



# Register an interest

DANIEL FRAJMAN TAKES A LOOK AT CANADA'S NEW BENEFICIAL OWNERSHIP REGISTER

PERHAPS TAKING ITS cue from the UK's 2016 introduction of a public register of people with significant control of private companies and certain other entities, Canada has introduced similar legislation,<sup>1</sup> primarily aimed at increasing transparency. The Canadian register, however, is internal to the corporation (in fact, each corporation prepares its own register) and will not be public; rather, it will be available to shareholders and creditors of the corporation only.

Financial institutions will be able to obtain a copy in the context of their compliance with know-your-client (KYC) requirements,<sup>2</sup> and the Canada Revenue Agency (CRA) and Revenue Quebec should be able to receive a copy when exercising their general audit powers. However, there seems to be a grey area relating to how to list in the register any interests in the corporation held by trusts, as discussed below.

## THE NEW RULES

The new Canadian rules were introduced and enacted in late 2018. They come into force on 13 June 2019 and will apply to private corporations formed under the federal *Canada Business Corporations Act*.<sup>3</sup> These new rules will require the corporation to take reasonable steps to go through as many levels of information as necessary and to look through trusts and other corporations in the shareholder structure, so as to list in the register the individuals with significant control (ISCs). ISCs are the ultimate owners or controllers of 25 per cent or more of the corporation, as measured by voting rights or fair market value of shares, or the ultimate controllers in fact of the corporation, regardless of whether there are nominees in the structure.

Shareholders are obliged to respond accurately to the best of their knowledge

(a rare positive obligation for shareholders in Canadian corporate law) if asked by the corporation to provide beneficial ownership (BO) information needed for the register.

Not establishing and maintaining the register as required may lead to a fine of CAD200,000 (unusually large for this kind of statute), to be imposed on a director, officer or shareholder involved in the non-compliance. Non-compliance will be underlined by the new rules: the register must state the annual reasonable steps taken by the corporation to keep the register up-to-date.

## TRUSTS

There may be different views as to how to approach the register in situations where a trust is a shareholder. For example, for a discretionary family trust holding the non-voting common shares of the corporation, value must be considered. In the past, there has been a certain unresolved tension on the valuation issue in Canada, the standard business valuation view probably being that a discretionary trust interest is speculative and therefore has nil value.

On the other hand, the view under family law is often that you 'cannot trust the trust'. In other words, a trust will be disregarded as per a beneficial trust interest held by a spouse who is a party to divorce or legal separation proceedings if, for example, that spouse, as a trust beneficiary, has a history of receiving trust income or controls trust decisions. This view under family law provides that spouse, notwithstanding the discretionary nature of the trust, with an imputed financial means and perhaps rights and obligations in family property owned by the trust.

There is a CRA position that appears to come to a similar result to that family law view relating to discretionary trusts.

This is the CRA's apparent view that a reasonable method by which to value a disposed trust interest would be to value the interest as if the trust assets were fully distributed equally among all the discretionary beneficiaries.<sup>4</sup> Based on that view, value may rest with the beneficiaries rather than, say, the trustees. Perhaps, with the introduction of the new register, additional attention will be paid to that family law view and the CRA position, so as to more definitively determine whether the value of the discretionary trust rests with the beneficiaries. If value rests with the trustees, then Quebec trusts,<sup>5</sup> for example, may need to have a non-family member, i.e. the independent trustee, listed in the register.

## CONCLUSION

Although the new register will be useful to financial institutions in meeting KYC requirements, it could be argued that the new register is an unjustified invasion of privacy. This latter view would be based on the position that tax evasion, money laundering and terrorism financing are not sufficiently problematic in Canada to justify the register, and that the tax department in Canada can, in any event, take steps to access BO information under its general audit power.

<sup>1</sup> In *Budget Implementation Act, 2018*, No. 2 (Canada) (Bill C-86)

<sup>2</sup> 'Know Your Client Requirements' and 'Beneficial Ownership Requirements', issued by the Financial Transactions and Reports Analysis Centre of Canada, at [www.fintrac-canafe.gc.ca](http://www.fintrac-canafe.gc.ca)

<sup>3</sup> See new ss.21.1–21.4 <sup>4</sup> CRA document no. 2001-0111303, 'Beneficiary Added to Discretionary Trust' <sup>5</sup> Where art.1,275 of the *Civil Code of Quebec* requires an independent trustee, such as a professional.



DANIEL FRAJMAN TEP IS A PARTNER AT SPIEGEL SOHMER ATTORNEYS, MONTREAL