

How recent CBCA amendments could impact your business

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Companies that are incorporated into the *Canadian Business Corporations Act* (CBCA) need to be cognizant of [recent amendments to the CBCA](#) that came into force on June 13, 2019. These amendments — the Register of individuals with significant control or ISC Register — were put into place to address transparency over who owns or controls a private corporation. In accordance with these changes, CBCA corporations that qualify must create and maintain a new type of register to list and identify individuals with significant control of their corporation.

However, understanding whether your business meets the ISC Register threshold and navigating the legislation can be challenging. In this webinar, [Chad Bayne](#), founder and Co-Chair of Osler's [Emerging and High Growth Companies Group](#), explains how to address these amendments and how to interpret the rules, including how to identify significant shareholders (i.e., individuals who have significant control over the shares in the corporation; generally 25% or more of the voting rights or 25% or more of the outstanding shares measured by fair market value) and whether you need to complete the new register.

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Video transcript

SPEAKER 1: Hello, everyone. It's Chad Bayne from Osler. Today we're going to talk about the new CBCA Amendments and how it affects companies that are incorporated into the Canadian Business Corporations Act. These amendments came out within the last month, actually effective as of June 13 2019. So corporations will need to take steps to address them in terms of dealing with these amendments.

We can actually help you address them, but I thought it'd be easy to have this webinar, ultimately to go through some of why these amendments are put into place and ultimately, how we will address them, and ultimately, how to interpret the rules. Because in most cases, it's pretty cut and dry, but in other cases, it may need a bit of analysis in terms of whether or not you need to actually complete the new register.

OK. So let's just step back in terms of why these amendments were put in place. The amendments were put in place to help improve transparency over who owns and controls a

private corporation. And really this all is to do with money laundering, law enforcement, those types of activities. Tax evasion. So with respect to the Canadian Business Corporations Acts corporations, the federal government thought it would be advisable to have a separate register to identify those individuals with significant control over Canadian corporations.

The amendments came in, and these are really targeted at private companies, or not public companies, to maintain these registers. And as I mentioned, these amendments came into force on June 13 2019. So, basically, what you need to do with respect to these amendments is identify what we call significant shareholders on the corporations cap table. So generally, it's a pretty simple test in that you look at- sorry, individual significant control.

So those shareholders would have to have a significant control over shares in the corporation. And significant control, basically, is dealt with by their ownership of shares, so, a significant number being 25% or more of the votin rights, or 25% or more of the outstanding shares measured by fair market value. Generally, most companies, we can use the 25% rule as the guidepost, just from an ownership perspective of the Voting Rights.

So generally, a lot of times, founders will be caught in that bucket. It may be the case where a large angel investor might be caught in that bucket, but it's fairly rare that a venture capital investor, if you sort of looked through, the venture capital investor would never have a situation where they own 25% or more of the company in terms of an individual LP of that fund. So that's the simplest way of looking at it in terms of that 25% threshold. Then you can get into other situations of which you may have direct or indirect control or direction over a significant number of shares in the corporation.

So, that 25% threshold, you can look at it by virtue of, if there's a voting trust in place or some sort of voting arrangement, whether you have sufficient control over those votes. So for example, if an individual is aggregated their votes. Typically, we see in a lot of the corporations that we set up, the CEO has powers of attorney for potentially certain investors, et cetera, the voting trusts set up. So as a result, you'd have to note that is an individual seeking control between their founders shares plus the votes that they control, end up with 25%.

Another situation that is a bit ambiguous as to what is meant by the legislation- although we can sort of take some guidance from the CCPC test, the can't control private corporations test that you should find under the Tax Act with respect to Canadian control of private corporations- is looking at the control on fact test. Whether or not a shareholder has director or indirect influence that's not necessarily represented by share ownership. And if you look at a founder, they may ultimately have control over the board.

They may not have 25% of the company, but they may have them, connected with another founder, end up controlling the board by virtue of majority of the votes of their founder shares. And they get to appoint the majority of the board. Arguably, the way the legislation would pick up, is those two individuals in concert would be viewed as individuals with significant control because the combination of the two of them could essentially elect the majority of the board. So based on the way the legislation reads and what we can take from sort of the way the tax laws work with respect to CCPC, we would err on the side of caution.

And basically, the founders can elect the majority of the board and they don't have individually 25% each, but collectively have- can elect the board, then we would suggest listing those founders on the list, as well, by virtue of the fact that they have control over the nomination of the board. Those are the main categories. So what you need to do, ultimately, if you have a 25% shareholder or a shareholder that controls 25% of the votes- and these are all individuals. These are not corporations.

It's very much focused on the individual shareholder. And to the extent that there's a trust or a limited partnership, you need to ask the question to look through whether or not- if they own 25%, the question ultimately is, is there an individual that has 100% ownership of the 25%? If not, then you sort of drop below the 25% threshold. But what you need to do with respect to- do you have one of these 25% shareholders or an individual that we determine has significant control, you need to maintain a register. It's a similar register to your share register, which is required by law as well, and which we would maintain in connection with your minute books.

But you would list those individuals with significant control on a separate register. We need the name, address, date of birth of the individual of significant control, their jurisdiction of residence for tax purposes, the data on which significant control was obtained- typically when the shares were issued to them.

It may be the case where we fall into that majority control of the board category that would be the date the financing event occurred, et cetera. And then just a description of how the individual qualifies, whether it's by virtue of shares, by virtue of shares plus a voting trust or voting arrangement, or whether or not they actually exercise direct or indirect influence. If you don't have any individuals of significant control in the corporation, then you don't have to do anything. It's simple.

It's a blank list. So it'd be an NNA. Non-voting shares do affect the test by virtue of the fact that if you own 25% of the company in terms of value- and that would include non-voting shares- then that would be triggered. Given the way we set up most of our companies, it would be a pretty rare occurrence that a shareholder would own 25% of the value in combination with their non-voting shares. But there may be cases where we'd have to look at that. But I'd say, those are more edge cases than the norm.

Typically, the individuals with large shareholdings are the founders of the corporation. They generally have voting shares. If we've actually gone through- I think with respect every company that we hold minute books for that's under the CBC, I think we've sent out a share register, which I think we've highlighted who we believe there to be. To the extent there's questions, specifically, we can answer those in terms of the edge cases. But generally, it's going to be a pretty straightforward exercise in terms of highlighting them.

And again, you don't have to highlight them more than once again. If two founders are 25% holders and they also control the board, you don't need to list them multiple times. They're already listed by virtue of the fact they hold 25% of the company. We've essentially sent out those registers highlighted. We just need the confirmation and the information to be provided back. We'll follow up. We can follow with a general email blast to the extent that this hasn't been done and confirmed, and we can then work with each company to ensure this is completed for each company.

And then, again, to the extent the cap table changes over time, we can update this with respect any financing event when that occurs. Just seeing if there's any other questions that I had immediately brought forward to us. I think that's it in terms of what we need from companies. And these are the questions that were asked today.

If there are any other questions, please email them to Emma, and she can then triage them accordingly. So, that would be ewoods@osler.com. And she can en-triage them accordingly. But we'll follow up in due course with companies that haven't gotten back to us and ensure that this is completed for every company.

Thanks very much for participating, and we'll be speaking to you soon.

