

Trust Reporting Under Federal and Quebec Legislation: A Comparison of Approaches to Transparency

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Abstract

The Financial Action Task Force (FATF), established by the Group of Seven, has set global standards requiring countries to ensure transparency around beneficial ownership of corporations and express trusts. These rules aim to combat tax evasion, aggressive tax avoidance, money laundering, and other public harms. In Canada, corporate transparency obligations are met through internal reporting to tax authorities and law enforcement, and public registers at the federal and Quebec levels. Since 2023, trusts have been subject to expanded reporting under the Income Tax Act, requiring most to file annual returns and disclose all beneficiaries, including those with only contingent interests. The authors address whether trust reporting strikes the right balance between transparency and privacy. Unlike corporate rules—which limit beneficiary disclosure to those with control or who have received distributions—trust reporting imposes broader, more burdensome disclosure. The authors argue that trust reporting should align more closely with the corporate approach or, alternatively, that Parliament should better define the objectives of the trust regime to guide more flexible administrative enforcement by the Canada Revenue Agency. The authors also recommend adopting features from Quebec’s more targeted approach to trust transparency, including narrower disclosure rules and less punitive penalties, to reduce unnecessary compliance burdens.

Keywords Corporate reporting; trusts; transparency; penalties; beneficial ownership.

Introduction

This paper will examine trust reporting under the Income Tax Act (Canada),¹ with comparisons to the approach in Quebec under both the federal ITA and the Taxation Act (Quebec).² Aiming to promote understanding and reduce concern regarding the trust reporting rules (and to demonstrate the need for flexibility in applying them), we begin by examining the international antecedents to Canada's current rules. We emphasize transparency as a means of promoting tax compliance, including through corporate reporting rules that identify trusts as shareholders. We briefly review the current trust reporting rules, analyze proposed amendments from the federal Department of Finance, and discuss the implications of these changes. Our discussion includes a consideration of the penalties for non-compliance and a recommendation that the Canada Revenue Agency (CRA) apply these rules flexibly and predictably—or that legislative amendments be considered with regard to the categories of reportable relationships, the penalties for insufficient reporting, and the requirement for an annual tax filing by bare trusts.

We conclude with a review of the differences in Quebec's rules and suggest that some vehicles—which might otherwise be characterized as bare trusts—consider designating Quebec law as applicable. This could enable these arrangements to avoid being characterized as bare trusts (and instead be subject, apparently, to one-time filing under Quebec's nominee agreement reporting regime—provided that the vehicle has tax consequences in Quebec).

Antecedents to the Trust Reporting Rules

A June 13, 2019 release from the Department of Finance included the following statement:

[T]he Government continues to take action to combat financial crimes in Canada. . . . Better information on who owns what will help authorities effectively counter . . . criminal activities.³

An October 2019 consultation of the Ministry of Finance of Quebec included the following statement:

[In the] fight against fraud, tax evasion, tax avoidance, money laundering and the financing of criminal activities . . . the government is examining . . . approaches . . . aimed at improving transparency.⁴

Governments Identifying a Transparency Goal

The Financial Action Task Force (FATF) is an intergovernmental organization, founded in 1989 at the initiative of the Group of Seven that now has about 40 nations as members. FATF guidance clearly demonstrates why governments seek

transparency in relation to corporations and trusts.⁵ To paraphrase some of the main points in this guidance:

- Corporations, trusts, and other vehicles have an essential, legitimate role in the global economy. However, they have sometimes been misused for illicit purposes—including tax fraud, money laundering, terrorist financing, and bribery and corruption—because such vehicles are a way to disguise beneficial ownership, and to disguise and convert the proceeds of crime before it is introduced into the financial system.
- FATF has therefore established standards for transparency that require countries to ensure that adequate, accurate, and timely information on the beneficial ownership of corporations, trusts, and other vehicles is available and accessible by competent authorities in a timely manner.
- The information required to be accessible includes, for corporations, information on beneficial ownership and control (under FATF recommendation 24); for express trusts, it includes information on the settlor, trustee, and beneficiaries (under FATF recommendation 25).

Certainly, Canadian federal and provincial governments have indicated a need to develop transparency for both corporations and trusts. Therefore, although our focus in this paper is on trust reporting rules, we see that an approach to greater transparency should also involve rules for corporate transparency. Thus, the corporate reporting rules will be briefly considered so as to compare their framework with the framework for the trust reporting rules. This comparison should clarify the current purpose of and framework for trust transparency through reporting. Our view is that the corporate reporting regime (which extends also to trust shareholders) acknowledges a need for flexibility in certain important areas, and that, as suggested above, this approach should be extended to the trust reporting rules.

Trusts and Corporations: A Separate Approach in Government Policy

FATF, in its recommendations promoting access to information about corporations and trusts, seems to allow the possibility of public beneficial ownership registers for trusts.⁶ Despite these recommendations, Canada's approach, although in several notable instances providing for public beneficial ownership registers for corporations, has been to impose relatively limited reporting obligations on trusts. These obligations mainly consist of reporting and tax filings that are not publicly available.

Reflecting FATF's guidance, Canada's March 2016 federal budget referred to further investment by the government in the hiring of auditors and other specialists, along with related steps, with the aim of cracking down on tax evasion and combatting tax avoidance.⁷ One year later, the 2017 federal budget clarified the separate approaches for corporations and trusts: with the goal of combatting money laundering,

terrorist financing, tax evasion, and tax avoidance, the federal government would (1) collaborate with the provinces and territories to put in place a national strategy to strengthen the transparency of legal persons and legal arrangements and to improve the availability of beneficial ownership information, and (2) examine ways to enhance the tax-reporting requirements for trusts in order to improve the collection of beneficial ownership information.⁸

Corporate Reporting Introduced

More concrete measures followed soon after these announcements. As regards corporate reporting, the federal, provincial, and territorial finance ministers, in December 2017, came to an agreement, in principle, that each jurisdiction would amend its legislation to ensure that corporations hold up-to-date information on beneficial owners—information that would be available to law enforcement, tax, and other authorities.⁹ The related backgrounder released by the Department of Finance stated that “[t]he information revealed through the recent leaks of the Panama and Paradise Papers reinforces the need for action.”¹⁰

At the time, some observers said that Canada was lagging behind other jurisdictions in the tracking of beneficial ownership. For example, assessments carried out in 2015 and 2017 by Transparency International, an international non-governmental organization, cited Canada as not fully complying with the Group of Twenty (G20) principles calling for accessible information on the ultimate beneficial ownership of corporations, trusts, and other entities. Transparency International also rated Canada as one of only two G20 countries with a weak regulatory framework for ultimate beneficiaries.¹¹

Corporate beneficial ownership reporting was subsequently enacted, and it came into force federally in June 2019 and then on a rolling basis in all provinces except Alberta.¹² The federal legislation, in the Canada Business Corporations Act (CBCA), provides for a register of individuals with significant control (ISCs). Briefly stated, these are individuals who, with respect to private corporations, have, directly or indirectly, at least 25 percent of the votes or value of the CBCA corporation after all holding corporations, trusts, and nominee agreements are looked through, or who hold factual control of the corporation. As we will discuss in more detail below, these rules, when it comes to determining the ISCs, also account for shareholders that are trusts.

Initially, beginning in 2019, the rules required CBCA corporations only to maintain an internal register of ISCs, to be turned over to the CRA, Revenu Québec, or law enforcement in the event of a serious investigation.¹³ Since January 2024, however, CBCA corporations, in addition to maintaining the internal register, must also publicly report their ISCs annually on the searchable website of Corporations Canada.¹⁴

Beneficial ownership registers in most provinces remain, for now, internal to the corporations and generally available to tax authorities and law enforcement in the case of a serious investigation. The exception is Quebec, where the register

has been public since March 2023 and searchable by the names of individuals since July 2024. (British Columbia appears set to require public registration of its internal registers in 2025.) As with the federal register, the provincial registers apply to corporations formed within the province's jurisdiction. An exception is Quebec's register, which is broader in scope and applies to corporations and partnerships formed anywhere in the world that carry on activity in Quebec. (In effect, then, Quebec's register functions as Canada's de facto public corporate beneficial ownership registry.) As under the CBCA, the provinces also take into account shareholders that are trusts when identifying ISCs—referred to as “ultimate beneficiaries” in Quebec and “significant individuals” in British Columbia.

It is worthwhile to set out here the CBCA's definition of an ISC, given that a similar definition appears in the provisions of provincial statutes dealing with corporate registers. In addition, the definition clearly states the distinction—which we discuss below—between individuals who meet the 25 percent ownership or control threshold (directly or indirectly) and individuals who exercise control in fact over a corporation through any direct or indirect influence. Notably, control in fact must extend over the entire corporation, not merely a minimum of 25 percent of it.

The CBCA's definition, partly set out in sections 2.1(1) and (3), is as follows (with the caveat that no prescribed circumstances currently exist under section 2.1(1)(c)):

2.1(1) For the purposes of this Act, any of the following individuals is an individual with significant control over a corporation:

(a) an individual who has any of the following interests or rights, or any combination of them, in respect of a significant number of shares of the corporation:

(i) the individual is the registered holder of them,

(ii) the individual is the beneficial owner of them, or

(iii) the individual has direct or indirect control or direction over them;

(b) an individual who has any direct or indirect influence that, if exercised, would result in control in fact of the corporation; or

(c) an individual to whom prescribed circumstances apply. . . .

(3) For the purposes of this section, a significant number of shares of a corporation is

(a) any number of shares that carry 25% or more of the voting rights attached to all of the corporation's outstanding voting shares; or

(b) any number of shares that is equal to 25% or more of all of the corporation's outstanding shares measured by fair market value.

Trust Reporting Introduced

What we broadly refer to as trust reporting (requiring certain trusts to file a tax return, mandating the annual disclosure of additional information by certain trusts, and imposing penalties for failure to file) was first introduced in the February 2018

federal budget. Subsequently, on July 27, 2018, the government released draft legislation under the ITA and draft regulations¹⁵ that were to be applicable for the 2021 and later taxation years.¹⁶ Significant changes were later made to the original 2018 proposals, including the addition of bare trusts to the reporting requirement and the postponement of the rules' applicability to taxation years ending after December 30, 2023.¹⁷ Quebec announced in its 2021-22 budget that it would harmonize its rules with the federal trust reporting rules as announced in July 2018,¹⁸ albeit with some differences (which we will discuss below).

The 2018 federal budget underlined the by-then familiar federal public policy rationale for the collection of beneficial ownership information (namely, to combat public harms arising from tax evasion and other criminal activity), and indicated that trust reporting would now form part of this broader information-collecting process. As stated in the budget:

Better information on who owns which legal entities and arrangements in Canada—known as “beneficial ownership information”—will help authorities to effectively counter aggressive tax avoidance, tax evasion, money laundering and other criminal activities perpetrated through the misuse of corporate vehicles.

To improve the availability of beneficial ownership information, the Government proposes to introduce enhanced income tax reporting requirements for certain trusts to provide additional information on an annual basis.¹⁹

These public policy goals for trust reporting, which are similar to those for corporate reporting, aimed to shed light on beneficial ownership in an effort to combat the stated public harms. We will examine these goals more closely in the next section of this paper. The public policy goals, as expressed, serve to underline that, although the trust reporting rules are invasive and inconvenient, they are grounded in a broader public policy rationale that also recognizes the importance of limiting the extent of publicly disclosed information. This approach aligns with the treatment of non-public tax filings, in contrast to the publicly accessible corporate beneficial ownership registers in the Canadian federal and Quebec jurisdictions.

The Trust Reporting Rules

Both the federal and provincial governments in Canada have introduced—in line with other governments around the world (albeit later and more slowly than many of them)—various statutory schemes to collect and (sometimes) share information about the beneficial ownership of property. In this section, we consider the federal trust reporting rules.

As mentioned above, the Department of Finance first announced its intention to legislate enhanced trust reporting in the 2017 federal budget. The objective was to use the tax reporting system to obtain beneficial ownership information

about trusts. The new trust reporting rules were proposed in the 2018 federal budget, to be applicable to 2021 and subsequent taxation years. Following delays, comment periods, and amendments, the new rules received royal assent on December 15, 2022. They were to apply to taxation years ending after December 30, 2023, which meant that they generally would apply for 2023 (since most trusts have a December 31 year-end).

The new rules had two key elements:

- 1) an expanded scope of trusts required to file a T3²⁰ return (now to include, most notably, bare trusts); and
- 2) enhanced disclosure requirements under the revised T3 return, including more detailed personal information about trustees and beneficiaries.

The implementation of the system and the rules went badly in the first year, primarily because of confusion over what constituted a “bare trust.” Under fairly intense pressure, the CRA announced on March 28, 2024 that bare trusts would not be required to file a T3 return, including schedule 15 (“Beneficial Ownership Information of a Trust”), for the 2023 tax year unless the CRA made a direct request for these filings. This announcement came after tens of thousands of such returns had been filed.

On August 12, 2024, the minister of finance announced changes to the trust reporting rules that will apply to the 2024 and subsequent taxation years.

Trust Reporting Rules Before the Enactment of the Enhanced Reporting Rules

A T3 return functions both as an income tax return and as an information return. Filing obligations, with respect to information returns, are found both in section 150 of the ITA and in regulation 204.

Paragraph 150(1)(c) of the ITA imposes a general obligation on trusts and estates to file an income tax return within 90 days of the end of their taxation year. This general obligation is subject to exceptions. The principal exceptions are as follows:

- 1) Subsection 104(1) of the ITA excludes from the definition of a “trust” any arrangement under which a trust can reasonably be considered to act as an agent for all the beneficiaries under the trust with respect to all dealings with all of the trust’s property, unless the trust is described in any of paragraphs (a) to (e.1) of the definition of “trust” in subsection 108(1). This description applies to bare trusts and previously meant that such arrangements were not required to file T3 returns. This approach made sense, given that the income from such arrangements would be reported by the beneficial owners of the property held by the agent as nominee.

- 2) Paragraph 150(1.1)(b) of the ITA contained exclusions for trusts. A trust was not required to file a T3 return in a particular year unless
 - a) the trust had tax payable under part I for the particular taxation year;
 - b) the trust was resident in Canada and had a taxable capital gain or disposed of capital property in the year; or
 - c) the trust was not resident in Canada and had a taxable capital gain or disposed of taxable Canadian property in the year.
- 3) Regulation 204(1) requires trustees to file returns. Regulation 204(3) exempts certain trusts from this filing obligation, but the exceptions are for special-purpose trusts under the ITA that are tax-exempt and do not apply to most trusts.
- 4) The language of regulation 204 imposes a filing requirement on a person who has control of property in a fiduciary capacity. While the regulation also refers to income, income is not required in order for the filing requirement to be applicable.
- 5) On an administrative basis, the CRA required trusts to file only under certain conditions, which would exempt from the filing requirements many trusts used in common commercial and family estate planning arrangements. In chapter 1 of its 2022 T3 Trust Guide (T4013),²¹ the CRA stated that a T3 return was required if income from the trust property was subject to tax and the trust
 - a) had tax payable;
 - b) was requested to file;
 - c) was resident in Canada and disposed of (or was deemed to dispose of) capital property or had a taxable capital gain;
 - d) was non-resident throughout the year and had a taxable capital gain or disposed of taxable Canadian property;
 - e) was a deemed resident trust;
 - f) held property subject to ITA subsection 75(2);²²
 - g) provided a benefit of \$100 or more to a beneficiary for upkeep, maintenance, or taxes for property maintained for the beneficiary's use; or
 - h) received income, gains, or profits from the trust property that were allocated to one or more beneficiaries, where any of the following conditions were met: the total income from all sources exceeded \$500, more than \$100 of income was allocated to any single beneficiary, the trust distributed capital to a beneficiary, or any portion of the income was allocated to a non-resident beneficiary.

2023 Trust Reporting Rules

Modified Reporting Exception

The enhanced reporting regime, enacted in 2022, did not change the obligation to file T3 returns imposed by paragraph 150(1)(c) of the ITA and regulation 204.

Rather, the new trust reporting rules modified the types of trusts that are required to file T3 returns. The new rules did so by amending subsection 150(1.1) of the ITA and introducing new subsections 150(1.2), (1.3), and (1.4).

New Subsection 150(1.2) of the ITA

Before the amendments, paragraph 150(1)(c) required a trust to file a T3 return unless subsection 150(1.1) provided an exemption. Subsection 150(1.1) was amended to make it subject to subsection 150(1.2). Subsection 150(1.2) provides that the exemption in subsection 150(1.1) does not apply unless the trust meets one of the exceptions listed in paragraphs 150(1.2)(a) through (p). If no exception is met, the subsection 150(1.1) exemption does not apply and a T3 return must be filed.

Subsection 150(1.2) uses the term “express trust” but does not define it for the purposes of the ITA. Therefore, one must look to principles of equity for the meaning of this term. According to equity, an express trust arises when a settlor expresses an intention to have property held by one or more persons for the benefit of others.²³ Specific technical language is not required to create an express trust, and, depending on the context in which it is created, the trust can be either written or oral, and either express or implied.²⁴ This contrasts with trusts that arise by operation of law, such as resulting or constructive trusts.

The creation of an express trust requires the presence of three certainties: intention, subject matter, and object.²⁵ Waters et al. summarize the three certainties as follows:

For a trust to come into existence, it must have three essential characteristics . . . (1) the language of the alleged settlor must be imperative, (2) the subject-matter or trust property must be certain; (3) the objects of the trust must be certain. This means that the alleged settlor . . . must employ language which clearly shows his or her intention that the recipient should hold on trust. No trust exists if the recipient is to take absolutely, but he or she is merely put under a moral obligation as to what is to be done with the property. If such imperative language exists, it must, second, be shown that the settlor has so clearly described the property which is to be subject to the trust that it can be definitively ascertained. Third, the objects of the trust must be equally and clearly delineated. There must be no uncertainty as to whether a person is, in fact, a beneficiary.²⁶

The creation of an express trust also requires that the trust property be vested in the trustee(s).²⁷

It is not always clear whether an express trust has been created. Confirming the existence of a trust and its classification can be difficult in a case where the intention of the settlor was not reduced to writing or where written intentions were not properly drafted. While these issues previously existed, they took on new significance with the introduction of subsection 150(1.2).

If a trust is an express trust resident in Canada, subsection 150(1.1) may still apply if the trust meets any of the criteria for exclusion listed in paragraphs 150(1.2)(a) to (o). To summarize, exempt trusts²⁸ are

- trusts that have been in existence for less than three months at the end of the year;
- trusts whose assets are composed only of certain types of assets (for example, cash, government debt obligations, and listed securities) and that have a fair market value (FMV) of \$50,000 or less throughout the year;
- trusts governed by registered plans such as registered retirement savings plans (RRSPs) and registered retirement income funds (RRIFs);
- mutual fund trusts, segregated funds, and master trusts;
- lawyers' general trust accounts;
- graduated rate estates and qualified disability trusts; and
- trusts that qualify as non-profit organizations or registered charities.

Notably, private company shares and real estate holdings, which are routinely held by discretionary trusts in typical private company and family estate planning arrangements, are not among the assets listed in the second item. The CRA also takes the position that because collectable gold or silver coins or bars do not meet the ordinary meaning of "money," settling a trust with such property would result in the trust falling outside the exception in paragraph 150(1.2)(b).²⁹

Bare Trusts and Similar Arrangements

A bare trust is a trust under which the trustee's only obligation is to dispose of the trust property as directed by the beneficiary.³⁰ The trustee has no other active duties to perform.³¹ It is not clear whether bare trusts actually qualify in equity as trusts; many are contractual arrangements and can better be characterized as agency relationships.

Bare trusts have generally been ignored for most income tax purposes because the beneficiary reports income and losses from the property as if the beneficiary held it directly.³² Bare trustees have generally been ignored for the same reason.

Before the introduction of subsection 150(1.3), bare trusts arrangements were excluded, for most purposes, from the definition of "trust" under subsection 104(1). Subsection 104(1) referred to arrangements under which a trust can be considered to act as an agent for all the beneficiaries under the trust with respect to all dealings with the trust's property. The CRA has historically accepted that bare trusts are within the ambit of subsection 104(1), although the agency has taken the position that for subsection 104(1) to apply, the trust would generally need to consult and take instructions from each and every beneficiary with respect to all dealings with all of the trust property.³³

Subsection 150(1.3) provides that, for the purposes of section 150, a trust includes an arrangement under which a trust can be reasonably considered to act as

agent for all the beneficiaries of the trust with respect to all dealings of the trust with the trust's property. Consequential changes were introduced to subsection 104(1), such that the language that exempted bare trusts from T3 return filing obligations no longer applied for the purposes of section 150. The combined effect is to cause bare trusts and similar arrangements to be considered trusts for the purposes of section 150 reporting.

There was uncertainty about how the T3 return requirement applied to bare trusts. Was a bare trust required to file only schedule 15 or to file an entire T3 return? The Joint Committee on Taxation of the Canadian Bar Association and the Chartered Professional Accountants of Canada ("the joint committee") recommended that changes be introduced to implement the former requirement (that is, that only schedule 15 be filed),³⁴ but no changes were made before the measure's enactment. If a full T3 return reporting requirement applies, how would the T3 return be completed? Bare trusts continue to be generally ignored for tax computation purposes, and they often lack basic identifying features (such as a name) that would be included in a T3 return. Bare trusts are often undocumented (or sparsely documented), making it difficult to obtain a trust account number. The CRA stated—on its web page on trust reporting³⁵ and, in particular, on web pages still posted at section 3 but posted before the suspension of bare trust reporting for the 2023 tax year—that bare trusts (1) would file the T3 return with schedule 15; (2) could leave blank sections of the return relating to, for example, income of the trust; and (3) would give themselves a name (for example, a name based on the name of the beneficial owner) if the bare trust was otherwise nameless.

Subsection 150(1.3) does not apply for the purposes of regulation 204. The relationship between bare trust arrangements and regulation 204 was historically irrelevant because bare trusts would have been exempted from filing under the administrative exceptions published in the CRA's T3 Trust Guide. Without that administrative position, the question may arise regarding whether a bare trustee or agent has control of or receives income, gains, or profits in a fiduciary or analogous capacity, such that an information return obligation is triggered.³⁶

New Regulation 204.2

New regulation 204.2 expands the scope of information that must be provided in a T3 return. The information required in respect of each disclosable party is set out in regulation 204.2(1) and includes the party's name, address, date of birth (in the case of an individual other than a trust), jurisdiction of residence, and taxpayer identification number.³⁷ The information must be reported in schedule 15 of the T3 return.

Persons in respect of whom the information must be provided are the trustees, beneficiaries, and settlors of the trust and any person who "has the ability (through the terms of the trust or a related agreement) to exert influence over trustee decisions regarding the appointment of income or capital of the trust."³⁸

Regulation 204.2 requires the provision of information about the same persons who must file a T3 return under regulation 204(1), although the exceptions to each requirement differ. Trusts that meet one of the exceptions listed in paragraphs 150(1.2)(a) to (o) of the ITA will not need to include schedule 15 even if they are required to file T3 returns. Thus, for example, a graduated rate estate that is required to file a T3 return under the usual rules will not need to include schedule 15 with its T3 return. However, all trusts that do not meet one of the exceptions will be required to file schedule 15.

If changes regarding a trust's disclosable parties are made (for example, if beneficiaries or trustees are added or removed), both the former and the new parties will be disclosable, provided that they were disclosable at some point in the year in respect of which the schedule 15 is prepared.³⁹

Regulation 204.2(2) provides that the requirement to provide information about a trust's beneficiaries is met if the person filing the return either (1) provides the required information for each beneficiary whose identity is known or ascertainable with reasonable effort at the time of filing or (2) provides sufficiently detailed information to determine with certainty whether any particular person is a beneficiary of the trust.⁴⁰ Note that this applies only to information in respect of beneficiaries.

The technical notes to regulation 204.2(2), as later reflected in part C of schedule 15 ("Beneficiaries unable to be listed"), require, for example, details of the trust terms that extend the class of beneficiaries to unknown entities. They also require relevant information regarding any beneficiaries who cannot be listed by name (such as unborn children, grandchildren, or spouses) because they were unknown at the time the trust return was filed.

Trustees

The term "trustee" is not defined for the purposes of the new rules, and therefore the term's ordinary meaning will apply. In most circumstances, the identity of the trustee (or trustees) is clear.

Beneficiaries

The term "beneficiary" is not defined for the purposes of the rules. Because the ITA does not contain a general definition of "beneficiary," the ordinary meaning of the term should apply.

An interpretive challenge regarding the definition of "beneficiary," for the purposes of the rules, is whether the term should be interpreted to include all persons "beneficially interested" in the trust, as defined in subsection 248(25) of the ITA. Certain provisions, including subsection 108(1), explicitly adopt this definition for certain purposes, but it is not explicitly adopted in the ITA for all purposes. The new trust reporting rules do not refer to the term "beneficially interested." However, a residual concern is that the term "beneficially interested" might be applicable

whenever the term “beneficiary” is used in the ITA. This became a concern following the comments made by the Federal Court of Appeal in *Propep*, although case law, since that case, has not consistently applied the court’s reading of *Propep*.⁴¹

To our knowledge, the CRA has not opined publicly on whether, in its view, the term “beneficiary” includes, for the purposes of the new rules, all persons “beneficially interested” in a trust, though it has taken that position in relation to another use of the term “beneficiary” elsewhere in the ITA.⁴² The CRA has opined that the definition of “beneficiary,” for the purposes of the new rules, includes contingent beneficiaries and other persons (other than a protector) who have a right to legally compel the trustee to act in accordance with the terms of the trust, whether that person’s right to income or capital from the trust is immediate, future, contingent, absolute, or conditional on the exercise of discretion.⁴³

Practical issues may arise when beneficiaries, especially contingent beneficiaries, are not aware of their status as beneficiaries but are disclosable. Trustees will be required to gather information from such individuals and may need to disclose the reason the information is required.

Settlers

When identifying settlers, the original legislation adopted the definition of “settlor” in subsection 17(15) of the ITA. Under that provision, a “settlor” is broadly defined as any person who has made a loan or transfer of property, either directly or indirectly, in any manner whatever, to or for the benefit of the trust at or before that time, unless (1) the person dealt at arm’s length with the trust and (2) the loan was made at a reasonable rate of interest or the transfer was made for FMV consideration. Identifying all persons who meet this definition will in many cases require a detailed review of all transactions entered into by a trust over its lifetime, because the rule applies retrospectively to the trust’s entire history.

Additional Parties

The new rules also require personal information for every person who has the ability (through the terms of the trust or a related agreement) to influence trustee decisions regarding the appointment of income or capital of the trust.

Exception: Solicitor-Client Privilege

There is an exception to disclosure for information that is subject to solicitor-client privilege. Pursuant to subsection 150(1.4), subsections 150(1.1) to (1.3) do not require the disclosure of information that is subject to solicitor-client privilege. Subsection 150(1.4) was not included in the original draft rules but was added in response to criticisms of the proposals.⁴⁴

Penalties

The new reporting regimes involve both existing penalties and a new gross negligence penalty. Several existing failure-to-file penalties may be incurred,⁴⁵ though these penalties are not fiscally onerous and are typically well understood.

New subsection 163(5) imposes a penalty on a person or partnership if it

- (a) knowingly or under circumstances amounting to gross negligence
 - (i) makes—or participates in, assents to or acquiesces in, the making of—a false statement or omission in a return of income of a trust that is not subject to one of the exceptions listed in paragraphs 150(1.2)(a) to (o) for a taxation year, or
 - (ii) fails to file a return described in subparagraph (i); or
 - (iii) fails to comply with a demand under subsection 150(2) or 231.2(1) to file a return described in subparagraph (a)(i).

Both subsection 163(5) and regulation 204.2 exclude trusts that are subject to one of the exceptions listed in paragraphs 150(1.2)(a) to (o). Despite this linkage, subsection 163(5) is not limited to false statements or omissions made on schedule 15.

The penalty under subsection 163(5), set out in subsection 163(6), is the greater of \$2,500 and 5 percent of the highest amount at any time in the year that is equal to the total FMV of all the property held by the trust referred to in subsection 163(5) at that time.⁴⁶

The potential severity and breadth of the penalties, coupled with the absence of statutory defences, is troubling. As discussed above, a trustee may be unable to locate a beneficiary even when the identity of the beneficiary is known or ascertainable. Also, a trustee may be unable to compel a beneficiary to provide the information required under regulation 204.2.

Trustees have two possible defences. The first defence is that the trustee is not grossly negligent. Gross negligence is a high standard. The leading definition of this term is from *Venne*,⁴⁷ where the court wrote:

“Gross negligence” must be taken to involve a greater neglect than simply a failure to use reasonable care. It must involve a high degree of negligence tantamount to intentional acting, an indifference as to whether the law is complied with or not.⁴⁸

In *Venne*, the court found that the taxpayer “did not exercise the care of a reasonable man” yet still removed the gross negligence penalties that had been imposed because the taxpayer’s carelessness did not meet the high standard of gross negligence.⁴⁹ The standard for gross negligence is therefore clearly higher than the standard for simple unreasonableness.

However, unlike subsection 163(3), which requires the minister to establish the facts justifying the assessment of a subsection 163(2) penalty, subsection 163(6)

involves no such requirement. However, most of the extensive jurisprudence dealing with subsection 163(2) penalties should be applicable to subsection 163(6) penalties. This jurisprudence includes Bowman J's comments in *Farm Business Consultants Inc. v. Canada*.⁵⁰

A Court must be extremely cautious in sanctioning the imposition of penalties under subsection 163(2). . . . [W]here a penalty is imposed under subsection 163(2) although a civil standard of proof is required, if a taxpayer's conduct is consistent with two viable and reasonable hypotheses, one justifying the penalty and one not, the benefit of the doubt must be given to the taxpayer and the penalty must be deleted.⁵¹

The CRA audit manual stresses the high threshold that must be met before gross negligence penalties can be imposed:

Gross negligence, as used in subsection 163(2), covers a set of facts which clearly indicates either that the taxpayer knew or ought to have known that an offence was committed under this subsection or that the taxpayer acted so carelessly or so negligently that the way in which the taxpayer handled their affairs amounted to gross negligence (that is, negligence of conspicuous magnitude).⁵²

However, even if a trustee (or an adviser to a trustee) can raise a successful defence to a gross negligence penalty, doing so is a costly and stressful affair. The CRA has said:

While the Act also includes a gross negligence penalty under subsection 163(5), as part of the CRA's education-first approach, the CRA will only apply this penalty in the most egregious cases where a bare trust fails to file. Imposing such penalty would only occur in the context of a compliance action, such as an audit, where all factors and circumstances of the taxpayer's particular situation are considered together. A gross negligence penalty for failing to file will be subject to oversight and approval by Headquarters, following a mandatory referral.⁵³

Such sentiments may be a comfort now, while the trust reporting rules are in their infancy, but a legitimate fear exists that the restraint cited here will wane in the future, as it has in the case of other penalties that are now routinely assessed.

A second possible defence for trustees is a common-law due diligence defence. It is clear, as a matter of law, that anyone assessed a penalty will be excused if they exercised due diligence in carrying out their obligations.⁵⁴ But a similar concern arises here as in the contesting of a gross negligence assessment: the cost and stress of being assessed a penalty are severe. Trustees and their advisers need greater certainty about whether their actions could incur significant penalization. This concern is compounded by the requirement to update the relevant information annually.

It is generally a sound practice to obtain as much information as possible upfront when dealing with a new trust, but now, to reduce the risk of penalization, yearly efforts must be undertaken to ensure the continuing accuracy and completeness of the information.

August 12, 2024 Amendments

The August 12, 2024 amendments to section 150 of the ITA and regulation 204.2 were intended to address the shortcomings identified during the initial year of trust filings. Of particular note, among these shortcomings, was the widespread confusion over the scope of the “bare trust” concept. It became evident over the course of early 2024 that the number of such potential arrangements far exceeded the government’s estimated numbers and could apply to relationships that the drafters had not anticipated.

The principal areas for amendment were the following:

- 1) The definition of “settlor” in regulation 204.2 was revised, to reduce the scope of settlors required to file returns.
- 2) The property requirements for the “small trust” exemption in subsection 150(1.2) were eliminated.
- 3) There was an increased asset limit for the filing and reporting exceptions under subsection 150(1.2) in cases involving related-party arrangements that qualify as trusts but fall outside the scope of the rules’ policy objectives.
- 4) The regulated trust account exception was expanded, and statutory trusts were added to the category of exempt trusts.
- 5) New exceptions were added with respect to bare trusts’ filing and reporting obligations and their exclusion from 2024 T3 reporting.

Each of these amendments is discussed below.

Definition of “Settlor”

The incorporation by reference of the definition of “settlor” in subsection 17(15) of the ITA was deleted, and a specific definition was added as regulation 204.2(3).⁵⁵ The new definition reads as follows:

For the purpose of subsection (1) [the requirement to file a T3] a *settlor* of a trust at any time means any person or partnership that has directly or indirectly, in any manner whatever, transferred property to the trust at or before that time, other than a transfer made by the person or partnership to the trust for fair market value consideration or pursuant to a legal obligation to make the transfer. [Emphasis in original.]

The new definition applies to years that end after December 30, 2024 (that is, beginning with the 2024 calendar year) and applies to sales for FMV consideration and transfers made pursuant to a legal obligation.

The apparent purpose of adding this definition is to exclude commercial arrangements. This amendment addresses concerns raised by the joint committee. Specifically, under the previous version, the use of the definition of the term “settlor” in subsection 17(15) could have led to unintended consequences—for example, (1) dividends received by a trust could be treated as transfers of property without consideration, thereby requiring that the corporation paying the dividend be disclosed as a settlor; and (2) a trust subscribing for shares in a non-arm’s-length corporation could have been viewed as the corporation transferring property (the shares) to a non-arm’s-length person.⁵⁶ Both of these concerns are addressed by the revised definition of “settlor”: the first, because the payment of the dividend is made pursuant to a legal obligation to make the transfer; the second, because the shares are issued for FMV consideration.⁵⁷

Expansion of Exceptions in Subsection 150(1.2)

The current legislation contains several categories of exemptions; the most significant changes are being made to the “small trust” exception, professional trust accounts, and money held pursuant to a statutory obligation.

Small Trust Exception: Paragraph 150(1.2)(b)

Under the current legislation, a trust is exempt only if it holds assets with a total FMV of no more than \$50,000 throughout the year, and only if these assets are limited to those listed in paragraph 150(1.2)(b). Non-exempt property includes shares of closely held corporations, real or immovable property, personal-use property, and property that is often used to settle a trust, such as a silver coin.

The small trust exception is retained with the asset requirements removed.⁵⁸

One shortcoming noted in respect of the small trust exception is that the exception is based on the FMV of the property rather than its cost. This changes the due diligence requirement for determining whether the exemption applies from a straightforward, periodic analysis—based on when property is acquired and disposed of—to an annual valuation exercise. There is little benefit in focusing on value: once the trust acquires property with a value of \$50,000, it no longer qualifies for the exemption; if the trust holds property with a lower value that increases, there is no principled reason for the trust’s status to change, so far as reporting is concerned, because the nature of the property has not changed, merely its value. If the property is sold and new property acquired whose value is greater than \$50,000, reporting will be required.

Related-Party Exception

New paragraph 150(1.2)(b) of the ITA expands the small trust exemption by applying it to trusts with specific characteristics (rather than focusing solely on the trust's assets) and by enlarging the list of qualifying assets.

The criteria for the expanded exceptions are set out in paragraph 150(1.2)(b.1). In summary, a trust will be exempt if

- 1) all trustees and beneficiaries are individuals, and each beneficiary is related to each trustee;
- 2) the value of the trust's assets does not exceed \$250,000 (an increase from the \$50,000 limit that applies to trusts that do not meet the other criteria for exclusion in paragraph 150(1.2)(b.1));
- 3) the trust's assets are limited to those listed in subparagraph 150(1.2)(b.1)(iii), which are as follows:
 - a) money;
 - b) Canadian guaranteed investment certificates (GICs);
 - c) certain government debt obligations and debt obligations issued by listed corporations, mutual funds, and limited partnerships;
 - d) listed shares, units of listed mutual funds, and shares of listed mutual fund corporations;
 - e) units of mutual fund trusts, whether listed or not;
 - f) units of a related segregated fund trust; and
 - g) personal-use property of the trust.

The most significant changes introduced by this amendment are the following:

- 1) the exception for related-party trusts;
- 2) the higher limit for the value of the trust assets (increased from \$50,000 to \$250,000); and
- 3) the addition of personal-use property.

However, one should also identify the trusts that are not exempt, which include (1) trusts in which the trustee is also a beneficiary (a common occurrence in family trusts); (2) trusts in which a corporation is a beneficiary (again, common in trusts that own shares of closely held corporations); (3) trusts that own shares of a closely held corporation; and (4) trusts settled with property, such as a silver coin.⁵⁹

The higher limit for the value of the trust assets will be welcome for small trusts. The \$250,000 limit is arbitrary; however, given that it is five times the limit in the previous legislation, it will relieve many small trusts from reporting obligations, assuming that the property held by these trusts meets the other listed exemption requirements.

The addition of the exemption for personal-use property is welcome, but its effectiveness is limited by the \$250,000 value cap. Whether the \$250,000 cap will be

effective in the context of common strategies—such as adding an adult child as a joint tenant on a house or bank account in order to avoid probate taxes—will depend on the legal nature of the interest transferred. If the transfer creates a true joint ownership interest in the property, many such arrangements will exceed the reporting threshold, given the average value of homes in many parts of the country. Joint bank accounts are likely to vary more in value, but many will also exceed the limit.

However, many of these arrangements do not confer a beneficial interest in property equal in value to the legal title held. In law, many of these arrangements are referred to as “legal but not beneficial joint tenancies” or “Pecore” joint tenancies—named after the Supreme Court’s decision *Pecore v. Pecore*.⁶⁰ In that case, the Supreme Court of Canada recognized that an individual may transfer legal title to property to a joint tenant in a way that provides the transferee only with a right of survivorship, without granting immediate beneficial ownership of the property. With this kind of joint tenancy (legal but not beneficial), the transferee acquires only legal title, with no present beneficial interest in the property. This raises questions about how to value such interests for the purposes of trust reporting.

Although the courts have not yet considered these questions, the prevailing view is that the transfer of the right of survivorship or a legal interest in the title does not constitute a disposition for the purposes of the ITA. An implication of this view is that the value of the interest is nil, or close to nil. This interpretation is supported by the fact that the donor continues to receive all income from the property during their lifetime and can terminate the arrangement at any time.⁶¹ Only on the donor’s death does the joint holder receive the property through the right of survivorship.

The foregoing suggests that the value of a right of survivorship is negligible and should certainly be below the \$250,000 threshold. The challenge will be to identify which property interests are governed by such arrangements.

Other Exemptions

Trust Accounts

The exemption for regulated trust accounts (such as lawyers’ trust accounts) is narrowed by the \$250,000 limit. However, the question whether the information is subject to solicitor-client privilege remains.

The Supreme Court of Canada’s 2016 companion decisions in *Canada (National Revenue) v. Thompson*⁶² and *Canada (Attorney General) v. Chambre des notaires du Québec*⁶³ confirmed the primacy of solicitor-client privilege as a principle of fundamental justice, despite the CRA interests involved in gaining access to taxpayer information. In *Thompson*, in the context of reviewing a requirement for information made to a lawyer under subsection 231.2(1), the Supreme Court found that information in a lawyer’s accounting records, such as a list of accounts receivable containing names of clients, was “presumptively privileged” and therefore the lawyer was not required to provide the information to the CRA unless a court first determined that solicitor-client privilege did not apply.⁶⁴

In addition, certain information normally required on schedule 15, such as a client's identity or address, might be covered by privilege independently.⁶⁵

Whether privilege applies to trust account records may depend on the circumstances. The Federal Court in *Levett v. Canada (Attorney General)* recently found that trust account documents were not privileged because the taxpayer had failed to detail the relationship between those documents and the seeking or giving of legal advice.⁶⁶ In upholding the decision (on other grounds), the Federal Court of Appeal commented (in obiter) that information in a lawyer's trust account might not always be privileged because it may not relate to the lawyer-client relationship or communications between a lawyer and client.⁶⁷

When considering the scope of privilege, it is important to remember that solicitor-client privilege belongs to the client, not the lawyer, and only the client is entitled to waive it.⁶⁸ Therefore, if solicitor-client privilege may apply to the information, a client's consent should be obtained before the filing of any T3 returns or schedule 15s.

Statutory Accounts

Paragraph 250(1.2)(q) has been added, exempting trusts that are established to comply with a statute requiring the trustees to hold property in trust for a specified purpose. This would exempt trusts established by condominium corporations that hold common property for the benefit of strata-title owners, or trusts of assets held by bankruptcy trustees and provincial guardians.

Bare Trusts

The application of the reporting rules to so-called bare trusts resulted in significant uncertainty and, frankly, chaos, in the leadup to the filing of trust tax returns for 2023. Therefore, the rules for bare trusts were subject to the greatest changes in the August 12, 2024 proposed amendments.

The version of subsection 150(1.3) (the bare trust provision) that passed into law reads as follows:

For the purposes of this section, a trust includes an arrangement under which a trust can reasonably be considered to act as agent for all the beneficiaries under the trust with respect to all dealings with all of the trust's property.

The August 12 draft legislation proposes to repeal the current version of subsection 150(1.3) and replace it with the following:

(1.3) For the purpose of this section and section 204.2 of the *Income Tax Regulations*,

(a) an express trust is deemed to include any arrangement under which

(i) one or more persons (in this subsection and subsection (1.31) referred to as a “legal owner”) have legal ownership of property that is held for the use of, or benefit of, one or more persons or partnerships, and

(ii) the legal owner can reasonably be considered to act as agent for the persons or partnerships who have the use of, or benefit of, the property;

(b) each person that is a legal owner of an arrangement that is described under paragraph (a) is deemed to be a trustee of the trust; and

(c) each person or partnership that has the use or benefit of property under an arrangement that is described under paragraph (a) is deemed to be a beneficiary of the trust.⁶⁹

A companion amendment to subsection 104(1) removes the reference to section 150.

The combined effect of the removal of the reference to section 150 and the replacement of subsection 150(1.3) is to clarify both (1) the types of arrangements that are to be subject to beneficial interest reporting (namely, legal ownership of property that is held for the use or benefit of one or more persons or partnerships where the holder acts as an agent for other persons or partnerships) and (2) the roles played by each of the parties to such a relationship. The amendments remove the circularity in former subsection 150(1.3) (“a trust includes an arrangement under which a trust . . .”) and attempt to provide some bright lines by deeming who is a trustee and who is a beneficiary under such an arrangement.

The August 12 draft legislation provides, in proposed subsection 150(1.31), a list of exempted relationships. These relationships can be summarized as follows:⁷⁰

- 1) All of the deemed beneficiaries are also legal owners of the property and there are no legal owners who are not deemed to be beneficiaries.
- 2) The legal owners are related individuals, and the property is the principal residence of one of the legal owners.⁷¹
- 3) The legal owner is an individual who holds real property, which is the legal owner’s principal residence, for the use or benefit of the owner’s spouse or common-law partner.⁷²
- 4) Property is held by a general partner for the benefit of a partnership, and the partnership will file an information return in form T5013 for the year.
- 5) Property is held by a legal owner pursuant to a court order.
- 6) Property that is Canadian-resource property is held for the use or benefit of a person (or persons) or partnership (or partnerships) that
 - a) is a public corporation (or corporations), or corporations controlled by public corporations;⁷³
 - b) is a partnership if a majority-interest partner (or a group of majority-interest partners) is a public corporation or a subsidiary of a public corporation; or

- c) is a partnership in which either a majority-interest partner is a public corporation (or a subsidiary of a public corporation) or a majority-interest group of partners is composed of public corporations (or their subsidiaries), or partnerships that consist of public corporations or their subsidiaries.
- 7) The arrangements are for non-profit organizations, provided that the property consists only of funds received from the Crown.

Application of Amendments

The changes described above apply to different years. Specifically:

- 1) The amendments to section 150(1.2)⁷⁴ apply to taxation years that end after December 30, 2024 (that is, beginning with the 2024 taxation year).
- 2) The current version of subsection 150(1.3) (bare trusts) is repealed for taxation years that end after December 30, 2024 (that is, beginning with the 2024 taxation year). Because reporting was not required on an administrative basis for 2023, bare trusts that have not reported for 2023 are not required to report.⁷⁵
- 3) The revised version of subsection 150(1.3) (bare trusts) applies only to taxation years ending after December 30, 2025 (that is, beginning with the 2025 taxation year) and thereafter. Presumably this delay is designed to allow taxpayers to organize their affairs and determine which arrangements are subject to beneficial ownership reporting. It is hoped that another objective of the delayed reporting is to allow the CRA and the Department of Finance to absorb further commentary on the implementation of the new rules so that the rules can be fine-tuned (whether through changes to the legislation itself or through administrative commentary) so as to meet their objective with a minimum of overreach.

What Is the Effect of the Changes?

Several observations can be made about the revised rules:

- 1) The relief is clearly targeted at relationships among “ordinary” taxpayers. The exceptions to the reporting rules for bare trusts, and the amendment to the small trust exception, clearly signal that the Department of Finance is responding to pressure to exempt the ordinary and low-risk arrangements of unsophisticated taxpayers.
- 2) There is little relief for taxpayers in large organizations. A submission made by the Tax Executive Institute to the director general of the Tax Legislation Division on September 11, 2024 included a number of comments. A theme of the submission was that many large organizations—which may have dozens or hundreds of bare trust arrangements to report—are low-risk taxpayers

that are already reporting all the income. The submission urged the Department of Finance to consolidate the enhanced reporting with the reporting already required of such taxpayers, in order to reduce the administrative burden the enhanced reporting will necessarily add.

- 3) The Department of Finance is clearly targeting the reporting requirements, presumably to match them with the overall policy goals of the legislation. But what are these goals, really? The minister's original announcement in the 2018 budget simply said that the goal of expanded reporting would be to "help authorities to effectively counter aggressive tax avoidance, tax evasion, money laundering and other criminal activities perpetrated through the misuse of corporate vehicles," and that "the Government proposes to introduce enhanced income tax reporting requirements for certain trusts to provide additional information on an annual basis."⁷⁶ A laudable goal. But, as the experience of 2023 showed, the scope of the legislation was overbroad, such that the CRA was not capable of administering the reporting required. The goals set out in the 2018 budget have been repeated without being clarified. What is the practical effect of this omission?

As the 2023 experience demonstrated, the scope and variety of relationships that could be seen as "bare trusts" vastly exceeded what the drafters of the legislation expected. The August 12 amendments, and the delay of beneficial interest reporting to 2026, are evidence of this. But the real question is how to ensure the legislation meets its objectives—that is, identifying and catching crooks—without excessive collateral costs to otherwise compliant taxpayers. It is not clear that this is possible with legislation alone. It may be necessary to impose a larger burden on the CRA, tasking the agency with defining, on an administrative basis, the categories of relationships that demand disclosure. This would involve an unwelcome departure from a strict rule-of-law approach to legislating, but there may be no alternative in such an amorphous area. This is an aspect of the "flexibility" discussed above and further discussed below—that is, giving the tax administrator the ability to respond to challenges as its knowledge grows. An example of a challenge requiring this flexible approach is cited by the joint committee in its September 11, 2024 submission: it observes that the explanatory notes to paragraph 150(1.2)(q) (which exempts statutory trusts) refer to bankruptcy and guardianship trusts but do not refer to deemed trusts arising under the ITA or the Excise Tax Act. Other such examples will emerge. This is an area where the CRA can show leadership in minimizing the burden that the reporting rules place on taxpayers and advisers.

Such a role puts a heavy burden on the CRA to respond in both a timely and a sensitive manner in an area where it lacks institutional history or background. Such a task would be helped by increased transparency regarding the goals of the regime. If the real purpose of the beneficial disclosure rules is to deter professionals from abetting schemes facilitated by a lack of oversight, clarifying the regime's goals would help alleviate fears about large penalties for innocent reporting omissions.

October 29, 2024 Announcement

The CRA announced on October 29, 2024 that it will not require bare trusts to file a T3 return, including schedule 15, for the 2024 tax year, unless the agency makes a direct request for the filing. This was immediately added to the CRA's New Reporting Requirements web pages, mentioned above.⁷⁷ This announcement ensures that, regardless of whether the changes proposed in the August 12, 2024 draft legislation are enacted by Parliament before March 2025, no general requirement will exist for bare trusts to file T3 returns or schedule 15 reporting for 2024. This reiterates for 2024 what the CRA announced in late March 2024 for the 2023 tax year. The Taxpayers' Ombudsperson issued a release on October 30, 2024, thanking the CRA for having lifted when it did the filing requirement for 2024, given that many tax preparers complete their hiring and training in the fall for each upcoming tax season and that, therefore, announcing relief or an exemption beyond November is not timely.

Leaving aside the question whether an upcoming federal election held no later than fall 2025 may delay the enactment of new tax legislation, the Department of Finance consulted with the public in August and September 2024 regarding the August 12, 2024 proposed amendments, and adjusted proposals may be in the offing—though they may not be released until after the 2024 tax season has begun. Therefore, given that the August 12, 2024 proposals indicated an intention to postpone bare trust reporting until the 2025 tax year, the CRA's announcement of October 29, 2024 is indeed welcome.

Alternative Protective Steps

In the conclusion to this paper, we make several suggestions regarding changes to the trust reporting rules. Our suggestions relate to narrowing the categories of relationships requiring reporting, reducing penalties, and limiting the scope of bare trust disclosure. Without such changes, it becomes more likely that trusts will take legitimate steps to protect themselves from the current onerous rules.

One example of such a protective measure consists in the argument⁷⁸ that under the provincial securities transfer acts, marketable securities are, in fact, securities entitlements, not property, with the result that a trust holding only publicly traded shares and bonds holds no property and therefore is not subject to trust reporting.

Another source of such protection is the ability, in the common-law provinces, to designate Quebec law as the law governing an agency agreement. This is a topic that goes deep into the conflict-of-laws context and is well beyond the scope of this paper. Suffice it to say that, whether the instrument in question is governed by contract or trust law, it is open to the makers of the instrument to choose the law by which it is governed. This may permit a single report to be filed under the QTA (under the QTA's nominee agreement reporting, discussed below) rather than in annual reports under the ITA. (Alternatively, as discussed below, the single

report may not even be required under the QTA if there is no Quebec taxpayer, no Quebec tax, or no property in Quebec.)

Reviewing Public Policy Goals: Flexible Application of the Trust Reporting Rules Is Warranted

As invasive as corporate registers and trust reporting may be, their underlying public policy goals—which sometimes differ in significant ways (for example, the UK and Quebec public corporate reporting rules, unlike other regimes, appear to reflect a public policy aim of combatting fraud among business counterparties)—may help (1) clarify the rationale behind these rules, (2) encourage acceptance of this rationale where it appears reasonable, and (3) show why flexibility is needed in applying the rules.

As regards the applicable public policy, the stated goal of combatting public harms is a first principle. The public harms identified are tax evasion, unreasonable tax avoidance, money laundering, and terrorist financing,⁷⁹ as noted in STEP Canada's submission of February 21, 2024 to Innovation, Science and Economic Development Canada ("the STEP submission"). This submission concerned the need to limit public access to corporate registers and to prohibit searching such registers by an individual's name.⁸⁰ The STEP submission makes the following points:

- There appears to be a trend in corporate registers: specifically, jurisdictions that aim to combat public harms (such as tax evasion, unreasonable tax avoidance, money laundering, and terrorist financing) have registers that are internal to the corporation and submitted to the government only in the context of an investigation. This is the case in several Canadian provinces that have reporting requirements for individuals with significant control. In other jurisdictions, such as the United States under the US Corporate Transparency Act,⁸¹ the information is submitted to the government but not posted publicly.
- However, when a jurisdiction cites not only public harms but also private harms as a rationale for corporate reporting, information on corporate beneficial ownership tends to be posted in public registers. In the United Kingdom, for example, the names of people with significant control of corporations have been posted publicly since 2016 under the Companies Act 2006.⁸² The private harm being combatted through this increased transparency seems to be fraud among business counterparties; the public posting clarifies for the parties who they are dealing with in business matters, and it thereby levels the economic playing field between the parties. As stated in 2013 by then UK Prime Minister David Cameron: "Illegality . . . is bad for Britain's economy . . . as people evade their taxes through untraceable trails of paperwork. . . . There are so many wider benefits to making this information available to everyone. It's better for businesses here—who will be able to better identify who really owns the companies they're trading with."⁸³

- Another example of a jurisdiction with a public corporate beneficial ownership register is Quebec, which—like the United Kingdom—has cited the prevention of fraud between counterparties as a goal of its public corporate register. This is evident, for example, in the anti-fraud statement issued by Quebec’s Ministry of Finance, as referenced above,⁸⁴ and in the opening provision of Quebec’s legal publicity act,⁸⁵ which states in part, at section 0.1:

The purpose of the [Legal Publicity] Act is to enhance the protection of the public by providing public access to certain information contained in the register, particularly in the context of socio-economic relations. A further purpose of the [Legal Publicity] Act is to prevent and fight tax evasion, money laundering and corruption.

- Given that the Canadian federal government has clearly identified a public policy goal of using the corporate beneficial ownership register to combat the public harms listed above (but not the goal of combatting fraud among counterparties), one questions whether making the federal register public is justified. This highlights the importance of maintaining the current restriction on name-based searches of the federal register, a limitation that the federal government has, to date, preserved.⁸⁶
- Similarly, although British Columbia appears set to require public access to its internal corporate registers in 2025, it has not clearly cited a need to address private harms in this context.⁸⁷ Therefore one questions whether British Columbia needs to make those registers public.
- In fact, the public nature of the federal, Quebec, and (potentially) BC corporate registers may be seen as constituting an unreasonable invasion of privacy, placing these jurisdictions at odds with international norms. This norm was reflected in, for example, the November 2022 decision of the highest EU court (the European Court of Justice) in *WM and Sovim SA v. Luxembourg Business Registers*.⁸⁸ In this case, the court held Luxembourg’s public corporate beneficial ownership register to be a serious interference with fundamental privacy rights. Following that decision, several EU jurisdictions have closed public access to such registers.

The public policy discussed above appears to show the following about trust reporting in Canada:

- When, as in the case of trust reporting, public policy is aimed at combatting public harms (tax evasion, unreasonable tax avoidance, money laundering, and terrorist financing) and does not extend to combatting the private harm of fraud among counterparties, little justification exists for a public register. However, reporting beneficial ownership to the government appears unavoidable, except when such reporting is an unintended consequence of the rules.

- The requirement that trusts report information to a governmental authority is likely to increase the already conservative tendency of professionals to err on the side of caution when applying reporting rules. In this regard:
 - US attorneys who were beginning—prior to the March 2025 US announcement to limit reporting, under the US Corporate Transparency Act, to non-US companies—to implement corporate beneficial ownership reporting under the US Corporate Transparency Act had indicated that the additional work involved in collecting a wider range of information had changed the way they practise law, increasing the caution, planning, and time needed to carry out the applicable work.⁸⁹
 - When we consider the example set by the regulation for corporate register reporting (in force as of January 2024 under the CBCA),⁹⁰ it may become common for professionals to assist clients in preparing questionnaires for trustees and others familiar with a trust’s affairs—particularly for those individuals known to a trustee. That regulation requires private CBCA corporations, in an effort to ensure that they are aware of all of their ISCs, essentially to annually request information from their ISCs, shareholders, and any other persons that the corporation reasonably believes may have relevant knowledge. These individuals may be asked to provide, among other things, contact information for any other ISC or for any person who might have such information.

We would suggest, however, that as trusts comply with trust reporting under the ITA, the apparently heavy burden of compliance—evident, for example, in the early experience with corporate beneficial ownership reporting—may prompt a more flexible approach to applying the trust reporting rules.

The view that flexibility in applying the trust reporting rules is appropriate is surely supported by the fact that major jurisdictions such as the United States (for its corporate reporting for non-US companies) and the United Kingdom, whose corporate reporting (including for trust shareholders) is more extensive than Canada’s, tend to having trust reporting rules that are less extensive than Canada’s.⁹¹ In the United States, tax filings seem to follow the traditional approach, requiring the reporting of beneficiaries only in years when they have received a distribution. In the United Kingdom, a non-public trust register is maintained; it requires a one-time filing with His Majesty’s Revenue and Customs of detailed trust information, with updates required only when there are changes to the trust.

In the next section of this paper, we discuss the flexibility within the corporate reporting rules when it comes to the identification of trust beneficiaries and persons with *de facto* control of the reporting corporation. We also set out our submission that the trust reporting rules should be similarly flexible in identifying these persons.

Defining Trust Beneficiaries and Influencers: Extending Corporate Reporting Flexibility to Trusts

The rules governing corporate beneficial ownership registers must address trusts when a trust effectively holds 25 percent or more of the votes or value (or, in British Columbia, 25 percent or more of the votes or the shares by number) of the subject corporation, or exercises control in fact over the corporation.⁹² In such cases, reporting is generally required in respect of individuals who are trustees or beneficiaries, or who have control in fact.

As regards identifying trust beneficiaries under the corporate beneficial ownership rules, the following points indicate that not all beneficiaries are required to be reported:

- With respect to ultimate beneficiaries under Quebec’s legal publicity act, the Quebec Enterprise Registrar, which administers the regime, takes the position that only individual beneficiaries who have received a trust distribution either currently or at some point in the past are ultimate beneficiaries.⁹³
- As regards ISCs under the CBCA, Corporations Canada has indicated, as a matter of administrative guidance, that a beneficiary is considered to be in control of the trust only if their rights include appointing or removing trustees, directing the distribution of the trust assets, making investment decisions for the trust, amending trust documents, or terminating the trust.⁹⁴
- As regards significant individuals under the BC Business Corporations Act, the BC government subscribes to the following definition of a reportable beneficial owner: “A beneficial owner is an individual who is legally entitled to receive benefits of property rights (e.g. shareholder rights) in equity even though legal title of the property belongs to another person (e.g. the trustee).”⁹⁵ This approach appears to extend to discretionary beneficiaries, though it has some limitations (for example, it does not appear to include future beneficiaries not yet in existence).
- An international example can be found in the United Kingdom,⁹⁶ where ISCs include any individuals with significant influence or control over the activities of the trust.

An issue related to the reporting of beneficiaries concerns how legislation governing information-exchange deals treats discretionary trust beneficiaries (which is relevant by analogy, even if does not per se relate to corporate or trust reporting). Such legislation often limits reporting to situations where a trust beneficiary receives a distribution in the given calendar year. In this context, it should be noted that the common reporting standard at part XIX of the ITA⁹⁷ (relevant, for example, when a Canadian financial institution reports account information on a tax resident of another country—other than the United States—to the CRA, which then remits the information to the tax authority of the other country) indicates that “controlling persons,” who are reported in the case of a trust, include its beneficiaries (but for

this purpose, a discretionary beneficiary will be considered a beneficiary in a calendar year only if a distribution has been paid or made payable to the discretionary beneficiary in the calendar year).

As regards identifying individuals who exercise influence over trustee decisions—without necessarily holding or controlling the 25 percent interest in the underlying corporation—corporate reporting legislation imposes a relatively high bar, relying on the “control in fact” standard as defined in the operational control criteria in subsection 256(5.11) of the ITA.

This approach can be seen, for example, in section 0.4 of Quebec’s legal publicity act, which cites the QTA equivalent⁹⁸ of subsections 256(5.1) and (5.11) of the ITA; in sections 1.1(5) and (6) of the Ontario Business Corporations Act, which explicitly incorporate the wording of subsections 256(5.1) and (5.11) of the ITA; and in the CBCA, where section 2.1(1)(b) refers to “control in fact” without defining the term. Corporations Canada, however, has issued guidance on control in fact⁹⁹ that appears to align with the operational control standard set out in subsection 256(5.11) of the ITA. This guidance includes the following statement: “Determining whether an individual has ‘control in fact’ requires consideration of all factors relevant to the circumstances and goes beyond looking solely at whether an individual has the legal authority to effect change in the board.”¹⁰⁰ The guidance proceeds to identify a number of factors to consider in this regard, including “how much control the individual has to direct the activities of the corporation.”¹⁰¹

Accordingly, we submit that the corporate reporting rules generally set a high threshold for identifying significant individuals in their capacity as trust beneficiaries—whether as beneficiaries per se or as individuals exercising control in fact. This clearly supports the need for flexibility in trust reporting, in the following sense:

- With respect to reportable beneficiaries, two key considerations arise. First, as noted above, there is a need to limit the categories of relationships that require disclosure—if necessary, through CRA administrative guidance that narrows the scope of relationships subject to reporting. A second consideration is that the gross negligence penalty (equal to 5 percent of the highest value of trust property during the year) should be waived in all but the most egregious cases. This approach should not be limited solely to bare trusts for the 2023 year (as referenced in the CRA’s New Reporting Requirements Pages),¹⁰² but should reflect a broader policy similar to Quebec’s. Under the QTA (as discussed below), Quebec dropped the 5 percent gross negligence penalty entirely and did not adopt it as part of its harmonization with the federal trust reporting rules.
- As regards determining who, under regulation 204.2(1)(b), has the ability (through the terms of the trust or a related agreement) to exert influence over trustee decisions regarding the appointment of income or capital of the trust, the technical notes indicate that “this would include, for example, a protector of the trust.” In this context, it is important that there be an acknowledgment

that “exerting influence,” for trust reporting purposes, means controlling trustee decisions—in accordance with (1) the concept of “control in fact” over a corporation or its major trust shareholder under corporate reporting rules and (2) the 2018 budget, which introduced trust reporting and used the word “controlling” in reference to trustee decisions; inexplicably, however, a lesser standard (to “exert influence”) has been used since the introduction, later in July 2018, of draft legislation for trust reporting. Quebec, by contrast, uses the word “controlling” on the Quebec trust tax return prescribed under the province’s equivalent provision for trust reporting, section 1000 of the QTA.

Quebec Aspects of Trust Reporting

Quebec Aspects of the ITA Trust Reporting Rules

Nature of the Quebec Trust: “For Civil Law Purposes a Trust Other Than a Trust That Is Established by Law or by Judgement”

The obligatory filing of trust tax returns arises under subsection 150(1.2) of the ITA for civil-law trusts, other than those established by law or judgment. This terminology refers to a trust concept similar to the concept of the express trust in common-law jurisdictions, but it is based on the unique nature of the Quebec civil-law trust. According to article 1262 of the Civil Code of Québec (CCQ),¹⁰³ a Quebec trust may be established by contract (for example, by a trust deed, which is treated in Quebec as a contract; Quebec also recognizes contracts established by gratuitous title), by will, by law, or by judgment.¹⁰⁴

Articles 1260 and 1261 of the CCQ, among other CCQ provisions, emphasize that although Quebec civil law does not recognize a division of ownership between legal and equitable (or beneficial) owners, it permits a trust to be set up. Under Quebec civil law, a trust is set up when the settlor transfers property from their patrimony (broadly defined as a person’s assets minus their liabilities) to a separate trust patrimony. This trust patrimony is held and administered by the trustee and is appropriated to a particular purpose. The resulting structure is referred to as a “patrimony by appropriation,” which is distinct from the respective patrimonies of the settlor, trustee, and beneficiaries—none of whom hold a “real right” (right “in rem”) in the trust patrimony.

A unilateral declaration of trust is therefore generally not possible under Quebec law. Furthermore, it is notable that at least one trustee of a Quebec trust must not be a current or potential future beneficiary (this is the so-called independent trustee requirement set out in article 1275 of the CCQ). Article 1293 of the CCQ also provides that additional property may be contributed to the trust by any person, if this is done in accordance with the rules governing the constitution of the trust.

Some other important elements have recently been highlighted in relation to Quebec trusts, as follows:¹⁰⁵

- Although Quebec law takes intention into account when determining whether a trust (other than a trust created by law or judgment) has been established, Quebec courts appear to closely examine whether the separate patrimony required for a trust actually exists. Therefore, as we will discuss below, courts have held, depending on the circumstances, that other arrangements, such as nominee agreements (in French, “prête-nom” agreements), exist instead.¹⁰⁶
- Also limiting the potential existence of a trust is article 1274 of the CCQ, which requires that a trustee be either a natural person or a legal person authorized by law to act as a trustee (such as a qualified trust company or, apparently, a non-share capital corporation incorporated under the Canada Not-For-Profit Corporations Act,¹⁰⁷ pursuant to sections 31 and 32 of that act).

Bare Trust Not Part of Quebec Law

In light of the foregoing, it is not surprising that the concept of a bare trust is not obviously a part of Quebec trust law.¹⁰⁸ Indeed, the CRA recognized this in a February 27, 2024 technical interpretation.¹⁰⁹ This interpretation addressed the question whether, given the terms of subsection 150(1.3), a trust return must be filed in circumstances where a person is acting as agent for one or more other persons in relation to all dealings with certain property, but without the arrangement constituting a trust.

The CRA indicated that, for a trust return to be required under section 150, a trust must exist under the applicable private law. Commentary both before and after that technical interpretation has indicated that, although every situation must be evaluated according to its particular facts, the typical arrangement under a standard Quebec nominee agreement, whereby one person acts as an agent (or, under Quebec law, enters into a contract of mandate under article 2130 of the CCQ) does not constitute a trust, provided there is no stated intention to create a trust through the establishment of a patrimony by appropriation (which would be rare). Accordingly, trust reporting would generally not be required in such cases, despite the wording of subsection 150(1.3).¹¹⁰

It should be noted that the introductory language of subsection 150(1.2) (drawing, as noted above, on article 1262 of the CCQ) does not require the filing of a trust return when a Quebec trust is established by law or by judgment. Revenu Québec has identified examples of trusts established by law,¹¹¹ including Quebec vehicles such as the usufruct, the right of use, and the substitution. These arrangements—rooted in French legal tradition from a time before the formal recognition of trusts in the CCQ and its predecessor, the Civil Code of Lower Canada—are referred to by Revenu Québec as “deemed trusts” established by law (specifically, under sections 7.9 to 7.11 of the QTA)¹¹² and are therefore not trusts to which the trust reporting rules apply.

An example of a Quebec trust arising by judgment—and therefore not subject to trust reporting—would be a court judgment ordering the constitution of a trust to secure the payment of alimentary support in a family law matter.¹¹³

Proposed Subsection 150(1.3)

New subsection 150(1.3), as proposed by Finance on August 12, 2024 (“proposed subsection 150(1.3)”), makes it clear that the situations it addresses include neither a Quebec nominee agreement that is not a trust nor, apparently, even a Quebec trust that might otherwise fall within the scenarios to which proposed subsection 150(1.3) refers. This is because the proposed provision, by removing reference to the term “bare trust,” refers only to “express trusts” and does not include the phrase “for civil law purposes a trust other than a trust that is established by law or by judgement.” This interpretation is supported by both the French and English versions of the explanatory notes to proposed subsection 150(1.3).¹¹⁴ Both versions reference only common-law concepts—specifically, the division between legal and beneficial ownership, and the concept of the bare trust.

Trust Reporting Rules Under the QTA

The Quebec trust tax return takes account of the federal trust reporting rules, except in the case of bare trusts, and it imposes lighter penalties than the federal rules. As indicated in the province’s 2021-22 budget,¹¹⁵ the Quebec tax system is harmonized with the federal tax system, subject to specific exceptions,¹¹⁶ regarding the obligation to file a tax return and provide certain information about trusts. The QTA provisions on trusts and trust reporting were finally amended in December 2024 to reflect the harmonization with the federal regime (effective for trust year-ends after December 30, 2023).¹¹⁷ The harmonization was, however, reflected already in the Quebec trust tax return and its accompanying guide,¹¹⁸ which referred to trust reporting and, in effect, incorporated the wording of subsection 150(1.2). Subsection 150(1.3), which concerns bare trusts, was not referenced.

The Quebec equivalent of federal schedule 15 (which provides beneficial ownership information as required under regulation 204.2) is in part 5 of the Quebec trust tax return. Titled “Additional information about the trust,” this section has the same content as federal schedule 15, with one exception: it lacks the box at the end of federal schedule 15, which asks for details regarding the terms of the trust that extend the class of beneficiaries to unknown entities, such as unborn children and grandchildren.

When the QTA was amended to reflect the harmonization, standard Quebec nominee agreements were not included in the trust reporting. This exclusion is consistent with the CRA technical interpretation of February 2024 (mentioned above), the commentary on Quebec nominee agreements, and the current approach (also mentioned above) reflected in part 5 of the Quebec trust tax return. Including Quebec nominee agreements in trust reporting would have constituted a substantive

change—not merely a technical change—to Quebec’s current reporting framework. Apart from the fact that excluding Quebec nominee agreements from trust reporting is consistent with the principles outlined above, Quebec has a separate regime for the one-time reporting of nominee agreements to Revenu Québec, as discussed below, which effectively provides for such arrangements a more efficient alternative to trust reporting.

Also worth noting are the following additional points from the Quebec budget papers 2021-22 on the subject of Quebec’s harmonization with the federal trust reporting rules:

- Quebec tax legislation and regulations will be amended to incorporate the changes made to the federal tax legislation and regulations relating to trusts (released on July 27, 2018) in accordance with the general principles of the federal regime.¹¹⁹ However, Quebec will introduce a distinct penalty for non-compliance with the trust reporting rules. The new Quebec penalty will be significantly lower than the federal penalty (which is the greater of \$2,500 and 5 percent of the highest value of trust property at any time in the year). Quebec’s penalty will be a base amount of \$1,000, plus an additional penalty of \$100 per day for each day the omission or default continues, up to a maximum of \$5,000. The current Quebec penalties for filing defaults will continue to apply.
- The changes to the Quebec tax system will be adopted only after the enactment of the corresponding federal statute or regulation implementing the July 27, 2018 federal proposals retained by Quebec, subject to any subsequent technical amendments. These Quebec changes will take effect on the same dates as the federal measures with which they are harmonized.

Revenu Québec Comments on the Trust Reporting Rules

It is useful to summarize Revenu Québec’s comments on trust reporting, as outlined in the 1/22 APFF-RQ committee report,¹²⁰ given that these comments are likely to influence the CRA’s approach to trust reporting and appear to reflect Revenu Québec’s approach to certain aspects of trust reporting under the QTA:

- Revenu Québec appeared to take a very expansive view of who is a beneficiary for the purposes of trust reporting. This position was revealed in Revenu Québec’s response to a question about whether a beneficiary must be reported even if the terms of the trust allowed for the vesting of interests in the trust among certain beneficiaries, such that some beneficiaries have been irrevocably vested and the beneficiary in question holds no vested interest and will never receive a distribution or other benefit from the trust. Revenu Québec answered that regulation 204.2 refers broadly to beneficiaries as the object of the reporting and does not exclude beneficiaries who, because of irrevocable vesting in favour of others, will never receive a benefit. Therefore,

such beneficiaries are included among those whose information must be reported on the trust tax return.

- Revenu Québec’s answer also indicated the following:
 - Revenue Québec referenced the 2021-22 Quebec budget and reiterated that it harmonized the Quebec tax system with the federal tax regime concerning the obligation to file a trust tax return and to disclose certain information regarding trusts. As a result, the forthcoming amendments to Quebec tax legislation and regulations will require trustees to provide beneficiary information for the same categories of beneficiaries covered by regulation 204.2.
 - Revenu Québec will not require from the person filing the trust return the additional information required by trust reporting if that person can demonstrate that (1) they have taken reasonable steps and exercised due diligence to fulfill the reporting obligation, and (2) the identity of the beneficiary cannot reasonably be determined. The trustee’s due diligence is assessed according to the particular circumstances of each case.
 - If a trust beneficiary refuses to provide the identifying information required, such as a social insurance number that meets the definition of a taxpayer identification number (TIN) set out in the ITA and referenced in regulation 204.2, or if a trust does not file all of the other information required, Revenu Québec may exercise its discretion not to apply a penalty to the trust. However, Revenu Québec will base this decision on the particular circumstances of each case, and the trust will be required to establish its reasonable diligence. Beneficiaries who do not provide the information required may be liable for a penalty in this situation, under sections 58.1 and 58.2 of the Quebec Tax Administration Act.¹²¹
 - Beneficiaries are subject to trust reporting regardless of whether they have received a trust distribution.
 - Future beneficiaries—for example, capital beneficiaries in a “second rank” who will benefit from the trust only after the death of “first ranking” beneficiaries—are considered reportable beneficiaries under regulation 204.2. This is because of the definition in paragraph 248(25)(a) of the ITA, which includes as a “beneficially interested” person or partnership any beneficiary with a right that is immediate or future, absolute or contingent, or conditional on or subject to the exercise of discretion. Revenu Québec has noted that section 7.11.1 of the QTA is similar to paragraph 248(25)(a) of the ITA. Therefore, trust reporting under the QTA, as under the ITA, adopts a broad definition of “beneficiary.”¹²²
 - An “express trust,” though not defined in the ITA, was explained by the Department of Finance in its draft trust reporting legislation, released on July 27, 2018. An “express trust” was defined as a trust generally created with the express intent of the settlor (typically in writing), differing in this regard from resulting trusts, constructive trusts, and certain trusts that arise by operation of law. For example, an express trust under common

law is characterized by the “three certainties”: (1) certainty about the intention to create the trust, (2) certainty about the trust property (certainty of subject matter), and (3) certainty about the beneficiaries of the trust (certainty of objects). Subsection 150(1.2) refers to express trusts and, for civil-law purposes, to trusts other than those established by law or by judgment. Accordingly, an express trust is not one created under civil law.

Reporting of Nominee (Prête-Nom) Agreements in Quebec

As noted above, standard nominee (or prête-nom) agreements in Quebec do not appear to be subject to trust reporting under the ITA or the QTA, for the simple reason that they do not constitute trusts under Quebec law. They are, however, subject to mandatory disclosure by way of a prescribed form required to be filed with Revenu Québec within 90 days of the agreement being entered into.¹²³ This reporting is a one-time filing, although it appears that any amendment to the agreement must also be reported within 90 days of the amendment being made.

In effect, the prescribed form filed with Revenue Québec for nominee agreements is analogous to one element of the federal trust tax return—namely, schedule 15.

Nominee agreements in Quebec are, by their nature, typically entered into between mandators (similar to principals under agency law) and a single mandatory (similar to an agent under agency law). This arrangement limits the number of parties that must be reported. This limit, in combination with the one-time nature of the reporting and a monetary penalty for non-compliance that many see as reasonable, has apparently made this filing requirement seem less burdensome to the parties involved. Although standard nominee agreements are not trusts under Quebec law, their purpose is similar to that of bare trusts in the common-law provinces—namely, to facilitate arrangements where a nominee is needed. (However, situations where an implied nominee agreement might arise outside a business context are much less common in Quebec because the province has negligible probate fees and because joint tenancy with the right of survivorship does not exist in Quebec. Also, Quebec’s nominee agreement reporting rules specifically exempt most situations where an individual co-signs an immovable hypothec—that is, a mortgage—to support a related person.)

In Quebec, a nominee agreement may be referred to as an agency agreement (between principal and agent), but it is more accurately described as a mandate agreement, under article 1830 of the CCQ, between the mandator and the mandatory. Often, this is a “non-apparent” mandate—one that third parties are unaware of. Such an agreement establishes a simulated (apparent) contractual situation (as contemplated in articles 1451 and 1452), giving good-faith third parties the ability to rely on either the apparent or the actual situation. Both the CRA and Revenu Québec generally respect the nominee agreement.¹²⁴

A common example of a nominee agreement is one in which, for administrative convenience, an immovable property (that is, real property) is registered in the

name of the mandatary, who holds title on behalf of the mandator, who is the true owner.¹²⁵ To promote transparency, Quebec has required—since the coming into force, in 2020, of an amendment to the QTA—the reporting of all nominee agreements. (This reporting obligation is set out in section 1079.8.6.4 of the QTA, reproduced in full below.) Reporting is done by filing a prescribed form¹²⁶ with Revenu Québec within 90 days of the conclusion of the nominee agreement. In essence, the form requires the identification of (1) the nominee agreement, (2) the parties involved, and (3) the facts of the related transaction, so that Revenu Québec can understand the transaction. Written nominee agreements should be attached. One party to the agreement can report for all of the parties (a common practice). If a limited partnership is a party, only the general partner must be reported; for a general partnership, all partners must be reported (in accordance with section 1079.8.6.4 of the QTA).

Transitional rules are as follows: for nominee agreements entered into before September 24, 2020 (the date that the reporting requirement came into force), the 90-day filing period began on that date. Nominee agreements that had no further effect as of May 17, 2019 do not have to be reported.

Some issues that have arisen in relation to this nominee reporting are the following:

- 1) *Tax consequences.* Although the legislation and prescribed form suggest that agreements without tax consequences need not be reported, Revenu Québec has indicated that it would be rare for an agreement to have no tax consequences.
- 2) *Non-Quebec transactions.* In the case of a transaction outside Quebec involving, for example, one Quebec party, reporting is probably required. The prescribed form allows for the reporting of non-resident parties, and it appears, given the form's content, that the reporting obligation applies when the nominee agreement involves a Quebec taxpayer, Quebec tax, or property in Quebec.
- 3) *Amendments.* If a material amendment is made to an existing nominee agreement, it appears reasonable to conclude that the amendment must be reported.
- 4) *Unwritten agreements.* If the nominee agreement is unwritten, reporting appears to be required, but without an agreement attached. In practice, many such filings have been made, with the form indicating that the nominee agreement is unwritten and no nominee agreement is provided.
- 5) *Existence of a nominee agreement.* Revenu Québec, in a 2022 round table response, provided an important clarification: a nominee (or prête-nom) agreement exists—and must be reported—only if the parties express their true intent in an undisclosed contract, not known to third parties. Therefore, if a mandatary discloses to third parties, explicitly or implicitly, that it is acting in conformity with a mandate, a reporting requirement may not arise.¹²⁷ This interpretation could significantly limit the scope of nominee reporting, but it may also introduce uncertainty in some situations.

When in doubt as to whether a nominee agreement requires reporting, it may be prudent to err on the side of caution by reporting. For example, consider an escrow agreement in which one party holds funds for another, who pays income tax on the earnings. It is not clear that nominee agreement reporting is needed in this situation (this is not a classic non-apparent mandate), but there seems to be little downside to reporting.

Penalties for non-compliance with the nominee reporting rules are as follows:

- 1) *Late-filing penalty.* A penalty for late filing may be assessed, but it must be formally assessed by Revenu Québec and need not be enclosed with a late filing. Such assessments may not yet be common. The penalty can easily rise to \$5,000 plus interest, given that the law provides for a penalty of \$1,000, plus an additional penalty of \$100 per day, up to a maximum of \$5,000. All parties to the agreement are solidarily (that is, jointly and severally) liable for this amount (see section 1079.8.13.3 of the QTA).
- 2) *Suspension of prescription.* The applicable limitation period for Revenu Québec to assess or reassess the tax consequences of the transaction will be suspended for all the parties to the nominee agreement until the required filing is made. Once the filing is made, the prescription period resumes (see section 1079.8.15.1 of the QTA).

The QTA provision that sets out the nominee agreement reporting requirements (namely, section 1079.8.6.4, as referenced above) is as follows:

A taxpayer who is a party to a nominee contract entered into in the course of a transaction having tax consequences under this Act or who is a member of a partnership that is a party to such a contract shall, in an information return sent to the Minister under separate cover by registered mail and in the prescribed form, disclose the contract and the transaction to the Minister on or before the 90th day after the date on which the contract was entered into.

The information return must contain the following information:

- (a) the date the nominee contract was entered into;
- (b) the identity of the parties to the nominee contract;
- (c) a complete description of the facts of the transaction that is sufficiently detailed to allow the Minister to analyze it and have a proper understanding of the tax consequences;
- (d) the identity of any other person or entity in respect of which the transaction has tax consequences; and
- (e) such other information as is required by the prescribed form.

A disclosure made in accordance with the first paragraph by a party to a nominee contract is deemed to be such a disclosure made by any other party to the nominee contract.

Despite the first paragraph, the obligation to disclose provided for in that paragraph applies, in the case of a limited partnership, to all of its general partners and to them only.

Conclusion

It is our hope, as we await the finalizing of the August 2024 proposals to amend the trust reporting rules under the ITA, that the Department of Finance and the CRA will consider adopting the suggestions made in this paper. We conclude with a broad summary of these suggestions:

- If the goals of the trust reporting rules are, as the government has said, to combat public harms such as tax evasion, unreasonable tax avoidance, money laundering, and terrorist financing, then a need exists to limit the types of relationships that require disclosure. The corporate reporting rules, which have similar goals and likewise extend to trust shareholders, have imposed such limits.
- Quebec, in harmonizing with the federal rules on trust reporting, has introduced important differences that should be adopted at the federal level. The following elements of the federal regime, in particular, should be changed: the reporting of persons exerting influence over trustee decisions regarding appointment of income and capital should be limited to persons controlling such decisions; the 5 percent gross negligence penalty for failure to file should be repealed or, at the very least, applied only in the most egregious cases; and bare trusts (akin to nominee agreements in Quebec) that require reporting should be subject to a one-time (not annual) filing (and to filings for subsequent amendments) of the additional information now required in schedule 15 of the trust tax return, without the need to file the entire return.

Notes

- 1 RSC 1985, c. 1 (5th Supp.), as amended (herein referred to as “the ITA”). Unless otherwise stated, statutory references in this paper are to the ITA.
- 2 CQLR c. I-3 (herein referred to as “the QTA”).
- 3 Canada, Department of Finance, “Government of Canada Leads National Response to Money Laundering and Terrorist Financing,” *News Release*, June 13, 2019 (www.canada.ca/en/department-finance/news/2019/06/government-of-canada-leads-national-response-to-money-laundering-and-terrorist-financing.html).
- 4 Finances Québec, *Corporate Transparency: Consultation Paper* (Québec: Finances Québec, 2019), at 5 (www.finances.gouv.qc.ca/department/tools_services/public_consultations/prebudget_consultations/2020/DocEN_TranspaCorpo.pdf).
- 5 Financial Action Task Force, *FATF Guidance: Transparency and Beneficial Ownership* (Paris: Financial Action Task Force, 2014) (herein referred to as “the FATF guidance”) (www.fatf-gafi.org/content/dam/fatf-gafi/guidance/Guidance-transparency-beneficial-ownership.pdf).
- 6 See Society of Trust and Estate Practitioners (STEP), *Tackling Economic Crime* (London, UK: STEP, 2024), at 10 (www.step.org/knowledge-hub/tackling-economic-crime).
- 7 Canada, Department of Finance, 2016 Budget, Budget Plan, March 22, 2016, at 216, under the heading “Cracking Down on Tax Evasion and Combatting Tax Avoidance.”

- 8 Canada, Department of Finance, 2017 Budget, Budget Plan, March 22, 2017, at 213, under the heading “Strengthening Corporate and Beneficial Ownership Transparency.”
- 9 Canada, Department of Finance, “Agreement to Strengthen Beneficial Ownership Transparency” (www.canada.ca/en/department-finance/programs/agreements/strengthen-beneficial-ownership-transparency.html).
- 10 Canada, Department of Finance, “Backgrounder: Tax Fairness and Beneficial Ownership Transparency” (www.canada.ca/en/department-finance/news/2017/12/backgrounder_taxfairnessandbeneficialownershiptransparency.html).
- 11 As cited in *Finances Québec*, supra note 4.
- 12 For corporate beneficial ownership registers at the federal level, see Canada Business Corporations Act (CBCA), RSC 1985, c. C-44, at section 21.1, and following. For provincial equivalents, see, for example, in Quebec, the Act Respecting the Legal Publicity of Enterprises, CQLR c. P.44.1 (herein referred to as “the legal publicity act”), at section 0.4 and following; in Ontario, the Business Corporations Act, RSO 1990, c. B.16, at section 140.2 and following; in British Columbia, the Business Corporations Act, SBC 2002, c. 57, at section 119.1 and following. These registers call on corporations to maintain accuracy through an annual filing or annual review of an internal register, and through implementing updates during the year within 15 or 30 days of becoming aware of a change.
- 13 The provinces’ legislation also uses the ISC terminology, with two exceptions: British Columbia refers to “significant individuals,” while Quebec refers to “ultimate beneficiaries.” All provinces’ definitions are similar to the CBCA’s for an ISC (or significant individual or ultimate beneficiary). Notably, however, British Columbia does not consider the *value* of shareholdings; instead, it uses the *number* of shares held or controlled as the criterion.
- 14 The website of Corporations Canada, searchable by corporation and showing ISCs, is as follows: Corporations Canada, “Search for a Federal Corporation” (<https://ised-isde.canada.ca/cc/lgcy/fdr/CrpSrch.html>). Corporations Canada has confirmed that, as of this writing, it has not implemented searching by individual name. STEP Canada, among others, has argued that search by individual would be an unjustified invasion of privacy and should not be introduced. See “RE: Bill C-42, Canada Business Corporations Act Amendment (Public Disclosure of the Beneficial Ownership Register),” *STEP Canada eNews*, August 20, 2024 (https://step.ca/downloads/marketing/STEP_eNews_Aug_20_PPC.pdf).
- 15 Income Tax Regulations, CRC, c. 945.
- 16 Canada, Department of Finance, 2018 Budget, Tax Measures: Supplementary Information, February 27, 2018, at 15, under the heading “Reporting Requirements for Trusts,” with the proposed legislation and regulations released later that year. See Canada, Department of Finance, “Legislative Proposals Relating to Income Tax and Other Legislation and Explanatory Notes,” July 28, 2018 (<https://fin.canada.ca/drlég-apl/2018/ita-lir-0718-eng.html>).
- 17 Fall Economic Statement Implementation Act, 2022, SC 2022, c. 19, at sections 35(1) to (3).
- 18 Québec, *Finances Québec*, 2021-2022 Budget, Additional Information, March 25, 2021, at A56-A61, under the heading “Measures Concerning Trusts” (herein referred to as “the Quebec budget papers 2021-22”).
- 19 2018 Budget, supra note 16, at 69.
- 20 CRA form T3, “Trust Income Tax and Information Returns.”
- 21 Canada Revenue Agency, *T4013 T3 Trust Guide 2022* (Ottawa: Canada Revenue Agency, 2022).
- 22 The CRA has held that where a property subject to subsection 75(2) generates no revenue, no T3 need be filed: CRA document nos. 2010-0373681C6, October 8, 2010; and 2016-0645811C6, June 10, 2016.

- 23 Albert Oosterhoff, Mitchell McInnes, and Robert Chambers, *Oosterhoff on Trusts*, 9th ed. (Toronto: Carswell, 2019), at 22.
- 24 *Aura Ventures Corp. v. Vancouver (City)*, 2023 BCCA 209, at paragraph 45; and Oosterhoff et al., supra note 23, at 22.
- 25 *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60, at paragraph 83.
- 26 Donovan W.M. Waters, Lionel D. Smith, and Mark R. Gillen, *Waters' Law of Trusts in Canada*, 5th ed. (Toronto: Thomson Reuters, 2021), at 142.
- 27 *Aura Ventures*, supra note 24, at paragraph 45. Other requirements may invalidate the formation of an express trust, such as the trust being illegal or contrary to public policy. For further discussion, see Sarah Netley and Lucinda Main, "Trust Reporting Requirements under the Income Tax Act and Beneficial Ownership Disclosure Under the Ontario Business Corporations Act," in *2022 Ontario Tax Conference* (Toronto: Canadian Tax Foundation, 2022), 6:1-44, at 6:15-17.
- 28 Prior to August 12, 2024.
- 29 CRA document no. 2023-0968111C6, June 20, 2023.
- 30 Oosterhoff et al., supra note 23, at 19.
- 31 The trustee has a duty to account for the property while it is held in trust, though this duty is considered passive: Waters et al., supra note 26, at 34-35.
- 32 For a more detailed description of the general nature and income tax treatment of bare trusts, see *De Mond v. R.*, [1999] 4 CTC 2007 (TCC), at paragraphs 30-38.
- 33 Canada Revenue Agency, supra note 21, chapter 1.
- 34 The Joint Committee on Taxation of the Canadian Bar Association and Chartered Professional Accountants of Canada, "Reporting Requirements for Trusts," submission to Canada, Department of Finance, April 5, 2022, at 5.
- 35 Canada Revenue Agency, "Enhanced Reporting Rules for Trusts and Bare Trusts: Frequently Asked Questions," March 12, 2024, at section 3.
- 36 This would require that the bare trust be exempted from section 150 reporting.
- 37 It is not clear whether the use of the word "includes," in reference to the required information, means that the governor in council is considering whether the CRA could require additional information beyond what is listed in regulation 204.2.
- 38 Regulation 204.2(1)(b).
- 39 Preamble to regulation 204.2(1), which reads "for each person who, in the year. . ."
- 40 Other exceptions apply to trusts whose beneficiaries are (1) members of an Indigenous group, community, or people that holds rights recognized and affirmed by section 35 of the Constitution Act, 1982, as amended, or (2) an identifiable class of the members of an Indigenous group, community, or people that holds rights recognized and affirmed by section 35 of the Constitution Act, 1982. Exceptions also apply to trusts that have both listed and unlisted units.
- 41 *Canada v. Propep Inc.*, 2009 FCA 274. For discussion of this point, see Kate Harris and Balaji (Bal) Katlai, "New Trust Disclosure Rules: The Unfolding of the Propep Nightmare" (2020) 20:4 *Tax for the Owner-Manager* 7-8; and Richard Weiland, "Planning with Trusts: Challenges and Opportunities," in *2018 British Columbia Tax Conference* (Toronto: Canadian Tax Foundation, 2018), 11:1-21, at 11:5-6.
- 42 See, for example, CRA document no. 2014-0538021C6, October 10, 2014, regarding paragraph 55(5)(e).
- 43 CRA document no. 2023-0968111C6, June 20, 2023.
- 44 See, for example, the Joint Committee on Taxation of the Canadian Bar Association and Chartered Professional Accountants of Canada, "Re: Legislative Proposals Released July 27, 2018," submission to Canada, Department of Finance, September 10, 2018, at 5-6.

- 45 See subsections 162(5), 162(6), and 162(7).
- 46 Subsection 163(6).
- 47 *L Venne v. The Queen*, [1984] CTC 223; the definition in *Venne* was endorsed by the Supreme Court of Canada in *Guindon v. Canada*, 2015 SCC 41, at paragraph 60.
- 48 *Venne*, supra note 47, at 234.
- 49 Ibid.
- 50 [1994] 2 CTC 2450 (TCC); aff'd 96 DTC 6085 (FCA).
- 51 Ibid., at 2457 (TCC).
- 52 Canada Revenue Agency, "Income Tax Audit Manual" (www.canada.ca/en/revenue-agency/services/tax/technical-information/income-tax-audit-manual-domestic-compliance-programs-branch-dcpb-28.html), at 28.4.2.
- 53 See Canada Revenue Agency, supra note 35, at question 3.5.
- 54 See, for example, *Home Depot of Canada Inc. v. The Queen*, 2009 TCC 281; *Douglas v. The Queen*, 2012 TCC 73; and *Moore v. The Queen*, 2019 TCC 141.
- 55 To recap the discussion above, the key elements of the definition of "settlor" in subsection 17(15) are that it applies to anyone who "transfers or lends" property to a trust (directly or indirectly). Exceptions apply to lenders if the loan was made at a "reasonable rate of interest" and the lender dealt with the trust at arm's length, and to transferors if property was sold for FMV and the transaction was at arm's length.
- 56 The Joint Committee on Taxation of the Canadian Bar Association and Chartered Professional Accountants of Canada, "Trust Reporting," submission to Canada, Department of Finance, July 19, 2024, at 5.
- 57 Ibid.
- 58 In a submission, the Joint Committee on Taxation of the Canadian Bar Association and Chartered Professional Accountants of Canada recommended increasing the de minimis threshold amount to \$100,000, to align it with the \$100,000 threshold used in the definition of "reporting entity" under the foreign property reporting rules, and suggested that the threshold be based on cost rather than FMV. See Joint Committee on Taxation of the Canadian Bar Association and Chartered Professional Accountants of Canada, "Submission Regarding Proposed Audit Powers in Budget 2024 Included in the August 2024 Draft Legislation," submission to the Department of Finance, September 11, 2024.
- 59 The Joint Committee, in its September 11, 2024 submission (ibid.), recommended expanding the asset category for the exemption to include near-cash items such as gold coins, silver ingots, and other precious metals used to settle trusts, as well as GICs from credit unions and limited partnership units listed on designated stock exchanges.
- 60 2007 SCC 17. The similarities and differences between the two are beyond the scope of this paper. Suffice it to say, for the purposes of this discussion, that under any characterization of the relationship between the title holder and the beneficial owner, the value of the interest granted to a title holder who is not the beneficial owner is arguably negligible.
- 61 If the CRA were consistent in its position on valuing remainder interests in charitable remainder trusts that include a right of encroachment, it would conclude that a gift of a future right of survivorship has no value.
- 62 2016 SCC 21.
- 63 2016 SCC 20.
- 64 *Thompson*, supra note 62, at paragraph 41.
- 65 See, for example, *Chambre*, supra note 63, at paragraph 74; and *Re Arnott; Ex p. Chief Official Receiver* (1888), 60 LTR 109.

- 66 2021 FC 295, at paragraphs 134-35; aff'd 2022 FCA 117.
- 67 *Ibid.* (FCA), at paragraph 57. Before the decisions in *Thompson* and *Chambre*, the BC Court of Appeal also found that information in a solicitor's trust account ledger is not presumptively privileged, and that the question whether it is privileged depends on whether the information reflects "the solicitor-client relationship and what transpires within it" (*Donell v. GJB Enterprises Inc.*, 2012 BCCA 135, at paragraphs 50, 55, and 59-60; *Wong v. Luu*, 2015 BCCA 159, at paragraph 36; leave to appeal to the Supreme Court of Canada dismissed January 28, 2016 (2016 CanLII 3182). See also *Canada (National Revenue) v. Ouellette*, 2008 FC 594.
- 68 *Chambre*, supra note 63, at paragraphs 45 and 48; and *Lavallee, Rackel & Heintz v. Canada (Attorney General)*; *White, Ottenheimer & Baker v. Canada (Attorney General)*; *R v. Fink*, 2002 SCC 61, at paragraph 39.
- 69 Canada, Department of Finance, "Legislative Proposals Relating to the Income Tax Act and the Income Tax Regulations" (<https://fin.canada.ca/drleng-apl/2024/ita-lir-0824-1-3-eng.html>).
- 70 Some technical nuances have been eliminated from these descriptions to increase their comprehensibility. These nuances are summarized in the footnotes.
- 71 Proposed paragraph 150(1.3)(b) assumes that the necessary designation to make the property a principal residence has been made.
- 72 Proposed subparagraph 150(1.3)(c)(ii) also assumes that the necessary designation to make the property a principal residence has been made.
- 73 Technically, corporations listed on a designated stock exchange. The minister of finance has the power to designate stock exchanges under section 262. For the list of designated stock exchanges, see Canada, Department of Finance, "Designated Stock Exchanges" (www.canada.ca/en/departement-finance/services/designated-stock-exchanges.html). We use the term "public corporation" only as shorthand for "corporation listed on a designated stock exchange."
- 74 The expansion of the small-trust exemption, the changes to the related-party trust exemption, the increase in the monetary value of solicitors' trust accounts, and the exemption for statutory accounts.
- 75 A purely administrative question is: What happens to bare trusts that reported for 2023? They now have trust numbers and are in the CRA's system. Will a failure to report in 2024 or thereafter prompt requests to file? Will such trusts be required to terminate their trust numbers to get out of the system? But how does one get out of the system without a termination of the trust—an event that will not occur? There is currently no process to cancel a trust number other than to report the trust as wound up.
- 76 Canada, Department of Finance, 2018 Budget, Budget Plan, February 27, 2018, at 69.
- 77 *Supra* note 35.
- 78 See David Sohmer, "The Securities Transfer Act and the Income Tax Act: Who Owns Publicly Traded Securities?" *Tax Topics* no. 2556, March 2, 2021, at 1.
- 79 See these public harms referenced at the submission made by STEP Canada to Innovation, Science and Economic Development Canada. See "RE: Bill C-42, Canada Business Corporations Act Amendments (Public Disclosure of the Beneficial Ownership Register)," *STEP Canada eNews*, February 22, 2024 (https://step.ca/downloads/marketing/STEP_eNews_Feb_22_Bill_C42.pdf).
- 80 The STEP submission, consisting of 13 pages. See *supra* note 79, at 1, footnote 1.
- 81 Sections 6401 to 6403 of the National Defense Authorization Act for Fiscal Year 2021 (Pub. L. no. 116-283), primarily adding section 5336 to title 31 of the federal United States Code. The United States issued an interim final rule, on March 21, 2025, that generally limits reporting under the US Corporate Transparency Act to foreign (non-US) reporting companies registered to do business in any US state.
- 82 Companies Act 2006, 2006 c. 46.

- 83 Patrick Wintour, “Register Revealing Firms’ True Owners Will Be Open to Public, Says Cameron,” *Guardian*, October 31, 2013 (www.theguardian.com/business/2013/oct/31/public-register-firms-secret-owners-cameron).
- 84 Finances Québec, *supra* note 4.
- 85 The legal publicity act, *supra* note 12.
- 86 See the source cited in *supra* note 14.
- 87 Government of British Columbia, “Business Corporations Act Beneficial Owner Consultation,” December 31, 2020 (www2.gov.bc.ca/gov/content/employment-business/business/bc-companies/business-corporations-act-beneficial-owner-consultation).
- 88 Case C-37/20, November 22, 2022.
- 89 See Robert E. Ward, “The Corporate Transparency Act Will Change the Way You Practice,” *ABA Business Law Today*, February 9, 2022 (www.americanbar.org/groups/business_law/resources/business-law-today/2022-february/the-corporate-transparency-act/); and see Tori J. Osler and Jacqueline N. Walton, “The Corporate Transparency Act: An Overview and Its Impact on Lawyers and Law Firms,” *Idaho State Bar (ISB)* blog, February 2, 2024 (<https://isb.idaho.gov/blog/the-corporate-transparency-act-an-overview-and-its-impact-on-lawyers-and-law-firms-by-tori-j-osler-and-jacqueline-n-walton>).
- 90 Canada Business Corporations Regulations, 2001, SOR/2001-512, at section 33.
- 91 In the United States, beneficiary reporting in tax filings can occur in years when a beneficiary receives a distribution. For example, see US federal trust return form 1041, and see New York State, Department of Taxation and Finance form IT-205, “Fiduciary Income Tax Return.” Regarding a general description of the United Kingdom’s trust register with a one-time filing subject to later changes, see, generally, Irwin Mitchell, “UK Trusts Register” (www.irwinmitchell.com/personal/wills-trusts-estates/trusts/uk-trusts-register).
- 92 British Columbia Business Corporations Act, *supra* note 12.
- 93 This is evident in the guide to ultimate beneficiaries, issued in March 2023 by the Quebec Enterprise Registrar: Gouvernement du Québec, Registraire des entreprises, “Comment identifier un bénéficiaire ultime?” (https://cdn-contenu.quebec.ca/cdn-contenu/adm/min/emploi-solidarite-sociale/registraire_entreprises/REQ_identifieur_beneficiaire_ultime.pdf).
- 94 See Corporations Canada, “Individuals with Significant Control,” under the heading “Trust” (<https://ised-isde.canada.ca/site/corporations-canada/en/individuals-significant-control#7>).
- 95 Government of British Columbia, “Transparency Register—Significant Individuals” (www2.gov.bc.ca/gov/content/employment-business/business/bc-companies/transparency-register/significant-individual).
- 96 Companies Act 2006, *supra* note 82.
- 97 Subsection 270(1) of the ITA, “controlling persons.” See, in this regard, Canada Revenue Agency, “Guidance on the Common Reporting Standard,” at paragraph 9.54 (www.canada.ca/en/revenue-agency/services/tax/international-non-residents/enhanced-financial-account-information-reporting/reporting-sharing-financial-account-information-other-jurisdictions/guidance-on-common-reporting-standard-part-income-tax-act.html), referring to the need for a beneficiary being reported to have received a distribution in the year.
- 98 QTA, *supra* note 2, sections 21.25 and 21.25.1.
- 99 Corporations Canada, “Control in Fact Guidance” (<https://ised-isde.canada.ca/site/corporations-canada/en/individuals-significant-control/control-fact-guidance>).
- 100 *Ibid.*
- 101 *Ibid.*
- 102 *Supra* note 35.

- 103 CQLR c. CCQ-1991 (herein referred to as “the CCQ”).
- 104 The word “judgment” is correctly spelled without a letter e, as it is spelled in the CCQ. Subsection 150(1.2) of the ITA misspells the word by including a letter e.
- 105 Daniel Frajman, “Internal Trusts of Charities: Possible T3 Reporting May Be Less Applicable in Québec,” *Tax Topics* no. 2684, August 15, 2023, 1-4, at 1 (<https://sps0.nyc3.digitaloceanspaces.com/wp/home/sysadmin/spiegelsohmer.com/htdocs/cms/2023/08/Tax-Topic-Article-Internal-Trust-of-Charities-Possible-T3-reporting-may-be-less-applicable-in-Quebec-by-DLF.pdf>).
- 106 See, for example, *Victuni v. Minister of Revenue of Quebec*, [1980] 1 SCR 580 (land held by a nominee corporation as a mandatary, under a contract of mandate, rather than as a trustee). See also other characterizations in *Groupe Sutton-Royal Inc. (Syndic de)*, 2015 QCCA 1069 (real estate agency holding commission monies under a debtor-creditor relationship that was not a trust) and in *Bank of Nova Scotia v. Thibault*, 2004 SCC 29 (financial institution holding self-directed RRSP funds under an innominate investment contract rather than under a trust or annuity).
- 107 SC 2009, c. 23.
- 108 For example, the term “bare trust” and the French term “simple fiducie” (used in the French-language version of subsection 150(1.3) of the ITA) are not defined as being part of Quebec law in the standard Quebec textbook on trusts: Jacques Beaulne and André J. Barette, *Droit des fiducies*, 3d ed. (Montréal: Wilson & Lafleur, 2015).
- 109 CRA document no. 2024-1006681E5, February 27, 2024.
- 110 See Éric Hamelin, “Disclosure of Bare Trusts and Nominee Contracts: A Federal-Quebec Comparison” (2023) 23:2 *Tax for the Owner-Manager* 12-13, referring to the Supreme Court of Canada case of *Victuni*, supra note 106, to the effect that in Quebec law, an agreement to act as nominee (prête-nom) is a contract of mandate rather than a trust. See also Marc Pietro Allard and Eric White, “CRA Clarifies T3 Filing Requirements for Quebec Nominee Contracts” (2024) 14:2 *Canadian Tax Focus* 14, suggesting that, in Quebec, *Victuni* will typically support the finding of a mandate rather than a trust in cases involving a standard nominee agreement. However, the specific facts must always be considered, and it is possible—if so intended on the particular facts—to have an “implied trust” in Quebec, as noted in obiter in *Groupe Sutton*, supra note 106.
- 111 At the report of the Comité de Liaison (liaison committee) of the Association de planification fiscale et financière (APFF) and Revenu Québec of January 24, 2022, at question 17 (herein referred to as “the 1/22 APFF-RQ committee report”) (www.apff.org/fr).
- 112 Concordant provisions are found in the ITA, at subsections 248(3) to (3.2).
- 113 Provided for in article 591 of the CCQ.
- 114 Canada, Department of Finance, “Legislative Proposals and Explanatory Notes Relating to Various Statutes,” August 12, 2024 (<https://fin.canada.ca/drlég-apl/2024/ita-lir-0824-eng.html>).
- 115 Quebec budget papers 2021-22, supra note 18.
- 116 The exceptions referred to in the Quebec budget papers 2021-22 cite Quebec budget speeches of 2012 regarding situations that require the filing of a Quebec tax return for a trust subject to Quebec taxation, particularly situations where a trust, in calculating its income for the year, has deducted an amount allocated to a beneficiary, regardless of the beneficiary’s place of residence.
- 117 See An Act To Give Effect to Fiscal Measures, announced in the budget speech delivered on March 12, 2024, and certain other measures, SQ 2024, c. 41. Given this harmonization, section 646 of the QTA is roughly concordant with subsection 104(1) of the ITA; section 1000(1) of the QTA is roughly concordant with subsection 150(1.1) of the ITA; section 1000(2.2) of the QTA is roughly concordant with subsection 150(1.2) of the ITA; section 1000(4) of the QTA is roughly concordant with subsection 150(1.3) of the ITA; section 1000(5) of the QTA is roughly concordant with subsection 150(1.4) of the ITA; and the introductory paragraph to

- section 1000(1) of the QTA gives authority for part 5 of the Quebec trust tax return (TP-646-V), which is roughly concordant with schedule 15 to the federal trust tax return (T3RET). The 5 percent penalty at subsection 163(6) of the ITA has no equivalent in the QTA, which has instead, at section 1049.0.0.1(a), a gross negligence penalty of \$100 per day up to a maximum of \$5,000.
- 118 Revenu Québec form TP-646-V, “Trust Income Tax Return 2023”; and Revenu Québec, *Guide to Filing the Trust Income Tax Return 2023* (TP-646.G-V) (Québec: Revenu Québec, 2023).
- 119 This was before the federal government’s announcement, on February 4, 2022, of its intention to include bare trusts within the scope of subsection 150(1.3) of the ITA. See Canada, Department of Finance, “Department of Finance Consulting on Draft Tax Proposals,” *News Release*, February 4, 2022 (www.canada.ca/en/departement-finance/news/2022/02/departement-of-finance-consulting-on-draft-tax-proposals.html).
- 120 Supra note 111.
- 121 CQLR c. A-6.002.
- 122 See the discussion above, under the heading “Beneficiaries” (in the section titled “The Trust Reporting Rules”), for a discussion of whether the definition of “beneficially interested” in subsection 248(25) of the ITA applies in determining beneficiaries for the purposes of the federal ITA.
- 123 Regarding mandatory disclosure of nominee agreements to Revenu Québec, see Jonathan Lafrance, “Mandatory Disclosure of Nominee Agreements to Revenu Québec” (2019) 9:4 *Canadian Tax Focus* 5-6, at 5.
- 124 Lafrance, *ibid.*, at 6, referring to *ZT22 Holding Inc. v. The Queen*, 2013 TCC 17, to the effect that the tax authorities, when assessing tax, defer to the actual situation (for example, the true ownership) because they must determine a taxpayer’s liability on the basis of the real facts. However, when acting as tax collectors, the authorities are considered to be good-faith third parties and may rely on either the actual situation set out in a secret contract or the arrangement outlined in the nominee agreement.
- 125 In Quebec, it is more correct to refer to the true owner, rather than the beneficial owner, since Quebec does not have a division between legal and beneficial ownership.
- 126 Revenu Québec form TP-1079.PN-V, “Disclosure of a Nominee Contract.”
- 127 2022 APFF tax conference, Revenu Québec round table, at question 22, “Divulgence de prête-nom” (www.apff.org/fr). This round table question is also discussed by Hamelin, supra note 110.