

# CORPORATE NEWSLETTER



## FRANK SHOSTACK

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As we move into the second half of 2017 I wanted to take a moment to update my valued clients on the status of my practice. Since moving to DSF I have continued to grow and offer a wide range of legal services for businesses and corporations. Regardless of what stage your business is in I can assist with any of the following:

- Incorporation and Formation of all forms of Business Entities
- Purchase and Sales of Businesses
- Dissolution and wind-up
- Reorganization
- Shareholder disputes
- Succession planning
- Professional corporations/ takeover of practice
- Corporate secretarial work
- Contract review and advice
- Secured transactions
- Corporate governance matters
- Trademarks

- IP Licensing agreements
- Estate planning
- Estate administration
- Corporate and Personal Tax Planning

### RECENT DEVELOPMENTS IN CYBERSECURITY LIABILITY:

Certain proposed changes to the monitoring and reporting of privacy and cybersecurity breaches could have a serious impact on the operations of many businesses.

Apart from certain specifically targeted provincial privacy legislation, most privacy issues in Canada are governed by the federal Personal Information Protection and Electronic Documents Act ("PIPEDA"). Similar provincial legislation is more or less designed to protect personal information of employees including health-related information.

The federal Digital Privacy Act adopted in June 2015 was primarily directed to amend the provisions of PIPEDA to establish penalties for breaches of that statute, and is administered by the same government agency that administers PIPEDA, namely the Office of the Privacy Commissioner of Canada (the "Commissioner"). Regulations under the Digital Privacy Act are expected to be introduced late in 2017 to require mandatory reporting of privacy breaches including cyber attacks and data breaches. The changes will include mandatory record-keeping for all breaches, mandatory data breach notification and penalties for noncompliance with the new requirements.

When these new requirements come into effect, organizations will be obligated to give notice to affected individuals and to

the Commissioner, where it is reasonable to believe that the breach creates a "real risk of significant harm to the individual." These rules are expected to increase the litigation exposure as a result of a breach. Fines for failing to keep records or report a breach can be up to \$100,000.

In addition class-actions based on the occurrence of cyber security breaches have increased recently and Canadian courts appear more willing than in the past to certify this type of class action.

Consideration should be given to ensuring that the company's standard commercial general liability policy and directors and officers E&O policies adequately provide coverage for these types of risks.

## ADDITIONAL RECORD KEEPING REQUIREMENTS FOR ONTARIO CORPORATIONS

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The beginning of a new year is often a time when corporations look to ensure

that all of their book keeping and record keeping obligations are being met. Unbeknownst to many of these corporations, effective December 10, 2016, the Ontario Government has significantly increased corporate record keeping obligations for many Ontario corporations.

Bill 144, the Budget Measures Act, 2015 came into force on December 10, 2016, enacting the Forfeited Corporate Property Act, 2015 (FCPA) which in turn has amended the Business Corporations

Act (Ontario) (OBCA). The changes to the OBCA require that a corporation incorporated under this legislation now maintain a register of its ownership interests in land in Ontario, at its registered office.

Pursuant to section 140.1 of the OBCA, the register shall identify each property in which the corporation has an ownership interest and show the date that the corporation acquired the property and, if applicable, the date the corporation disposed of it. In

addition, the corporation is required to maintain supporting documentation with the register, such as copies of any deeds, transfers or similar documents that contain any of the following with respect to each property listed in the register:

The municipal address, if any.  
The registry or land titles division and the property identifier number.  
The legal description. The assessment roll number, if any.

A question that arises within the language of the new provisions of the OBCA is the question of what is meant by "ownership interest." It is unclear whether the intention of the amendment to the OBCA was that the register reference only registered interests in property, or if it should also reference any beneficial ownership in property.

If the latter, the obligations under the new provisions become more onerous for certain corporations and

will also capture other corporations that might not otherwise have had to comply. It should also be noted that the FCPA provides that real property and "interests in real property" include a charge or mortgage. If an "ownership interest" under the OBCA includes an "interest in real property" as defined under the FCPA, then the register would also need to set out any of a corporation's charges and mortgages over land in Ontario.

In spite of the uncertainty and how little

the government has done to let people know about these changes, the new register requirements are immediately in effect for any corporations incorporated or continued under the OBCA on or after December 10, 2016. Any corporations that were incorporated or continued under the OBCA prior to December 10, 2016 shall have until December 10, 2018 to comply.

The register and supporting documents must be kept at the corporation's registered office. If a corporation's

registered office address is not at its place of business, but elsewhere, such as the company lawyer's office, it will be incumbent on the corporation to provide its lawyer (or other applicable party) with all of the information and supporting documentation required to properly maintain the register and meet these new obligations.

If you have any questions or would like more information regarding these changes, contact the Corporate Services & Acquisitions group at DSF.

## OH CANADA, OUR HOME AND "SNOW-WASHED" TAX HAVEN??

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The release of a joint [CBC / Toronto Star](#) investigation earlier this week has made headlines across the world and calls Canada's tax system into question.

Most Canadians would argue that Canada's tax rates are among the highest in the world and that the Canadian tax system is designed to ensure that income earned in Canada is subject to Canadian income tax, whether that income is earned by an individual, a corporation, a partnership, joint venture, or any other form of organization. In the normal course, a Canadian entity earning income in Canada from a business or property is required to report, calculate, and remit income taxes on such income to the Canada Revenue Agency.

The CBC and the Toronto Star used the term "[snow washing](#)" to refer to the use of Canadian corporations and limited partnerships as part of complex offshore money laundering and tax

evasion schemes, due to the perception of the legitimacy of such Canadian entities and Canada's reputation as a "whitelisted, respectable jurisdiction." The Toronto Star / CBC investigation identifies the practice, advocated by some other offshore jurisdictions, of non-residents incorporating companies or setting up other entities (such as Canadian limited partnerships) and installing Canadian "nominee directors." The Toronto Star [article](#) reports as follows:

"Canada is a new player in the world of offshore companies," claims the website of a Swiss firm. "Canada is the most preferable destination for compliant tax planning since it has no negative offshore reputation and no association with tax avoidance or evasion. It is by far one of the best neutral jurisdictions, providing offshore benefits without any of the traditional offshore drawbacks."

In another [article in the series](#), the Toronto Star states the following:

Nominee directors are not illegal in Canada, but the secrecy they provide facilitates abuse. The tax haven industry relies on nominee directors to put a legitimate face on companies, masking their real owners and allowing them to evade tax, launder ill-gotten money or bribe corrupt officials.

Corporate statutes, both provincial and

federal, impose duties and liabilities on directors of Canadian corporations. Directors are regarded as fiduciaries of their corporation, and as such, are required to exercise a duty of care, to act honestly and in good faith, and to ensure that they protect the corporation's interests. Other statutes (such as the [Income Tax Act](#)), impose other responsibilities on corporate directors.

The key premise of the Toronto Star / CBC joint investigation, is that the opacity of our corporate registry system, whereby it is almost impossible to identify the real owners of companies, creates an environment of secrecy that encourages money laundering and tax evasion. The Toronto Star [articles](#) make the assertion that "[t]he use of nominee directors is a key channel of tax evasion," and that "[s]ecrecy is at the heart of financial crime."

The conclusions reached in the series of Toronto Star and CBC investigative articles, are that, to curb abuse of the system, Canada needs to adopt a more transparent corporate registry system, such as one [recently adopted in the U.K.](#), which provides that individuals holding more than 25% of the shares or voting rights in a company are listed on a public database. In addition, the articles conclude that some

structures, such as Canadian limited partnerships, help avoid tax because non-resident owners are not required to file a Canadian tax return. This is not entirely correct. Limited partnerships are required to file annual information returns setting out details of their income and the names of the partners who are entitled to such income.

Tax evasion, avoidance and abuse of our financial, corporate, and legal system are deplorable and certainly have negative repercussions for all Canadian taxpayers. It is commendable that the CBC and the Toronto Star have undertaken this investigation, exposing the deficiencies in the system and the opportunities for exploitation that such deficiencies create. We can hope that as a consequence of these articles, the Federal and Provincial governments will act to close loopholes in reporting and accountability and minimize opportunities for abuse. That being said, it is a maxim of Canadian tax law that taxpayers are entitled to arrange their affairs to minimize tax. There are many valid and legal strategies which can be implemented by Canadian taxpayers through effective tax planning.

If you have a tax question or concern, please contact tax lawyer [Sabina Mexis](#), for a consultation. If you have any other legal issues, please contact one of our lawyers at [Devry Smith Frank LLP](#).

### DEVRY SMITH FRANK LLP NEWSLETTER

This newsletter is intended to inform and to entertain our clients and friends. Its content does not constitute legal advice and should not be relied on by readers. If you need legal assistance, please see a lawyer. Each case is unique and a lawyer with good training and sound judgment can provide you with advice tailored to your specific situation and needs. If you would like to receive future newsletters but are not yet on our mailing list, please send your name and e-mail address to: [info@devrylaw.ca](mailto:info@devrylaw.ca)



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