

## ***New Real Property Register May Have Environmental Implications***

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On December 10, 2016, the Ontario *Business Corporations Act* (“OBCA”)<sup>1</sup> will be amended by the *Forfeited Corporate Property Act, 2015* (“FCPA”)<sup>2</sup> to include new record keeping obligations for corporations with interests in land. Ontario companies should be aware that these obligations *may have environmental implications*.

Corporations will be required to prepare and maintain a register of their **ownership interests** in land in Ontario<sup>3</sup>. The register must identify each property, show the date the corporation acquired the property, the date it was disposed and include supporting documents.<sup>4</sup>

For companies incorporated or continued under the OBCA before December 10, 2016, these obligations will not apply for two years, until December 10, 2018. For companies incorporated on or continued on or after December 10, 2016, these new obligations apply immediately.<sup>5</sup>

You may ask how the obligation to maintain this register has environmental implications.

### **Environmental Orders**

Under the *Environmental Protection Act* (the “EPA”),<sup>6</sup> the Ministry of the Environment and Climate Change (“MOECC”) has the authority to issue Orders against a person who “owns or owned or who has or had management or control of an undertaking or property”<sup>7</sup> or the “owner or the person having the charge, management or control of any real property or personal property that is affected.”<sup>8</sup> The EPA defines “owner” differently for various purposes in that legislation, but there is nothing in the OBCA or FCPA to indicate that the EPA definitions will apply.<sup>9</sup>

Corporations will be now obliged to maintain a register that documents each property in which the corporation had or has an “ownership interest”.

Our view is that the MOECC could seek to use this new register to identify prospective ordererees. The MOECC will be able to identify owners, prior owners and those with beneficial or other ownership interests simply by accessing the company’s own register.

<sup>1</sup> *Business Corporations Act*, RSO 1990, c B.16. [OBCA]

<sup>2</sup> *Forfeited Corporate Property Act, 2015*, SO 2015, c 38, Sched. 7.

<sup>3</sup> OBCA at s 140.1.

<sup>4</sup> OBCA at ss 140.1(2) and (3).

<sup>5</sup> OBCA at ss 140(4) and (5).

<sup>6</sup> *Environmental Protection Act*, RSO 1990, c E.19 [EPA].

<sup>7</sup> EPA at s 18(1).

<sup>8</sup> EPA at s 97(1).

<sup>9</sup> EPA at ss 24, 25, and 168.1 have definitions of owner as related to specific Parts of the EPA.

### **Who Has an Ownership Interest?**

Corporations will be obligated to identify “ownership interests” in land in Ontario. Neither the FCPA nor the OBCA defines the term “ownership interest.” “Ownership interests” may well include those who hold a beneficial interest in real property, in addition to registered owners.

If the term “ownership interest” does include holders of beneficial interests in real property, this casts a wide net.

### **Mortgagees and Lessees Beware**

Under the FCPA, real property includes “real property and interests in real property”. The FCPA specifically includes a charge under the *Land Titles Act* (Ontario),<sup>10</sup> and a mortgage, as “real property” or an interest in real property. Could these FCPA definitions inform the meaning of “ownership interest” under the OBCA, obliging mortgagees and lessees to maintain the register?

### **MOECC’S Right to Inspect and Seize Documents**

Under the EPA, the MOECC can inspect and seize any documents or business records related to any acts or offences regulated by the EPA.<sup>11</sup> The MOECC’s seizure powers may include this new register.

In the past, the MOECC has obtained information about land ownership through title searches, interviews and investigations. If this new register can be obtained by the MOECC as the corporation’s business record, then the register will provide an additional source of information.

### **What Do the New Obligations Mean for those with an “Ownership” Interest?”**

The requirement to maintain the new register makes it more important than ever for any corporation that holds an ownership interest in land to know the environmental condition of that land.

Pre-purchase environmental due diligence will be more important than ever, as will having an environmental management plan in place during ownership.

Lastly, documenting the environmental condition on disposition assumes enhanced significance.

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<sup>10</sup> *Land Titles Act*, RSO 1990, c L.5.

<sup>11</sup> *EPA* at ss 156(2) and 160.

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