

Wills, Trusts & Estates

Will Quebec's ultimate beneficiary register be delayed and non-public?

By Daniel Frajman



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(January 11, 2023, 10:23 AM EST) -- There has been a wave of corporate, trust and tax transparency that has reached Canada that appears to be continuing unabated, with for example trust tax return filing obligations being expanded for the 2023 tax year, including the requirement to identify trust beneficiaries. Another example is Ontario this past Jan.1 having joined the federal government and group of provinces that oblige corporations formed in their jurisdiction to keep an internal register (accessible to the authorities in the context of an investigation) of individuals (who may not be shareholders) with significant control of the corporation including for example through nominee agreements, trusts, holding companies and de facto control (a Significant Control Register).

Quebec has seemed set to continue this wave of transparency. For example, on its website the Quebec enterprise register (REQ) (an online register of all corporations and other business entities that have activity in Quebec, no matter where in the world the entity is formed, meaning that Quebec's register is of interest to persons across Canada and worldwide) continues to say that Quebec's version of the Significant Control Register

(Quebec's version refers to individuals with control as ultimate beneficiaries, and will oblige registered entities to determine and then list their ultimate beneficiaries on the public and freely accessible online REQ website) will have a March 31, 2023, in force date. Indeed, it does seem almost a certainty that information on ultimate beneficiaries will eventually have to be assembled by corporations and other entities from everywhere that have activity in Quebec. However, and we will find out soon, one wonders if Quebec will really oblige public disclosure on March 31.

Notable in this regard is that the Quebec REQ's current webpages indicate that the upcoming public reporting of ultimate beneficiaries on the REQ "conforms perfectly with the orientation adopted at the international level by different countries." (Author's translation from the original French.) Quebec has been saying this since it released its corporate transparency consultation of 2019 and its provincial budget of March 2020, which state a view that a public corporate beneficial ownership register would not only help combat public ills such as tax evasion, unreasonable tax avoidance, money laundering and terrorist financing, but would also essentially help to reduce fraud generally and level the playing field between counterparties by promoting knowledge as to who one is dealing with. Furthermore, Quebec has noted that a public register promotes accuracy through the possibility of errors on the register being flagged by the public.

Those not in favour of a public beneficial ownership register usually point to the loss of privacy as being disproportionate to whatever benefit the public disclosure would provide. As of yet, no other jurisdiction in Canada or the U.S. has such a public register. In Europe, it has been different, with the U.K. leading the way with a public register in 2016 (and indicating then that public access would promote accuracy and economic relations), and with EU members being required to have a public register since 2020 under the EU's Fifth Anti-Money Laundering Directive. Quebec stated a desire to follow these European examples.

Quebec's rules on ultimate beneficiaries are in the *Quebec Act* respecting the legal publicity of enterprises, as it was amended by Quebec Bill 78 of June 2021.

With this background, one can then speculate that Quebec's ultimate beneficiary register may not require public disclosure by March 31 despite Quebec's previous announcement. In this regard:

- When questioned in December 2022, REQ employees answering general inquiries have said that there might be a one-year postponement of the in-force date for the REQ public access rules (at face value, that would make sense as the rules are complex);
- Notably, the EU's top court, the Court of Justice of the European Union, rendered an important judgment for Europe in this area of law in late November 2022, in the Luxembourg Business Records case. Such EU cases usually receive very little attention in North America as they would usually have no relevance here. This case has received almost no attention in North America;
- This EU case ruled that Luxembourg's public business registry (similar to the public ultimate beneficiary register that Quebec is set to put in force) is invalid under EU human rights legislation, as being "neither limited to what is strictly necessary nor proportionate to the objective pursued";
- In light of the EU judgment, Austria, Belgium, Germany, Ireland, Luxembourg and other European jurisdictions have already closed or are not proceeding with public access for these registers, but rather have or will set up systems allowing government authorities, financial institutions, perhaps members of the media and others showing a legitimate interest (but not the public generally) to access the beneficial ownership information;
- Therefore, does this EU case make it more difficult for Quebec to open up a public ultimate beneficiary register? Is there the potential for Quebec's proposed public register to be challenged under the *Quebec Charter of Human Rights and Freedoms* and the federal *Charter of Rights and Freedoms* as an unreasonable invasion of privacy and/or limitation on security of the person?;
- Would Quebec consider the updated Canadian federal government approach? Currently that updated approach, which is enacted under the *Canada Business Corporations Act* (CBCA) but not yet in force, would be to require the filing of beneficial ownership and control information of CBCA corporations with Corporations Canada, i.e., not publicly, to be accessible by authorities in the context of an investigation.

It will be interesting to see further developments in the next few months regarding the Quebec ultimate beneficiary rules, developments that will be of interest across North America and worldwide.

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