

# QUEBEC GOVERNMENT MANDATES DISCLOSURE OF NOMINEE AGREEMENTS

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Nominee agreements are frequently used in commercial real estate transactions for various non-tax reasons, and often legal title to real or immovable property is registered in the name of a nominee company, whereas beneficial ownership is held by a separate person or entity. A nominee agreement allows one party (the principal) to grant a mandate to another party (the nominee) to act on its behalf. As such, the nominee would generally enter into contracts with third parties on behalf of the principal, but without necessarily disclosing to the third parties the fact that the nominee is acting on behalf of an undisclosed principal.

On May 17, 2019, the Ministère des Finances du Québec released Information Bulletin 2019-5 announcing new mandatory disclosure requirements with respect to nominee agreements. The proposed legislation was subsequently released on November 7, 2019 and received assent on September 24, 2020.

These new rules will require that parties to a nominee agreement that is entered into as part of a transaction or series of transactions disclose the following information in form TP-1079.PN to Revenu Québec:

- the date of the nominee agreement,
- the identity of the parties to the nominee agreement,
- a full description of the facts of the transaction or series of transactions to which the nominee agreement relates,
- the identity of any person or entity for which such transaction or series of transactions have tax consequences, and
- any other information requested in the prescribed form.

It should be noted that the description of the facts must be sufficiently detailed to allow the Minister to analyse the transaction or series of transactions and obtain a fair comprehension of the related tax consequences.

While there is still some uncertainty surrounding what may constitute “tax consequences”, it is expected that a wide array of transactions will be considered to give rise to “tax consequences”, and Revenu Québec has already stated that it would interpret the meaning of “tax consequences” very broadly. Revenu Québec has also confirmed that “tax consequences” refers to income tax consequences under the Québec *Taxation Act*, and

would therefore not include indirect or land transfer tax consequences. While one could argue that entering into a nominee agreement whereby one party merely agrees to hold legal title to real or immovable property beneficially owned by another would not give rise to any tax consequences since any tax consequences would essentially be the same as those that would result from both legal and beneficial ownership being held by the same person, it appears that Revenu Québec would not accept such an argument. Indeed, based on one example of what Revenu Québec considers to be a tax consequence (specifically the case where a nominee holds legal title to a rental property and the beneficial owner collects rent and incurs expenses in respect of the property), it is likely that all nominee agreements relating to the acquisition or holding of real or immovable property situated in Québec would need to be disclosed. Additionally, where the property is located outside of Québec, but the nominee or beneficial owner is subject to Québec income tax, the relevant nominee agreement would need to be disclosed.

These rules apply to all nominee agreements entered into after May 16, 2019, but will also apply to nominee agreements entered into before May 17, 2019 if the tax consequences of the relevant transaction or transactions to which a nominee agreement relates continue after May 16, 2019.

The disclosure must be filed by the later of (i) 90 days following the conclusion of the nominee agreement and (ii) December 23, 2020 (meaning that nominee agreements entered into at any time prior to September 24, 2020 must be disclosed at the latest by December 23, 2020). Where there is a failure to comply with the disclosure requirement, penalties will apply. The penalty is \$1,000 plus an additional \$100 per day for which the disclosure is not filed starting on the second day of failure, up to a maximum of \$5,000. More importantly, failure to comply will result in the suspension of the prescription period otherwise applicable to one or more transactions. This suspension would allow Revenu Québec to reassess tax, interest and penalties on the parties to a nominee agreement even if the normal reassessment period has expired; however the reassessment must reasonably be considered to relate to the tax consequences of the transaction or transactions to which the nominee agreement relates.

Given the broad application of these rules, parties should review their existing nominee agreements to determine whether they are subject to the disclosure requirement.

by Michel Ranger and Michael Hassar

### **A Cautionary Note**

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

The logo for mcmillan, featuring the word in a lowercase, sans-serif font. The 'm' and 'c' are in a dark red color, while the 'm', 'i', 'l', 'l', 'a', and 'n' are in a light blue color. The logo is positioned in the upper left corner of the page.

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