

# Update on Beneficial Ownership Transparency in Canada and Internationally

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With transparency requirements for private corporations and their trust shareholders leading increasingly to publicly accessible corporate beneficial ownership registers in Europe, and with the United States enacting the reporting of similar information in an internal register to be maintained by the US treasury department, it is an opportune time to set out below a brief update on beneficial ownership transparency under the Canadian federal, Quebec and Ontario corporate models, which also applies to trusts that are significant shareholders of the subject corporation, and at the same time look briefly at the abovementioned developments in Europe and the US, and also at related developments concerning beneficial ownership reporting on trust tax returns in Canada. International developments are in some cases influencing how we deal with these transparency issues in Canada.

## Canadian Corporate Registers

Canada's federal, provincial, and territorial governments are for the most part proceeding with their commitment under a December 2017 agreement to amend legislation in their respective jurisdictions to ensure that

private corporations internally hold accurate information on the beneficial ownership of issued shares and to make that information available to law enforcement and tax and other authorities in the context of investigations including, presumably, tax audits.

Federal rules in this regard, the so-called CBCA model, came into force in June 2019 as amendments to the *Canada Business Corporations Act* (CBCA). Substantially similar rules to amend provincial corporate statutes are in force or close to being so in several provinces—namely, Manitoba, Prince Edward Island, Saskatchewan, Nova Scotia, Newfoundland and Labrador, and Ontario. British Columbia has put in place a somewhat similar model.<sup>1</sup> The Ontario rules, contained in amendments to the *Ontario Business Corporations Act* (OBCA), are scheduled to come into force on January 1, 2023.

In 2021 Quebec enacted its own rules in this regard, the so-called Quebec model, as amendments to its provincial and extraprovincial corporate registration statute, *An Act respecting the legal publicity of enterprises* (often called “the Quebec Legal Publicity Act”). The Quebec model is currently scheduled to come into force in March 2023, although the provincial government has stated that it will issue further administrative or regulatory guidance in order to clarify some grey areas in the rules before they come into force.

The goal of these models is to determine which individuals have significant control of the subject private corporation. (Usually, such individuals control at least 25 percent of the votes or value of the subject corporation, through direct share ownership or other means.) Determining who these individuals are is done by looking through as many levels of information as necessary, including levels of shareholdings that may include holding corporations or trusts, and reviewing corporate documents, including shareholder agreements and other commercial and contractual arrangements, regardless of whether the shareholdings are subject to nominee agreements. Private corporations are required to record individuals with significant control over the corporation (ISCs), as they are known under the CBCA model (which is also therefore known as the ISC model), and individuals who are the ultimate beneficiaries (UBs), as they are known under the Quebec model (which is also therefore known as the UB model).

One substantial difference among the models is that the CBCA model keeps the recorded information internal to the corporation unless required by tax and other authorities, whereas the Quebec model, unique in North America, provides for a public register that lists UBs to be freely accessible (and searchable by names

<sup>1</sup> Unlike under the CBCA model, as well as the Quebec model also referred to in this article, the BC rules ignore the value of shareholdings, consider the actual number of shares held (not just the number of votes) to be important, and administratively consider discretionary beneficiaries of a trust with a significant interest to be “significant individuals.”

of corporations, UBs, directors, and principal officers).<sup>2</sup>

Another notable substantial difference among the models is that the ISC model applies to corporations formed in the jurisdiction in question. In contrast, the Quebec model applies to all corporations (and other entities, principally partnerships) that are incorporated or formed in Quebec, or anywhere else in the world but with activity in Quebec such that they are required to extra-provincially register in Quebec. Some therefore refer to the Quebec model as Canada's de facto public corporate transparency register.

The following discussion of Canadian corporate registers presents a brief overview of how the CBCA and Quebec models determine ISCs and UBs in certain common scenarios.

### **Direct and Indirect Ownership**

As regards the holding or owning of shares, the ISC rules look only at direct ownership, because apparently the default corporate-law rule,<sup>3</sup> which recognizes only direct ownership of shares and not indirect ownership, would apply. The UB rules, in contrast, specifically recognize both direct and indirect ownership.

### **Control or Direction**

Under the ISC rules, an individual with direct or indirect "control or direction" of at least 25 percent of the votes or value of the subject corporation also is considered to be an ISC, and this rule probably includes, for example, trustees of trusts and directors of corporations with significant control. Some feel that this rule is imprecise and may unduly multiply the number of ISCs. This concern seems to have

been expressed by Quebec, which excludes such control or direction from the UB rules, and also by Ontario, given that the OBCA rules state that Ontario may make regulations defining the meaning of an individual having "direct or indirect control or direction over shares."

### **De Facto Control**

Both the ISC model and the UB model indicate that an individual is an ISC or a UB if the person has any direct or indirect influence that, if exercised, would result in control in fact (de facto control) of the subject corporation (and not just ownership, control, or direction of a minimum 25 percent interest, as described above).

The CBCA provisions for the ISC model refer to but do not define the meaning of de facto control, leading some to take the view that de facto



<sup>2</sup> Quebec's public register is available at <https://www.registreentreprises.gouv.qc.ca/en/>.

<sup>3</sup> *Army & Navy Department Store Limited v. MNR*, [1953] 2 SCR 496; 53 DTC 1185, is a high-level decision that distinguishes between ownership of shares, which is direct, and the statutory creation of indirect ownership in particular circumstances for various purposes.

control under the CBCA may be as set out in a 2016 tax case<sup>4</sup>, where similar wording in the subsequently amended provision of the *Income Tax Act* (Canada) 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 does not extend to operational control of the corporation otherwise arising. In contrast, the UB model, and also the ISC model as it is set out in the OBCA rules, provide a definition of de facto control that appears to explicitly include operational control of the corporation.

### **Joint Control**

The rule on joint control under the ISC model says that two or more individuals who jointly own a minimum 25 percent interest, or who have an agreement or arrangement to vote a minimum 25 percent interest, will all be ISCs. The OBCA rules widen this further to include as ISCs related parties who separately hold such rights (even if each is below 25%) but whose aggregate holdings are at least 25 percent.

The UB rule appears narrower, because it seems to refer only to an agreement relating to a minimum of 25 percent of the vote as giving UB status to all of the individuals subject to the agreement.

### **Trust as a Shareholder**

A trust shareholder of the subject corporation may, for example, have the minimum 25 percent interest in votes or value. A question about the value of a trust's interest under both the ISC and UB models will sometimes arise

after an estate freeze, when common non-voting shares that may have been issued to the trust start with no value and therefore do not meet the 25 percent value minimum, but may meet that minimum later as their value rises.

When a trust has the requisite interest in the corporation, trust beneficiaries with a fixed trust interest would be both an ISC and a UB, since they would likely be seen as a "beneficial owner" under the ISC rules and as a "beneficiary" under the UB rules. Most feel that, under the ISC rules, discretionary beneficiaries under a trust are not ISCs, because there is no basis for it in either the CBCA or other provincial corporate statutes providing for ISCs, which include "beneficial owners" as ISCs but do not refer to "beneficiaries" per se. Under Quebec's UB rules, some feel that a discretionary trust beneficiary is a "candidate beneficiary" and not a trust beneficiary per se, and therefore is not included as a UB.<sup>5</sup>

The ISC model makes no distinction between inter vivos and testamentary trusts as shareholders. However, the UB model indicates that the beneficiaries of a testamentary trust are not UBs.

An unanswered question under the ISC model currently is how to deal with the situation where a trust company is a trustee of the shareholder trust, because it is unclear who might in effect be the ISC of the trust company, which is often owned by a public financial institution. Some have speculated that, if necessary, the highest-level managers at the trust company dealing with the trust would be named as ISCs. In contrast, the UB rules explicitly deal with this situation by indicating that where the UB rules appear to point to

a trust company's representatives as UBs, the analysis stops at that point and the trust company is designated as the UB.

Since the UB model extends to all corporations that carry on an activity in Quebec, it was necessary to address the question whether corporations that are non-profits or charities must report their UBs. Last-minute amendments to the UB rules in 2021 exempted non-profits and charities from having to report their UBs.

### **The European Approach**

The United Kingdom and the European Union have also been grappling with the issue of ultimate beneficial ownership, an effort that has included the implementation of corporate transparency registers. The United Kingdom has been a leader in this regard, having opened a register of persons with significant control of corporations in 2016. The register, which is publicly accessible, attempts to deal with the issue of discretionary trust beneficiaries by indicating that where a trust has significant control, individuals are reported if they have significant influence or control over the activities of the trust.

In the European Union, the *Fifth Anti-Money Laundering Directive* of 2018 required member states to implement publicly accessible company beneficial ownership registers by early 2020. Substantial but not full compliance is now in place. The European-based Financial Action Task Force (FATF) (which has a worldwide membership that includes Canada and the United States) is currently reviewing its Recommendations 24 and 25 on

<sup>4</sup> *McGillivray Restaurant Ltd. v. Canada*, 2016 FCA 99; 2016 DTC 5048.

<sup>5</sup> See Barreau du Québec, "Panel sur la transparence corporative — Nouvelles exigences législatives canadiennes et québécoises," in *Développements récents en droit des affaires* (Montreal: Éditions Yvon Blais, 2020), 331 et seq., at 418.

corporate and trust registers, apparently with a view to strengthening them.

### The US Approach

The United States had been generally inactive with regard to instituting the collection of corporate transparency information for the purposes of a register, but this changed in 2021 with the enactment of the federal *Corporate Transparency Act*, which requires the disclosure of corporate beneficial ownership information for a non-public register maintained by the US Treasury's Financial Crimes Enforcement Network (FinCEN). Principally, entities that are required to report include private corporations and limited liability companies from

subject to the reporting, but refer to individuals who may hold ownership interests in corporations through trusts, and refer to trust beneficiaries holding such ownership interests if they have a right to withdraw, or demand distribution of, substantially all of the assets from the trust or if they are the only allowable recipient of both income and principal from the trust.

### Trust Tax Returns in Canada

The new requirement to report the identity of all trustees, beneficiaries, settlors, and protectors of a trust on the federal T3 trust tax return, and the Quebec equivalent, was postponed by one year to begin for trust taxation years ending after December 30, 2022—that is, generally starting for

requirements. The update notably indicates that the trust reporting will not require the disclosure of information that is subject to solicitor-client privilege, but adds that the reporting will be required for a “bare trust”—that is, a trust that can reasonably be seen to be acting as an agent for its beneficiaries with respect to all dealings in all of the trust's property (thereby adding a new requirement that a bare trust must file a trust tax return). This bare trust filing will be somewhat analogous to the requirement since September 2020 under the Quebec *Taxation Act* to report all “nominee agreements” that involve in essence a Quebec taxpayer or a Quebec property, including trusts that act as agents for beneficial or true owners, by way of a one-time reporting form, which may have to be refiled only if the nominee agreement is amended.

Beneficial owners of the entity include those individuals exercising substantial control or those owning or controlling at least 25% of the ownership interests of the entity.

anywhere in the world that are registered to conduct business in the United States, but excluded are entities with substantial operating activity in the United States (such as those with 20 or more full-time employees, more than US\$5 million of gross annual receipts, and a US physical operating presence).

Beneficial owners of the entity include those individuals exercising substantial control or those owning or controlling at least 25% of the ownership interests of the entity. Draft regulations released in December 2021 relate to a clarification process that has not yet ended, and refer for example to most trusts as not being entities

trust tax returns for the 2022 calendar year. Although there was a lack of guidance as to whether or how to report on discretionary trust beneficiaries, including for the typical family trust, Revenu Québec recently stated its view that, under both the federal and Quebec rules (which are the same on this point), a discretionary beneficiary must be reported, for example, even if the beneficiary has never received a distribution, and even after all of the trust interests have been vested by the trustees in another beneficiary.<sup>6</sup>

In February 2022, the federal government released updated draft legislation for these reporting

### Policy Considerations

One reason why the Quebec corporate transparency register will be public, and the UK register is already public, may be because the registers appear to have a goal of levelling the economic playing field among contractual counterparties—in addition to the often-cited purposes of the CBCA and EU models of combatting tax evasion, undue tax avoidance, money laundering, and terrorist financing. Therefore, the varying approaches in Canada and internationally at least seem reasoned on the issue of whether such registers should be public. But on the varying approaches to whether to report discretionary beneficiaries of a trust with a significant interest, there appears currently to be much less reasoned discussion.