



Secret Entities: A legal analysis of the transparency of beneficial ownership in Canada

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About Publish What You Pay and Publish What You Pay Canada

Publish What You Pay is the world's leading coalition of civil society organizations united in the call for a more transparent and accountable extractive sector. With more than 800 members, a global secretariat and 40 national coalitions that span the globe, PWYP is committed to working together to ensure that citizens have a say over whether their resources are extracted, how they are extracted and how their revenues are spent.

Publish What You Pay Canada is the Canadian coalition of the global PWYP network. Since its foundation in 2007, PWYP-Canada has been at the forefront of the national movement for transparency in the Canadian extractive sector, championing and driving forward the passage of legislation that requires that Canadian extractive companies disclose their payments to governments in Canada and across the globe. In addition, the coalition has worked to actively encourage and support the use of Canadian company information in global advocacy efforts. As part of its transparency promotion, PWYP Canada is calling for a publicly available centralized registry of the beneficial owners of all companies registered, listed, and operating in Canada, both provincially and federally.



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Executive Summary

Key Findings and Conclusions

- A number of laws in Canada enable actors involved in business transactions to obscure beneficial ownership, and are out of step with global efforts to address money-laundering and terrorism financing.
- Canada is falling short of global standards on beneficial ownership transparency, including the Financial Action Task Force Recommendations and Canada's commitments at the G20. Implementing the recommendations contained in this report would enable Canada to meet its international obligations and fight crime more effectively.

Legal Relationships and Arrangements

- Laws in Canada allow one person to conduct business on another person's behalf without disclosing their relationship, including agents, trustees, nominee directors and nominee shareholders. An effective anti-money-laundering (AML) and terrorism financing (TF) regime would legally require all trustees, agents and nominees to disclose their status to government officials, financial institutions and designated non-financial businesses and professions (DNFBPs).
- Powers of attorney are frequently used to perpetrate real estate fraud, and may be abused to obscure the true ownership or control of the holder of the power of attorney.
- Trust laws in Canada easily allow for the abuse of trusts to obscure true ownership or control for criminal purposes. While privacy interests in trusts, especially personal trusts, may be greater than those associated with business activities, laws could be tightened to make it more difficult for criminals to abuse trusts. Trust registries which would include information about trustees, settlers and beneficiaries should be considered, at a minimum for business trusts.

Corporations, partnerships and sole proprietorships

- All entities and arrangements doing business in Canada including general and LLP partnerships, limited partnerships, business trusts and all distributing (publicly-traded) and non-distributing (privately-held) corporations should be required to collect and disclose beneficial ownership information about their businesses to a public registry.
- Distributing corporations are more transparent due to public conflict of interest filings for shareholdings over 10%. However, non-distributing corporations are very opaque in all Canadian jurisdictions and beneficial ownership information is generally unavailable and difficult to verify. Non-distributing corporations can easily be used by criminals for money laundering or other criminal purposes.



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- Current provincial business registries are important transparency promotion tools, however they could go much further in meeting FATF obligations if they collected and disclosed information on beneficial ownership.
- Canada should create a national business registry that pools all information collected by the provincial and federal databases, which would create a one-stop resource for the public, as well as financial institutions, DNFBPs, and potential creditors. It would reduce delays in law enforcement investigations as well as the compliance burden on the private sector. An effective registry would make information available to the public with no associated costs, in an open and accessible format with maximum searchability functions and in compliance with open data standards. The functions and powers of Provincial and federal Registrars should ensure that they can play an effective role in the anti-money laundering and terrorism financing regimes. They should have expertise in business law, be granted powers to compel information, verify information and impose dissuasive penalties to non-compliant businesses.

Land Title Registration

- Land title registries should collect beneficial ownership information. Currently, provincial land title registration systems collect only registered owners' information – not beneficial ownership information. This can provide a cover of legitimacy for properties paid for through proceeds of crime, including proceeds of corruption, and it is impossible for authorities to ascertain the true owners of property.

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Abbreviations

AMD4: *European Union Fourth Anti-Money Laundering Directive*

CBCA: *Canada Business Corporations Act*

DNFBPs: *Designated Non-Financial Businesses and Professions*

FATF: *Financial Action Task Force*

PIPEDA: *Personal Information Protection and Electronic Documents Act*

PCMLTFA: *Proceeds of Crime (Money Laundering) and Terrorism Financing Act*

NOBO: *Non-Objecting Beneficial Owner*

OBO: *Objecting Beneficial Owner*

Glossary

Agent: Under the laws of agency, an agent is authorized to act on behalf of another (called the principal), including entering into legal agreements with third parties.

Bare Trustee: A person who holds property in trust at the absolute disposal and for the absolute benefit of the beneficiaries. The bare trustee has no significant powers or responsibilities and can take no action without instructions from the beneficiary.

Beneficial Owner: Refers to the natural person who owns, controls, or exercises ultimate effective control over a legal entity, arrangement, or property. This ownership may be direct, indirect and/or exercised through a chain of ownership.

Beneficiary: A person entitled to receive property or income from a trust.

Business Trust: A trust set up for the purpose of carrying on business or for the purpose of investment.

Corporation: Through incorporation, an entity with a separate legal personality is created under the law, whereby the liability of those investing in the company is limited to the amount invested.

Designated Non-Financial Businesses and Professions: Under the FATF rules, non-financial businesses and professions are those that pose money laundering risks, including lawyers, casinos, traders in precious metals and stones, real estate agents, etc.

Distributing Corporation: Under the CBCA, a corporation that is a reporting issuer, i.e. issues shares on a provincial securities exchange (a publicly-traded corporation).

General Partnership: A partnership in which all partners possess unlimited personal liability for the debts, obligations or liabilities of the partnership.

Limited Liability Partnership: A partner in a limited liability partnership is not liable for the debts, obligations, or liabilities of the partnership or of another partner arising out of negligence or other wrongs of another partner or employee.

Limited Partnership: A form of partnership in which at least one general partner possesses unlimited personal liability; however, a limited partner's liability is restricted to the amount contributed to the partnership.

Nominee: "In the name of"; a person or entity who acts for another, such as an agent or trustee.

Non-Distributing Corporation: Under the CBCA, a corporation that is not a reporting issuer, i.e. does not issue shares on a provincial securities exchange (a privately-held corporation).

Non-Objecting Beneficial Owner: Under provincial securities laws, beneficial owners of securities which do not object to their identities being provided by the registered owner to the corporation, partnership or other issuer.

Objecting Beneficial Owner: Under provincial securities laws, beneficial owners of securities which object to their identities being provided by the registered owner to the corporation, partnership or other issuer.

Partnership: A form of business which arises when two or more people begin to carry on business together with a view to making a profit. Partners do not possess a separate legal personality from the partnership.

Power: The authority to deal lawfully with the property of another.

Principal: Under the laws of agency, a principal grants authority or powers to the agent to conduct certain transactions or perform certain roles on his or her behalf.

Registered Shareholder: As distinguished from the beneficial owner, the registered shareholder is the legal owner of shares, which may (or may not) be held on behalf of another.

Settlor: A person who establishes a trust for the benefit of beneficiaries.

Sole Proprietorship: A form of business that comes into existence whenever an individual starts to carry on business and ceases to exist when the individual closes down the business. There is no legal separation between the owner and the business.

Securities Registry: Under the CBCA and other corporate law statutes, a corporation must record and maintain the registered securities it has issued (e.g. shares), together with certain information with respect to each class or series of securities.

Shareholder Registry: See Securities Registry.

Trust: An obligation, binding a trustee to deal with property over which he/she has control for the benefit of persons (beneficiaries) to the trust.

Trustee: Manages property held under a trust for the benefit of beneficiaries.

1. Introduction

A number of reports have made a compelling case to increase beneficial ownership transparency in Canada and around the world.¹ These reports demonstrate the role that Canadian companies have played in domestic and international money laundering and tax evasion schemes.

In Canada as elsewhere, there are numerous ways of concealing ownership information in business dealings, real estate purchases, shareholding, and in general, acquiring or selling valuable goods and services. With Canadian laws on beneficial ownership having few disclosure requirements and no legal prohibitions on the secret representation of a third party in business dealings, Canada is an easy place to obscure the true ownership of business interest and real estate holdings for criminals, tax evaders, money launderers, and corrupt officials.

A beneficial owner refers to the natural person who owns, controls, or exercises ultimate effective control over a legal entity, arrangement, or property. This ownership may be direct, indirect and/or exercised through a chain of ownership.

As a result of the criminal misuse of corporations, trusts, and other legal arrangements, the Financial Action Task Force (“FATF”), the global anti-money-laundering and anti-terrorist financing organization, has put in place numerous recommendations for state implementation requiring businesses and service providers to ascertain beneficial ownership when doing business with clients. Financial institutions and other designated non-financial businesses and professions (DNFBPs) such as accountants, casinos, real estate agents, and dealers in precious gems and stones have anti-money-laundering and terrorism financing obligations because they may handle large cash transactions, which are susceptible to misuse. Despite a certain level of implementation of these obligations in Canada, this report will demonstrate that there are numerous ways to legally remain anonymous in business transactions and to hide beneficial ownership information from law enforcement authorities, financial institutions, and DNFBPs.

In addition to the FATF obligations, in 2014, the G20 Leaders committed to lead by example and improve the transparency of beneficial ownership in their respective jurisdictions. In striving to meet these commitments, the UK and other European countries have taken clear steps to improve public beneficial ownership information, including establishing public registries of beneficial owners. Public beneficial ownership registries will ensure that civil society organizations, businesses, customers, law enforcement agencies, tax collection authorities, and others are able to discern the true owner or the person who ultimately benefits or controls the entity or property in question. Registries, alongside complementary efforts to require that

¹ See, e.g., Transparency International Canada, *No Reason to Hide; Unmasking the Anonymous Owners of Canadian Companies and Trusts* <http://www.transparencycanada.ca/wp-content/uploads/2017/05/TIC-BeneficialOwnershipReport-Interactive.pdf>

agents and nominees disclose their status and the identities of those they represent, are critical to creating a transparency beneficial ownership system that can allow law enforcement to fight crime.

PWYP-Canada commissioned this legal research to better understand a) how Canadian law permits companies to obscure or hide their ownership, b) the disclosure requirements that currently apply to Canadian businesses, and c) what changes need to be made in Canada to increase beneficial ownership transparency. Publish What You Pay Canada and its members are very concerned about government revenue loss through corruption and tax evasion. At the global level, Publish What You Pay members have highlighted the role that secret company ownership has played in cases in the mining and oil and gas sector, allowing corrupt officials to siphon money directly out of the pockets of their citizens. As a coalition, Publish What You Pay has supported the integration of beneficial ownership transparency into the Extractive Industry Transparency Initiative (EITI) and has supported campaigns in the US, the UK and Europe to increase beneficial ownership transparency.

The report begins with a brief overview of Canada's G20 and FATF obligations on beneficial ownership and then it reviews different types of legal doctrines and businesses entities in Canada, including sole proprietorships, partnerships, corporations, and trusts, and identifies the reporting obligations in each with a view to clarifying the transparency of the current system.²

Due to the high incidence of fraud and money-laundering in real estate transactions, improving beneficial ownership transparency in provincial land title registries is also discussed. The last section explores the current laws around privacy rights and how these might impact the goal of making beneficial ownership information public.

This assessment finds that those individuals intent on obscuring beneficial ownership information or conducting business anonymously are able to do so lawfully through a variety of means.

This assessment finds that individuals intent on obscuring beneficial ownership information or conducting business anonymously are able to do so lawfully through a variety of means. The report provides recommendations on how the Government of Canada and provincial governments could improve beneficial ownership transparency in Canada. If implemented, these policies would improve corporate governance as well as the business climate in Canada and increase the information available to prospective investors and consumers. It would ensure that Canada has the information necessary to fight corruption, money laundering, tax evasion, and terrorist financing. The recommendations are summarized at the end of the report.

² This report is limited in scope to for-profit business activity and does not address non-profit or charitable organizations.

2. Canadian Landscape

2.1 Implementation of International Anti-Money Laundering Initiatives

Both the Financial Action Task Force (FATF) Recommendations and G20 High-Level Principles on Beneficial Ownership recognize the role that beneficial ownership transparency could play in addressing money-laundering, terrorism financing and other crimes.

Corrupt officials, money launderers, and other criminals employ various means of obscuring their true ownership of assets and property, such as shell corporations, trusts, nominee shareholdings, and complex structures to remain anonymous in the course of their business transactions.

Due diligence and reporting obligations of financial institutions and DNFBPs often represent the best or only opportunity available for the state to detect suspicious activity for reporting to law enforcement.

The FATF includes a number of recommendations that reflect the need for financial institutions and DNFBPs, including real estate agents, lawyers, precious metal and stone dealers, casinos, and others to ascertain the structure and beneficial ownership of companies and legal arrangements of companies with which they do business. Specifically, FATF requires financial institutions and DNFBPs to do the following as part of their customer due diligence and record-keeping requirements:

Identifying the beneficial owner, and taking reasonable measures to verify the identity of the beneficial owner, such that the financial institution is satisfied that it knows who the beneficial owner is. For legal persons and arrangements this should include financial institutions understanding the ownership and control structure of the customer.³

These obligations are placed on financial institutions and DNFBPs because by the very nature of their activities they facilitate or engage in transactions that can be misused for criminal purposes. They are required to conduct due diligence on their clients and file reports to authorities when they detect suspicious activity or when transactions are above a certain threshold. Reports made by financial institutions and DNFBPs often represent the best or only opportunity available for the state to detect suspicious activity for law enforcement purposes. As the FATF regime is currently structured, financial institutions and DNFBPs are required to play an outsized role in combatting money-laundering and terrorism financing, yet as this report will show, they often do not have adequate tools to do this.

FATF Recommendations 24 and 25 specifically require countries to take measures to prevent the misuse of legal persons and legal arrangements for money laundering or terrorist financing and require countries to ensure that there is adequate, accurate, and timely information on the beneficial ownership and control of legal persons that can be obtained or accessed in a timely

³ Financial Action Task Force Recommendation 10 (b); found at http://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF_Recommendations.pdf

fashion by competent authorities.⁴

The G20 High-Level Principles on Beneficial Ownership represent a political commitment by G20 countries to meaningfully address beneficial ownership transparency domestically and internationally, including conducting a risk assessment of existing and emerging risks at the domestic level.

Both the FATF Recommendations and the G20 urge member states to consider measures to facilitate access to beneficial ownership and control information by financial institutions and DNFBPs. The G20 High Level Principles expressly contemplate “central registries of beneficial ownership of legal persons or other appropriate mechanisms” as a means of ensuring that competent authorities have timely access to adequate, accurate and current information regarding beneficial ownership of legal persons.

Canada’s international commitments on anti-money-laundering and terrorism financing are largely implemented through the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act* (PCMLTFA)⁵, however, on beneficial ownership they fall short of what is required by the FATF Recommendations.

Financial institutions are obligated to abide by record-keeping and client identification requirements for borrowers and other customers. Under section 11.1 of the PCMLTFA Regulations to the Act, all financial institutions, trust companies, securities dealers, and insurance brokers required to confirm the existence of an entity or trust, must also collect beneficial ownership information on that entity or trust. For all entities including corporations, the names and addresses of all persons who own or control, directly or indirectly, 25 per cent or more of the entity must be collected. For trusts, the names and addresses of all trustees and all known beneficiaries and settlors of the trust must be collected. In all cases, information establishing the ownership, control, and structure of the entity must also be collected.⁶

DNFBPs such as real estate agents are required to take reasonable measures to ascertain whether transactions or purchases are made on behalf of third parties as well as take reasonable measures to determine whether clients are acting on behalf of third parties. In cases where a third party is involved, DNFBPs must obtain specific information about the third party and their relationship with the individual providing the cash or the client. However, DNFBPs are **not** required to enquire into and take reasonable measures to obtain beneficial

⁴ FATF defines legal persons as “any entities other than natural persons that can establish a permanent customer relationship with a financial institution or otherwise own property. This can include companies, bodies corporate, foundations, anstalt, partnerships, or associations and other relevantly similar entities.” *Ibid*, FATF Recommendations, see glossary at p 113. FATF defines legal arrangements as “express trusts or other similar legal arrangements. Examples of other similar arrangements (for AML/CFT purposes) include fiducie, treuhand and fideicomiso.” *Ibid*.

⁵ *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*, S.C. 2000, c.17

⁶ *Ibid.*, Regulations s. 11.1, see <http://laws-lois.justice.gc.ca/eng/regulations/SOR-2002-184/page-3.html#h-10>

ownership information of legal persons or arrangements.

In not obligating DNFBPs to enquire into beneficial ownership, the federal and provincial governments have placed the greatest part of the burden of the detection of money-laundering and terrorist-financing on the financial services industry alone. At the same time, the governments have not provided the sector with the tools or legislative framework to aid them. Insufficient information is publicly available on businesses and their beneficial ownership structures for them to effectively detect and report suspicious transactions. Moreover, multiple financial institutions are currently expending significant resources conducting due diligence including beneficial ownership research on the very same companies, a highly inefficient use of resources in the Canadian economy when such information could easily be gathered by governments and disclosed to all.

In September 2016, a FATF Mutual Evaluation Report on Canada's anti-money laundering and counter-terrorist financing measures found Canada only partially compliant on Recommendation 24 (transparency and beneficial ownership of legal persons) and non-compliant on Recommendation 25 (transparency and beneficial ownership of legal arrangements).⁷ There remains an information deficit on beneficial ownership for financial institutions and DNFBPs, including those who diligently, and to the best of their ability, implement all the FATF requirements relating to beneficial ownership. Where information is not gathered or made publicly available, such entities are often unable to obtain or independently verify beneficial ownership information for Canadian companies and trusts.

Canada should look to best practices of other jurisdictions on implementing FATF recommendations on beneficial ownership transparency. Member states of the European Union are implementing the Fourth EU Anti-Money-Laundering Directive (AMD4),⁸ which requires all member states to create beneficial ownership registries for all legal persons and arrangements, including trusts. Under the EU AMD4, companies, legal entities, and trustees of express trusts, will be required to collect and disclose to their governments adequate, accurate and current beneficial ownership information, as required by the Directive. Each EU member state is required to create a central registry of beneficial ownership information that is accessible, at a minimum, to competent authorities and financial intelligence units (FIUs) and "obliged entities" when carrying out customer due diligence measures, as well as those who can demonstrate a "legitimate interest" in the information. Currently, a draft Directive⁹ is under consideration that would amend the AMD4 to require that such registries would become publicly available, and lower the ownership and control threshold from 25% to 10%.

⁷ <http://www.fatf-gafi.org/media/fatf/documents/reports/mer4/MER-Canada-2016.pdf>

⁸ http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:L_2015_141_R_0003&from=ES

⁹ [http://www.europarl.europa.eu/legislative-train/theme-area-of-justice-and-fundamental-rights/file-revision-of-the-anti-money-laundering-directive-\(aml\)](http://www.europarl.europa.eu/legislative-train/theme-area-of-justice-and-fundamental-rights/file-revision-of-the-anti-money-laundering-directive-(aml))

Recommendation: *The Government of Canada should amend the Proceeds of Crime (Money Laundering) and Terrorism Financing Act (PCMLTFA) to require that DNFBPs collect beneficial ownership information on entities and trusts when conducting transactions over \$10,000. The PCMLTFA should also be amended to lower the beneficial ownership and control threshold for information collection from 25% to 10%.*

2.2 Division of Powers

Canada possesses a federal system of government in which federal, territorial, and provincial governments are granted particular powers under the Canadian Constitution and thus have jurisdiction over different business activities. Under the constitutional division of powers, the federal government regulates banks,¹⁰ federally incorporated companies,¹¹ and through its criminal law¹² powers, certain rules for financial institutions and DNFBPs to comply with anti-money-laundering and anti-terrorism financing requirements. Federally incorporated companies have a right to carry on business in all provinces, however, they are required to register in each province in which they do business.

Provinces exercise jurisdiction over provincially-incorporated companies,¹³ trusts, securities regulation, trust and loan companies, cooperative credit societies, savings and credit unions, and caisses populaires.¹⁴ Provinces also regulate professions, including casinos, real estate agents, and lawyers. Provincially-incorporated companies may register their names in other provinces to obtain the right to do business there.

Due to the scope of the issues covered by the report, the analysis will focus mainly on federal and Ontario statutes and laws, although it should be noted that many of the provincial statutes discussed are similar across Canada (with some exceptions in Quebec).

¹⁰ *Constitution Act, 1867*, s. 91(15)

¹¹ Through Trade and Commerce powers, *ibid.*, s. 91(2)

¹² *Ibid.* s. 91(27).

¹³ *Ibid.* s. 92(11).

¹⁴ The remainder of subjects are covered by s. 92(13) of the *Constitution Act*, *ibid.*

3. Regulation of Business in Canada and Beneficial Ownership Transparency

This section will review business law principles and business organization forms relating to the conduct of business in Canada, with a view to ascertaining the transparency of beneficial ownership of property, transactions and securities. Sections 1-3 will summarize powers, trusts and agency law. Sections 5-8 will review business names statutes, sole proprietorships, partnerships, corporations and securities laws, all through the lens of beneficial ownership transparency.

3.1 Powers

Power is “the authority that the owner of property can invest in another and that gives the non-owner the legal right to use the property. In short, a power is the authority to deal lawfully with the property of another.”¹⁵ Under a **power of attorney**, a person is empowered to represent another or act on his or her behalf for certain purposes. The law permits the creation of any power so long as it is not illegal or contrary to public policy. Powers, including a power of attorney, are covered under the definition of beneficial ownership that pertains to directing or controlling property. Powers of attorney can be very transparent, as a person would typically perform a business transaction on behalf of another, pursuant to a clear Power of Attorney document presented at the time of performing the transaction, such as signing a contract. On the other hand, powers of attorney can also obscure true relationships and ownership, including for criminal purposes. A person exercising a power of attorney may secretly be a principal or a beneficial owner, as illustrated by the example below. Additionally, real estate fraud conducted through forged powers of attorney documents has become sufficiently prevalent for the Law Society of Upper Canada to issue guidelines to lawyers on how to handle powers of attorney in real estate transactions.¹⁶

Because powers are conveyed directly from one person to another in the private realm, there are few regulatory opportunities apart from interactions between the holder of the power of attorney on the one hand, and with financial institutions and DNFBPs such as real estate agents on the other hand. Currently, FATF recommendations create an important detection role for real estate agents, but many cases demonstrate that the latter can be complicit in, or the primary perpetrator of the criminal activity.

¹⁵ Eileen E. Gillese, *The Law of Trusts*, 3rd Edition, Toronto: Irwin Law, 2014, at 22.

¹⁶ http://www.lsuc.on.ca/media/power_of_authority.pdf

Case 1: Criminal Misuse of Powers of Attorney: The Globe and Mail reported on the following allegations against a Vancouver real estate agent, Kenny Gu

“Gu was the beneficial owner of certain properties, even though absentee foreign clients bankroll everything from the down payment and mortgage payments to property-related taxes and other expenses. The homes and mortgages are registered in the names of his clients, their companies or spouses. The financing Gu’s companies receive from those clients comes in the form of loans that are not taxable, and that fall within what’s known as “shadow banking” – an unregulated system that has exploded in popularity in China, and now appears to be getting a toehold in Canada. Such “peer-to-peer” loans, as they are also called, sidestep banks entirely, and promise lenders significantly higher returns than they can get elsewhere. Gu’s lender clients earn their wealth primarily in China, while coming and going from Vancouver.... Records show that they give Gu power of attorney to facilitate everything through his small, nondescript Vancouver office, but his stake in the properties remains hidden. And although he is not licensed to broker mortgages or manage investments, records suggest he does both. Those records also link him and his clients to activity involving at least 36 properties over the past five years. Yet Gu paid next to nothing in taxes last year, while millions of dollars flowed through his business and personal accounts. An in-depth look at five of his deals this year reveals that he sold the properties for a cool \$5-million more, in total, than he paid for them.

“(...)When Mr. Gu flips a property, his contracts stipulate that lender clients get back what they put in, plus a set return – 15 per cent in one instance. After the mortgage and the bills are paid, Mr. Gu keeps whatever is left, which, in some cases, appears to be hundreds of thousands of dollars. According to legal and tax experts, this arrangement would allow him to avoid taxes, because the properties are not in his name.”

Recommendation: *The PCMLTFA should be amended to require those exercising powers on behalf of others to disclose their status to financial institutions and DNFBPs, together with identities of all registered owners and all beneficial owners of property/funds involved in the transactions.*

3.2 Agents and Nominees

Persons may hire agents to act on their behalf. Pursuant to a contract, a “principal” grants authority or powers to the “agent” to conduct certain transactions or perform certain roles.

Nominees are essentially agents acting on behalf of and under the instructions of others. For example, a nominee shareholder is the registered owner of shares, acting on behalf of the beneficial owner, often without even disclosing the existence of the beneficial owner. Shell corporations, trustees, individuals, and others may act as nominees.

Agency Law relating to undisclosed principals

There are particular rules governing the liability of a principal who has an agent acting on his or

Case 2: Friedmann Equity Developments Inc. v. Final Note: Supreme Court of Canada upholds sealed contract/undisclosed principal rule

The corporation “Final Note” was created as a bare trustee and with the sole purpose of legally holding title in property for beneficial owners. A mortgage agreement was entered into between Final Note and a lender. The Vice-President of Final Note signed the mortgage and attached the corporate seal. The owners of Final Note and therefore, beneficial owners of the property, remained undisclosed and were not part of the mortgage agreement. When Final Note defaulted on the mortgage, the lender attempted to recover from the beneficial owners. The case was appealed to the Supreme Court.

The Supreme Court of Canada in 2000 upheld the sealed contract rule and found that the lender could not sue the principals: “Parties are presumed to be aware of the possibility that those with whom they are bargaining are acting on behalf of an unnamed principal...The rule has been an accepted part of the common law in Canada since at least 1903. Presumably, parties have been aware of the rule and have structured their transactions accordingly.”

her behalf to sign contracts. The rules are different depending on whether the party dealing with the agent knows there is a principal behind that agent. Where the agent does not even disclose that he or she is acting for another person, the principal is referred to as “undisclosed.”

As a general rule, an undisclosed principal may sue or be sued on a simple contract entered into on his or her behalf by an agent. The sealed contract rule is a well-established exception to that general rule, according to this rule, when a contract is executed under seal; an undisclosed principal can neither sue nor be sued upon the contract. The exception stems from the rule that only parties to a sealed instrument may have obligations and rights under it.

The sealed contract/undisclosed principal rule may date back to 1903 in Canada (and many centuries earlier in the common law), but it certainly seems out of step in 2017.

Under the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act* and its

Regulations, financial institutions are obligated to abide by record-keeping and client identification requirements for borrowers and other customers. Generally, lenders that constitute “financial entities” under the Act will be required to open or maintain an account and to keep a signature card in respect of any mortgage loan and so will be obliged to undertake reasonable enquiries regarding the beneficial ownership of the mortgaged property if that property is held by a corporation, trust or on behalf of a third party.

While banks are obligated to make reasonable enquiries about third parties and beneficial owners, there appears to be no common law or statutory obligation on the part of agents and nominees to respond truthfully to these enquiries. This negatively impacts the ability of a financial institution to implement the “know your customer” rule.

Recommendation: *The Government of Canada should make changes to the PCMLTFA to make it more difficult to obscure beneficial ownership through agents and nominees. When conducting transactions on behalf of others, all agents and nominees should be legally required to disclose their status to government officials, financial institutions and DNFBPs, together with the identities of all persons represented, including all beneficial owners of legal persons and arrangements involved in the transactions.*

3.3 Trusts

A trust is an obligation, binding a person (who is called a trustee) to deal with any type of property (land, money, etc.) over which he/she has control (which is called the trust property) for the benefit of persons (who are called the beneficiaries).¹⁷ The person creating the trust and conveying the property to the trustee is called the settlor.

3.3. a) Personal Trusts

Personal express¹⁸ trusts are created when all the legal requirements are met. First, settlors and trustees must meet certain capacity requirements. Any person capable to own property in his or her own right can act as a trustee, including a corporation (but not an unincorporated association). The “three certainties” must be met, i.e. certainty of intention, certainty of subject matter, and certainty of objects. This means that the property and beneficiaries must be clearly ascertainable and identifiable, as well as a clear intention that the trustee is placed under an obligation to hold property on trust for the benefit of the beneficiaries. Lastly, the

¹⁷ Underhill and Hayton, *Law Relating to Trusts and Trustees*, 18th ed by David J Hayton, Paul Matthews, & Charles Mitchell, (London: LexisNexis, 2010)

¹⁸ Express trusts are those created intentionally, in comparison to trusts arising by operation of the law, i.e. constructive trusts and resulting trusts.

property in question must actually be conveyed i.e. physically handed over to the trustee, or title conveyed in the case of land. Once the requirements are met, the trust is created and cannot be undone, even by the settlor, unless revocation powers are included in the trust. With some exceptions, formalities are not strictly required and trusts can arise very informally, as in the example below.

Case 3: Hypothetical example of the creation of a personal trust without formalities.

The “M” is a new mother, and her aunt “P” visits M at home to meet P’s newborn great-niece, “D”. P gives M a cheque for \$10,000 and says to M, “this money is for D’s post-secondary education. Please look after it and make sure the funds go toward paying her tuition when she attends university.” M deposits the cheque into a bank account she has set up for D.

Personal trusts are typically a private matter in the common law jurisdictions in Canada. Testamentary trusts are created on the death of a settlor to pass property down to family members or others. Trusts may be set up to ensure lifetime care for incapacitated family members. Given the privacy interests in private and testamentary trusts, it may be more challenging to create public disclosure requirements for these types of trusts, as opposed to business trusts (see below). Yet personal trusts can be equally vulnerable to misuse for money laundering purposes.

Case 4: Hypothetical money-laundering case using a personal trust.

“J” was a politician in an oil-rich country and through corruption and embezzlement received an estimated \$250 million in criminal proceeds. Illicit funds were laundered through off-shore companies and some were regularly wired to an associate, “U” who was living in the same western country as J’s daughter, “S”, a university student. U acted as a trustee for S, paying her tuition, providing her with spending money, and buying a condo in U’s name for the exclusive use of S. There was no formal trust agreement in operation.

3. 3. b) Business Trusts

A business trust is a trust “set up for the purpose of carrying on business or for the purpose of investment.”¹⁹ Business trusts can be used to add layers to transactions and obscure true ownership.

Unlike default provisions in the *Canada Business Corporations Act* or other corporate law statutes, there are no default statutory rules governing a business trust, so a trust agreement is required setting out all the details regarding the rights and obligations of participants.²⁰ This creates a great deal of flexibility in creating a business trust.

¹⁹ Mark Gillen, *Securities Regulation in Canada*. Toronto: Thomson Carswell, 2007 at 14.

²⁰ *Ibid.*

Often, business trusts are used as vehicles to manage RRSPs and investments, with the settlors and beneficiaries being the same persons, and with the trustee mandated to manage the investments.²¹ Such trusts may be governed by statutes, including those governing pooled registered pension plans and mutual funds.

Units in business trusts may be bought and sold by investors. When such units are sold to the public, they are regulated by provincial securities laws and are at a low risk for being misused for money laundering purposes. However, when business trusts are not regulated by pension or securities law, there is a higher opportunity for misuse.

3. 3. c) Limitations to creating trusts

The rules regarding the creation of trusts, as outlined in the sections above, are subject to certain limitations, including land transactions and trusts created for illegal purposes.

Unlike informal trusts, the creation of a trust in land requires an agreement in writing and signed by the settlor; otherwise it is void.²² This requirement is detailed under the *Statute of Frauds*²³, which stipulates that agreements of the purchase and sale of property must be made in writing, signed by both parties to it, and lawfully authorized in writing.

Trusts created for illegal purposes will be unenforceable and voided by the courts. Illegal purposes include trusts that involve criminal acts such as tax evasion or money-laundering. For example, the trial judge in *Homelife Romany Realty Ltd v Castelluzzo*²⁴ (see Case 5) declined to enforce any agreements and arrangements entered into between the plaintiffs and defendants due to illegal purposes.

3. 3. d) Bare trustees

A bare trustee is a person who holds property in trust at the absolute disposal and for the absolute benefit of the beneficiaries.²⁵ The trustee has no active duties to perform except to deal with the trust properly as instructed by the beneficiaries. In these cases, the trustee role is closer to that of an agent, who takes instructions from the principal. The bare trustee has no significant powers or responsibilities and can take no action without instructions from the beneficiary.

Bare trusts are used by business interests that do not possess legal personality and are unable

²¹ *Ibid.*, at 15.

²² Ontario *Statute of Frauds*, R.S.O 1990, c. S19, s. 9.

²³ The *Statute of Frauds* was originally passed in the English Parliament in 1677 (29 Chas. 2 c. 3). Modern statutes requiring land contracts to be executed in writing exist in some form in all provinces, for example, Ontario (RSO 1990, c.S.19), Nova Scotia (RSNS 1989, c 442).

²⁴ *Homelife Romano Realty Ltd v. Castelluzzo*, [2004] 248, D.L.R. (4th) 349

²⁵ *De Mond v R, Canadian Tax Court*, 29 ETR (2d) 266 (1999)

to hold land in their own names, for example, partnerships, joint ventures, and investment trusts. They may also be used as nominees, to hold shares in a corporation and for many other purposes.

Bare trustees can obscure beneficial ownership information, as they may choose not to disclose that they are acting for another. Indeed, bare trusts can be created for the sole purpose of rendering true owners anonymous.

Case 5: Bare trusts and shell corporations: vehicles for fraud and tax evasion

Peter and Stella Castelluzzo worked as Real Estate Agents for Homelife Romano, a Real Estate Broker owned by Donato Romano. They speculated on properties and implemented schemes to evade taxes. When Homelife Romano sued Peter and Stella for some \$46,000 in defaulted loans, a great extent of their illegal actions came to light in court. The brokerage used an Ontario numbered corporation with shares held by a nominee as well as other trust arrangements to anonymously purchase houses from their clients with whom they had listed the properties as agents, a clear breach of their fiduciary duties as real estate agents and, according to the trial judge, conduct amounting to criminal fraud. As the contracts and agreements were entered into for illegal purposes, the trial judge declined to enforce them.

The use of bare trusts is a very simple and effective way for criminals to obscure their involvement in business activities and launder funds, as the case in Case 5 demonstrates. Taking this case further, a public registry of corporations which included not just registered shareholders, but also beneficial owners could have enabled the home vendors who retained Homelife to easily access information about the shell corporation purchasing their homes, including the beneficial interest in it held by their own real estate agents. At the very least, it would have made it more difficult for the real estate brokerage to conduct its illegal activities.

Recommendation: *Given the risk of misuse associated with trusts, the federal government should consider amending the PCMLTFA to make it more difficult for trustees to obscure the beneficial ownership of trust property. These amendments should require that trustees, when conducting transactions on behalf of others, disclose their status to government officials, financial institutions and DNFBPs, together with identities of all settlors, trustees and beneficial owners of property/funds involved in the transactions.*

3.3. e) Taxation of Trusts

A trust is not recognized as a legal person, however, the Income Tax Act taxes it as though it were a person. A trust needs to file a tax return (a “T3 Return”) every year that it sells capital property or otherwise receives a taxable capital gain (for example, by selling shares). It also needs to file a tax return if it receives any income, gain or profit greater than \$500, or pays out a benefit to any beneficiary of more than \$100.

A T3 return contains a great deal of information. Most importantly, the trust document or will containing the trust must be included at first filing. The trust document or will sets out the property to be held in trust, as well as the identity of the settlor(s), trustee(s) and beneficiaries. A written trust document will also detail how the trust property is to be held, to whom and when the property should be distributed, and in what amounts. There may also be terms or conditions that must be met before disbursements can be made. The obligations and powers of the trustee will also be set out.

A T3 return will also include the trust account number (a unique identifier issued by CRA), as well as amounts allocated and designated to beneficiaries. If a personal trust distributes property to a beneficiary, then a statement must be attached to the return that includes, among other things, the name and address of the recipient or recipients, a description of the property, and the fair market value on the day it is distributed.

Thus, tax authorities will be aware of any major transactions by Canadian trusts that lawfully file taxes, potentially providing a valuable data set, able to reduce the misuse of trusts, if made available to other authorities such as a potential Trusts Registrar, financial intelligence agencies and law enforcement.

3.3. f) The Creation of Trusts Registries in Canada

The creation of trust registries is more complicated than business registries, first, due to the essentially private law nature of most trusts; and secondly, due to the potentially high degree of privacy expectations around trusts, especially family trusts. Personal information contained in trust agreements and wills setting up testamentary trusts, and possibly even the mere existence of a trust would likely to be found in Canadian law to have strong privacy rights attached. Unlike incorporation, which is a public act, there are often no public dimensions to a trust, which may exist entirely in the private realm, although the argument for trust privacy is lower for trusts conducting business in the marketplace.

The European Union Fourth Anti-Money Laundering Directive adopted in 2015 requires all trustees to obtain, hold, and provide beneficial ownership information to “obliged entities” (as defined in the statute, including financial institutions with customer due diligence obligations) and to communicate that information to a central register or a central database.²⁶ Trustees are also required to disclose their status to obliged entities when conducting transactions on behalf

²⁶ See http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:LJOL_2015_141_R_0003&from=ES

of the trust. This Directive does **not** require the central register to be made public, however, the **draft** Proposal recently presented for a future EU Anti-Money Laundering Directive would clarify that all trust-like arrangements (including Treuhand, Stiftung, Privatstiftung, Usufruct Fiducia) be included, and that such registries be required to publicly disclose certain beneficial ownership information.²⁷ This draft Directive will undergo lengthy negotiations and undoubtedly significant changes prior to being agreed upon by all member states of the EU.

In efforts to comply with the 4th EU Money Laundering Directive, the UK released a consultation paper which provides a proposal on **creating a beneficial ownership register for trusts**²⁸ Under the UK proposal, trustees will:

- be required to obtain and hold adequate, current and up-to-date information on the trust's beneficial ownership;
- have to provide the trust's beneficial ownership information to HMRC when the trust "generates tax consequences". It is likely that this will mean that beneficial ownership information will have to be submitted alongside a tax return; and
- have to grant timely access to the beneficial ownership information they hold to HMRC and the Financial Investigation Unit housed in the National Crime Agency.

The UK employs the definition of trusts in the EU 4AMD. It should be noted that unlike the companies register, the UK government has pledged that the proposed trust registry will not be made public or shared with private entities or individuals.

While not a final policy decision, the UK proposal on trusts provides a possible precedent for Canada. Canada's trust law resembles English trust law and the idea of providing beneficial ownership information to a central registry "when the trust generates tax consequences" resonates with the way that Canada taxes trusts. The UK approach also provides a practical threshold and trigger for reporting to the central trust registry.

In Canada, trusts registries could be a viable option. Because trusts fall under provincial jurisdiction, provincial legislatures would have to set up trust registries. However, with cooperation, the data in these could be pooled with that of other provinces and combined into a single trust registry. The Canada Revenue Agency may be able to share information about trusts gathered through tax returns, however, this would likely require legislative changes as their information-sharing is highly restricted.

As with a business entity registry, the value of a trust registry would be much greater if the Trust Registrar were to verify the information on a risk-sensitive basis and hold powers to impose proportional and dissuasive sanctions for non-compliance. Certain personal

²⁷ See <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-%2f%2fEP%2f%2fNONSGML%2bREPORT%2bA8-2017-0056%2b0%2bDOC%2bPDF%2bV0%2f%2fEN> at preambular paragraph 21.

²⁸ See <http://www.osborneclarke.com/insights/uk-government-plans-beneficial-ownership-register-for-trusts/>

information contained in trust documents may well have strong privacy rights attached. While a strong public interest argument might favour making trust registries publicly available, in the alternative, limiting availability of the sensitive information to the public could be justified, while allowing access to law enforcement, financial institutions, DNFBPs and others with permission for verification purposes.

Recommendation: *Federal and provincial governments should work together to develop beneficial ownership trusts registries. The functions and powers of a Trusts Registrar should ensure that they can play an effective role in the anti-money laundering and terrorism financing regimes. Registrars should have expertise in trust and business law, be granted powers to compel information, verify information and impose dissuasive penalties to non-compliant businesses. Registrars should also have a mechanism to report suspicious businesses to appropriate authorities. At a minimum, beneficial ownership information on business trusts should be made available to the public. Transparency options for non-business trusts should also be explored.*

4. Provincial and Federal Business and Corporate Registries

Provincial Registries

Each province and territory has a business name statute that, with few exceptions, requires every business operating in that province to register the name under which the business operates. Information gathered through registrations is made available in a registry on-line.

Each province has its own laws requiring the registration of business names. The Ontario *Business Names Act*²⁹ is typical, and some of its important provisions, including incentives to register, will be summarized below:

- Requires all³⁰ businesses to register
- Requires that a business use its registered business name when carrying on business in the province, e.g. in all contracts, invoices, negotiable instruments and orders involving goods or services issued.³¹
- The *Ontario Business Names Act* creates the position of the Registrar, who is responsible for maintaining a record of every registration made under the Act in a registry, accessible to the public, for a fee.
- The registry includes the name of the person behind the business name who will bear responsibility for any obligation of the business.
- The statute creates an offence to not register when required without reasonable cause, with a possible fine of up to \$5000.00.³²
- Businesses failing to register business names may not sue in Ontario for a debt incurred in connection with the business except with leave of the court.
- Applicants have an obligation to provide accurate and complete information. It is the responsibility of the applicant(s) to ensure the accuracy of the information submitted. It is an offence under section 10 to submit false or misleading information.

Business name registries are important transparency promotion tools to ensure that potential creditors, consumers and other members of the public have access to certain information about businesses operating in that province. However, they could go much further in meeting FATF obligations if they collected and disclosed information on beneficial owners. While these registries are technically public, paywalls and antiquated technology limit access. In addition, many lack search functions such as the ability to search for the individual names of directors rendering them inadequate for full due diligence and research purposes. For example, most

²⁹ R.S.O. 1990, c. B.17

³⁰ There are some exceptions and these will be discussed in the sections below on different types of business

³¹ Ontario *Business Names Act*, supra note 29, s.2 (6)

³² *Ibid.*, s. 10 (2)

registries are searchable by company, not by director, meaning one can search company listings and obtain the directors of record but cannot search a director and obtain all of the companies where that person is a director. From a due diligence perspective, this is a serious limitation.

With the exception of Alberta and Quebec, which includes some corporate shareholder information, there is no information on registered or beneficial owners on any of the central business registries in Canada. In addition, the information submitted by corporations and other businesses to the government is not verified before posting to the central registry, thus undermining the reliability of this tool for due diligence purposes.

Federal Corporations Registry

The federal government maintains a registry of federally-incorporated companies (discussed further below). Information collected by Industry Canada from incorporation and annual filings is made public through a search engine on the Corporations Canada website.³³ A search will disclose certain information, including the names of directors of the corporations and their residential addresses (or an address for service) but no information on beneficial ownership.³⁴ A corporation's articles of incorporation, amendments thereof and articles of association are also a matter of public record and available from Corporations Canada on request, but not free of charge through the public search engine. Provincial governments provide information about corporations incorporated in their jurisdictions on their respective business registries.

Creation of Canadian Beneficial Ownership Registries

Given that provinces and the federal government already collect and disclose information in business/corporate registries, such registries should be augmented to include beneficial ownership information. All entities and arrangements doing business in Canada or under provincial jurisdiction, including general and LLP partnerships, limited partnerships, business trusts and all corporations including non-distributing corporations, should be required to file particular information about their businesses for public disclosure, including names and other identifying information of all beneficial owners, along with their percentage of holdings. Further recommendations on creating beneficial ownership registries include the following:

³³ <https://www.ic.gc.ca/app/scr/cc/CorporationsCanada/fdrlCrpSrch.html>

³⁴ A full list of publicly available information is found at Annex 1.

Recommendation 1: *In order to ensure up-to-date information in the registry, all businesses, including partnerships, corporations and other entities, should be required to collect, maintain and promptly update beneficial ownership at their place of business, and provide this information to authorities pursuant to rules elaborated for a beneficial ownership registry, and upon request.*

Recommendation 2: *Where businesses own 10% or greater securities or ownership interests in other businesses, detailed information on all related entities and arrangements, should be required to be included in the filings of each (businesses should be required to file an organizational chart where complex interrelationships exist with other businesses).*

Recommendation 3: *Ideally, a national business registry which pools all information collected by the provincial and federal databases would create a one-stop resource for financial institutions, DNFBPs, potential creditors as well as the public to easily find information about any business in Canada. It would reduce delays in law enforcement investigations as well as the compliance burden on the private sector.*

Recommendation 4: *Federal and provincial registries should make information available to the public with no associated costs, in an open and accessible format with maximum searchability functions and in compliance with open data standards. All businesses registered should be assigned a unique identifier that is displayed publicly.*

Recommendation 5: *The functions and powers of Provincial and federal Registrars should ensure that they can play an effective role in the anti-money laundering and terrorism financing regimes. They should have expertise in business law, be granted powers to compel information, verify information and impose dissuasive penalties to non-compliant businesses. Registrars should also have a mechanism to report suspicious businesses to appropriate authorities.*

5. Business Organizations

Canadian law allows businesses to be structured in a variety of forms. This section will review sole proprietorships, partnerships and corporations, and explore the ownership transparency of each (See Annex 2 for a summary of the findings).

5.1. Business Organizations: Sole Proprietorships

The sole proprietorship is the simplest form of business operation in Canada. It comes into existence whenever an individual starts to carry on business and ceases to exist when the individual closes down the business. There is no legal separation between the owner and the business: all benefits accrue to the owner and similarly, all obligations of the business are his or hers to perform. One important consequence of the non-legal separation between the business and the person is that all of the sole proprietor's personal assets, such as his or her house, as well as business assets may be seized in fulfilment of the business' obligations.

When a sole proprietor conducts business in his or her full name, there is little or no confusion as to the ownership of the business. One example would be a consultant who signs contracts under his or her legal name. Sole proprietors are permitted to do business under a business name other than the name of the business owner but in most provinces this name must be registered along with details such as the business address and a residential address or an address for service. While an attorney may file for the business owner, *the sole proprietor's name* must be provided and will be published in the public Registry.³⁵

As the sole proprietor's name is either i) used in carrying out the business, or ii) publicly available on the business registry, sole proprietorships are the most transparent with regard to true ownership / beneficial ownership of all business organizations.

Recommendation: *To ensure maximum transparency of sole proprietorships, those registered in central business registries should be required to provide a sworn declaration confirming their status as sole providers and the identities of any other persons directly controlling or directly benefitting from the business.*

5.2. Business Organizations: Partnerships

There are three different types of partnerships: a) general partnerships, b) limited liability partnerships and c) limited partnerships.

³⁵ The Ontario *Business Names Act* Regulations spells out in detail the information collected by Registrar from sole proprietors who choose to work under a business name other than their own name.

In Canada, partnerships are regulated entirely by provinces. Partnership law originally arose out of the common law, but now each province, apart from Quebec, has a Partnerships Act. They include, for example, the *Alberta Partnerships Act*, R.S.A. 2000, c. P-3; *British Columbia Partnerships Act*, RSBC, c. 349 ss 80.1 – 90.5, and the *New Brunswick Partnerships and Business Names Registration Act*, RSNB 1973, c P-5. These statutes cover far from all legal issues relating to partnerships, so the common law continues to apply, consistent with the respective statutes. Partnership law is very similar across the country, with the exception of Quebec where partnerships are governed by the Civil Code.³⁶ This analysis considers the *Ontario Partnerships Act*³⁷ and the *Ontario Limited Partnerships Act*³⁸.

Partnerships arise when two or more people begin to carry on business together with a view to making a profit. Partners do not possess a separate legal personality from the partnership. All revenues and debts flow through to the partners' respective taxes as income or losses in the proportion allocated by them in the partnership agreement. Partners in any partnership may be corporations. The provincial partnership acts include default rules governing the relationships among partners, for example, roles and responsibilities in managing the business. These rules will typically be supplemented or replaced by a partnership agreement which is tailored to the business. Such partnership agreements will be important sources of beneficial ownership, including evidence of actual control over the decision-making as well as financial entitlements of particular partners.

Partnership statutes also create rules governing liability of partners. These rules, however, are mandatory. The general rule (with some exceptions) is that each partner is the agent of the partnership, meaning that each of the partners may bind the partnership when acting in the usual course of the partnership business.

Liability for obligations of the partnership differs in accordance with the three different types of partnerships: i) general partnerships, ii) limited liability partnerships and iii) limited partnerships. Each type of partnership and its respective potential for beneficial ownership transparency will be discussed below.

5.2. a) General Partnerships.

Like sole proprietorships, all partners in a general partnership possess unlimited personal liability for the debts, obligations or liabilities of the partnership.

Such a partnership may not carry on business in Ontario unless its firm name has been registered with the Ontario Registry by all partners in the partnership, however, they are exempted from this rule if the partnership conducts business under the names of the

³⁶ *Civil Code of Québec*, S.Q. 1991, c.64 arts 2186-2266.

³⁷ *Partnerships Act*, R.S.O. 1990, c. P.5

³⁸ R.S.O. 1990, Ch L.16

partners.³⁹

Registration of a partnership includes providing the Registrar with the name of each partner, the address of each partner including his or her municipal address i.e. where that person can be served, and the name of the person submitting the form on behalf of the partnership.

If a corporation is a partner in a general partnership, the information collected and published by the Registrar will include the corporation name and address of the corporation. Beneficial ownership information of corporations will not be captured in the business registry.

5.2. b) Limited liability partnerships

Limited liability partnerships are the same as general partnerships, except that risks are allocated differently. A partner in a limited liability partnership is not liable for the debts, obligations, or liability of partnership or of another partner arising out of negligence or other wrongs of another partner or employee. The partner remains liable, however, for his own negligence or wrongs, those of persons under his or her supervision, and the negligence of another partner or employee that is criminal or fraudulent, or that the partner knew or ought to have known of and did not take reasonable actions to prevent it.

Without exception, limited liability partnerships are not permitted to carry on business unless they have registered their business name under the *Business Names Act*. The firm name of a limited liability partnership must contain the words “limited liability partnership” or “société à responsabilité limitée” or the abbreviations “LLP”, “L.L.P.” or “s.r.l.” as the last words or letters of the firm name.⁴⁰

The Ontario *Business Names Act* collects the same information for limited liability partnerships as it does for general partnerships, including names and residential addresses for partners (or addresses for service). If a corporation is a partner in a limited liability partnership, the information collected and published by the Registrar will include the corporation name and address of the corporation. Similar to general partnerships, beneficial ownership information of corporations will not be captured on the provincial registry, which will only disclose the names of the corporation’s directors, under the name of the corporation.

5.2 c) Limited partnerships

Limited partnerships are very different from the first two and are governed by a separate statute, the *Limited Partnerships Act*⁴¹. They include at least one partner who is an investor, called a “limited partner.” Limited partners can be individuals, corporations or trusts, and their rights and obligations are closer to those of a shareholder in a corporation than those of a

³⁹ Ontario *Business Names Act*, s. 2

⁴⁰ Ontario *Partnerships Act*, s. 44.3

⁴¹ R.S.O 1990, Ch I.16

partner.

While at least one general partner in a limited partnership possesses unlimited personal liability, a limited partner's liability is restricted to the amount contributed to the partnership. Limited partners do not partake in the management of the company. If they do, they lose their limited liability privileges.

A limited partner's interest is called a "unit" rather than a share. These units can be bought and sold depending on the rules governing the limited partnership. If these units are tradable on exchanges, then securities laws apply.

Unlike general partnerships, limited partnerships do not arise by just conducting business, but are formed when a declaration is filed with the Registrar and signed by all general partners.⁴² The declaration includes the following information: the firm name; the general nature of the business; for each **general partner** who is an individual, the partner's name and address (residential address or address for service); and for each general partner that is not an individual, the partner's name and address or address for service.⁴³

The *Limited Partnerships Act* also requires such partnerships to collect information about limited partners i.e. investors and maintain a current record to be kept at its place of business in Ontario (it is not provided to the Registrar). For each limited partner, the following information must be gathered and maintained in corporate records:

- If the partner is an individual, the partner's surname, the given name by which the partner is commonly known, the first letters of the partner's other given names and the partner's residential address or address for service, including municipality, street and number(if any) and postal code.
- If the partner is not an individual, the partner's name and address or address for service, including municipality, street and number (if any) and postal code, and the partner's Ontario corporation number (if any).
- The amount of money and the value of other property contributed or to be contributed by the partner to the limited partnership.⁴⁴

The above information about limited partners must be provided on request and without charge to **any persons** wishing to inspect the record and by any general partner during normal business hours of the limited partnership. The provision also permits a person inspecting the record to make copies or take extracts from them.⁴⁵

⁴² See *Limited Partnerships Act*, s. 3.

⁴³ *Limited Partnerships Act Regulations*, s.1.1

⁴⁴ *Ibid.*, s. 4

⁴⁵ *Limited Partnerships Act*, s. 4 (3).

Note, however, that similar to general and limited liability partnerships, the limited partner registry does not require the collection of the name of the shareholders/ beneficial owners of the limited partner if it is a corporation.

Recommendation: *To increase beneficial ownership transparency, all partnerships registered in central business registries should be required to include a sworn declaration by all general partners confirming the identities of all beneficial owners of the partnership above a 10% beneficial interest threshold.*

5.3 Business Organizations: Corporations

Corporations are creatures of statute. Through incorporation, a company with a separate legal personality is created under the law, whereby the liability of those investing in the company is limited to the amount invested. Thus, it represents a fundamental intervention of the state into the free marketplace, altering potential risks, benefits, and liabilities of different stakeholders and tipping them largely in favour of shareholders.

As with any major intervention or distortion, it is critical to regularly re-assess whether the current laws strike the right balance between various stakeholder and societal interests; whether it is working as optimally as possible. Our analysis finds that the current rules in place do not provide enough beneficial ownership transparency, potentially obscuring criminal activity, as well as increasing risks of those doing business with the corporation, including financial institutions, creditors and DNFBPs.

All for-profit corporations in Canada must have at least one shareholder. In undertaking a beneficial ownership analysis of corporations, shareholders can be considered “owners” although this is more accurate in small corporations with a very small number of shareholders. In more complex corporations, it is more accurate to say that shareholders enjoy a specific bundle of rights, which would typically include voting rights, rights to dividends, and to a proportion of assets should the corporation dissolve. The larger a corporation, the greater the likelihood that directors meet the beneficial ownership test under the “control” arm of the definition, particularly for widely-held corporations, in which a large number of shareholders often struggle to overcome collective action problems in exercising control.

There are generally two types of corporations in Canada: public corporations and private corporations, the latter of which issues shares not publicly traded on stock exchanges. These types of corporations have very different rules and very different challenges when it comes to beneficial ownership transparency. The *Canada Business Corporations Act* (CBCA) refers to these respectively as “distributing corporations” and “non-distributing corporations”; the

former being ones that are considered *reporting issuers* under provincial securities laws or otherwise are sellers of securities on public exchanges. Provincial securities laws play an important role requiring transparency of a distributing corporation's affairs.

5.3. a) Incorporation, Mandatory Reporting, and Maintaining Corporate Records

Incorporation is a public act, because it involves the creation of a new legal "person" that is publicly registered.

Incorporators must file prescribed documents with the branch of the federal, provincial or territorial government that has responsibility for incorporations.

Under the CBCA, those incorporating must file the following:

- Articles of Incorporation
- Initial registered office address and founding Board of Directors
- A name search report on the proposed name of the corporation along with supporting information; and
- The required fee (\$250; \$200 for an on-line filing).

The incorporation comes into existence on the date of a certificate issued by the issuing authority. Normally, companies will have to register as well in each province in which they do business.

Understanding how a corporation operates requires a review of a company's articles of incorporation, its bylaws, any directors' resolutions, shareholders' resolutions, and any shareholders agreements, along with CBCA provisions. These documents may provide some strong indicators of beneficial ownership, particularly with regard to who controls the organization, for example, through voting rights or powers to appoint and remove directors.

After incorporation, directors hold a meeting and pass a resolution to issue shares to the shareholders. The directors adopt procedures for carrying on the formal business of the corporation, set out in bylaws. Bylaws typically include procedures for directors meetings, shareholders meetings, payments of dividends, and who may sign documents on behalf of the corporation.

Under the CBCA, corporations are required to make annual filings. The annual filings contain some basic information, although no information about securities holders or beneficial owners is collected.

Corporations must also notify Corporations Canada between annual filings if they are changing their registered head office address or if there are changes in the directors. More fundamental changes such as the number or range of directors permitted, or the province where the

registered office is located, require amendments to the articles of association.

Securities Registry

Under the CBCA, a corporation is required to maintain certain corporate records at its registered office (or at some other location in Canada, as set out by the directors). These records must include a securities registry, which records the registered securities it has issued (e.g. shares), including the following information with respect to each class or series of securities:

- the names, alphabetically arranged, and the latest known address of each person who is or has been a security holder;
- the number of securities held by each security holder; and
- the date and other details regarding the issue and transfer of each security.⁴⁶

As will be discussed in the privacy section below, securities registries are an important step toward making ownership information available to the public. However, any particular “registered security holder” is not necessarily the beneficial owner of the shares.⁴⁷ Shares may be registered directly in the name of the beneficial owner or they may be held on behalf of others by another corporation, by a nominee shareholder, by a bank, pension fund, etc. and in these cases, the share registry *per se* may not provide beneficial ownership information.

Under the CBCA, a corporation is entitled to treat the *registered* owner of a security as the person exclusively entitled to vote, to receive notices, to receive any interest, dividend or other payments in respect of the security, and otherwise to exercise all the rights and powers of an owner of the security.⁴⁸ (If the shareholder is another corporation or an association, a person so authorized by the corporation or association holding the shares is entitled to represent it at shareholder meetings.) Indeed, historically in common law and under the CBCA, beneficial owners of shares who were not registered owners were denied shareholder rights including the right to vote and bring forward proposals.⁴⁹ This situation prevailed until securities laws were amended to provide greater rights to beneficial owners.

5. 3. b) Distributing (publicly-traded) corporations

Distributing corporations incorporated federally and some provinces, such as Ontario, must allow **any person** to have access to the securities registry, subject to the payment of a

⁴⁶ CBCA, s. 50.

⁴⁷ One exception to this rule is found in s. 73 of the CBCA relating to “constrained corporations” i.e. ones in which other statutes require they be owned at least 50% by Canadians. These are generally ones that operate in certain industries, such as the cultural sector. Constrained corporations must ascertain the beneficial ownership of their securities holders to ensure that they comply with the 50% rule.

⁴⁸ CBCA, s. 51(1)

⁴⁹ See, *Verdun v. Toronto-Dominion Bank*, [1996] 3 S.C.R. 550.

reasonable fee and the presentation of an affidavit to the corporation.⁵⁰ In other provinces, such as New Brunswick, only creditors and other shareholders will have access to the registry, as well as government authorities responsible for corporations.

Both corporate law and securities law have operated dynamically to increase the transparency of registered ownership and beneficial ownership of shares to the public.

Beneficial Ownership Transparency under Securities Regulation

Securities law regulates the issuance of securities by business and the marketplace in which securities are bought and sold. The principal objective of securities law is to promote the fair and efficient operation of securities markets with a view to encouraging investors to make their money available to businesses by buying their securities.⁵¹ If a federally-incorporated corporation issues shares on a provincial exchange, both the CBCA and the provincial securities laws will apply.

Securities law has played a significant role in promoting transparency of beneficial ownership through the corporate law requirement on all “reporting issuers” (i.e. companies and partnerships issuing securities) to keep a registry of security holders.

While the securities registry traditionally maintained a list of **registered shareholders** rather than **beneficial owners**, over time corporate governance concerns were raised about beneficial owners being too remote from the companies they held shares in and not voting or otherwise participating meaningfully in the oversight of the companies. These concerns were shared across numerous jurisdictions, including the US and Canada, leading to changes in rules requiring communication with beneficial owners. A report for the Council of International Investors explains the rationale for the changes:

A complex chain of intermediaries often separates the record owner from the beneficial owner. Companies typically do not know the identities of all beneficial owners of their shares, nor do beneficial owners know the identities of other beneficial owners generally. The information resides largely with the intermediaries. This information disconnect limits the ability of companies to communicate with their beneficial owners and of beneficial owners to communicate directly with each other.⁵²

Under the Ontario *Securities Act*, registered shareholders are now required to send information received by the reporting issuer including notices of meetings, financial statements, information circulars, or other materials to beneficial owners, so long as the latter has agreed

⁵⁰ See, for example, CBCA, s. 21. A more in-depth look at these provisions are found in Part D under a discussion on privacy rights and access to corporate registries.

⁵¹ VanDuzer, Anthony, *The Law of Partnerships and Corporations*, 3rd Ed., Toronto: Irwin Law, 2009 at page 465.

⁵² Alan L. Beller and Janet L. Fisher, *The OBO/NOBO Distinction in Beneficial Ownership: Implications for Shareowner Communications and Voting* (2010: Cleary Gottlieb Steen & Hamilton LLP).

to pay for the costs of shipping those materials.⁵³ Beneficial owners also have the right to vote on proxy or instruct nominees on voting.⁵⁴

As of 2002, National Instrument⁵⁵ 54-101 “New Rules for Communicating with Beneficial Owners” came into force with a view to ensuring that beneficial owners of securities receive proxy-related and other security holder materials and are given the opportunity to vote in the securities they own. As a result, registered shareholders are required to contact them and then provide lists of “non-objecting beneficial owners” directly to issuers (i.e. corporations and limited partnerships). These lists are to be made available to third parties (e.g. minority shareholders and dissenters), who have a right to contact shareholders directly.

Non-objecting beneficial owners (“NOBOs”) may receive circulars and other materials from the reporting issuers or third parties, although the latter will still have the option to send these to intermediaries who are required to forward them. The NOBO list is available to a member of the public, subject to strict conditions of use. NOBO lists can only be used for one or more of the following purposes: (a) sending security holder materials to NOBOs in accordance with National Instrument 54-101; (b) an effort to influence the voting of security holders of the reporting issuer; (c) an offer to acquire securities of the reporting issuer.⁵⁶

However, under NI 54-101, beneficial owners are entitled to **object** to their identities being provided by the intermediary to the corporation, partnership or other issuer. These are called objecting beneficial owners (“OBOs”) and communication with them must continue through their intermediaries.

There are some exceptions to the right of beneficial owners to remain anonymous. Insider trading rules require that beneficial ownership information of securities purchased, held and sold by insiders must be disclosed. In Ontario, an “insider” is defined in part as a director or officer of a reporting issuer; a company that is itself an insider or subsidiary of a reporting issuer; or any beneficial owner holding more than 10 per cent of the voting rights of a security holder.⁵⁷ Insiders must report all holdings within 10 days of becoming an insider, and all changes in holdings.⁵⁸ Beneficial ownership transparency is critical for the effective regulation of insider trading, to ensure that insiders are not just avoiding rules by arranging for legal ownership by another party.⁵⁹ Insider information promotes a high degree of beneficial ownership transparency as it is publicly viewable at the System for Electronic Disclosure by

⁵³ *Ontario Securities Act*, s. 49 (3)

⁵⁴ *Ibid.* s. 49 (4)-(5).

⁵⁵ In Canada, securities markets are governed by a number of largely harmonized National Instruments that have been negotiated and adopted by provincial securities regulators.

⁵⁶ National Instrument 54-101, s. 7.1

⁵⁷ *Ontario Securities Act*, R.S.O. 1990, c. S.5, s. 1

⁵⁸ *Ibid.*, s. 107.

⁵⁹ David Johnston, Kathleen Rockwell, Christie Ford, *Canadian Securities Regulation*, 5th Ed, Toronto: LexisNexis, 2014 at 345.

Insiders (SEDI) website.⁶⁰

Other provisions requiring beneficial ownership transparency in securities laws relate to early warnings to shareholders of a securities issuer when a person acquires beneficial interest or control or direction in holdings above 10 per cent.⁶¹ The rationale is to ensure that companies and their shareholders targeted for hostile take-over bids receive early warning of large share acquisitions. New rules as of 2016 also require disclosure when a security holder's ownership decreases by 2 per cent or falls below the 10 per cent reporting threshold, highlighting a decrease in that person's voting power.⁶²

All told, securities law has overall greatly increased the beneficial ownership transparency of corporate security holdings and made holders of 10% or of voting shares easily available to the public. Nonetheless, opacity still prevails for beneficial owners holding under 10 per cent voting rights who object to being identified. A common example of an OBO is an institutional investor, which typically prefers to remain anonymous so as not affect markets by its decisions to buy or sell shares. For this reason, institutional investors would likely resist a move to disclose beneficial ownership information below the 10% threshold. Objecting beneficial owners may also include criminals investing proceeds of crime who prefer to stay anonymous behind a nominee registered shareholder, as demonstrated by the example below.

Case 6: Hypothetical Example of Objecting Beneficial Owner Investing Proceeds of Crime
An organized crime actor has some illegal proceeds he wishes to invest. He hires a solicitor in Ontario, who incorporates a nominee shell corporation with the criminal as the sole beneficial owner and the solicitor as both nominee director and nominee shareholder. The sole purpose of the shell corporation is to invest anonymously in blue chip distributing corporations. In accordance with Ontario laws, so long as the holdings are under 10% of voting shares and the beneficial owners object to being disclosed, the true owners' names are never recorded on the distributing corporation's securities registry or disclosed to the business name/public corporations registry. The solicitor collects dividends on behalf of the corporations and passes them on to the criminal organization, taking a fee. In Canada, lawyers are exempt from statutory anti-money laundering reporting requirements, so there is no requirement to report suspicious activity to the financial intelligence agency. In theory, law enforcement could seek beneficial ownership information with a court order, but without any suspicious transaction reports or tip-offs the shell corporation is unlikely to come to the attention of law enforcement.

5.3. c) Non-Distributing (i.e. Privately-Held) Corporations

Privately held corporations are much more opaque than distributing corporations. No financial

⁶⁰ <https://www.sedi.ca/sedi/>

⁶¹ National Instrument 62-102

⁶² NI 62-103.

reporting information or access to securities registers is available under the CBCA, except to creditors and shareholders. The misuse of corporations for criminal purposes occurs largely through small, opaque, closely held corporations⁶³ and/or shell corporations⁶⁴. Despite the risk of misuse, incorporation is extremely easy and cheap in Canada, with very little information disclosed to the government or the public. It is time to re-evaluate whether the rules governing privately held corporations are meeting the interests of society.

As was described above, the basic rationale behind corporate law is that it encourages people to start businesses and invest money in businesses. Corporate law both increases potential returns over other investments and diminishes the risk associated with business operations by limiting investor losses to the amount invested in the company. In other words, the worst possible return of an investor is the loss of 100% of that person's investment. This can be compared to a sole proprietorship, in which an unincorporated person risks all his or her business assets plus all his or her personal assets, such as her home.

However, limited liability for owners and shareholders does not eliminate risk but shifts it onto other stakeholders:

Protecting shareholders against liability for the corporations' obligations means limiting the pool of assets that others may claim against to those belonging to the corporation. The result is that there is a greater likelihood that there will be insufficient assets to pay creditors, employees, and others with financial claims against the corporation.⁶⁵

Risks to creditors of incorporation can be considerable, particularly in cases of closely held corporations where there are few or just one shareholder. There are no capitalization requirements on Canadian corporations, and incorporation allows or even encourages serious undercapitalization of the business and excessive reliance on outside credit.⁶⁶ The creation of a separate legal personality enables a shareholder to become a secured creditor of his own corporation, thus further undermining the prospects of payment to the corporation's unsecured creditors if the corporation runs into difficulties. It imposes heavy risks of non-payment on voluntary creditors, employees, as well as tort claimants and municipal, provincial and federal tax claims.⁶⁷

Governments across Canada are aware of such risks to creditors and others, as evidenced by

⁶³ Closely held corporations are those with only one or a very small number of shareholders.

⁶⁴ A shell corporation is one that does not conduct any business apart from serving as a vehicle to conduct transactions for other persons.

⁶⁵ Supra note 51 at page 119.

⁶⁶ Jacob S. Ziegel, *Is incorporation (with limited liability) too easily available?* Les Cahiers de droit, vol. 31, n° 4, 1990, p. 1075-1094. See also P. Halpern, M. Trebilcock and S. Turnbull, *An Economic Analysis of Limited Liability in Corporation Law*, (1980) 30 U.T.L.J. 118, and F. Easterbrook and D. Fischel, *Limited Liability and the Corporation*, (1985) 52 U.Chi.L.Rev. 8

⁶⁷ *Ibid.*, Ziegel at 1082.

the blog posted by the Canada Business Network entitled, “How to verify that a business really exists.”⁶⁸ The introductory paragraph begins:

Just as consumers check to make sure a business is legitimate before they buy, you likely do the same before your business has dealings with someone new. Whether you're looking to buy from a supplier...you want to make sure you aren't taking unnecessary risks.

The recommended first step is seeing whether the company is incorporated federally or provincially by conducting a search in respective registries. In truth, ensuring that a company is properly incorporated does not do much to insulate potential creditors from risk. As illustrated above, little relevant information about the company is collected and made publicly available under the federal registry or provincial Business Names registries.

Due to the high risks of corporations, and often small corporations, defaulting on or defrauding others, the doctrine of “piercing the corporate veil” was developed in the common law. This is when courts will disregard the separate legal personality of the corporation and hold the business owner personally liable for the harm, the debt or the fraud. In some cases the *Fraudulent Conveyances Act*⁶⁹ would apply so that a court can declare a transfer of property void if the intention of the person who made the transfer was to hide assets from a creditor or ex-spouse.

Case 7: Piercing the Corporate Veil of Closely-Held Corporations: C-L & Associates Inc c.o.b. Fay-J Packaging v. Airside Equipment Sales Inc

Airside was an incorporated small business operating in Winnipeg with a sole officer and director, Thurston. In 1997, a creditor sued Airside for failing to make payment on a contract. In 2000, Thurston incorporated 4119703, naming himself as the sole director and officer and began doing business under this corporation. A judge issued a judgment against Airside for \$68,892.00 in 2000, but by this time, Airside had a negative bank balance and no assets and had ceased operations. The judge found that this was an appropriate case to “pierce the corporate veil” and ordered the judgment to be entered against the new corporation and against Thurston personally.

With regard to beneficial ownership transparency, non-distributing corporations are opaque. They are not required to provide public access to securities registers. Registries are available only to creditors, shareholders and the government officials responsible for administering the federal and provincial Corporations acts. As with distributing corporations, the registered shareholder may not be the same as the beneficial owner. If the beneficial owner cannot be ascertained, a court may order a corporation to disclose beneficial ownership information, generally in the context of legal processes. However, that information can be difficult, if not impossible, to independently verify and in any case the process is so lengthy that any funds will

⁶⁸ See <http://canadabusiness.ca/blog/how-to-verify-that-a-business-really-exists-1/>.

⁶⁹ R.S.O. 1990, c. F.29

long since have moved on.

Given the ease with which corporations can be created, it is no surprise that they are misused for criminal purposes. A beneficial ownership registry for non-distributing corporations would make it more difficult to perpetrate the fraud in the example below.

Case 8: Law Society Disciplinary Hearing: Solicitor Facilitates Tax Evasion

A disciplinary hearing was held by the Law Society of Upper Canada for lawyer Alan Coles, who was accused of tax evasion and money laundering. Coles had set up a scheme involving numerous shell corporations in Canada and overseas, which exchanged false invoices and loans to give the impression of arms' length legitimate business transactions. Funds flowed through the shell corporations, overseas and back to Canada for the purposes of both evading the personal income taxes of his clients as well as fraudulently making use of a Canadian government tax credit for scientific research. The Discipline Committee estimated that he had assisted his clients in defrauding the Canadian Government of approximately \$30 million and disbarred him.

Recommendation 1: *Non-distributing corporations should be included in beneficial ownership registries.*

Recommendation 2: *All nominees, agents, and trustees, including nominee shareholders and directors, in providing information to all government officials, including Central Beneficial Ownership Registrars, must be required to divulge their status as nominees, agents or trustees, and be required to disclose the names, dates of birth and other prescribed information of the beneficial owners they represent.*

6. Beneficial Ownership of Real Property and Provincial Land Registries

Land registration systems are the means by which title to real property and documents affecting such title are recorded by the state, and by which ownership and other interests in real property is made available to the public. Under provincial land registration statutes, a member of the public can, for a fee, conduct a search at the registry office regarding a specific property and receive a substantial amount of personal information. A search will ascertain a significant amount of personal information, including registered ownership of property, as well as liens and mortgages registered against the property. Information available includes the date the property transfer (sale) was registered at the Land Title Office, price paid for the property, and mortgage information registered on the property, including the Borrower and Lender, date registered, mortgage amount, interest rate, and monthly payment amount. The owner information provided includes the registered owner, which may not be the same as the beneficial owners, if the registered owner is a corporation, a trust, or a nominee.

The Supreme Court of Canada considered some privacy issues relating to land registration in *Royal Bank of Canada v. Trang*.⁷⁰ It noted that “...in implementing Ontario’s land registration system, the Legislature has considered and debated the appropriate balance between the right to privacy and the need for transparency, and has made a decision that transparency outweighs privacy, in the public interest.”⁷¹

Canadian legislatures may wish to go further and require land title registries to collect beneficial ownership information. Currently, registered owners may provide a cover of legitimacy for properties paid for through proceeds of crime, including proceeds of corruption, and it is impossible for authorities to ascertain the true owners of property. To address this problem, the UK has announced a proposal to create a beneficial ownership registry of all property held by foreign corporations.⁷²

Recommendation: *In the interest of increasing transparency, land title registries should be enhanced to include information on beneficial owners, not just registered owners, and should be freely open to the public without a paywall.*

⁷⁰ 2016 SCC 50. Case highlights in Annex 3.

⁷¹ *Ibid.*, paras 36-37.

⁷² See <https://www.gov.uk/government/news/proposals-to-introduce-transparency-to-overseas-owned-uk-property-published>

7. Privacy Rights and Transparency of Beneficial Ownership Information

The creation of public registries of trusts and of beneficial ownership information of corporations and real property needs to take into account the privacy of individuals who would have their personal information disclosed in such registries. The creation of a public registry of beneficial owners of corporations, which includes names and other personal information of shareholders and beneficial owners will require legislation by territorial, provincial and/or federal legislatures. Under Canadian law, a person's financial information is generally extremely sensitive and therefore attracts greater privacy rights, with the caveat that the degree of sensitivity of specific financial information is a contextual determination.⁷³ However, in balancing privacy interests against the public interest in transparency, legislatures can determine that for some important objectives, public interest outweighs privacy interests.

7.1 General Privacy Framework

A number of different statutes govern how sensitive personal information, including about shareholders/beneficial owners, is handled by federal and provincial governments. If federal and/or provincial governments were to create a public registry of companies and trusts including beneficial ownership information, both the collection and the disclosure of such information would be governed by the *Privacy Act*⁷⁴ and similar provincial statutes.⁷⁵

Generally, personal information collected by a government institution *cannot be disclosed without consent, except where authorized by Parliament*⁷⁶ or pursuant to a list of exceptions. Therefore, the creation of a public registry of trusts and corporations would require legislation passed by federal and provincial legislatures authorizing such collection and public disclosure.

The Canadian Parliament could mandate the collection and disclosure of such information under areas of federal jurisdiction, including federally incorporated companies and banks, whereas the provinces would be required to legislate in areas under their jurisdiction, including partnerships, sole proprietorships, trusts, provincially incorporated companies and property registration.

Corporations are required by law to protect from disclosure the personal information they collect in the course of conducting their business. Information collected about shareholders by companies incorporated either federally or in a number of provinces is governed by the *Personal Information Protection and Electronic Documents Act* (PIPEDA), as are provincial businesses in which the personal information crosses provincial or national borders. The

⁷³ *Royal Bank of Canada v. Trang*, *supra* note 82.

⁷⁴ R.S.C., 1985, c. P-21

⁷⁵ All provinces have legislation protecting privacy of information collected by provincial government agencies. See, e.g. *Ontario Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, CHAPTER F.31

⁷⁶ *Privacy Act*, *supra* note 74 at s. 8(2)(b)

PIPEDA coverage excludes businesses regulated by provinces which have legislation substantially similar to the PIPEDA or other statutes such as health information protection acts. Alberta, British Columbia and Quebec have general private-sector legislation that has been deemed substantially similar.⁷⁷

PIPEDA applies to the collection, use or disclosure of personal information in the course of a commercial activity.⁷⁸ In general, PIPEDA prohibits organizations covered by the Act from disclosing personal information without the knowledge and consent of the affected individual. There are, however, a number of exceptions where the requirement for knowledge and consent are not necessary for the disclosure, including where disclosure is “required by law.”⁷⁹ Additionally, disclosure is also permitted which relates to reporting mandated by the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*.⁸⁰

As discussed in earlier sections, the *Canada Business Corporations Act* (and similar provincial statutes) requires corporations to maintain a list of registered shareholders, and in the case of distributing corporations, to make this list available to any person, on certain conditions and with certain safeguards. Registered shareholder information of distributing corporations may be supplanted by beneficial owner information of non-beneficial owners, pursuant to National Instrument 54-101 “New Rules for Communicating with Beneficial Owners”.

Judicial decisions around some of these requirements have helped illuminate how Canadian law sees the balancing of privacy interests of business owners, against the public interest in greater transparency. The privacy of shareholders considered in the analysis below provides some revealing indicators as to the current state of the law as it might apply to the privacy of beneficial owners.

7. 2 Privacy and Distributing Corporations

The privacy rights currently enjoyed by shareholders have been elaborated in case law interpreting statutory provisions in Canadian corporate law that govern access to shareholder registries. Recall that in the CBCA, **any person** is allowed access the shareholder registry of a distributing corporation, on payment of a reasonable fee and provision of an affidavit.⁸¹ The required affidavit must include:

- the name and address of the applicant;
- the name and address for service of the corporation, if it is a corporation seeking access to the securities registry;
- a statement that the information obtained will not be misused i.e.

⁷⁷ Privacy Commissioner of Canada, located at https://www.priv.gc.ca/en/privacy-topics/privacy-laws-in-canada/02_05_d_15/

⁷⁸ PIPEDA, s. 4(1)(a).

⁷⁹ PIPEDA, s. 3 (i)

⁸⁰ PIPEDA, s. 3 (c.2)

⁸¹ CBCA, s. 21 (3).

used for any purpose other than:

- an effort to influence the voting of shareholders of the corporation;
- an offer to acquire securities of the corporation; or
- any other matter relating to the affairs of the corporation.⁸²

The provision is backed up by a penalty of 6 months in prison or a maximum fine of \$5000.00 for contravention of the section presumably by either the corporation holding the information or the person(s) seeking the information.⁸³

Traditionally, the access to shareholder registries was an important common law right intended to ensure that minority and dissident shareholders had the opportunity to communicate freely with other shareholders.⁸⁴ However, since 2001 the Canadian Parliament has seen fit to provide access to information about shareholders of distributing corporations to the public at large. In the CBCA, the requirement of an affidavit and clear uses which are permitted of the securities register is an effort by Parliament to balance the interests of the public on the one hand in having access to information about corporations, against the privacy rights of shareholders on the other hand, while preventing the misuse of the information.

Canadian courts have interpreted what types of uses are allowable under this provision, as well as looking at privacy issues. Two cases in Annexes 4 and 5 demonstrate that there is a growing trend toward a reasonably broad right of public access to lists of shareholders of distributing corporations in Canada (common law jurisdictions). Currently under the relevant statutes, this right of access is not absolute: it is granted upon provision of an affidavit, and is limited to allowable uses, requiring a good faith reason that is related to or associated with the corporation in some legitimate fashion. Allowable uses can include helping shareholders evaluate the performance of directors, efforts to influence the voting of shareholders at a meeting of the corporation, or communicating with shareholders regarding management and labour relations policies and practices of the organization. Improper purposes for accessing shareholder lists would include using the information to target wealthy persons for selling products or investments opportunities unrelated to the corporation.

Given that the trend is moving significantly toward public access of shareholder information, not just in Canada but in other jurisdictions, it is foreseeable that legislators may decide to tip the balance in favour of public access of beneficial ownership information in the future.

⁸² CBCA, s. 21 (7, 9).

⁸³ CBCA, s. 21 (10)

⁸⁴ See *Bank of Bombay v Suleman Somji* (1908) [1908-1910] All E.R. Rep. 533 at 535.

8. Conclusion

This report identifies several shortcomings relating to the transparency of beneficial ownership information of legal entities, trusts and business arrangements in Canadian law. Implementation of proposed recommendations in this report would enable Canada to possess a more rigorous and effective AML/TF regime, as well as meet our G20 and FATF commitments as they relate to beneficial ownership information. Most importantly, proposed changes would help Canadian law enforcement more effectively and efficiently fight crime in this country.

Summary of Recommendations

Amend the Proceeds of Crime (Money Laundering) and Terrorism Financing Act (PCMLFTA)

Currently, the PCMLFTA does not adequately require financial institutions and DNFBPs to collect sufficient beneficial ownership information, nor does it require agents, nominees, trustees to disclose adequate information on beneficial owners represented.

- Require that **DNFBPs collect beneficial ownership information on entities and trusts** when conducting transactions over \$10,000. The PCMLFTA should also be amended to lower the beneficial ownership and control threshold for information collection from 25% to 10%.
- Require those **exercising powers** on behalf of others to disclose their status to financial institutions and DNFBPs, together with identities of all registered owners and all beneficial owners of property/funds involved in the transactions.
- Introduce measures to make it more difficult to obscure beneficial ownership through agents and nominees. When conducting transactions on behalf of others, **all agents and nominees** should be legally required to disclose their status to government officials, financial institutions and DNFBPs, together with the identities of all persons represented, including all beneficial owners of legal persons and arrangements involved in the transactions.
- Make it more difficult for trustees to obscure the beneficial ownership of trust property. These amendments should require **that trustees, when conducting transactions on behalf of others, disclose their status to government officials, financial institutions and DNFBPs**, together with identities of all settlors, trustees and beneficiaries of property/funds involved in the transactions.

Reform and enhance existing corporate registries in Canada⁸⁵

Provincially, territorially and federally-administered business and corporate registries collect and disclose a certain amount of information on businesses, but it is not verified and does not collect beneficial ownership information. Many registries in Canada protect this information behind a paywall and/or use antiquated technology. These registries can be reformed to make them fit for purpose for anti-money-laundering and terrorism financing purposes.

- **Current registries should be augmented to include beneficial ownership information.** All entities and arrangements doing business in Canada or under provincial jurisdiction, including general and LLP partnerships, limited partnerships, business trusts and all corporations including non-distributing corporations, should be required to file particular information about their businesses for public disclosure, including names and other identifying information of all beneficial owners, along with their percentage of holdings.
- In order to ensure up-to-date information in the registry, **all businesses**, including partnerships, corporations and other entities, should be required **to collect, maintain and promptly update beneficial ownership information** at their place of business, and provide this information to authorities pursuant to rules elaborated for a beneficial ownership registry, and upon request.
- Where businesses own 10% or greater securities or ownership interests in other businesses, **detailed information on all related entities and arrangements, should be required to be included in the filings of each** (businesses should be required to file an organizational chart where complex interrelationships exist with other businesses).
- **Ideally, a national business registry which pools all information** collected by the provincial and federal databases would create a one-stop resource for financial institutions, DNFBPs, potential creditors as well as the public to easily find information about any business in Canada. It would reduce delays in law enforcement investigations as well as the compliance burden on the private sector.
- Federal and provincial registries should make **information available to the public with no associated costs, in an open and accessible format with maximum searchability** functions and in compliance with open data standards. All businesses registered should be assigned a **unique identifier** that is displayed publicly.
- **The functions and powers of provincial and federal Registrars should ensure that they can play an effective role in the anti-money laundering and terrorism financing regimes.** They should have expertise in business law, be granted powers to compel

⁸⁵ For a more in-depth discussion on creating an effective beneficial ownership registry, please see _____

information, verify information and impose dissuasive penalties to non-compliant businesses. Registrars should also have a mechanism to report suspicious businesses to appropriate authorities.

- **Sole proprietorships** registered in central business registries should be required to provide a sworn declaration confirming their status as sole providers and the identities of any other persons directly controlling or directly benefitting from the business.
- **All partnerships** registered in central business registries should be required to include a sworn declaration by all general partners confirming the identities of all beneficial owners of the partnership above a 10% beneficial interest threshold.
- **All nominees, agents, trustees**, including nominee shareholders and directors, in providing information to all government officials, including beneficial ownership Registrars, must be required to divulge their status as nominees, agents or trustees, and be required to disclose the names, dates of birth and other prescribed information of the beneficial owners they represent.

Create a beneficial ownership registry for trusts

- Federal and provincial governments should work together to develop **beneficial ownership trusts registries**.
- The functions and powers of a Trusts Registrar should ensure that they can play an effective role in the anti-money laundering and terrorism financing regimes. **Registrars** should have expertise in trust and business law, be granted powers to compel information, verify information and impose dissuasive penalties to non-compliant businesses. Registrars should also have a mechanism to report suspicious businesses to appropriate authorities.
- At a minimum, beneficial ownership information on business trusts should be made available to the public. Transparency options for non-business trusts should also be explored

Reform Land Title Registries

- In the interest of increasing transparency, **land title registries should be enhanced to include beneficial ownership information**, not just registered owners, and should be freely open to the public without a paywall.

Annex 1: Information Current Disclosed on federally-incorporated companies

The following information is made available through a public search on Corporations Canada website, <https://www.ic.gc.ca/app/scr/cc/CorporationsCanada/fdrlCrpSrch.html>

- Corporation Number
- Business Number (BN)
- Corporate Name
- Status (Active, dissolved, etc)
- Governing Legislation, e.g. Canada Business Corporations Act - 1984-09-12
- Registered Office Address. This must be an address where legal documents can be served, not a box number.
- Number of Directors – can be a range
- Names and Addresses of Directors. The address directors must provide can either be a residential address or an address for service that is not their residential address. An address for service is an address where legal documents must be accepted by the director or someone on the director's behalf. A director's address cannot be a post office box.
- Annual Filings
- Anniversary Date (MM-DD)
- Date of Last Annual Meeting
- Annual Filing Period (MM-DD)
- Type of Corporation (Distributing Corporation, Non-distributing Corporation with 50 or fewer shareholders; Non-Distributing Corporation with 50 or greater shareholders)
- Status of Annual Filings (whether they have been filed in the past 3 years)
- Corporate History, including corporate name history, and years each name was used. There will also be a history of certificates and filings, beginning with the certificate of incorporation and then list all amendments to the Certificate of Incorporation and the date on which the Articles of Amendment were filed. If the company has been dissolved and then revived, those dates will also be listed. The corporate history will also indicate whether the company is an amalgamated company and what the pre-amalgamated companies are, including their corporate numbers. The search will also disclose whether the company was previously incorporated in another jurisdiction and then continued (i.e. moved) from that province or territory to the federal jurisdiction.

Annex 2: Business Organizations and Beneficial Ownership

Canadian Forms of Business Organizations and Disclosure of Beneficial Ownership			
	Definition	Provincial / Federal Registries and Business Name Information	Disclosure of Beneficial or True Ownership
Sole Proprietorship	A sole proprietorship comes into existence whenever an individual starts to carry on business, and ceases to exist when the individual closes down the business	A sole proprietor may operate a business under a business name or under his or her own name. The business name must be registered on a provincial business registry.	The provincial registry will disclose the name of the sole proprietor of a registered sole proprietorship.
General Partnership	A general partnership arises when two or more people begin to carry on business together with a view to making a profit.	A partnership must register its firm name with the provincial registry, naming all partners, unless the partnership conducts its business under the names of the partners. General partners may be individuals or corporations.	General partners who are natural persons can readily be identified by the public through the provincial business names registries. If general partners are corporations, a further search will be required to determine whether the corporation's beneficial ownership information is available (see corporations below).
Limited Liability Partnership (LLP)	Limited liability partnerships are the same as general partnerships, except that risks are allocated differently.	An LLP must register its firm name with the provincial registry, naming all partners, unless the partnership conducts its business under the names of the partners.	General partners who are natural persons can readily be identified by the public through the provincial business names registries. If a general partner is a corporation, a further search will be required to determine whether the corporation's beneficial ownership information is available (see corporations below).

Canadian Forms of Business Organizations and Disclosure of Beneficial Ownership			
	Definition	Provincial / Federal Registries and Business Name Information	Disclosure of Beneficial or True Ownership
Limited Partnership	Limited Partnerships are formed when a declaration is filed with the Registrar, signed by all general partners. Limited partnerships include at least one partner who is an investor, called a "limited partner." General partners can be corporations and limited partners can be individuals, corporations or trusts.	A limited partnership must register its firm name with the provincial registry. Disclosure of identities of general partners is mandatory in the provincial business names registries. Limited partners are not disclosed on provincial registries.	Partnerships are required to collect information about limited partners i.e. investors and maintain these in a current record to be kept at its place of business in Ontario. If a limited partnership's securities registry discloses that the limited partner is a corporation, a further search will be required to determine whether the corporation's beneficial ownership information is available (see corporations below).
Distributing Corporations (those traded on a provincial securities exchange)	The incorporation comes into existence on the date of a certificate of incorporation issued by the federal or provincial government.	The corporation name is listed on the federal or provincial registry where it is incorporated. The corporation's directors and their addresses will be included in the provincial directory, but no shareholder / ownership information.	A securities register which includes the names, addresses and number of shares of all registered shareholders (not necessarily beneficial owners) must be maintained at the place of business. Federally-incorporated and some provincially-incorporated companies are required to make the registry available to any person who requests it, subject to a fee, affidavit and restrictions on uses of the registry. A distributing corporation is also subject to securities laws, which require beneficial ownership disclosure of all securities of insiders

Canadian Forms of Business Organizations and Disclosure of Beneficial Ownership			
	Definition	Provincial / Federal Registries and Business Name Information	Disclosure of Beneficial or True Ownership
			and 10% or more of voting shares held, publicly viewable on the SEDI website in Ontario. A list of non-objecting beneficial owners (NOBO) is also available to the public subject to restrictions and conditions of use.
Non-distributing Corporations (privately-held)	The incorporation comes into existence on the date of a certificate of incorporation issued by the federal or provincial government.	The corporation name is listed on the federal or provincial registry where it is incorporated. The corporation's directors and their addresses will be included in the provincial directory, but no beneficial ownership information is disclosed. Some provinces include some shareholder information (Alberta, Quebec)	No public availability of beneficial ownership information. A securities register which includes the names, addresses and number of shares of all registered shareholders (not necessarily beneficial owners) must be maintained at the place of business. There is no requirement to make this information public, although it must be made available to creditors and other shareholders.

Annex 3: Privacy and Land Registration: *Royal Bank of Canada v. Trang*⁸⁶

The Supreme Court of Canada considered some privacy issues relating to land registration in *Royal Bank of Canada v. Trang*. In that case, it interpreted the PEPIDA to determine whether a mortgage discharge statement from one financial institution could be disclosed to another financial institution holding a second mortgage in the case of an action for default. The court held that the borrowers had implicitly consented to disclosure when they entered into the second mortgage agreement, and made some comments about the privacy rights regarding financial information. More generally, the Court held:

In terms of sensitivity, I agree with the Privacy Commissioner *that financial information is generally extremely sensitive*. As this Court observed in *R. v. Cole*, financial information is one of the types of private information that falls at the heart of a person's "biographical core". However, *the degree of sensitivity of specific financial information is a contextual determination*. The sensitivity of financial information, here the current balance of a mortgage, must be assessed in the context of the related financial information already in the public domain, the purpose served by making the related information public, and the nature of the relationship between the mortgagor, mortgagee, and directly affected third parties. [...]when mortgages are registered electronically on title, the principal amount of the mortgage, the rate of interest, the payment periods and the due date are made publicly available pursuant to the Land Registration Reform Act.

The legislature decided to make this information available to the public, in part to allow creditors with a current or future interest in the land to make informed decisions. As the Office of the Information and Privacy Commissioner of Ontario observed [...] "The land registration system requires that all pertinent information be made available as a matter of public record, and *the extent to which this represents an invasion of any individual's privacy, that result is justified and defensible*. *Transparency is integral to the public administration of the system, and has been incorporated into the statutory framework that regulates land registration* in Ontario. Said another way, in implementing Ontario's land registration system, the Legislature has considered and debated the appropriate balance between the right to privacy and the need for transparency, and has made a decision that transparency outweighs privacy, in the public interest."⁸⁷

⁸⁶ 2016 SCC 50

⁸⁷ *Ibid.* at paras. 36-37.

Annex 4: Access to Membership Lists under the Ontario Corporations Act: *Lawrence v. Toronto Humane Society*⁸⁸

In 2006, the Ontario Court of Appeal considered a case regarding access to shareholder/membership registry provision in the Ontario *Corporations Act* (which also covers non-profit corporations).

Under the facts of this case, Lawrence, the Vice-President of the union representing employees of the Humane Society, sought access to the Society's membership list at a time that there were difficulties between management and the employees of the Humane Society. The Humane Society declined to provide it, arguing that he was seeking the list to obtain a benefit for the union and this was not an allowable use "connected with the corporation" as required by the statute. Douglas commenced an action to obtain the list.

In its decision, the Ontario Court of Appeal found that Lawrence had a right to the list. It held that "...s. 307 of the Act creates a **broad right of access** to the shareholder or membership list of a corporation [...] consistent with the objective of ensuring the timely disclosure of corporate information, but tempered by constraints on the purpose for which such information is sought and the actual use to which the information contained in such lists may be put."⁸⁹ It found that Lawrence's purpose related to the management and labour relations policies and practices of the Society, which is a legitimate purpose "connected with" the Society.

The court's findings included the following relating to the allowable use of the registry: "...the phrase 'connected with the corporation' requires only a showing that there is a *good faith reason for an access request* under s. 307 (1) that is related to or associated with the corporation in some legitimate fashion."

The court later notes: "[S. 307] contains no language confining the access right to circumstances related to the applicant's own financial or economic interests. Indeed, the use in s.307(1) of the phrase "any person" necessarily contemplates that an applicant under s. 307(1) *need not be an existing or even prospective shareholder or member of the affected corporation*. It follows that the purpose of a s. 307(1) access request need not be tied to the applicant's status as a shareholder or member of the corporation, or to his or her financial or economic interests."⁹⁰

⁸⁸ *Lawrence v. Toronto Humane Society* [2006] 271 D.L.R. (4th) 329

⁸⁹ *Ibid.*, at para 56 [emphasis added].

⁹⁰ *Ibid.* at para 94 [emphasis added].

Annex 5: *EnCana Corp v. Douglas*⁹¹: Access to Shareholder Registry

The Alberta Court of Appeal considered a case about access to the shareholder registry pursuant to the CBCA, section 21. In that case, Douglas, a shareholder of EnCana, applied for access to EnCana's share registry. Douglas's company attempted to identify potentially lost shares in corporations and reunite the shares with the shareholders, or if the shareholder is deceased, to contact the shareholder's relatives in order to unite the shares with their rightful owner for a fee. Douglas was particularly interested in the shares in EnCana's predecessor companies that have not yet been exchanged for EnCana shares as this might have indicated that they were lost shares. EnCana sought to cross-examine Douglas on the intended use of the securities registry, and refused access, claiming his intended use would breach privacy laws.

The Alberta Court of Appeal found in favour of Douglas. The court held that information within a securities register is personal information under PIPEDA, but that, such pursuant to s. 7 of PIPEDA, personal information may be disclosed without consent when authorized by another statute (in this case, the CBCA). "Privacy legislation does not modify the obligations on EnCana to provide access to the securities register."

The court also discussed permissible uses of the registry. Noting that, a shareholder using the registry to create a mailing list of high-net worth individuals, to advertise or solicit investment in another enterprise would not be an allowable use of the information under the statute.⁹² The court emphasized the importance of shareholders holding the officers and directors to account and openly communicating with each other:

"One of the general purposes identified for supporting communication between shareholders is the need for shareholders to be able to evaluate the performance of directors. [...] A corporation is required by legislation to maintain an accurate securities register. Shareholders who are concerned that the corporation comply with legislation may want to foster this compliance. This could be done by helping other shareholders return to an active relationship with the corporation."⁹³

The court also found that corporations *must* comply with the CBCA obligation to turn over securities registries, even if it is concerned that the information will be misused. The only alternative is to apply to the courts for direction in a particular case:

"The CBCA does not give a corporation the right to cross-examine an application on his or her affidavit. If there are circumstances where a corporation has reason to believe that the information in the securities

⁹¹ *EnCana Corp. v. Douglas*, [2005] 262 D.L.R (4th) 279.

⁹² *Ibid.* at para 40. Note that this comment is "obiter dicta" and therefore not a binding part of the judgment.

⁹³ *Ibid.* at para. 42.

register will be used for an improper purpose, a corporation is entitled to seek direction from the court as to whether it must comply..."⁹⁴

⁹⁴ *Ibid.* at para 46.