Corporate transparency in Québec: New disclosure obligations coming into force on March 31, 2023

March 02, 2023

On March 31, 2023, significant amendments to corporate disclosure and transparency obligations with the Québec Enterprises Registrar (the REQ), will come into force in Québec. These new disclosure obligations are provided in Bill 78, *An act mainly to improve the transparency of enterprises* (the Transparency Act), which received assent from the Québec National Assembly on June 8, 2021. The Transparency Act amends the *Act respecting the legal publicity of enterprises* (the Legal Publicity Act) and introduces several additional disclosure obligations on enterprises.

We also anticipate that Bill 7, *An Act respecting the implementation of certain provisions of the Budget Speech of 22 March 2022 and amending other provisions* (Bill 7), introduced to the National Assembly on February 1, 2023, will also come into force on March 31, 2023. Bill 7 will amend certain provisions of the Transparency Act.

The adoption of the Transparency Act is one of many measures introduced by the Québec government to combat corruption, money laundering, tax fraud and tax evasion. By requiring the disclosure of additional information to the REQ, notably the disclosure of ultimate beneficiaries, the Québec government is hoping to curb illicit practices by making information surrounding the control of enterprises more transparent.

Although the adoption of more robust corporate disclosure legislation is not something unique to the province of Québec, with both the Canadian federal government and several other provincial governments all having introduced legislation to improve corporate transparency, the province of Québec is the first to adopt legislation that will make the identity of ultimate beneficiaries accessible to the general public.

Affected enterprises

The Legal Publicity Act requires that persons (or certain groups of persons) who carry on commercial activities in Québec be registered with the REQ regardless of their jurisdiction of incorporation. These persons (or groups of persons) typically include corporations, limited and general partnerships, trusts operating a commercial enterprise, cooperatives and sole proprietorships. The obligation for enterprises to disclose and

register with the REQ their ultimate beneficiaries and to provide such other information as required under the Transparency Act will apply (with the limited exception of certain categories of exempt entities) to all persons who are required to register with the REQ pursuant to the Legal Publicity Act as well as to such other persons or groups of persons who voluntarily choose to register with the REQ (collectively, the Registrants).

The persons who are specifically exempted from declaring their ultimate beneficiaries to the REQ include private not-for-profit legal persons, legal persons established in the public interest, reporting issuers within the meaning of the Québec *Securities Act*, certain financial institutions, trust companies governed by Canadian federal law or by the laws of any province or territory of Canada, Canadian banks, certain foreign banks, as well as associations within the meaning of the *Civil Code of Québec* (the Civil Code). Additionally, pursuant to a new draft regulation amending the *Regulation respecting the application of the Act respecting the legal publicity of enterprises*, which was published on January 18, 2023, and is proposed to come into force on March 31, 2023, syndicates of co-owners created under the Civil Code will also be added to the list of entities exempt from registering with the REQ. New regulations may also be adopted in the future to provide additional exceptions to Québec registration obligations.

Concept of ultimate beneficiaries

An ultimate beneficiary is a natural person (that is, an individual) who has a right to benefit from a portion of the income or assets of a corporation or entity or who has a right to direct or influence the activities of such corporation or entity. A corporation or entity can therefore have several ultimate beneficiaries, each of whom must be disclosed to the REQ in accordance with the Transparency Act.

Under the Transparency Act, a natural person is considered to be an ultimate beneficiary of a Registrant if they satisfy one or more of the following conditions:

- The person is the holder, even indirectly, or the beneficiary of, a number of shares or units of the Registrant:
    - conferring on the person the right to exercise 25 per cent or more of the voting rights of the Registrant; or
    - the value of which is greater than or equal to 25 per cent of the fair market value of all of the outstanding shares or units of the Registrant.
- The person has any direct or indirect influence over the Registrant such that, if exercised, would result in the *de facto* control of the Registrant;
- The person is the general partner of the Registrant, or if the general partner of the Registrant is not a natural person, the general partner meets any of the conditions listed above or is a party to a voting agreement described below;
- The person is the trustee of a Registrant (note that any legal person acting as a trustee is considered to be a natural person); or
- The person is the beneficiary of a trust (this only applies in certain situations, however).

In addition, in the event that multiple individuals who directly or indirectly hold shares or units in a Registrant have agreed to jointly exercise the voting rights attached to such shares or units, so as to give them the ability to jointly exercise 25 per cent or more of the voting rights attached to the Registrant’s shares or units, each of said individuals

would be considered an ultimate beneficiary of the Registrant and would thus be subject to the registration obligations under the Transparency Act.

It is also important to note that since the initial adoption of the Transparency Act, another draft regulation, the *Regulation respecting the legal publicity of enterprises*, was introduced on December 21, 2022, which is scheduled to come into force on March 31, 2023. This regulation specifies that an individual who (i) controls, directly or indirectly, a number of shares or units of a Registrant which grants such person the right to exercise 25 per cent or more of the voting rights of a Registrant, or (ii) who holds shares or units in a Registrant whose value represents 25% or more of the fair market value of all the outstanding shares or units of the Registrant, is considered an ultimate beneficiary of such Registrant. The same applies to any individual who controls, directly or indirectly, a number of shares or units in a Registrant that is a party to a voting agreement described above.

In the case of an individual operating a sole proprietorship, the individual is presumed to be the sole ultimate beneficiary of the sole proprietorship, unless the individual declares otherwise.

With respect to the concept of *de facto* control referred to above, such *de facto* control occurs when a person has the ability to significantly influence the decisions of a corporation or entity. In determining whether such influence exists, sections 21.25 and 21.25.1 of the Québec *Taxation Act* (chapter I-3) find application (with the necessary adaptations). As such, in order to determine whether a person has direct or indirect influence over a corporation or entity, all relevant factors in the circumstances must be considered and a legal, documentary and factual analysis of the corporation or entity must be performed.

It is therefore possible that the ultimate beneficiaries of a Registrant be different from the ultimate shareholders/unitholders of such corporation or entity. With the adoption of the Transparency Act, Registrants will now be required to take the necessary measures in order to trace the identity of their ultimate beneficiaries. According to the REQ, taking necessary measures implies a higher standard of care than taking reasonable efforts, and the Registrant must therefore proceed to a rigorous legal, documentary and factual analysis of its stakeholders. This would typically include an analysis of its share capital and any agreements which may influence the manner in which voting rights are exercised in respect to such Registrant.

In certain situations, the Transparency Act may consider the ultimate beneficiaries of a Registrant to be a legal person (and not a natural person). In this case, such legal person would be deemed a natural person for the purposes of the Transparency Act. This is notably the case for legal persons who are themselves exempt from disclosing their ultimate beneficiaries to the REQ. For example, a corporation in which more than 25 per cent of its voting shares are held by a reporting issuer within the meaning of the Québec *Securities Act* may indicate such reporting issuer as being its ultimate beneficiary, without having to go further up the chain of such reporting issuer's ownership to identify the natural persons who are the ultimate beneficiaries of the reporting issuer. In this case, a Registrant would simply disclose the name of the reporting issuer as its ultimate beneficiary, whether or not such reporting issuer is registered with the REQ.

Although in some cases the ultimate beneficiaries of a Registrant are easily identifiable, the exercise may be significantly more onerous for other Registrants, particularly in the case of Registrants having elaborate ownership structures or whose control is subject to various agreements. Furthermore, determining the fair market value of the Registrant's shares or units will also present significant challenges.

Declaring ultimate beneficiaries to the REQ

Registrants will have to provide the REQ with the following information for each of their ultimate beneficiaries: (i) surname and given name, (ii) other names used in Québec under which the ultimate beneficiary identifies itself (pseudonyms), (iii) home address, (iv) date of birth, (v) date on which they became an ultimate beneficiary, (vi) date on which they ceased to be an ultimate beneficiary, and (vii) type of control which may be exercised or the percentage of shares, units or interests held or beneficially owned in the Registrant. Note, however, that under Bill 7, the requirement to disclose the type of control or the percentage of shares, units or interests held in the Registrant would be replaced by a requirement to disclose the condition under which the person became an ultimate beneficiary, as well as either (i) the percentage of voting rights that such person has the right to exercise based on the number of shares or units it holds or controls or beneficially holds in the Registrant, or (ii) the percentage of the fair market value of the Registrant that corresponds to the value of the shares or units of the Registrant that the ultimate beneficiary holds or controls or beneficially holds. According to the *Regulation respecting the legal publicity of enterprises*, the percentage of voting rights or of the fair market value held by the ultimate beneficiaries of a Registrant would be expressed using ranges, namely: (i) 25 per cent to 50 per cent, (ii) greater than 50 per cent to 75 per cent, or (iii) greater than 75 per cent.

Disclosure requirements for individuals listed on the REQ

The Transparency Act requires that the dates of birth of all individuals required to be listed on the REQ be disclosed (in addition to their full names and home addresses whose disclosure is currently already required).

Registrants will therefore have to provide the REQ with the dates of birth and home addresses of each of their directors, officers (such as president, secretary and chief executive officer), partners, individuals who are shareholders and others whose names are required on the REQ of the Registrant. In the event that an individual does not wish to have their home address published on the REQ, they can instead declare their professional address (that is, the address of their principal place of work or business), as applicable. Note, however, that an individual can only have one professional address and that such address must be the same, regardless of the Registrant for which the individual is being disclosed. Furthermore, the REQ will not accept P.O. Boxes as a professional address.

In the event that an individual's professional address becomes invalid, the Registrant will be required to update such individual's professional address within 30 days of the Registrant's receipt of a notice from the REQ. If the Registrant does not update the individual's professional address within said 30-day delay, the individual's home address will be published.

New obligations regarding directors

Registrants will now have to prove the identity of each of their directors by providing the REQ with a copy of such director's identification (photo ID is not required). This obligation applies to any new or existing directors.

Copies of identification documents will be kept by the REQ until a Registrant's declaration of registration or until the Registrant files an updating declaration. The copies of the identification documents will then be destroyed.

Any identification document provided to the REQ must be valid (that is, not expired), legible, issued by a governmental authority and be part of the identification documents accepted by the REQ. The accepted documents differ based on whether the director is a Canadian citizen or a citizen of a foreign country. All identification documents submitted to the REQ must indicate the director's full name and date of birth.

Public information

Most of the information required to be disclosed to the REQ under the Transparency Act will be public, with the exception of the dates of birth, copies of personal identification documents, as well as the home addresses of the individuals required to be listed on the REQ (provided that a valid professional address has been disclosed instead).

In the event that a minor is the ultimate beneficiary of a Registrant, such minor's information will not appear on the REQ. The REQ will nevertheless still indicate that an ultimate beneficiary exists with respect to such Registrant.

An individual may also ask the REQ not to publish their personal information in the event that they have reasonable grounds to believe that the publication of said information would result in a serious threat to their security or well-being. The REQ will then decide whether or not to grant an exception on the basis of the strict exception criteria imposed at law and will also consider the urgency of the situation at hand.

In addition, other government entities and organizations having entered into agreements with the REQ may also be granted access to Registrant information disclosed to the REQ.

As of March 31, 2024, a search function using the first and last names of an individual will also be introduced in order to help identify which individuals are associated to a particular Registrant.

Timeline and next steps

Although the new disclosure obligations required under the Transparency Act come into force on March 31, 2023, the act provides that any newly required information must be submitted to the REQ as of March 31, 2023, and in any event no later than the date on which the filing of the Registrant's next annual updating declaration is due.

Registrants who are currently eligible to file their annual updating declaration with the REQ and who wish to benefit from a longer period before being obligated to disclose the required information under the Transparency Act could therefore file their next annual declaration before March 31, 2023, and thus benefit from an additional year to gather the newly required information.

We understand that the collection of the information required to comply with the new obligations may be significant, time-consuming and may raise several additional questions. We therefore suggest that you do not wait to proceed with the necessary verifications.

Contact us

We invite you to contact any member of our team for additional information or assistance with respect to any of the above.

Please note that this publication is intended to provide general information on novel legal issues and does not constitute, and should not be interpreted as constituting, legal advice on these issues.

By

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