

Business

Quebec, federal beneficial ownership disclosure for corporations, trusts

By **Daniel Frajman**

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(April 3, 2020, 8:48 AM EDT) -- Quebec released its budget on March 10, and news on it has justifiably been overtaken by the COVID-19 pandemic, as the health of all is paramount at this time and always. Nevertheless, for those whose practice touches on corporations or trusts anywhere in Canada, it is important to note that a statement in the recent Quebec budget on beneficial ownership disclosure underlines the kinds of rules that will have to be interpreted in the upcoming years in all Canadian jurisdictions in order to apply new rules on disclosing individuals who are the ultimate beneficial owners or controllers of private corporations and sometimes of trusts. This, and a comparison to some of the federal rules on the issue, will be discussed below.

The various levels of government in Canada are beginning to take their cue from such organizations as the OECD and the Financial Action Task Force, and we are therefore beginning to see ultimate beneficial ownership registers pop up in our various Canadian jurisdictions, with the goal of the registers being to promote transparency by looking through trusts and holding companies in corporate structures in order to establish the

individuals with the ultimate significant control of the corporation at the bottom of the structure in question. Such individuals are usually those with at least 25 per cent of the votes, or sometimes those with 25 per cent of the outstanding shares or share value, or individuals with de facto control of the corporation at the bottom of the structure. In fact, Canada's finance ministers undertook in a December 2017 agreement to each establish a register along these lines in their particular jurisdiction by mid-2019.

Some jurisdictions keep the register internal to the corporation, and available basically to the police in certain circumstances and to the tax department in the event of a suspected material tax offence or if a tax audit is occurring — the federal register under the *Canada Business Corporations Act* (CBCA), and Manitoba's and British Columbia's registers. These jurisdictions usually point to such public ills as money laundering, tax evasion and terrorist financing as being matters they are trying to combat through these registers.

In jurisdictions where in addition there appears to also be an explicit desire to combat fraud generally among counterparties to transactions, the register tends to be a public one and searchable on the Internet (the U.K., EU and Quebec's register currently scheduled to be in place in 2021 as announced in the recent Quebec budget). There is a debate as to whether such registers should be internal or public, with reduction of business red tape supporting internal registers, and the need for transparency supporting the public ones.

With this background, and having worked with the federal CBCA register for over a year now since that legislation was released, it is interesting to note that with regard to corporate beneficial transparency, there are some very new developments regarding trusts and beneficial ownership:

- The CBCA provisions (in force since June 2019) on registering internally the individuals with ultimate beneficial ownership of a company do not expressly deal with trusts as a shareholder, but a widely held view is that for a typical family discretionary trust holding common and non-

voting shares (the trust), usually it would be the trustees of the trust who would be named in the register as those with control, and not the beneficiaries. This is based on a close reading of the statutory provision in question (s. 2.1 of the CBCA) essentially indicating that a person probably is not a controller if their interest has no votes, and also no value under private law (as opposed to tax law) rules (which is the case, it appears, for most discretionary beneficial trust interests).

- Furthermore, a close reading of that same statutory provision leads to the following widely held view: if the trust does not directly own shares in the company in question at the bottom of the corporate structure, but rather owns shares in an intervening company, even the trustees are not controllers of the company in question. This reduces trust disclosure, but some feel this is a good thing, as this makes the trust easier to administer, and does not require disclosure of beneficiaries with an indefinite interest.
- It remains to be seen, but Quebec may have put some of the above into question in its recent budget, where it was indicated that the public Quebec Enterprise Register (known by its French language acronym, the REQ), which is accessible to all online, will probably change by the second half of 2021 or maybe a bit later, so as to require all companies registered on the REQ (Quebec companies, and also federal and other companies doing business in Quebec) to indicate on the public REQ the individuals with ultimate beneficial ownership (currently on the REQ, only the top three registered shareholders have to be indicated), and to allow searches on the REQ by names of individuals (currently, a search of the REQ is only done by name of company). Quebec also indicated in the budget that it would harmonize with the CBCA definition of who is a controller of a company, which should, it appears, take the above analysis of who controls a trust.
- However, it was also indicated in the Quebec budget that for companies "where ownership or control is ultimately held through a trust, the names of the settlor, the trustee and beneficiaries of the trust (other than minors) will also have to be disclosed." It remains to be seen if Quebec will end up putting such a rule into its implementing legislation (expected to be tabled later this year), and if so if the legislation will apply such a rule to discretionary trusts. It would not appear logical to have such a rule or to allow the rule to require public disclosure of discretionary beneficiaries who do not have a definite interest.

Therefore, the federal and the Quebec jurisdictions have differing views on whether beneficial ownership disclosure should be private to the company and disclosed to the police and the tax department (the federal regime), or made public (the recently announced Quebec regime), and may have differing views on the extent of disclosure for trusts that have an element of control of a company (Quebec possibly having more transparency for such trusts than the federal regime). These are issues that each province and territory will have to deal with as its own corporate beneficial ownership legislation is introduced and comes into force.

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