

# CONFIDENTIALITY CONSIDERATIONS WHEN CHOOSING A JURISDICTION OF INCORPORATION IN CANADA

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In Canada, a corporation can be incorporated either under the federal *Canada Business Corporations Act* (“**CBCA**”), or the equivalent provincial or territorial corporate statute. For private corporations, there is limited jurisdictional variance in terms of corporate governance requirements as the federal and provincial corporate statutes are largely similar in form and substance.<sup>[1]</sup>

Where a foreign individual or entity is seeking to establish a presence in Canada or where a new player/ major competitor is entering a highly competitive market, confidentiality of officer, director or shareholder information can be an important consideration when choosing the jurisdiction of incorporation. There are some key differences that warrant examination with respect to who can be a director of a corporation, what officer, director and shareholder information must be filed on incorporation, and be made available to the public thereafter.

## 1) Director Residency Requirements

Under the CBCA and most provincial corporate statutes, at least 25% of a corporation’s directors must be either Canadian citizens or permanent residents ordinarily residing in Canada. Pursuant to the CBCA and the corporate statutes in Ontario, Manitoba and Saskatchewan, if a corporation has less than four directors, at least one director must be a resident Canadian.

Currently, there are five provinces (British Columbia, New Brunswick, Nova Scotia, Prince Edward Island and Quebec) that do not have director residency requirements. Alberta has passed legislation that will remove the director residency requirements from its corporate statute.<sup>[2]</sup>

## 2) Officer, Director and Shareholder Information Filed on Incorporation

In terms of what must be filed on incorporation, Quebec requires the most information of all provincial jurisdictions as the names and residential addresses of the officers, directors and the three shareholders which hold the greatest number of votes must be included as part of an incorporation application. The shareholders must be listed in the order of their shareholdings and any shareholder holding an absolute majority must be

identified. Furthermore, if a unanimous shareholder agreement is being entered into, the names and residential addresses (or registered office address if a corporation) of each shareholder must be disclosed as well if all powers of the directors are being restricted.

Although shareholder information is not required on incorporation, director and officer names and addresses<sup>[3]</sup> are required in Nova Scotia and Saskatchewan.

Under the CBCA and the corporate statutes of the remaining provinces (i.e. Alberta, British Columbia, Manitoba, New Brunswick, Newfoundland and Labrador, Ontario and Prince Edward Island) only the names and addresses of directors are filed on incorporation; no officer or shareholder information needs to be disclosed. One caveat, however, is that in British Columbia, the name and address of the first shareholder (i.e. the incorporator) is listed on the incorporation application, but no further disclosure is filed with the corporate registry when there are any subsequent transfers or changes in the shareholdings. In choosing between these jurisdictions of incorporation, a key difference lies in the fact that an address for service is sufficient under the CBCA and in Alberta, British Columbia<sup>[4]</sup> Ontario and New Brunswick, whereas Manitoba, Prince Edward Island and Newfoundland and Labrador require the residential address of each director. New Brunswick and Prince Edward Island incorporation applications also require that contact information be provided for each director.

### 3) Public Availability of Officer, Director and Shareholder Information

While certain investors into Canada may be sensitive to the amount of officer, director and shareholder information that is filed on incorporation, there is heightened sensitivity when such information becomes publicly available. Details of the public availability of officer, director and shareholder information is set out in the table below. In summary:

- officer information remains confidential under the CBCA and in Alberta, Newfoundland and Labrador, New Brunswick and Prince Edward Island. In all other provinces, it is publicly available;
- director information remains confidential only in Newfoundland and Labrador and Prince Edward Island. In all other provinces, it is publicly available; and
- shareholder information remains confidential in Ontario, New Brunswick, Newfoundland and Labrador, Nova Scotia, and Prince Edward Island. In all other provinces, it is publicly available.

#### Is Director/Officer/Shareholder Information Publicly Available?

Jurisdiction	Director Information	Officer Information	Shareholder Information
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Federal	Yes – name and address for service	No	No
Alberta	Yes – name and address for service	No	Yes – name and address for service of each voting shareholder <sup>[5]</sup>
British Columbia	Yes – name and address for service	Yes – name and address for service	Yes – name, last known address and shareholdings <sup>[6]</sup>
Manitoba	Yes – name and residential address	Yes – name and residential address	Yes - the names and shareholdings of the holders of 10% or more of the issued voting shares
New Brunswick	Yes – name and address for service	No	No
Newfoundland and Labrador	No	No	No
Nova Scotia	Yes – name and civic service	Yes – name and civic service	No
Ontario	Yes – name, address for service and confirmation of whether the individual is a resident Canadian	Yes – name and address for service <sup>[7]</sup>	No
Prince Edward Island	No	No	No
Quebec	Yes – name and residential address	Yes – name and residential address	Yes - the names and residential addresses (or registered office address if a shareholder is a corporation) of the three shareholders controlling the greatest number of votes

Saskatchewan

Yes – name and address for service

Yes – name and address for service

Yes – name, address for service (or registered office address if a shareholder is a corporation) and shareholdings

#### 4) Recent Developments

In 2019, the *CBCA* was amended<sup>[8]</sup> to require private corporations incorporated under the *CBCA* to maintain detailed registers of holders and beneficial owners of shares representing 25% or more of a corporation’s voting rights or any number of shares that is equal to 25% or more of the corporation’s issued and outstanding shares measured by fair market value, as well as those with direct or indirect control over such shares. These registers are not available to the public; however, upon request, corporations will have to disclose their contents to the ‘Director’ appointed under the *CBCA*. Furthermore, shareholders and creditors will also be able to request access to this information subject to certain conditions. British Columbia and Manitoba corporate statutes now contain analogous requirements and it is reasonable to expect that these changes will serve as a model for equivalent amendments in the other provinces.

by John Clifford, Laura Giesbrecht, Mikolaj Niski

[1] Territorial statutes are not addressed in this article.[ps2id id='1' target='']

[2] Bill 22, *Red Tape Reduction Implementation Act*, 2020, 2nd Sess., 30th Legislature, 2020 (which received Royal Assent on July 23, 2020) will amend the *Business Corporations Act* (Alberta) to remove the Canadian residency requirements for directors once the Bill comes into force on proclamation.[ps2id id='2' target='']

[3] Address for service/ mailing address is sufficient in Saskatchewan. A business address is sufficient in Nova Scotia.[ps2id id='3' target='']

[4] The director may select to provide either (a) the delivery address and, if different, the mailing address for the office at which the individual can usually be served with records between 9 a.m. and 4 p.m. on business days or (b) the delivery address and, if different, the mailing address of the individual’s residence. The delivery address must not be a post office box.[ps2id id='4' target='']

[5] *The Business Corporations Act* (Alberta) stipulates that any person may examine and make copies of the full share register (i.e. including non-voting shareholders) of a corporation upon payment of a reasonable fee.[ps2id id='5' target='']

[6] While shareholder information is not filed in a public record in British Columbia, the *Business Corporations Act* (British Columbia) provides additional rights of access to the general public: any person may inspect a corporation’s share register, and to the extent permitted by a corporation’s articles, the minutes of every meeting of shareholders and directors. Furthermore, anyone can apply to the corporation to obtain a list of the

names, last known addresses and shareholdings of each shareholder, however such list cannot be used by the recipient except in connection with the specific purposes set out in Section 49(3) (e.g. to influence shareholder voting; to purchase or sell securities; to amalgamate or reorganize the company).

[7] Officer information on the public record is limited to the five most senior officers of a private corporation.[ps2id id="7" target=""]

[8] Bill C-86, *A Second Act to Implement Certain Provisions of the Budget Tabled in Parliament on February 27, 2018 and Other Measures*, 1st Sess, 42nd Parl, 2018, Division 6 (as passed by the House of Commons 3 December 2018). We discussed the amendments in our Bulletin titled '[Starting in June 2019, Private CBCA Corporations Required to Gather and Record Detailed Information About Their Shareholders](#)'.

### **A Cautionary Note**

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

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