

Tax Topics

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COVID-19 Update

Federal 5

Provincial 6

Current Items of Interest 6

Recent Cases 7

International News 9

QUÉBEC BILL TABLED FOR QUÉBEC'S (AND CANADA'S *DE FACTO*?) PUBLIC ULTIMATE BENEFICIARY REGISTER

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The register under the *Canada Business Corporations Act* ("CBCA") that each private CBCA corporation must maintain, listing individuals with significant control ("ISCs") with regard to the corporation, has been in force since June 13, 2019. Each private CBCA corporation's ISC register is essentially an internal corporate record available to the Canada Revenue Agency ("CRA") and provincial bodies with similar responsibilities, and to police forces, when they are investigating serious offences, and perhaps also to the CRA and similar provincial bodies under their general audit power.

On December 8, 2020, Québec tabled a bill in the provincial legislature titled *An act mainly to improve the transparency of enterprises* (Bill 78) (the "Québec Bill"), which is meant to set up a public register accessible on-line as part of the Québec Enterprise Register (the "REQ Register"), and that will apply a definition of controlling individual that is roughly equivalent to the ISC definition. The Québec Bill requires entities registered on the REQ Register (mostly corporations incorporated in Québec but also *any corporation incorporated anywhere with activity in Québec that is therefore required to extra-provincially register in Québec*) to publicly post their controlling individuals (each to be called an "Ultimate Beneficiary", or "UB") on the REQ Register. Considering the number of non-Québec corporations that have activity in Québec and are required to be registered on the REQ Register, whether incorporated under the CBCA, a provincial or territorial corporate statute, or the laws of another jurisdiction, it is apparent that the public register called for by the Québec Bill, if it comes into force as Canada's only public register dealing with ultimate control of corporations, will in essence be Canada's *de facto* public ultimate beneficiary register.

Set out below are some of the major points in the Québec Bill, including a comparison with some of the major points in the CBCA's ISC regime. Notable though, is that the Québec Bill appears to be important to the Québec government and therefore is likely to come into force in the foreseeable future given that the issue of corporate transparency was subject to a public consultation held by the Québec government from October to December 2019 (the "Québec Public Consultation"). Also, Québec announced in its provincial budget of March 10, 2020 (the "Québec Budget") that it intended to introduce a bill to set up a public register on corporate control and indicated that the public register requirements would come into force one year after their enactment. The exact timetable for the Québec Bill to move through the legislature is, however, not known at this time.

Firstly though, it is useful to observe that although we all cherish privacy of corporations and their shareholders including trusts, North American jurisdictions have been outliers when it comes to the phenomenon elsewhere in the world of enacting public registers. Other jurisdictions look through as many levels of information as necessary, including punching through levels of shareholdings that may include holding corporations and trusts, and reviewing corporate documents including shareholder and certain creditor agreements, regardless as to whether shareholdings are subject to nominee agreements. As a result, the authorities can determine the actual individuals with significant control, and post publicly with the stated purpose of using up-to-date beneficial ownership information to combat illicit financial flows relating to tax evasion, money laundering, and terrorist financing. The United Kingdom has had such a public register since 2015 (the "UK Register"), many other European jurisdictions have one (the EU *5th anti-money laundering directive* required such public registers by January 2020 and EU nations are at various levels of compliance), and such public registers are also found in a number of Asian and Caribbean jurisdictions, among others.

Canada has therefore agreed in various international forums, including the G8, to come on board as regards corporate transparency, and the Canadian federal, provincial, and territorial finance ministers agreed in December 2017 to amend their respective statutes by July 1, 2019 "to ensure corporations hold accurate and up to date information on beneficial owners that will be available to law enforcement and tax and other authorities". Hence, the CBCA ISC rules have come into force, there are similar rules in some other provinces relating to their corporate statutes that also set up non-public registers that are internal to the corporation (in force in British Columbia, Manitoba, and Prince Edward Island, and apparently close to being in force in Saskatchewan and Nova Scotia), and there is now the Québec Bill which goes further by proposing a public register of the kind that is so pervasive elsewhere in the world. The Canadian federal government issued a consultation paper in February 2020 (titled "Strengthening Corporate Beneficial Ownership Transparency in Canada"), with the consultation ending in April 2020, asking, among other things, if Canada and/or the provinces and territories should have public registers. Some of the provinces, including Ontario, have been largely silent up to now on the issue of these registers.

The CBCA Regime

One of the major points in the CBCA ISC regime is the definition of an ISC (at s. 2.1 of the CBCA), essentially comprised of, after the corporation has been looked through:

- (1) those individuals with at least 25% of the votes or fair market value of the subject corporation arising from shares of the corporation, so long as those individuals are a registered holder or beneficial owner or have direct or indirect control or direction over the shares in question, or
- (2) those individuals with control in fact of the corporation.

These are often vague concepts when applied, and the federal government has not used its power under the CBCA to pass regulations to provide details as to who is an ISC. (Compare to the UK Register for example, where the corporate statute has more details, referring for example to "chains of legal entities" between the subject corporation and the people with significant control, and the UK government has provided statutory guidance indicating, among other things, that when a trust is one of the persons with significant control of the corporation, trustees, and trust beneficiaries who are actively involved in directing the activities of the trust, are persons with significant control.)

Given the lack of regulations in support of the CBCA regime, at this early stage resort has been had when determining who is an ISC, to other definitions scattered about the CBCA, to general principles, and to references to similar statutory wording elsewhere. In brief, as regards the main elements of the definition of an ISC, "registered holder" relates to those listed in the corporate securities register (s. 50 of the CBCA); "beneficial owner" (s. 2(1) of the CBCA) appears to refer to a trust beneficiary with presumably a fixed interest or to a principal under a nominee agreement; and "direct or indirect control or direction" appears to refer to trustees or tutors/guardians (concerning direction) and to directors of significant corporations higher in the corporate chain (concerning control). Significantly, discretionary trust beneficiaries may not fall under any of the foregoing and therefore may not be ISCs. Notable is that the above-mentioned reference in the definition to "direct or indirect" is not stated as applying to holders or owners, which

appears in accordance with the long-standing corporate principle that ownership of shares means direct ownership, not indirect ownership through another corporation (see *Army and Navy Department Store Limited v. Minister of National Revenue*, 53 DTC 1185 (SCC)). "Control in fact" in the ISC definition may be *de facto* control as set out in the tax case of *McGillivray Restaurant Ltd. v. Canada*, 2016 DTC 5048 (FCA), where similar wording in a subsequently amended provision of the *Income Tax Act* dealing with association describes the corporate concept of *de facto* control as the right to effect a change to the board of directors or its powers and need not include operational control. (For example, certain shareholders agreements which may even be considered under certain case law as providing *de jure* control, agreements concerning creditors' or investors' rights, casting votes held by a director or shareholder, etc.). Therefore, as should be apparent, there is a material compliance burden in applying the CBCA ISC definition.

The Proposed New Québec Regime

The Québec Bill appears to give a preliminary idea as to what will be posted publicly on Québec's REQ Register as to corporate control, but it seems that the definition of UB in the Québec Bill is even less explicit than the CBCA ISC definition. It therefore seems likely that Québec will have to issue regulations to provide further details as to who is a UB, and it is hoped that the regulations will on the one hand provide sufficient guidance and therefore reduce the compliance burden, but on the other hand not overreach and perhaps unduly extend the UB definition to all discretionary trust beneficiaries.

The Québec Bill will put the definition of UB at proposed new s. 0.3 of the *Québec Act respecting the legal publicity of enterprises* (the "LPA"), which is the statute that first established the REQ Register in 1994. Therefore, the new UB rules are not in the *Québec Business Corporations Act* (the "QBCA"). In essence, a UB is defined as a natural person (i.e., an individual) who is a "holder, even indirectly", or a "beneficiary", of shares conferring 25% of the votes or fair market value in the subject corporation, or who exercises "control in fact" of the corporation. Proposed amended s. 98 of the LPA indicates that the REQ Register will publicly state "the names, domiciles (it will be possible to state a business rather than a home address) and dates of birth of the ultimate beneficiaries, as well as the type of control exercised by each ultimate beneficiary or the percentage of shares or units each one holds or of which each one is a beneficiary." Several proposed new or amended sections of the LPA indicate that the government may make regulations concerning other conditions for being a UB and/or the terms to be used in describing why one is a UB. Such regulations will apparently be necessary, as otherwise there seems to be an unacceptable lack of clarity as to who is a UB. Furthermore, the Québec Bill does not exempt public corporations from having to declare UBs, but that exemption is undoubtedly intended (the CBCA provides that exemption), and therefore will have to be stated in a regulation.

Focusing further on the lack of clarity in the UB definition, note that it is not clear who is a "holder, even indirectly". The QBCA (s. 33) refers to the corporate securities register as listing shareholders who hold shares, presumably through registered holdings, but does the UB definition also refer to unregistered holders? Given the above-mentioned corporate principle not recognizing indirect ownership, the indirect holding reference in the UB definition seems problematic as regards share ownership. What is a "beneficiary" in the UB definition? Just trust beneficiaries? Discretionary trust beneficiaries in addition to fixed trust beneficiaries? The QBCA may give some clue, but seemingly not a definitive clue, when it defines "beneficiary" (at s. 2 of the QBCA) as essentially a person who holds a security of the corporation (possibly then mixing up the beneficiary element of the UB definition with the holder element), or a person with unregistered rights in a security registered in the name of another person, such as it seems, for example, rights held by a mandator (a.k.a., a principal) regarding a security held by a mandatary (a.k.a., an agent), or rights held by a person (such as a trust beneficiary?) regarding a security held by an administrator of the property of others (often a trustee).

More guidance will be needed to know what a beneficiary is in the UB definition. The *Civil Code of Québec*, in its section on trusts, does not really define the beneficiary of a trust, other than to essentially say that a trust states the persons or purposes who or that are the beneficiaries. Not stated explicitly in the UB definition is the "control or direction" element of the CBCA ISC definition, and more guidance would be needed on that also.

Searches (proposed amended s. 101 of the LPA) carried out by the public of the REQ Register will be able to be made based on the names of UBs and it appears by names of other parties on the register (top three voting shareholders,

directors, officers, or the name of the corporation or other registrant on the register). This is a major departure from the current rule allowing searches by the public by name of registrant only.

It should be noted that the REQ Register also has posted on it other kinds of entities aside from corporations, such as partnerships (general and limited), and trusts carrying on commercial activities, i.e., business trusts (not trusts holding only passive investments such as most family trusts). The UB definition may therefore be suffering from a need to make its terms more general so as to allow them to also apply to those other entities, but this underlines further that regulatory guidance is needed regarding the UB definition.

The Québec Budget signaled in March 2020 that Québec would have a public corporate beneficial ownership register, harmonizing with the CBCA ISC rules, and the budget indicated that "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." In this statement, the Québec Budget seems not to have acknowledged that a CBCA ISC may not include a discretionary beneficiary, and more guidance from Québec will be needed to know which trust beneficiaries are UBs. The fact that the term used in the Québec Bill for a person with the requisite ownership or control is "ultimate *beneficiary*", may be an indication that trust beneficiaries of trusts that are corporate shareholders have a role as UBs, or may on the other hand be a nod to the REQ Register also posting information in relation to partnerships and business trusts, and we hopefully will know more if and when regulations are issued.

One hopes that when the UB definition is clarified by Québec, that UB reporting will not extend to non-profits ("NPOs") and charities. Representatives of the REQ were apparently stating in mid-2020 that this was being studied as regards certain NPOs. NPOs and charities do not have shareholders and often have incomplete membership registers, meaning UB register compliance would provide them with an added cost that often they can least afford. Furthermore, NPOs are not supposed to earn more than ancillary profit under recent CRA interpretations, and charities are already subject to significant CRA regulation. NPOs and charities should therefore not have to be subject to UB reporting from a policy perspective. But we will have to wait and see.

Even before the Québec Bill was tabled, there was a preoccupation with determining whether an entity is required to be registered on the REQ Register. This is because the REQ Register is already robust by North American standards, as under its existing rules a corporation posted on the register has to list its top three voting shareholders in addition to its directors and principal officers. With the new UB rules under the Québec Bill, it becomes all the more important to know when an entity has to be posted on the REQ Register. Those requirements are mostly referred to at s. 21 of the LPA, which, among other situations, requires registration of business trusts operating in Québec, corporations and partnerships (general and limited) formed under Québec law, and also, in essence, corporations and partnerships (general and limited) not formed in Québec but that carry on activity in or own real estate (immovable property) in Québec, or that additionally, for corporations only, have their domicile (i.e., head office, even a paper head office, per art. 307 of the *Civil Code of Québec*) in Québec. "Carrying on activity in Québec" means (s. 25 of the LPA) performing any act for profit in Québec, having an address in Québec, or, either directly or through a representative under a general mandate (agency), having an establishment, a post office box, or the use of a telephone line in Québec. Case law indicates, for example, that performing an act for profit in Québec does not include licensing a trademark into Québec, or entering into a distribution contract with a Québec corporation.

From a policy point of view, why has Québec chosen a public register? The stated reasons for the Québec Bill are telling in this regard. Whereas it is common for governments to refer to this kind of legislation as combating tax evasion, money laundering, and terrorist financing, the Québec Public Consultation in late 2019 referred to a fourth goal, the need to combat fraud generally among counterparties (by allowing parties to better know who they are dealing with in contractual and other matters). The Québec Bill seems to speak to this by saying (at potential new s. 0.1 of the LPA) that the purpose of the REQ Register is not only to provide information to prevent and fight tax evasion, money laundering, and corruption, but also to "provide access to certain information in the context of socio-economic relations." The federal government, and the other provinces, which have essentially been implementing or considering internal rather than public registers, have not been referring to a possible anti-fraud and/or a socio-economic goal for these rules.

During the Québec Public Consultation, comments received from the public ranged from those supporting an internal register on the ground that anything else would be an unwarranted invasion of privacy and create undue red-tape, to those supporting a public register on the ground that consultation by the public allows those consulting the register to help significantly in detecting and reporting false information that has been posted. Québec, with its new bill setting out a public register, seems to have sided more with the latter ground, and entities across Canada and around the world with a sufficient nexus to Québec will eventually have to comply. However, one assumes that as the bill is considered further by the Québec legislature, that the rules that will apply to Québec's proposed ultimate beneficiary register will be clarified through regulations or amendments to the bill.

COVID-19 UPDATE

Federal

CEWS and CERS Regulations Enacted (January 6, 2021)

Amendments to the *Income Tax Regulations* (the "Regulations") pertaining to the Canada Emergency Wage Subsidy ("CEWS") and Canada Emergency Rent Subsidy ("CERS") have been published in the Canada Gazette. Most of these changes were previously announced in the 2020 Fall Economic Statement.

The Regulations are amended to prescribe three additional four-week periods under which eligible organizations can receive continued support through the CEWS and CERS: from December 20, 2020 to January 16, 2021 (Period 11); from January 17, 2021 to February 13, 2021 (Period 12); and from February 14, 2021 to March 13, 2021 (Period 13).

The maximum top-up rate for the CEWS applicable to the new periods was increased from 25% to 35%. The base subsidy rate for the CEWS remains at 40%.

The Regulations are amended to provide that the prescribed amount in respect of furloughed employees for Periods 11, 12, and 13 is equal to the greater of two amounts:

- (i) \$500, and
- (ii) the lesser of
 - (A) 55% of baseline remuneration in respect of the eligible employee determined for that week, and
 - (B) \$595.

The subsidy rates for the CERS remain unchanged for these new periods: a 65% base subsidy and a 25% supplemental Lockdown Support.

Last, an amendment to the Regulations addresses the timing mismatch that has been developing between claim periods (which correspond to fixed 28-day intervals) and reference periods (which correspond to calendar months), which, if left unaddressed, would both result in reference periods being less economically relevant to the related claim period and require eligible entities to wait longer to establish their change in monthly revenues to make a claim. For example, Period 10 ends on December 19, 2020, but requires the applicant to know its revenues for the month of December before making a claim.

To address this issue, the Regulations provide that the reference periods for Period 11 are the same as the ones for Period 10. Consequently, an eligible entity must know its December 2020 revenues to apply for the CEWS or CERS for the claim period that ends January 16, 2021 (i.e., Period 11).

Employers who have been using the "alternative approach" can continue to do so.