



## Who are Shareholders?

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This is an important question, given the common use of the company as a vehicle for doing business. Yet, determining who is a shareholder when the company has not been properly organized could be perplexing. The ease with which a person could be registered as a shareholder of company ought, one would think, reduce significantly, if not eliminate the chance of questions arising as to who is a shareholder. But that is not the case. Too often a company is incorporated, it conducts business for several years, but shares have not been issued to any person. Section 62 of the Companies Act Cap 308 of the Laws of Barbados requires that a meeting, called the organisational meeting, be held after incorporation, at which, amongst other things, the directors authorize the issue of shares. Section 62 of the Companies Act provides as follows:

*“62. (1) After the issue of a certificate of incorporation of a company, a meeting of the directors of the company must be held at which the directors may*

- (a) make by-laws;*
- (b) adopt forms of share certificates and corporate records;*
- (c) authorise the issue of shares;*
- (d) appoint officers;*
- (e) appoint an auditor to hold office until the first annual meeting of shareholders;*
- (f) make banking arrangements; and*
- (g) transact any other business.”*

The board of directors may authorize the issue of shares, but it is likely that no action is taken upon the resolution. For example, a register a shareholders is not drawn or share certificates are not issued to those who subscribed for shares.

The Companies Act requires that there be a register of shareholders, but the provision is not always complied with. Section 170(2) provides as follows:

*“(2) A company shall maintain a register of shareholders showing*

*(a) the name and the latest known address of each person who is a shareholder;*

*(b) a statement of the shares held by each shareholder;*

*(c) the date on which each person was entered on the register as a shareholder, and the date on which any person ceased to be a shareholder.”*

Who is a shareholder of a company is important. Shareholders are the “owners” of the company. Shareholders control the company by reason of their power to appoint and remove directors of the company. Further, shareholders are entitled to payment of dividends. And it is important to identify the persons who are shareholders of a company for the purpose of determining who are entitled to get notice of and attend shareholder meetings and vote. Only members on the register are entitled to vote. Section 109(2) of the CA provides that: *“A notice of a meeting of shareholders of a company is not required to be sent to shareholders of the company who were not registered on the records of the company or its transfer agent on the record date determined under section 106 or 107...”*. These are not exhaustive of the rights of a shareholder. But for these reasons, and others, who is a shareholder is of utmost importance.

The Companies Act does not define who is a shareholder of a company. The terms “allotment” and “issue” of shares are used interchangeably in respect to a party becoming a shareholder. Although not defined statutorily, in English law, the two terms seem to have different meanings legally. In English law, the term allotment seems to be used where a person acquires the unconditional right to be included in the company's register of members in respect of the shares; that is, there must be a binding agreement between the company and the individual to become a shareholder of the company. The contract to become a shareholder could be in writing or could be made orally. The ordinary principles of English contract law apply.

It seems that at common law, a share is regarded as having been issued when the allotment has been registered in the company's register of members, and not before (*National Westminster Bank plc v IRC [1995] 1 AC 119* at 124 (Lord Templeman)). Given that meaning, registration of an allotment is a vital step under English law, as the allottee will not be the holder of the allotted shares, or a member of the company in respect of the allotted shares, until the registration process has been completed, even though the person may have an unconditional right to be entered on the register. In effect, the decision

suggests that shareholder status in a company cannot be obtained by agreement alone, and a person is not be shareholder of a company unless and until his name has been entered in the company's register.

The last-mentioned case was followed in the Australian case of *Unicomb v Official Trustee in Bankruptcy* [2000] FCA 457; 99 FCR 1, where Cooper J similarly held that until the allottee has been entered on the register, that the person is not a shareholder. Cooper J remarked thus (paragraph 48):

*“Once the preconditions in s 13(1)(a) and (b) were satisfied, the applicant had the right to have the shares in AMP Limited issued to him and to be entered in the register of shareholders in respect of those shares. However, until he is entered in the register he is not a shareholder and his legal ownership of the shares is not complete.”*

Our CA follows Canadian company legislation. Naturally one looks to Canadian texts and Canadian decided cases for an answer. The authors of *Halsbury's Laws of Canada* considered a number of scenarios where a person may have subscribed for shares in a company, including the case where “..... *there are persons who have subscribed for shares and to whom shares have been allotted, even though some requisite procedure remains to be satisfied, such as the entry of their names into the registers of the corporation or the satisfaction of some other condition*”. After considering several scenarios, they concluded that “[e]ach of these persons may be a shareholder for some purposes but not for others, and, therefore, may possess the rights, and be subject to the liabilities, of a shareholder vis-à-vis some persons and in some circumstances but not in others.” The authors seem to think that there is some ambiguity in the term shareholder (paragraph HBC-268).

Kevin McGuinness, in *Canadian Business Corporation Law*, 2<sup>nd</sup> edition, page 1105, write that: “*Despite the inherent ambiguity of the term, most basically and strictly defined, a shareholder is a person (1) who has agreed to become a member of a corporation, (2) to whom one or more shares have been issued; and (3) for whom all the required formalities have been completed in connection therewith.*”

There can be no doubt that a person is a shareholder where the person has agreed to become a shareholder of a company, shares have been issued to the person and all

required formalities have been completed, such as the requisite entry being made in the register of shareholders. However, where there is an agreement, but the formalities, such as entry of the person's name in the register of shareholders have not been done, the position is less certain, but the weight of authorities seems to suggest that such a person is not a shareholder.

**You may contact Virtus Legal for legal advice on matters regarding becoming a shareholder of a company and shareholder rights and remedies.**

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