

Reflections presented to the Quebec Ministry of Finance as part of the public consultation on corporate transparency

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Preamble

The Quebec CPA Order is proud to participate in the Finance Ministry's consultation on corporate transparency.

Thanks to our members' expertise in taxation, investigative and forensic accounting, financing as well as company mergers, acquisitions and sales, this is an opportunity for us to put forward solutions to clarify the rules applicable to enterprises to ensure true corporate transparency without this becoming an insurmountable administrative hurdle for bona fide businesses that want to comply with the law.

For a few years now, the accountancy profession has been active on the international and national stage in the fight against money laundering, corruption and tax evasion. The International Federation of Accountants (IFAC) is the initiator of the call for action launched in G20 countries in 2014, and in 2019, joined hands with the International Bar Association (IBA) to fight corruption¹.

For its part, the Order resolutely supports implementing the 15 base erosion measures in Canada. The public, in fact, has a right to expect bold and decisive actions to be taken to end tax avoidance or evasion strategies and the use of tax havens. So, we welcome the Quebec government's unequivocal stand to move in this direction and we assure our cooperation both at the development and implementation stages of the measures that will lead to the achievement of this goal.

¹ International Accountancy and Law Professions Further Anti-Corruption Mandate Ahead of Global Economic Leaders' Meeting, July 18, 2018, online: <https://www.ifac.org/news-events/2018-07/international-accountancy-and-law-professions-further-anti-corruption-mandate>

Mandatory declaration of ultimate beneficiary information to Quebec's Registraire des entreprises (Enterprise Register)

1. In your opinion, is the federal definition appropriate for Quebec and if not, what other model or definition should Quebec consider? Why?

From the very start, we would like to point out that our reflections only concern private enterprises, that is, companies with 50 shareholders or less that are not reporting issuers. They are in fact already subject to the obligations to report to the Autorité des marchés financiers (Financial Market Regulator) which go beyond the requirements of the *Act respecting the legal publicity of enterprises* and allow individuals with effective control to be identified. If adjustments to the regime that is currently applicable to them need to be made, we understand that they would be within the framework of the *Securities Act* and they would be subject to another consultation.

Before picking a definition, it is important to define the ultimate goal of this initiative and differentiate the field of application of the *Canada Business Corporations Act* (CBCA) from the *Act respecting the legal publicity of enterprises* (LPLE). By suggesting the use of the Registre des entreprises (REQ Quebec Enterprise Register) as a vehicle for transparency, the government is showing its will to make transparency a core business value in Quebec.

The one-of-its-kind REQ Quebec Enterprise Register is already a reference in transparency because it gives free access to data about companies doing business in Quebec. The Quebec legal publicity system requires most companies (particularly business corporations) to keep all the information concerning them up to date.

This mandatory disclosure applies to business corporations regardless of their place of incorporation. So, it applies not only to companies incorporated in Quebec, but also federal and international corporations with an immovable real right other than a prior claim, hypothec or activities in Quebec².

In this context, it seems essential to us to go further than the registry stipulated by the CBCA and use the vehicle of the LPLE to enlarge the spectrum of information to be disclosed to the REQ Quebec Enterprise Register for true corporate transparency.

The first principle adopted by the G20 in November 2014 sets out to identify individuals who, by the fact that they hold a certain number of voting shares in a corporation or otherwise, have effective control or are the true beneficiaries of a corporate entity.³

The recent changes to the CBCA require Canadian business corporations keep a register **of individuals holding majority control**. This degree of control is defined by two criteria: the

²Sections 21, 33, 35, 41 and 45, *Act respecting the legal publicity of enterprises*, CQLR, chapter P-44.1

³ <http://www.fatf-gafi.org/media/fatf/documents/reports/Guidance-transparency-beneficial-ownership.pdf>

individual directly, indirectly or at an executive level holds 25% or more of the shares; or without holding 25% of the shares, the individual controls the corporate entity through the direct or indirect influence that he or she exerts on it.

This definition based on share percentage seems too limiting to us and cannot, in our opinion, contribute to achieving the goal of transparency targeted by the government. The presence of a shareholder with less than 25% of shares may be problematic in many respects. Whatever the threshold, effective control in fact depends on a series of factors that are very difficult to define objectively and people who want to use corporate vehicles for illegitimate ends would surely find a way. In addition, it may be of public interest to know the identity of all shareholders and their relationship with the company. Take the example of the *Registre des entreprises non admissibles aux contrats publics* (RENA - Register of Enterprises Not Eligible for Public Contracts) and the importance of knowing effective owners before the government awards public contracts.

On the other hand, the definition of a corporation's "effective control" is open to interpretation and does not allow voluntary disclosure to be imposed under the threat of penal sanctions for defaulting to comply. The idea of real or effective control of a corporate entity has given rise to various precedential interpretations, according to the applicable law, and should not be used to define the obligations, the default of which may lead to penal sanctions.

In the Transparency International technical guide for the implementation of G20 principles concerning ultimate beneficiaries, we notice that the definition of "control" does not enjoy unanimous agreement and each country has its own definition.⁴

In this context, to ensure real corporate transparency and reduce the risk of interpretations that may be detrimental to bona fide companies, the information required from corporations must be clearly defined. For this, we believe that the most effective solution would be to require that all the individuals who are ultimate shareholders of a business corporation that is not a reporting issuer, whatever the type of shares, must be disclosed when registering with the REQ Quebec Enterprise Register. For each share held by a corporate entity, the name of individual shareholders should be disclosed.

To reach the goal desired by the government, it is our strong belief that all shareholder names should be disclosed to the REQ Quebec Enterprise Register. As administrators' names and the existence of a unanimous shareholder agreement, if applicable, must be entered in the register, the REQ Quebec Enterprise Register will have enough information to identify, according to the context, people who have effective control on corporate entities registered in Quebec. Remember that corporations governed by the *Securities Act* will not be subject to this obligation as they come under a specific set of disclosure regulations.

The disclosure of all the details of ultimate shareholders in a private corporate entity would not be a greater administrative burden than identifying shareholders with 25% or more of the voting shares. The legal structure of these entities is generally not so complex to require long-term research.

⁴ *TECHNICAL GUIDE IMPLEMENTING THE G20 BENEFICIAL OWNERSHIP PRINCIPLES*, July 30, 2015, Transparency International, p.4, online: https://transparency.eu/wp-content/uploads/2016/09/2015_ImplementationG20BOPPrinciples_EN.pdf

If the government had to move away from the idea of requiring the disclosure of all the individuals who are shareholders in a corporate entity, it would seem to us, at the very least, essential to reduce the threshold to 25% of voting shares as other countries have done.

In this case, the ultimate beneficiary definition used for the present purposes may resemble the one in section 4 of the *Act respecting international financial centres*, with the necessary adaptations.

***“Ultimate beneficiary,”** at any time, in respect of a corporation or partnership operating an international financial centre as an adviser, means a person or any member of a group of persons, if, directly or indirectly, in any manner whatsoever, the person or group of persons has, at that time, an interest of **more than 10%** in the securities the corporation or partnership manages in the course of the operations of the international financial centre or in respect of which the corporation or partnership provides advice in the course of those operations.⁵*

This option would have the advantage of harmonizing Quebec legislation and avoiding a multiplicity of definitions, each one different from the other.

⁵ Section 4, *Act respecting international financial centres*, CQLR, chapter C-8.3

2. In your opinion, what personal information concerning ultimate beneficiaries should be collected?

Following the OECD's recommendations, the following information should be disclosed when registering with the REQ Quebec Enterprise Register:

- > Beneficiary's full name (given and last)
- > Aliases used
- > Beneficiary's nationality
- > Birthdate
- > Beneficiary's home address
- > Mailing address
- > Jurisdiction of residence for tax purposes
- > Date when beneficiary became shareholder
- > Declaration of relationship to other company beneficiaries

However, to protect privacy, only the beneficiary's name, birthdate and nationality should be made public. In a context of increasing identity theft, it is essential to reduce to a minimum the information that finally enters the register to identify the real owners of the business. The birthdate, which is already used in some registers, particularly court records, is definitely the surest element to distinguish one person from another and prevent mistaken identity.

3. Should some legal forms be exempted from the obligation of submitting information about their ultimate beneficiaries?

We believe that real corporate transparency requires that any legal vehicle used to hold shares must be subject to the obligation of registration and disclosure of its ultimate beneficiaries and this includes the vehicles currently exempted by Quebec legislation. If the law requires total transparency from business corporations, we must expect other legal vehicles to be used to get around these obligations. As an example, trusts that operate a commercial enterprise in Quebec, other than those administered by a registered registrant, have the obligation to register with the REQ Quebec Enterprise Register. The law may require the disclosure of beneficiaries, and possibly the constituent and trustee, to be able to identify the true beneficiaries, according to the type of trust.

As non-profits and other legal vehicles are sometimes used to hide funds, there should be great thought given to identify the different types of entities likely to be used for tax evasion or money laundering and identify their ultimate beneficiaries.

4. In your opinion, should other potential approaches be considered by Quebec?

Without in any way questioning the merits of the new disclosures need to counter money laundering, tax evasion and aggressive tax avoidance, the Order believes that it would be appropriate to group them together in a single form.

In fact, we think that it would be possible to reach the goals of transparency set by the government by developing a single form that would collect all the information required by various registers and public organizations.

The centralization of the process would have the advantage of minimizing the risk of error that preparing several declarations by various professionals may entail and not burdening businesses with an additional administrative burden. Simplification will only contribute to the goal of corporate transparency.

Other considerations

1. Among the other considerations presented, which resonate with you? Why?

Impact on competition and competitiveness in Quebec

We do not think that greater transparency will have a negative impact on competitiveness in Quebec. Besides, we have not found any studies showing that Scandinavian countries, which serve as models in this respect, have suffered significantly in their competitiveness or economy.

On the other hand, the laxity of some jurisdictions in this respect has the effect of making responsible corporations and potential investors flee, as pointed out by Matthew Davis and reported in the observations of authors Gaston Gelos and Shang-Jin Wei⁶:

“(...) at least when it comes to attracting much needed foreign capital, a lack of transparency indeed may affect economic performance by repelling international investors. ‘There is relatively clear evidence,’ they state, ‘that low transparency ... tends to depress the level of international investment.’”

(...)

Indeed, Gelos and Wei find that during economic crises, fund managers “flee non-transparent countries and invest in more transparent ones.”

Finally, Gelos and Wei observe that a lack of transparency seems to make investors somewhat suspicious of economic news.⁷

While consumers, investors and workers are increasingly concerned about the social and environmental performance of businesses, the Order is among those who believe that corporate transparency is the best path to take.

In addition, transparency is a tool to fight against corruption. On this subject, Transparency International insists on the fact that corruption is harmful to long-term economic growth because of its impact on investments, taxation, public spending and human development.⁸ In 2006, a survey revealed that 35% of the businesses in the sample had withdrawn from attractive investment projects because of corruption in the host country.⁹

⁶ GELOS, Gaston, WEI, Shang-Jin, *Transparency and international investor behavior*, online: <https://www.nber.org/papers/w9260.pdf>

⁷ DAVIS, Matthew, *Transparency Encourages Foreign Investment*, in The National Bureau of Economic Research, online: <https://www.nber.org/digest/mar03/w9260.html>

⁸ <https://knowledgehub.transparency.org/helpdesk/the-impact-of-corruption-on-growth-and-inequality>

⁹ https://www.transparency.org/news/feature/five_corruption_myths_that_block_progress

Information quality

It is essential for the information published by the REQ Quebec Enterprise Register to be reliable to ensure the credibility of the register.

So, the REQ Quebec Enterprise Register must have the means to fulfil the government's ambitions where corporate transparency is concerned. It is imperative to equip the REQ Quebec Enterprise Register with additional resources to manage the implementation of new obligations, check the accuracy of information shared and act quickly to obtain substantiating documents for declarations made.

Setting up a timely mechanism to verify and validate the information provided by businesses is essential. Currently, in spite of the means already outlined in the *Act respecting the legal publicity of enterprises*, the information contained in the register is not always accurate or up to date.

The REQ Quebec Enterprise Register must be invested with more active powers, which is currently not the case, to investigate and act against those who do not declare changes within the stipulated 30-day time frame, a period which is actually twice as long as what Transparency International recommends.¹⁰

Penalties

The penalties for non-compliance with the legislation must be dissuasive and commensurate with the importance that the initiative has for the Quebec legislature.

Impact on privacy

Registers that the public can consult to have free access to information about people already exist in Quebec.

A court record search can trace the criminal background or past court cases of a person whose birthdate and address have been made public. The contributions register of the Chief Electoral Officer of Quebec makes public the names, residential municipality and postal code of contributors while indicating the political entities or individuals who were beneficiaries of the contribution. The *Registre des droits personnels et réels mobiliers* (RDPRM Register of Personal and Movable Real Rights) gives public access to the information contained in it and allows people to be identified by their names and birthdates.

We think that making certain information about the ultimate beneficiaries of corporate entities public has limited impact on privacy.

Our law gives a legal personality to corporate entities, but it is important to remember that this is legal fiction. Allowing an individual to do business under a distinct entity, which limits this person's responsibility, is a privilege whose flip side is to show total transparency with regard to the identity of the bearer of this privilege. But the evolution of legal vehicles and the increasing complexity of

¹⁰Transparency International Canada's comments in the context of the consultation on the examination of Canada's anti-money laundering and anti-terrorist financing regime (BA/FAT), May 11, 2018.

corporate structures do not entirely facilitate the achievement of this goal. Corporate transparency is intended to correct this.

Certainly, the information collected must be kept safe and adequate measures must be taken to limit public access to only the information necessary to identify ultimate beneficiaries when the register is consulted. Section 100 of the *Act respecting the legal publicity of enterprises* already grants powers to this effect to the REQ Quebec Enterprise Register to protect sensitive personal information from being consulted. In the United Kingdom, the PSC Register offers the option of obtaining nondisclosure court orders in cases where there is a high risk of violence or intimidation towards declarants who comply with their legal obligation. A similar measure might be considered in Quebec.

Information security

Considering the REQ's digitization and the option of online consultation, it is imperative to block web search robots. A consultation fee, even nominal so that it does not compromise access to the register, may serve as a deterrent to such a practice and generate revenue that may be used to beef up data security. In this respect, blockchain technology offers interesting possibilities to create high-security environments.

Nominee

Mandatory disclosure of nominees has already been included in Bill 42 tabled by the Quebec Ministry of Finance.

2. What measures should the Quebec government take to facilitate implementation?

An information campaign across Quebec and our international network is essential.

Support as well as declaration and registration update guides should be offered, as in the United Kingdom.¹¹

For its part, the Order will create awareness among its members of the new requirements that enterprises will be subject to once the bill is passed.

Finally, as already mentioned, the government should ensure that the REQ Quebec Enterprise Register has the resources necessary to check the information sent to the REQ and act against those who do not fulfil their obligations to ensure the register's reliability and credibility.

¹¹ https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/621568/170622_NON-STAT_Summary_Guidance_4MLD_Final.pdf

3. Apart from the declaration concerning ultimate beneficiaries, should the REQ Quebec Enterprise Register collate and publish other types of information in the register?

As we recommend the application of transparency principles to different types of entities, the nature of the information collated should be adapted according to the structure.

Searching for an individual by name and address in the register

1. Given the repercussions on privacy, would it be desirable to expand the search for an individual by name in the register?

Searching for an individual by name would not be a first in Quebec. This is already the case with the RDPRM Register of Personal and Movable Real Rights, Elections Quebec, court records and the Ethics Commissioner. The Office of the Superintendent of Bankruptcy in Canada also allows for a name search to check if a debtor has already declared bankruptcy.

When the legislature has wanted to take certain issues by the horn, it has been able to set up the necessary mechanisms to ensure access to information of public interest. Caution, however, is advised to avoid abuse and the use of data for purposes other than what it was collected for. In the fight against money laundering, corruption and tax evasion, the government must ensure that it maintains a balance between public interest and protection of the data collected.

2. Should some conditions be imposed for individual name searches? Should exceptions be made?

As part of its tax transparency measures and to avoid the abusive use of name searches, Norway has established a mechanism whereby it automatically sends a notification to the person whose name is searched to inform him or her of the person who consulted his or her file.

Without going as far, setting up a search filter inspired by the City of Québec's assessment portal,¹² which would help identify the person making the request and know the reasons for the search, could be dissuasive enough to prevent the abusive use of the search engine.

Special permission may be granted to certain people (investigative journalists, forensic accountants, professionals, etc.).

¹²https://www.ville.quebec.qc.ca/citoyens/taxes_evaluation/evaluation_fonciere/form_demande_informations.aspx

Mandatory declaration of information about ultimate beneficiaries by all property owners

1. Which of these approaches—creating a new register to collect information about ultimate beneficial owners or entrusting the Registraire des entreprises du Québec (REQ Quebec Enterprise Register) with the job of collecting information about ultimate beneficial owners—should be favoured?

For the sake of efficiency and to avoid further burdening the legal system, it does not seem necessary to us to create a new structure. It would be enough to adapt the architecture of the land register in which information about property owners is currently collated, to new guidelines and transparency obligations.

However, at this time, the land register is not technologically designed for updates. A major modernization effort must be undertaken to allow information about ultimate beneficiaries to be added.

Interim measures would be necessary to update the data in the register according to the new requirements.

2. What should the definition of “ultimate beneficial owner” be?

The ultimate beneficiary is the real owner whether an individual or corporate entity, who actually owns the property. This, by the way, involves rights over the property itself rather than control of the building.

If it is a corporate entity, the REQ Quebec Enterprise Register will allow individuals who are trustees or ultimate beneficiaries to be identified. If it is a trust, the names of the beneficiary, constituent and trustee must be disclosed.

We should not let a nominee serve as a shield.

3. What information about ultimate beneficial owners should be collected?

- > For corporate entities: the Quebec Enterprise Number (NEQ) should be required.
- > For individuals: full name including all last and given names, nationality, birthdate, mailing address, home address.
- > For trusts: identity of trustees, beneficiaries and constituents.

4. What information about ultimate beneficial owners should be accessible to the public?

- > For individuals: name, nationality and birthdate.
- > For all legal entities: Quebec Enterprise Number (NEQ) and headquarters.

