

Lawyers' Insurance Association of Nova Scotia – NSBS 2023 Solo and Small Firm Virtual Conference

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New Nova Scotia *Companies Act* Requirements: Register of Individuals with Significant Control

Register of Individuals with Significant Control (“ISC”)

- Bill No. 226, 2nd Session, 63rd General Assembly
- Received third reading on March 5, 2020
- Came into effect April 1, 2023

Register of Individuals with Significant Control

- Enacted new Sections 46A to 46H of the *Companies Act*
- Amendments require Nova Scotia companies to maintain a register for individuals with “significant control” over the company (an “ISC Register”)
- Measures are similar to recent amendments to the *Canada Business Corporations Act* and corporation statutes of various provinces

Register of Individuals with Significant Control

- General objective: Increased transparency of economic interest in Nova Scotia companies
- Consistent with increased global measures aimed at combating “abusive” tax structures
- Particularly relevant to Nova Scotia companies/corporate structures

Register of Individuals with Significant Control

- Section 46A: Defines “significant control” and provides related interpretive rules
- Section 46B: Mandates the preparation and maintenance of an ISC Register
- Section 46C: Requires a company to take prescribed steps if unable to identify any individuals with significant control

Register of Individuals with Significant Control

- Section 46D: Obligation of company to disclose to the Registrar of Joint Stock Companies, upon request, any information in its ISC Register
- Section 46E: Process for shareholders/creditors to gain access to the ISC Register
- Section 46F: Process for investigative body to gain access to the ISC Register/information contained in the ISC Register

Register of Individuals with Significant Control

- Section 46G: Specifies offences and penalties
- Section 46H: Authorizes the making of regulations

Register of Individuals with Significant Control

What is meant by the expression “significant control”?

- Defined in subsection 46A(2) and 46A(3)
- Determination relies in part on expression “significant number of shares” (any number of shares representing 25% or more of all votes or fair market value)

Register of Individuals with Significant Control

What is meant by the expression “significant control”?

- Clause 46A(2)(a): Individual who has any of the following interests or rights (or combination of them) in a significant number of shares:
 - an interest as a registered owner
 - an interest as a beneficial owner; or
 - direct or indirect control over the shares

Register of Individuals with Significant Control

What is meant by the expression “significant control”?

- Clause 46A(2)(b): Individual who has direct or indirect influence that, where exercised, would result in control in fact of the company
- Clause 46A(2)(c): Individual to whom prescribed circumstances apply (no regulations at this point)

Register of Individuals with Significant Control

What is meant by the expression “significant control”?

- Subsection 46A(3): Two or more individuals are each an ISC if, in respect of a significant number of shares:
 - an interest or right (or combination thereof) as registered or beneficial owner (or direct/indirect control over the shares) is held jointly; or
 - rights described in Clause 46A(2)(a) are subject to an agreement or arrangement under which they are exercised jointly or in concert

Register of Individuals with Significant Control

What is meant by the expression “significant control”?

- Easiest test: Registered ownership of a significant number of shares
- If all ISCs are not identified via registered ownership, the identification of individuals with significant control can become much more complicated
- Almost every other determination is subjective and uncertain

Register of Individuals with Significant Control

What is meant by the expression “significant control”?

- “Direct or indirect control” over a significant number of shares (subclause 46A(2)(a)(iii)):
 - For layered corporate structures (ie. a chain of parent corporations) proportionate indirect ownership is likely relevant, but may not be determinative
 - This may include non-Canadian entities that are governed by rules that are foreign to Canadian corporate law concepts

Register of Individuals with Significant Control

What is meant by the expression “significant control”?

- Interest in a significant number of shares “as a beneficial owner”
 - Use of the word “beneficial” suggests a trust
 - How does this apply to a discretionary trust?
 - Arguably (probably) a contingent beneficiary is a “beneficial owner”
 - This could mean that any beneficiary (or class of beneficiaries) is individually the “beneficial owner” of all shares held by the trust

Register of Individuals with Significant Control

What is meant by the expression “significant control”?

- Interest in a significant number of shares “as a beneficial owner”
 - Typical freeze scenario: Shares that initially were not a “significant number of shares” can become a “significant number of shares” as the value of the company increases
 - Trustees would also likely be captured as the “registered owner(s)” of the shares

Register of Individuals with Significant Control

What is meant by the expression “significant control”?

- Clause 46A(2)(b): Individual who has direct or indirect influence that, where exercised, would result in control “in fact” of the company
- Nearest equivalent test would be the *de facto* control test in the *Income Tax Act*
- This is potentially very broad and uncertain, including a wide variety of circumstances

Register of Individuals with Significant Control

What is meant by the expression “significant control”?

- Subsection 46A(3) [summarized above]: Two or more individuals can be determined to have significant control if there is joint ownership of interests or rights or if rights over a significant number of shares are exercised jointly or in concert under an “agreement or arrangement”

Register of Individuals with Significant Control

Register: Required Contents/Actions

- Company is required to prepare and maintain, at registered office or any other place in the Province designated by the directors, a register of individuals with significant control

Register of Individuals with Significant Control

Register: Required Contents/Actions

- Register must contain the following information:
 - Name, date of birth and last known address of each ISC
 - Jurisdiction of residence for income tax purposes of each ISC
 - Day on which each ISC became or ceased to be an ISC

Register of Individuals with Significant Control

Register: Required Contents/Actions

- Register must include the following information:
 - Description of how each ISC is an ISC (including a description of the individual's interests and rights in respect of shares)
 - Prescribed information, if any (no regulations to date)
 - Description of steps taken to comply with subsection 46B(2)

Register of Individuals with Significant Control

Register: Required Contents/Actions

- Steps required to maintain accuracy of Register:
 - Subsection 46B(2): At least once annually the company shall take “reasonable steps” (including prescribed steps) to ensure it has identified all ISCs and to ensure the accuracy of the Register
 - Subsection 46B(3): Where the company becomes aware of changes to the information required to be noted in the Register it shall record the new information within 15 days

Register of Individuals with Significant Control

Register: Required Contents/Actions

- Subsection 46B(4): If the company requests information from a shareholder to update the Register, the shareholder shall, to the best of the shareholder's knowledge, reply accurately and completely "as soon as feasible"
- Failure of shareholder to comply is an offence subject to a fine of up to \$200,000 or imprisonment for up to 6 mo.

Register of Individuals with Significant Control

- Register: Required Contents/Actions
- Subsection 46B(5): Within 1 year after 6th anniversary of an individual ceasing to be an ISC the company shall dispose of the individual's personal information
- Failure by a company to comply with the requirements of Section 46B is an offence subjecting the company to liability for a fine of up to \$5,000

Register of Individuals with Significant Control

Access to Register

- Section 46D: A company that is required to maintain an ISC Register shall disclose to the Registrar of Joint Stock Companies, upon request, any information in the company's ISC Register
- A reporting issuer under the *Securities Act* and a company that is listed on a designate stock exchange is not require to maintain an ISC Register

Register of Individuals with Significant Control

Access to the Register

- Shareholders/creditors may apply to the company for access to the ISC Register
- Application must be accompanied by an affidavit that includes a statement that the information obtained from the Register will not be used except for a purpose permitted under subsection 46E(4)

Register of Individuals with Significant Control

Access to the Register

- Purposes permitted under subsection 46E(4)”
 - An effort to influence the voting of shareholders
 - An offer to acquire securities of the company
 - Any other matter “relating to the affairs of the company”
- Failure to comply with subsection 46E(4) is an offence punishable by a fine of up to \$5,000 or imprisonment for 6 months (or both)

Register of Individuals with Significant Control

Access to the Register

- Section 46F provides for access to the Register by an “investigative body”
 - Police force (RCMP, a municipal police department)
 - Taxing authority (CRA or provincial)
 - Regulator (NS Securities Commission, Financial Transaction and Reports Analysis Centre of Canada, prescribed agency)

Register of Individuals with Significant Control

Access to the Register

- On request by an investigative body, a company shall, as soon as feasible, and in the manner specified by the investigative body, provide the investigative body with a copy of the ISC Register or disclose to the investigative body any information specified by the investigative body that is in the ISC Register

Register of Individuals with Significant Control

Access to the Register

- A taxing authority may only make a request for the ISC Register for the purpose of:
 - Administering or enforcing a law of the Province or Canada that provides for the imposition/collection of a tax, royalty or duty
 - Providing such information to another jurisdiction to assist in the administration or enforcement of the tax laws of that jurisdiction if authorized under an international tax agreement

Register of Individuals with Significant Control

Access to the Register

- A police force may only make a request for the ISC Register for the purpose of
 - Conducting an investigation in Canada that is undertaken with a view to a law enforcement proceeding or from which a law enforcement proceeding is likely to result
 - Policing and criminal intelligence operations in Canada
 - Assisting another law enforcement agency
 - Providing information to a foreign law enforcement agency

Register of Individuals with Significant Control

- Access to the Register
- A regulator may only make a request for the ISC Register for the purpose of:
 - Administering or enforcing a law for which the regulator is responsible
 - Assisting another agency in Canada for such purpose
 - Providing information to an agency outside of Canada to assist in the administration or enforcement of a similar law if such assistance is authorized under an agreement

Register of Individuals with Significant Control

- Penalties (Section 46G)
 - Director or officer knowingly authorizing, permitting or acquiescing in the contravention of 46B(1) (requirement to maintain an ISC Register)
 - Director or officer who knowingly records or authorizing the recording of misleading information in the ISC Register
 - Director or officer who provides false or misleading information in relation to the ISC Register
 - Shareholder who contravenes subsection 46B(4)

Fine of up to \$200,000 and/or imprisonment of up to 6 months

Our Locations

Newfoundland and Labrador

ST. JOHN'S

Prince Edward Island

CHARLOTTETOWN
ALBERTON
MONTAGUE
MORELL
SUMMERSIDE

New Brunswick

SAINT JOHN
FREDERICTON
MONCTON

Nova Scotia

HALIFAX



FREDERICTON
MONCTON

A map of the Atlantic provinces of Canada (New Brunswick, Nova Scotia, and Prince Edward Island) shown in grey. Three red dots indicate office locations. Two are in New Brunswick, labeled 'FREDERICTON' and 'MONCTON'. One is in Nova Scotia, labeled 'SAINT JOHN'. A red circle highlights the Prince Edward Island region, which is further detailed in the inset map above.



Thank you

Questions/Comments

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