the transparency register or other records in respect of an individual within one year after the sixth anniversary of the date on the transparency register upon which the individual ceased to be a significant individual of the company.

Penalties for Non-Compliance by Company, Directors and Officers

A company and any of its directors or officers could be subject to significant penalties for:

- failing to identify all of the significant individuals (or falsely identifying a significant individual) of the company; or
- providing false or misleading information about significant individuals (or omitting material facts about significant individuals) of the company.

If a company commits an offence, any director or officer who authorized, permitted or acquiesced in the commission of the offence also commits an offence, whether or not the company is prosecuted or convicted. The quantum of penalties assessable in respect of an offence varies — the maximum penalty for each individual director or officer is $50,000, while the company could be subject to a maximum penalty of $100,000.

However, no company, director or officer will be liable for non-compliance with the Amending Act if she, he or it did not know, and could not have known with the exercise of reasonable diligence, that the identification or exclusion of the significant individual was incorrect or that the information about a significant individual was false or misleading.

Unlike the Federal Amending Act, the Amending Act does not propose jail time as a potential penalty for non-compliance.

Shareholders' Duty to Disclose and Non-Compliance

Upon receiving a request from the company to provide information in respect of the transparency register, shareholders are required to provide that information to the company promptly.

Shareholders who either fail to provide the requested information or knowingly provide false information to the company could be liable for penalties. If the shareholder is an individual, the maximum penalty is $50,000. If the shareholder is a non-individual person, such as a corporation or partnership, the maximum penalty is $100,000.

A shareholder will not be held liable if the shareholder did not know and could not have known with the exercise of reasonable diligence that the information provided by it was false or misleading.

Access to Information

Aside from the company's directors, "inspecting officials" are the only class of persons authorized to inspect and obtain copies of the transparency register and may only do so for the purposes set out in the Amending Act. An "inspecting official" is defined broadly and includes (and for each class of inspecting official, the corresponding purposes for which the inspection may arise are):

- provincial and federal law enforcement authorities, to conduct investigations and for related matters;
- provincial and federal tax authorities, such as the CRA, to administer tax laws; and
- certain regulatory authorities, including the B.C. Securities Commission, FINTRAC and the Law Society of British Columbia, in addition to other prescribed authorities (which have yet to be determined), to ensure regulatory compliance.

Unlike the Federal Amending Act, the Amending Act does not grant access to the transparency register to shareholders or creditors of the company, or to the B.C. Registrar of Companies (the Federal Amending Act grants the federal corporation equivalent "Director" such access).

Comment

The transparency register requirements will be in force on a date prescribed by regulation. Once in force, as expressed in debate by British Columbia's Minister of Finance, it is anticipated that a transition period will be adopted to give affected companies time to comply with the new requirements.

The transparency register will impose significant new obligations on private, non-distributing BCA companies and, given the need for further regulations to clarify aspects of the Amending Act, there is significant uncertainty regarding application and compliance matters under the Amending Act. Accordingly, we anticipate further developments and expect to receive additional guidance from the B.C. Registrar of Companies in respect of the transparency register in short order.

[1] See the federal/provincial *Agreement to Strengthen Beneficial Ownership Transparency*.

[2] The Federal Amending Act requires updates to be made within a 15 day period in respect of federally incorporated corporations.

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