



# ***Transparency Register Requirements & Bearer Share Elimination***

# Overview

- Why the change?
- Transparency Register of Beneficial Owners:
  - Determining who are significant individuals
  - Gathering information from significant individuals
  - Completing the transparency register
  - Keeping the transparency register up-to-date
  - Access to the register
- Bearer Shares

# ***Business Corporations Amendment Act, 2019 (Bill 24)***

- In spring 2019, the B.C. government amended the *Business Corporations Act* to:
  - As of October 1, 2020, require B.C. private companies to keep a record of beneficial owners in the company's records (known as the transparency register).
  - Immediately eliminate bearer shares in B.C. (May 16, 2020).

# Why the Change?

- These two changes:
  - Increase beneficial ownership transparency,
  - Which prevents the use of B.C. companies to launder money, evade taxes and fund terrorism.
- These changes reflect what other jurisdictions are looking at on an international, national and provincial level.

# International

- Financial Action Task Force (FATF) advocates for changes to protect the international financial system from money laundering and terrorist financing.
  - Canada is a founding member of FATF.
  - The federal government represents all Canadian provinces and territories at FATF.
- Member countries are meant to work towards FATF's 40 recommendations.
- Recommendation 24 calls for transparency of beneficial ownership of legal persons (corporations).
- At minimum, member countries are to:
  - Prevent the misuse of bearer shares or bearer share warrants.
  - Ensure competent authorities have adequate, accurate and timely information on beneficial ownership.

# Canada

- In 2016, FATF concluded: Canadian legal entities are at high risk of misuse for money laundering and terrorist financing.
- The provinces, territories, and federal government begin working together to improve Canada's rating by implementing recommendation 24.
- In December 2017 all Finance Ministers in Canada committed to:
  - Requiring companies to hold accurate and up to date information on beneficial owners that is available to law enforcement, and tax and other authorities.
  - Eliminating the use of bearer shares.

# British Columbia

- B.C. starts to see the impact of money laundering – notably in real estate.
- As part of the 30-Point Plan for Housing Affordability in B.C., government commits to:
  - Increase beneficial ownership information in real estate through the *Land Owner Transparency Act*.
  - Require companies in B.C. to hold accurate and up to date information on beneficial ownership.

# ***Business Corporations Amendment Act, 2019***

- These international, Canadian and provincial initiatives led to the specific changes we are here to talk about today:
  - Creation of a transparency register listing the beneficial owners of the company available for inspection by authorities.
  - Elimination of bearer shares.

# What is a Beneficial Owner?

- FATF definition:

## III. THE DEFINITION OF BENEFICIAL OWNER

### Box 1. Definition of 'beneficial owner' from the Glossary to the *FATF Recommendations*

*Beneficial owner refers to the natural person(s) who ultimately<sup>50</sup> owns or controls a customer<sup>51</sup> and/or the natural person on whose behalf a transaction is being conducted. It also includes those persons who exercise ultimate effective control over a legal person or arrangement.*

<sup>50</sup> Reference to "ultimately owns or controls" and "ultimate effective control" refer to situations in which ownership/control is exercised through a chain of ownership or by means of control other than direct control.

<sup>51</sup> This definition should also apply to beneficial owner or a beneficiary under a life or other investment linked insurance policy.

Note: Footnote reference numbers from the Glossary to the *FATF Recommendations*

- The tests to determine who is a beneficial owner – referred to as significant individual in the B.C. legislation – are based on the FATF definition.

# Significant Individuals

- Section 119.11 sets out the rules for significant individuals.
- Two key ways an individual can be significant:
  - Owning a significant number of shares (119.11(2)(a))
  - Having rights to replace a majority of the directors (119.11(2)(b)).
- Ministry of Finance expects that 90% of significant individuals will be caught through significant number of shares tests.

# TESTS FOCUSED ON SHARES



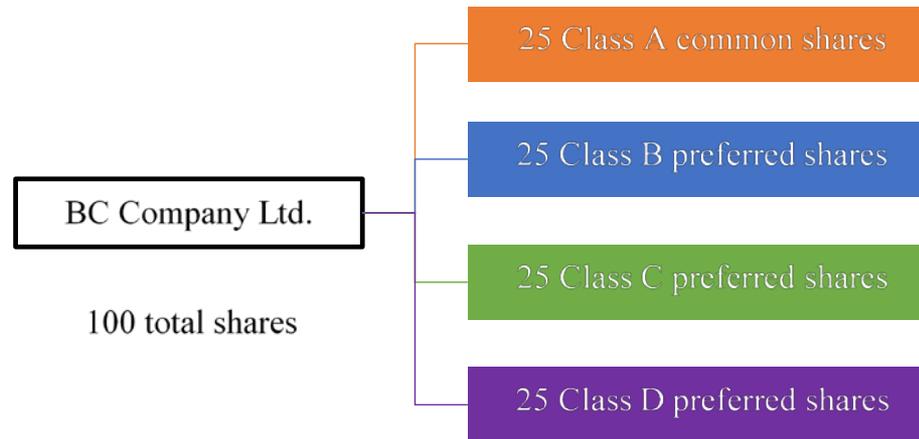
# Significant Number of Shares

- A significant number of shares means 25% or more of either:
  - The total shares of the company, or
  - The votes at general meetings.

$\frac{\text{shares of individual}}{\text{total shares of company}}$  , or  $\frac{\text{votes of individual}}{\text{total votes at GM}}$

- Do not take into account the class of shares; be concerned with the total shares.

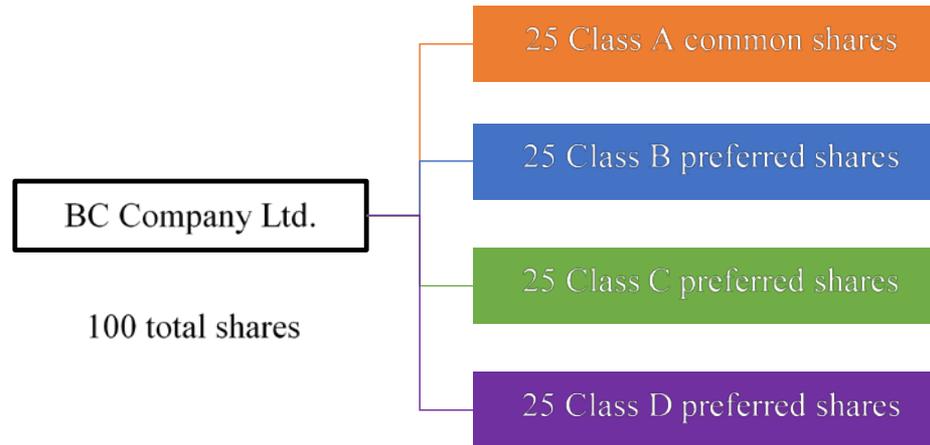
# Example



- If each class of shares are 100% owned by a different individual, then each individual is significant:

$$\frac{25 \text{ class shares}}{100 \text{ total shares}} = 25\%$$

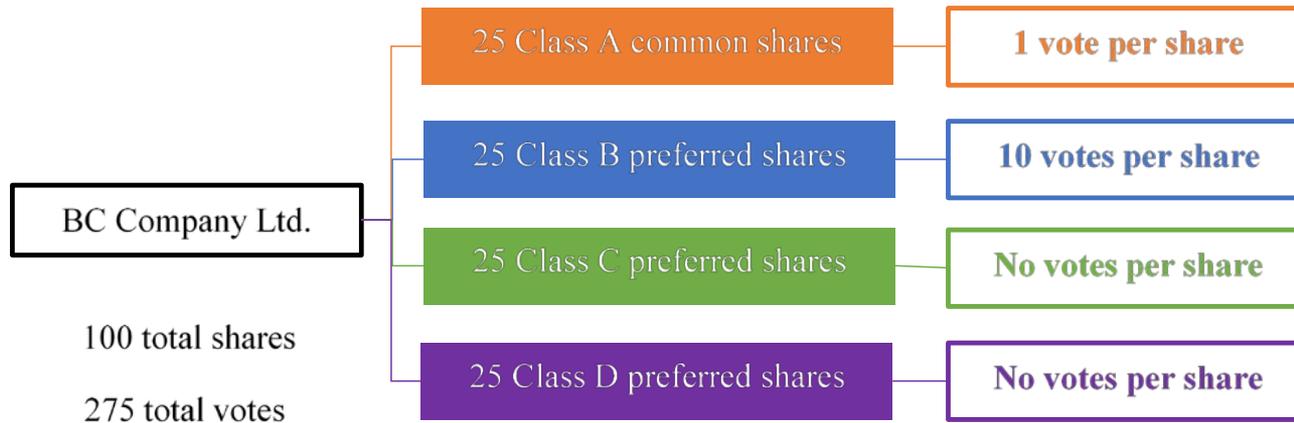
# Example



- Similarly, if Individual 1 owns 10 shares from each class, then Individual 1 is significant:

$$\frac{40 \text{ shares}}{100 \text{ shares}} \geq 25\%$$

# Example



- If Individual 2 owns 10 shares of class B, then Individual 2 is significant:

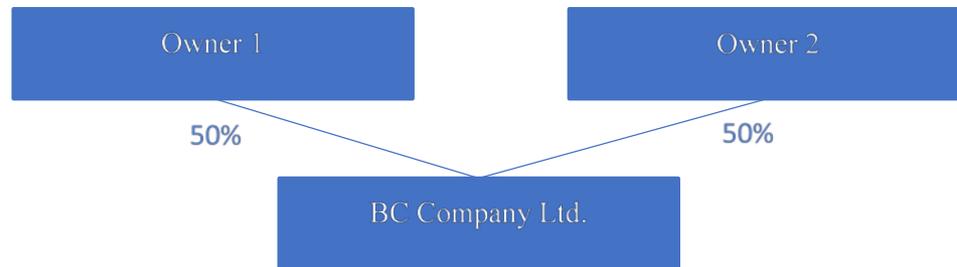
$$\frac{100 \text{ votes}}{275 \text{ votes}} = 36.4\%$$

# What do we mean by “own” shares?

- 3 key ways to own the shares:
  - As the registered owner.
    - The person listed as the owner in the company’s central securities register.
  - Having a beneficial interest in the shares.
    - A registered owner holds the shares on behalf of another through a trust arrangement, as a personal or legal representative or as an agent.
    - The person on whose behalf the shares are held has a beneficial interest.
  - Having indirect control of the shares.
    - Situations where the individual controls an entity(ies) or person(s) that owns shares in the company.
- For all three types of ownership, the starting point is the company’s central securities register.

# Registered Owner

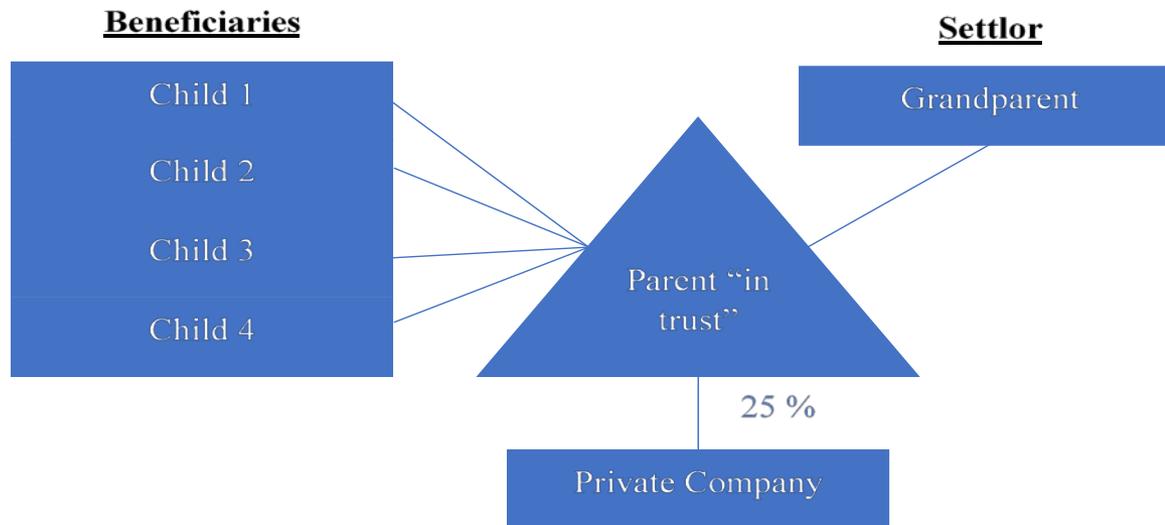
- The most straight-forward manner to own shares in a company.



- Both Owner 1 and Owner 2 will be listed in the company's central securities register as the registered owners.

# Beneficial Interest in the Shares

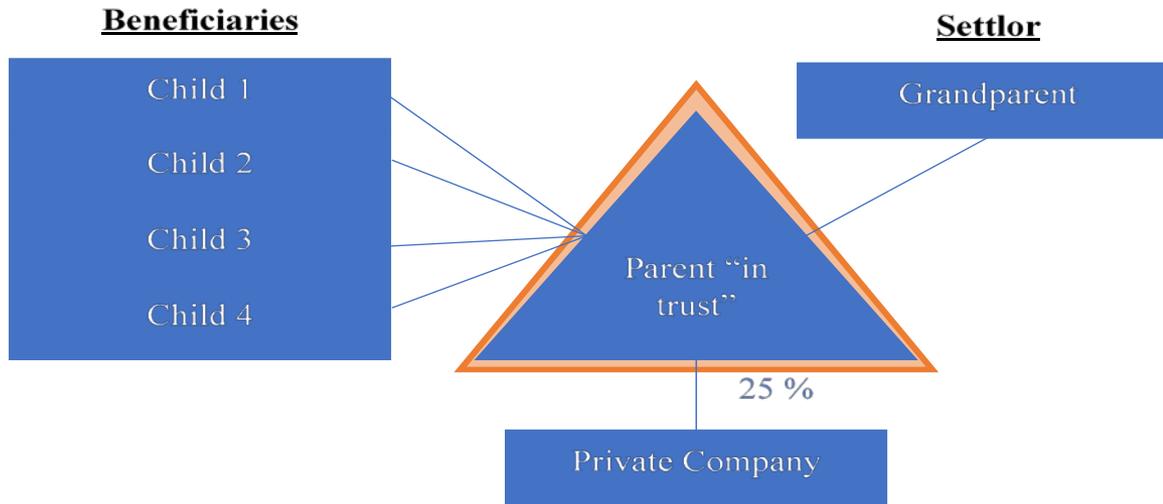
Most common way for this type of ownership to arise is through trust arrangement.



Who are the significant individuals here?

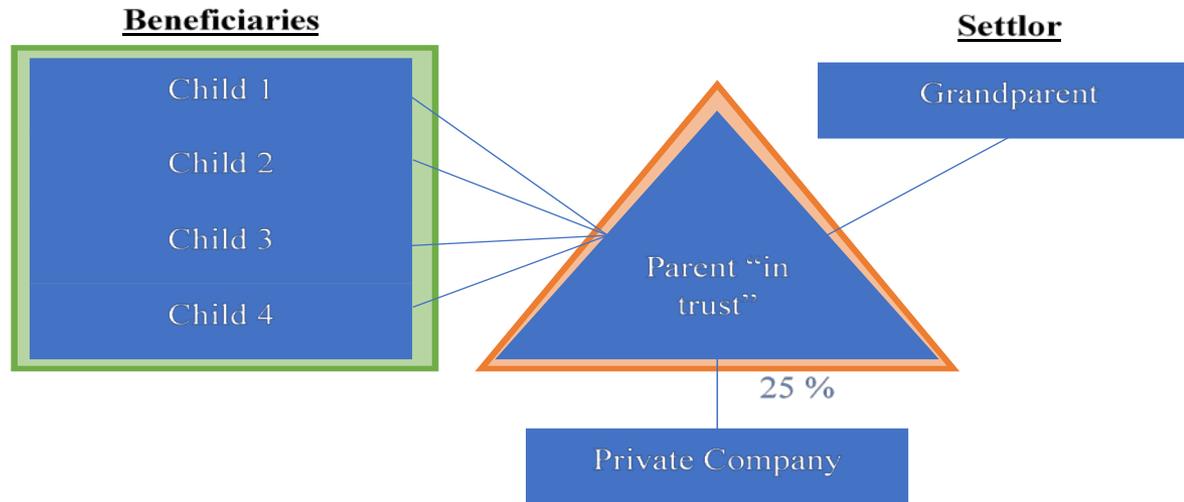


# Beneficial Interest in the Shares



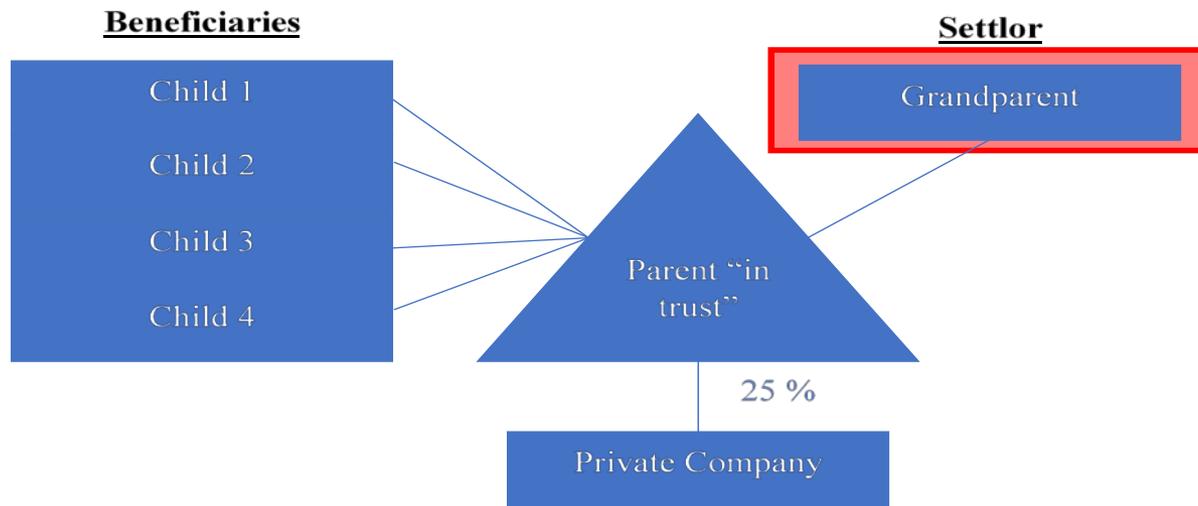
- John Smith is a significant individual because Parent is the registered owner of 25 % of the shares.

# Beneficial Interest in the Shares



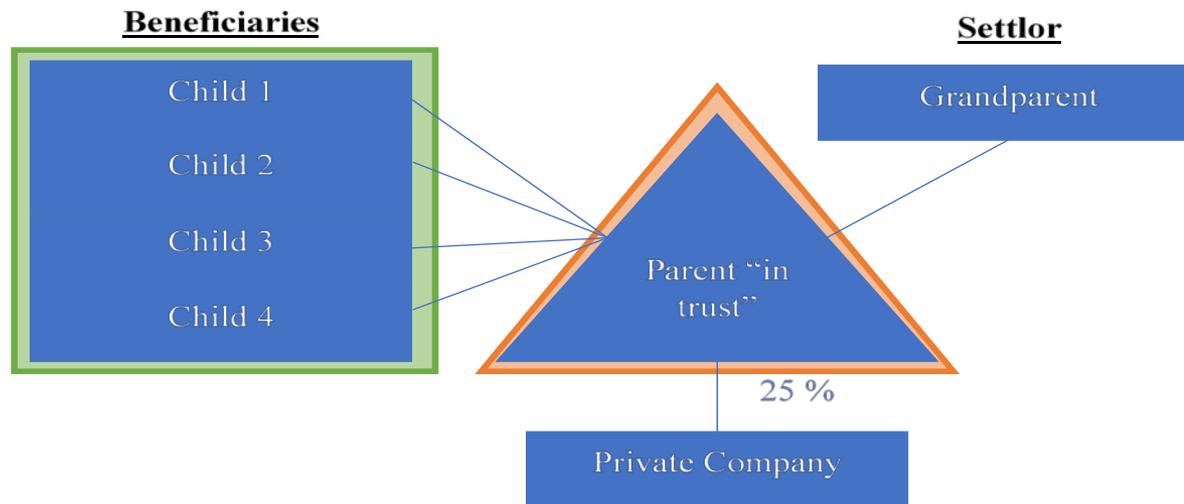
- The beneficiaries, Children 1 through 4 are also significant individuals due to their beneficial interest in the shares held by Parent.
- The shares held by Parent are not divided between the beneficiaries.
  - Each of the four has a beneficial interest in 25 % of the shares.

# Beneficial Interest in the Shares



- Grandparent, by setting up the trust, is not a significant individual (see exception in indirect control).

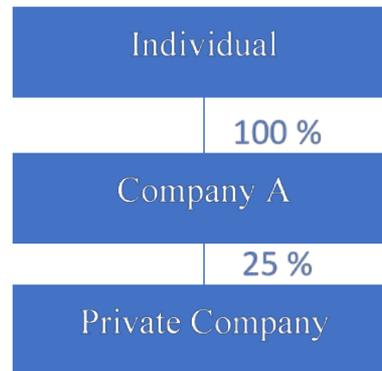
# How Does Private Company Know?



- The central securities register of the private company will only list Parent as the registered owner
  - Unlikely to be any indication of trust arrangement.
- The private company should ask the registered owner to confirm they are not holding the shares on behalf of another.
  - If they are, then the shareholder must provide details to the private company.

# Indirect Control

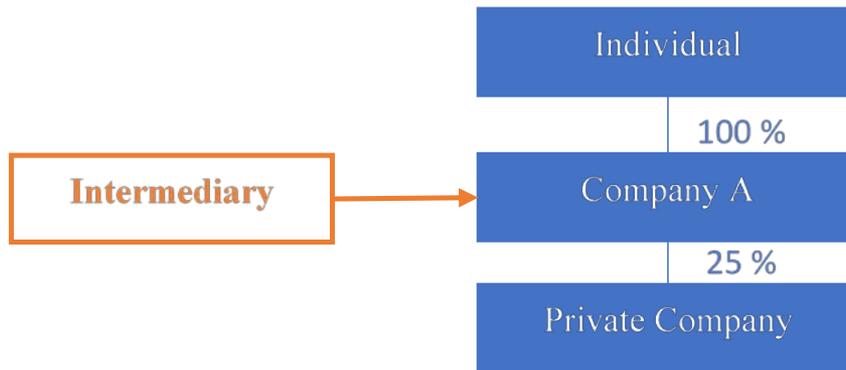
- Situations where there are other entities or arrangements between company and the natural person(s) who control the company.



- Common example is the holding company as illustrated.

# Indirect Control

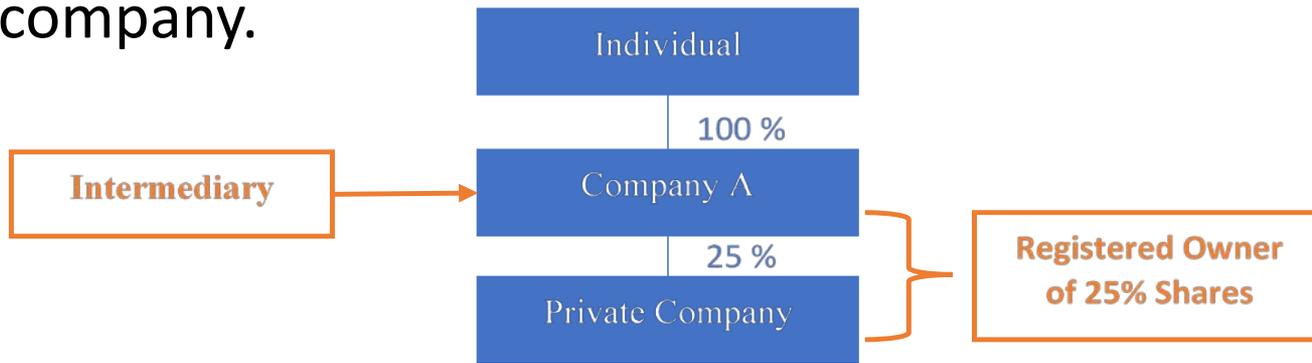
- Situations where there are other entities or arrangements between company and the natural person(s) who control the company.



- Company A is the registered owner of 25 % of the shares in Private Company.
  - If Company A were a natural person, it would need to be listed as a significant individual.

# Indirect Control

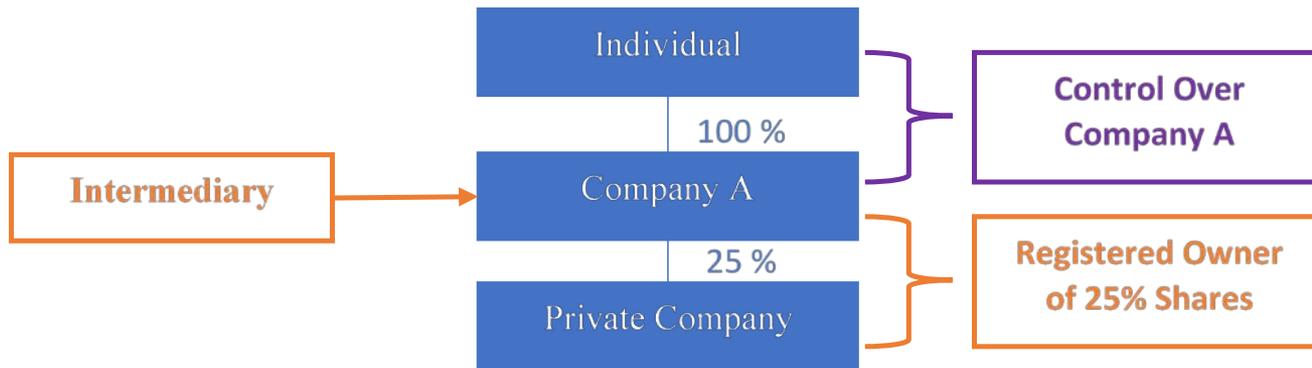
- Situations where there are other entities or arrangements between company and the natural person(s) who control the company.



- Control of a company means **the right to elect or appoint a majority of the directors.**
  - This will often be through having 50% + 1 of the voting shares of the company.

# Indirect Control

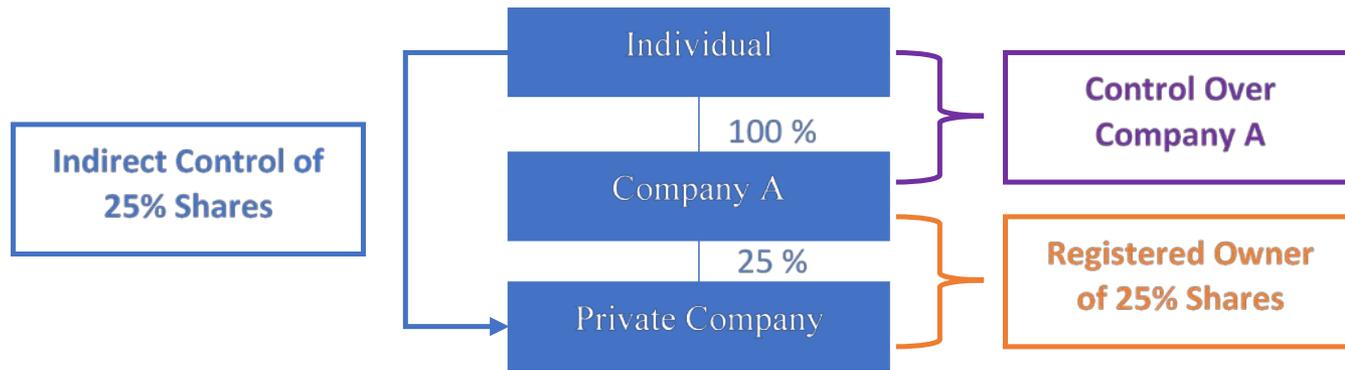
- Situations where there are other entities or arrangements between company and the natural person(s) who control the company.



- Because the registered owner is not a natural person, you must determine who, if anyone, controls the registered owner.
  - Since Individual owns 100% of the shares of Company A, Individual controls Company A.

# Indirect Control

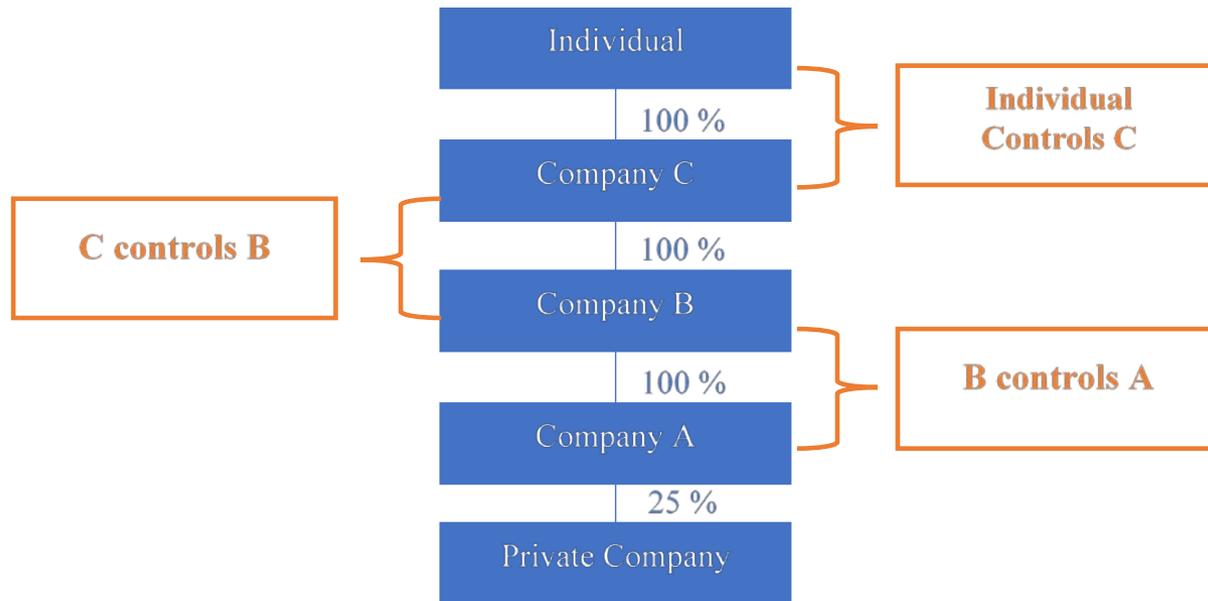
- Situations where there are other entities or arrangements between the company and the natural person(s) who control the company.



- Individual 1 must be listed as a significant individual of Private Company.
- How will the Private Company know? After identifying Company A as the registered owner, Private Company will ask Company A for the identity of the natural person who controls it.

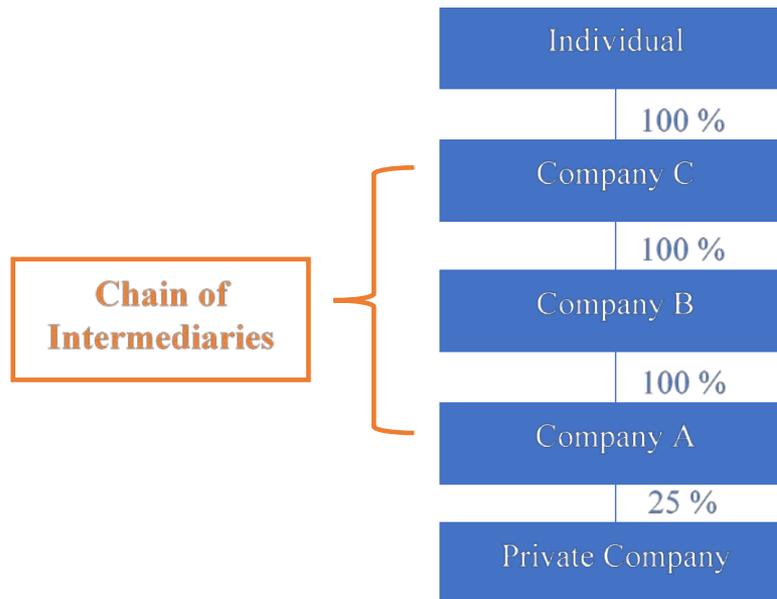
# Indirect Control – Chain

- Keep looking through intermediaries until a natural person is reached or control is lost:



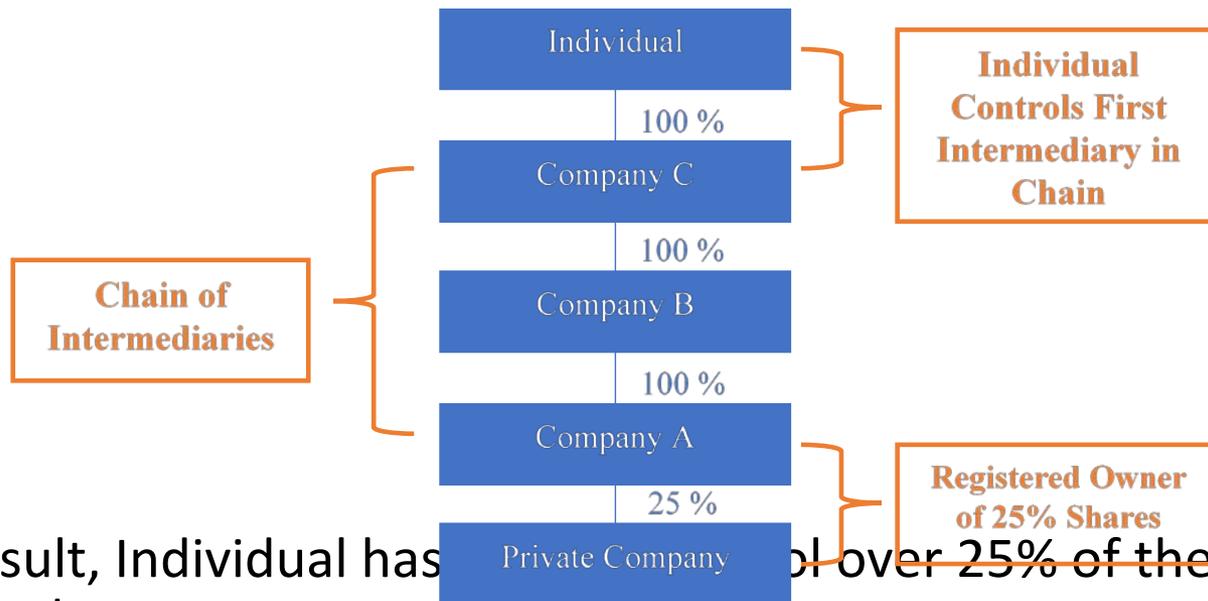
# Indirect Control – Chain

- Company C, Company B and Company A form a chain of intermediaries:



# Indirect Control – Chain

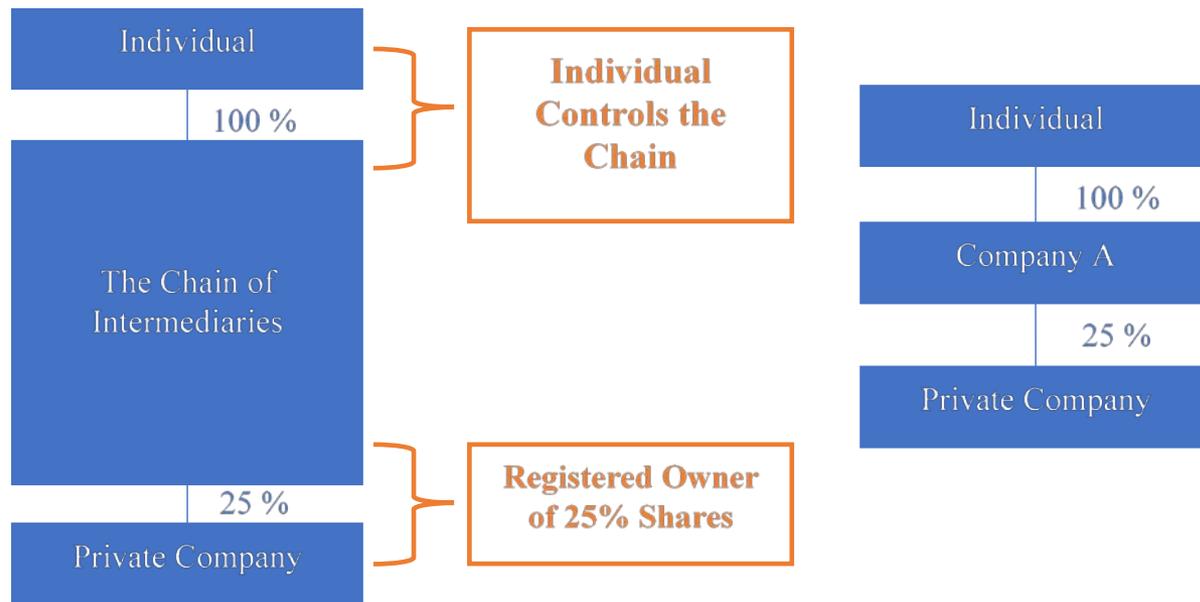
- Individual controls the first link in the chain of intermediaries, and control is maintained throughout the chain.



- As a result, Individual has control over 25% of the shares in the private company.

# Indirect Control – Chain

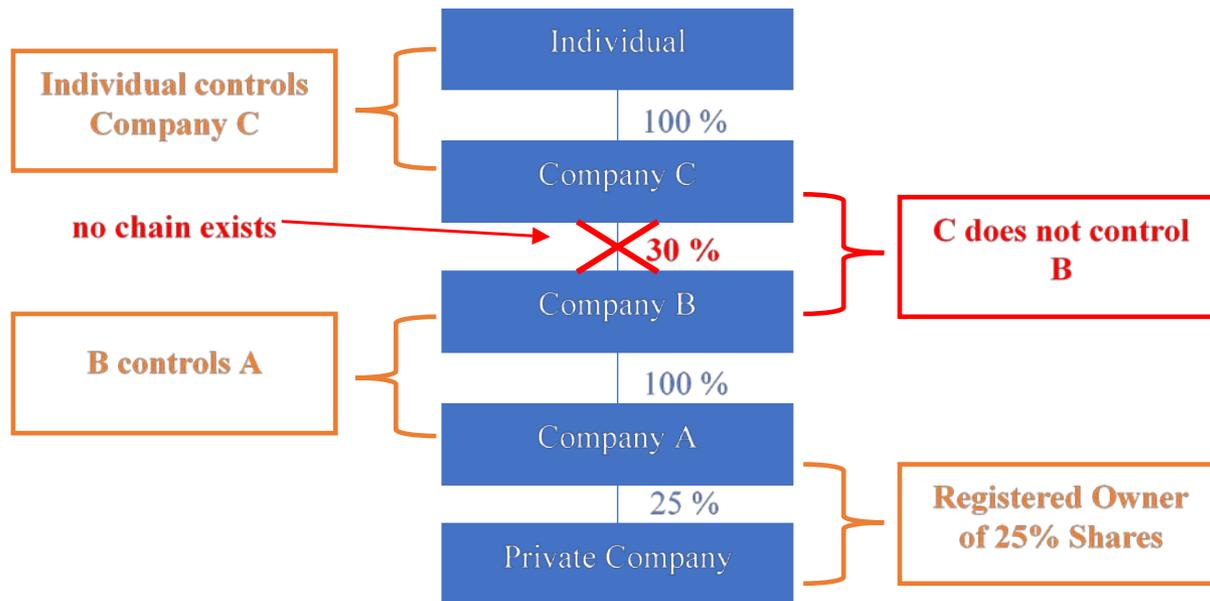
- The chain scenario can be viewed as similar to the no-chain scenario first discussed:



- The key is that control is maintained throughout the chain.

# Chain Example – No Control

- This time Company C owns 30% of the shares of Company B
- Work through the chain from Private Company upwards.



- Because no chain, Individual **does not** indirectly control Company A's shares in Private Company.

# What Is Control?

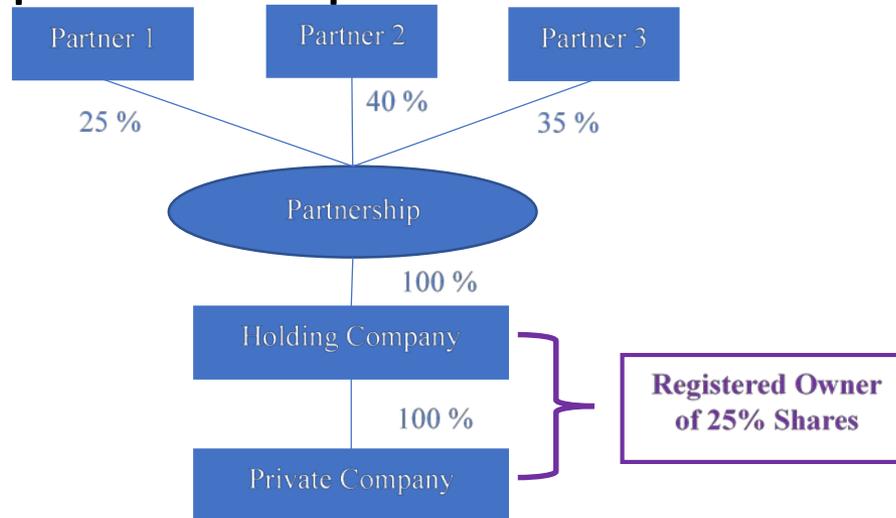
- Corporation – right to elect or appoint a majority of the directors.
- Partnership – partners are deemed to control the partnership (including limited partners and limited liability partners).
- Agent – principal controls the agent.

# What Is Control?

- Trust - Trustee deemed to controls the trust, in addition to:
  - A person who has power to direct how a trustee is to exercise rights associated with shares or rights held in trust, or exercise control over the intermediary.
- Personal or Legal Representative - The personal or legal rep has control, in addition to:
  - A person who has the legal authority to direct how a representative is to exercise rights associated with shares or rights held by the representative, or how to exercise control over the intermediary.

# Indirect Control – Partnership Example

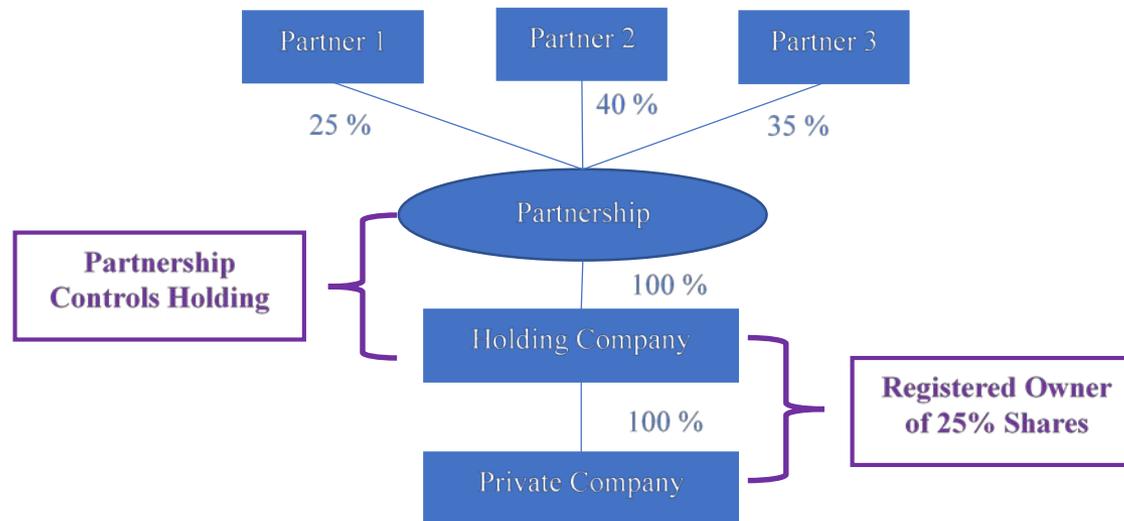
- All members of the partnership are each considered to control the partnership.



- Look for control within the chain of intermediaries plus control of the first intermediary in the chain.

# Indirect Control – Partnership Example

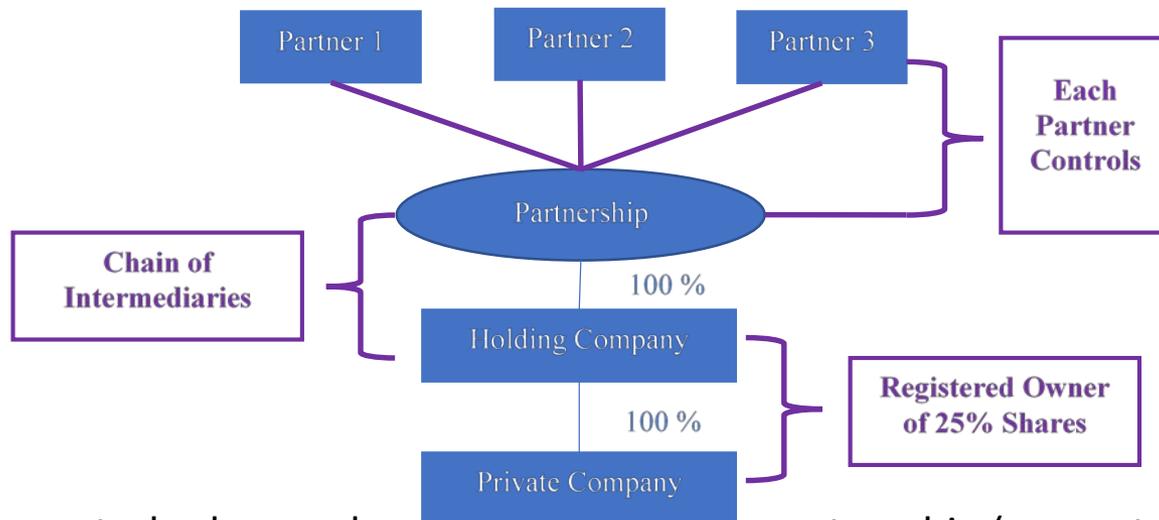
- All members of the partnership are each considered to control the partnership.



- Because Partnership controls Holding, who holds 25% or more of the shares in Private Company, there is a chain of intermediaries.
- Only remaining question is who controls the first intermediary in the chain - partnership?

# Indirect Control – Partnership Example

- Who Controls Partnership?



- Partnership control rule = each partner controls the partnership (percentages not relevant).
- Partner 1, Partner 2 and Partner 3 each indirectly control at least 25% of the shares of Private Company – they are significant individuals.

# TESTS FOCUSED ON RIGHTS



# Right to Elect, Appoint or Remove a Majority of the Directors

- The “tests focused on rights” exist for more unique ownership structures.
- There is some overlap with the 25% ownership rules (“tests focused on shares”).
- These tests are focused on the **right or ability to elect, appoint, or remove a majority of the directors of the company:**
  - Directly;
  - Indirectly; or
  - Through an ability to exert direct and significant influence over an individual with such a right.

# Rights to Replace

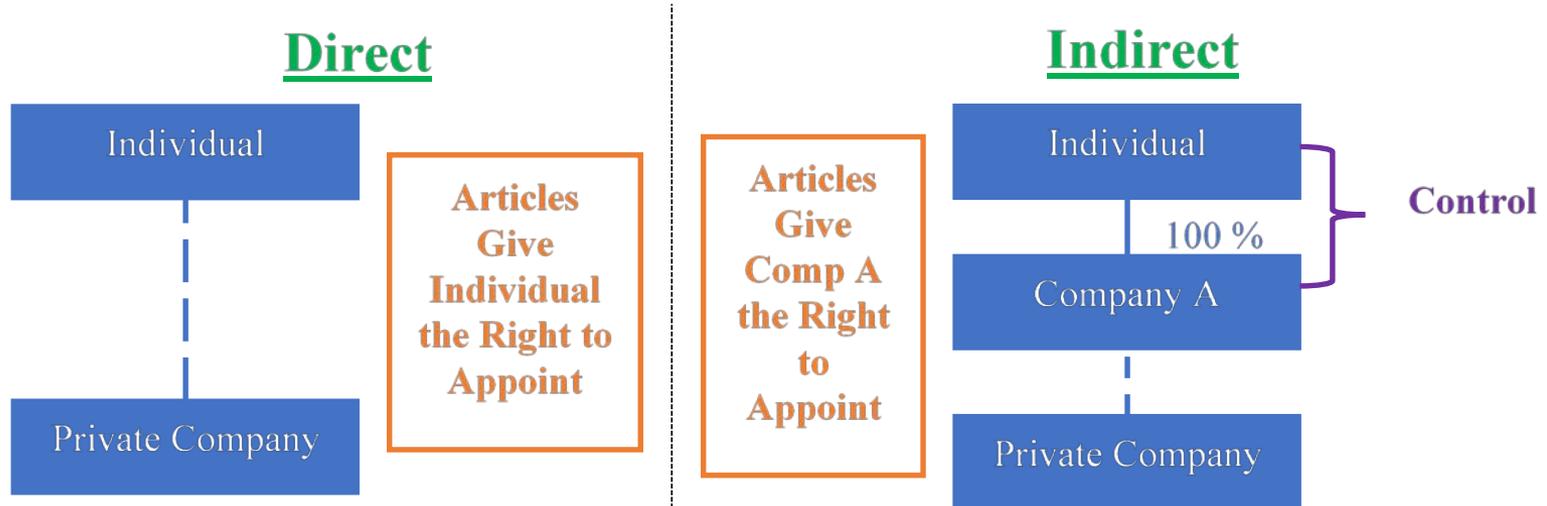
- Individual holds a majority of the shares with votes at the general meeting.
- The *Business Corporations Act* allows the right to appoint/remove directors to be separated from the shares of the company.
- Example:
  - The company's founder has retained the right to appoint the directors for themselves.
    - To be valid, this must be stated in the articles of the company.

# Rights to Replace

- The source of the rights to replace the directors will be the company's articles.
  - Setting out the special rights of each class of shares (election or appointment of directors).
  - Setting out the procedure for election and replacement of the company's directors.
  - Giving appointment powers to specified persons.

# Direct vs Indirect Right

- Direct means one degree of separation from the company.
- Indirect means more than one degree of separation but with control maintained throughout.



- Same rules of indirect control, described above, apply here too.

# Direct and Significant Influence

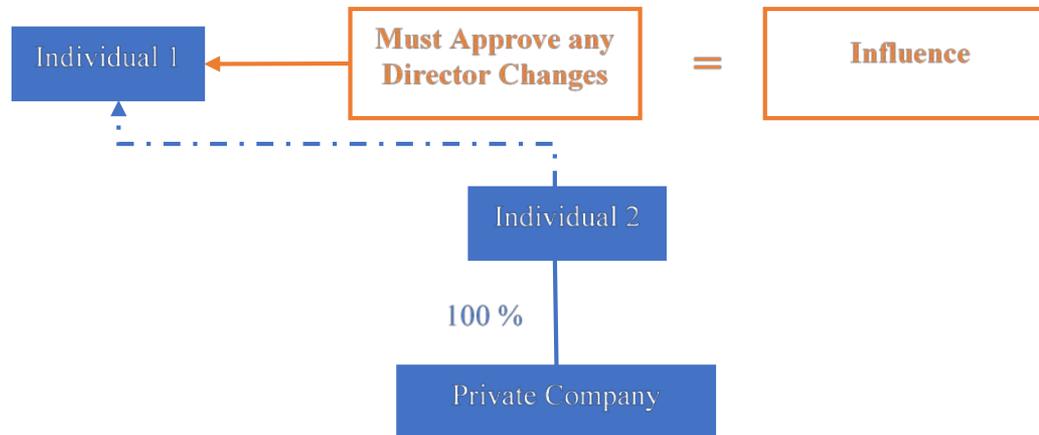
- The ability to exercise direct and significant influence over an individual who can replace the majority of directors directly or indirectly.
- The B.C. definition comes from *McGillivray Restaurant Ltd. v. Canada*, 2016 FCA 99 that interpreted the *Income Tax Act*:
  - “...direct or indirect influence that, if exercised, would result in control in fact of the corporation.”

# Direct and Significant Influence (AKA Control in Fact)

- The specific requirements for this test are:
  - Some person must have a legally enforceable right and ability to change the directors of the company; and
  - Another individual must be able to exercise significant influence over the person with that right.
    - The significant influence must come from a legally enforceable right (such as an agreement or contract).

# Direct and Significant Influence (AKA Control in Fact)

- Only concerned with an individual's ability to influence another individual's decision when exercising right to elect majority of directors.



- The facts are very important for the application of this rule.

# Direct and Significant Influence

- Example:
  - Owner transferred all shares to adult children on the condition that owner must consent in writing to major company decisions, including composition of the board of directors.
    - Owner has direct and significant influence over the shareholders' rights to appoint directors.

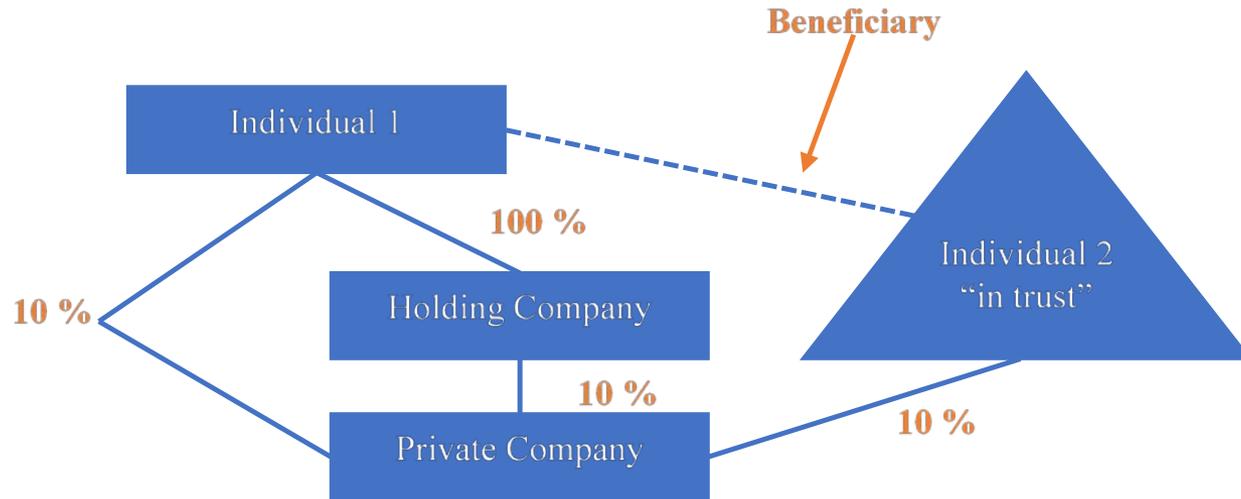
# Direct and Significant Influence

- Example:
  - Owner is the sole shareholder of company.
  - One customer is responsible for 75% of company's revenue.
  - If this customer went to another supplier, Owner's company would be ruined.
    - The customer **does not** have direct and significant influence over Owner.
    - The situation has arisen from business circumstances, not a legally enforceable agreement.

# Combination Rules

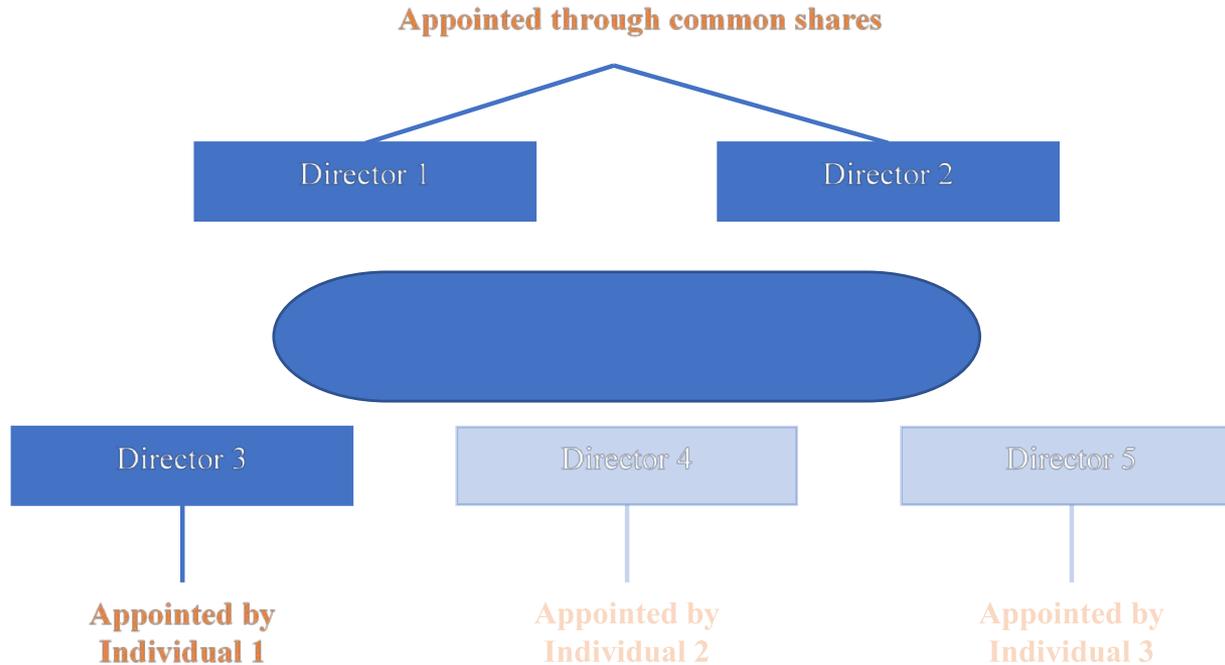
- Qualifying through shares: Look for an individual who has an interest in 25% of the shares through a combination of:
  - Registered ownership
  - Beneficial ownership
  - Indirect control
- Qualifying through rights: Look for an individual who has a right to elect, appoint or remove a majority of the directors through combination of:
  - Right to elect, appoint or remove one or more directors.
  - Indirect control of such a right.
  - Significant influence over a person with such a right.

# Combination Rules Example 1



- Individual 1 has a combined interest in 30% of the shares of the Private Company:
  - 10% registered owner;
  - 10% beneficial interest;
  - 10% indirect control of shares;
- 30% > 25%, therefore, Individual 1 is a significant individual.

# Combination Rules Example 2



- Assume Individual 1 also has 67% of the shares of the common shares.
  - Individual 1 can unilaterally appoint 3/5 of the directors when right to appoint Director 3 is combined with ability to appoint Directors 1 and 2 through her shareholder rights.

# TESTS FOCUSED ON RELATIONSHIPS OR AGREEMENTS

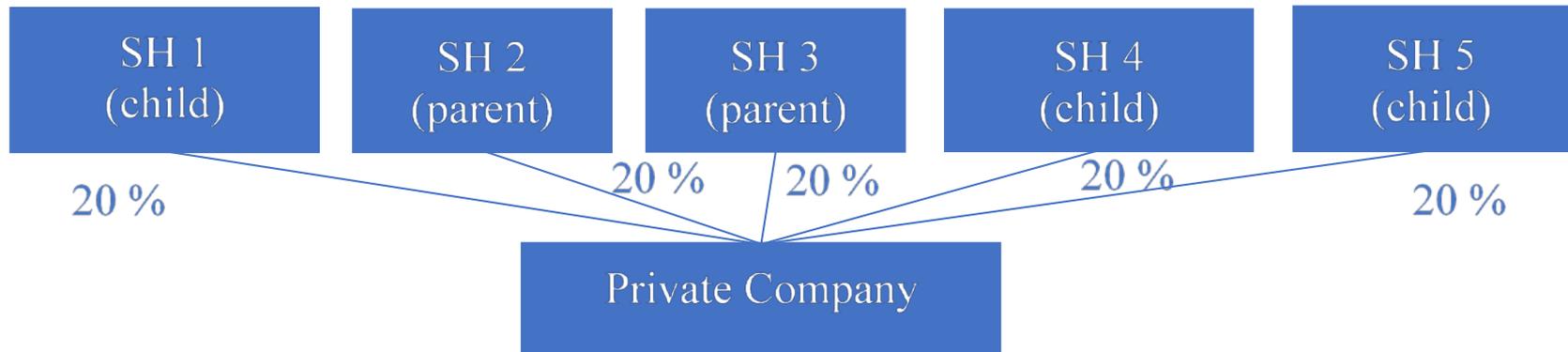


# Acting In Concert

- The combination rules add up the interests of a single individual.
- The acting in concert rules add up the interests of different people.
- Certain relationships are deemed to act in concert:
  - “associate” (c) – spouse, son or daughter;
  - “associate” (d) – relative of the person or person’s spouse living in the same home.

# Acting in Concert Example (Associates)

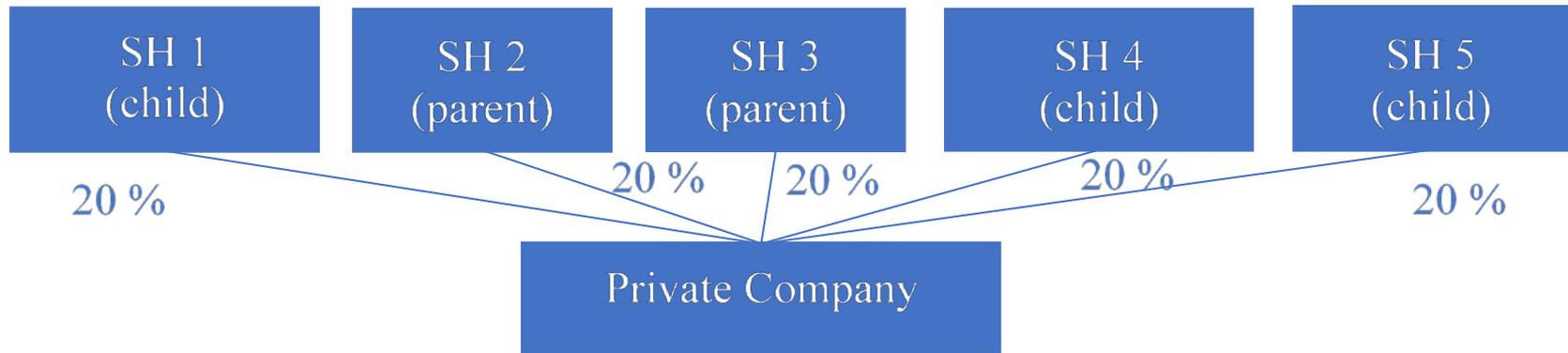
- In this case, no single person exceeds the 25% threshold:



- But, the two parents are deemed to act in concert as their spousal relationship makes them associates. When combined, they hold 40% of the shares such that both are significant individuals.
- The children are not deemed to act in concert with each other or their parents.
  - In order to be deemed to act in concert, both individuals must be associates of each other.
  - The children are associates of the parents, but the parents are not associates of the children.
  - The children are not associates of each other.
- For further information please review sections 119.11(4)(b) and 192(1)(c) of the BCA.

# Acting in Concert Example (Associates)

- In this case, no single person exceeds the 25% threshold:



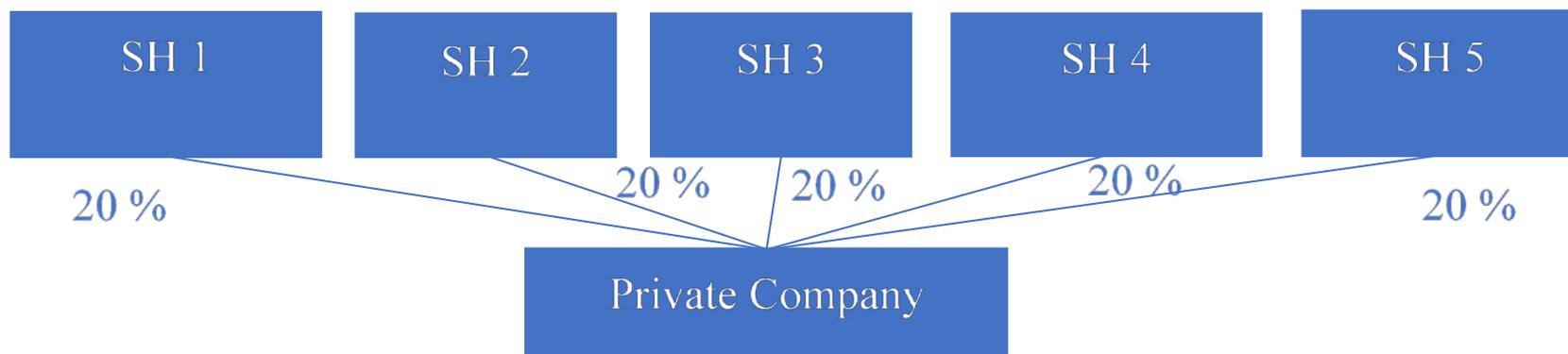
- In this example, **all the children live with their parents at the same residence.**
- In this case, all 5 individuals are associates with one another and therefore all 5 are deemed to act in concert. As a result, each individual must be listed as a significant individual of the company since each is considered to have a 100% interest.
- For further information please review sections 119.11(4)(b) and 192(1)(d) of the BCA.

# Factual Acting in Concert

- Don't all shareholders act in concert? While all the shareholders want the company to succeed, this is not what "acting in concert" means in the transparency register context.
- Acting in concert test: Situations where individuals set aside their independent interest to act on the direction of a "controller".

# Acting in Concert Example (2)

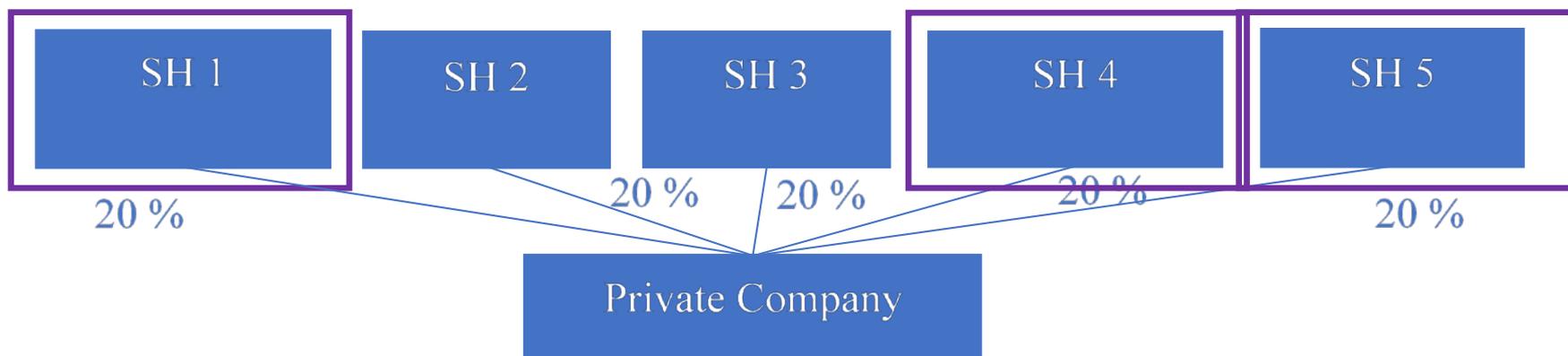
- Private Company has 5 shareholders.
- Articles require all five shareholders to agree on decisions



- Requiring consensus for decisions is **not** acting in concert for the purpose of the transparency register. Each shareholder makes their decision based on what they believe is best for the company.
- In this case, there are no significant individuals as the 5 shareholders do not act in concert.

# Acting in Concert Example (3)

- Private Company has 5 shareholders.
- **New facts:**
  - Articles no longer require consensus, and
  - SH 1, 4 and 5 have agreed to combine their votes on critical company decisions.



- The factual change means SH 1, 4, and 5 are no longer acting independently but instead in concert.
  - Their combined interest of 60 % is greater than 25 % and as a result, all three must be listed.

# Exclusions

- Currently only two exclusions:
  - Public companies
  - Extraprovincial companies
- Exclusions do not apply to intermediaries in the application of indirect control tests.
- Future Exclusion?
  - Ministry of Finance is actively evaluating more exclusions from the transparency register requirements similar to the *Land Owner Transparency Act*.
  - Subscribed to our [website](#) to stay informed.

# How to Complete

- Start with the central securities register as well as the articles of the company (for rights to elect directors).
- Once you have identified that someone is a significant individual, you must contact them to get the required information.
- Similarly, if you aren't certain whether someone is a significant individual, follow up by contacting the person.

# Creating the Transparency Register

- No specific format but must be accessible and contain the following information about significant individuals:
  - full name, date of birth and last known address;
  - whether the individual is a Canadian citizen or permanent resident of Canada;
    - if not, citizenship(s) of the individual;
  - whether the individual is a resident of Canada for tax purposes;
  - date the individual became a significant individual;
  - how the individual is a significant individual.
- Our [website](#) has an optional template.

# Shareholder Requirements

- Shareholders are required to assist the company to gather the required information.
- When a shareholder does not comply:
  - Record the non-compliance in the transparency register;
  - Record the steps taken to get the information;
  - Provide any information you do have.

# Creating the Transparency Register

- When you list an individual in the transparency register, the company is required to notify the individual within 10 days.
  - Notice will often take place during the information gathering stage.
- Significant individuals must remain on the transparency register until 6 years after ceasing to be one.
- The transparency register must be kept at the company's records office (including lawyer's office).

# Updating the Transparency Register

- Companies with a transparency register are required to review the register annually within 2 months of their anniversary date.
- If the company becomes aware of new information relevant to the transparency register (e.g., share sale), the register must be updated within 30 days.

# Access to the Transparency Register

- Accessible by directors of the company as well as:
  - Police officers (*Police Act* or RCMP)
  - Tax authorities of BC or Canada
  - Certain Regulators:
    - BC Securities Commission
    - BC Financial Services Authority
    - FINTRAC
    - Law Society of British Columbia
- Access is restricted to during statutory business hours.

# Bearer Shares

- Bearer Share Certificates have not been allowed under the BCA since 1973.
- The amendments require any outstanding bearer shares to be exchanged for registered shares before exercising any of the special rights attached to them.
- Likewise, warrants issued as dividends must now set out name of the person to whom it is issued.
- This change took effect on May 16, 2019 and applies to all BCA companies (public and private)

# Public Registry Consultation

- The B.C. government is seeking feedback on establishing a government-maintained registry of company beneficial ownership that could be public.
- Read more details [on government's website.](#)
  - Your input is greatly appreciated.

# Contact Information

- [FCSP@gov.bc.ca](mailto:FCSP@gov.bc.ca)
- [BCABO@gov.bc.ca](mailto:BCABO@gov.bc.ca) (temporary address)
- [FIN.Minister@gov.bc.ca](mailto:FIN.Minister@gov.bc.ca)
- [Website](#)