

# KEEPING CURRENT

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## Snow washing is now more difficult in Canada, but at what cost?

By Kenneth Jull and Ian Spiegel

Founded in the 1920s, Gardiner Roberts LLP has grown to become a strategically placed mid-sized business law firm with a diverse client base which includes several of Canada's largest banks, public companies including mining, high tech and software companies, real estate enterprises, lenders and investors.

**Kenneth Jull**  
Counsel  
416.865.2964  
kjull@grllp.com

**Ian Spiegel**  
Associate  
416.865.6658  
ispiegel@grllp.com

For several years, the Canadian government has begun to focus on “snow washing”, the purifying of illegitimate funds through using shell corporations to launder money in Canada. The Annual Budget in 2018 sought to address this issue, but the measures taken were met with wide criticism. The Annual Budget in 2021 has expanded those measures with a view to make snow washing even more difficult in Canada. However, there may be unintended consequences for legitimate businesses.

### **2018 Annual Budget**

The *Budget Implementation Act, 2018*, No. 2 (Bill C-86) added the following to the *Canada Business Corporations Act* (CBCA), partly as a reaction to information leaks, such as the release of the Panama Papers<sup>1</sup>:

#### Register

21.1 (1) The corporation shall prepare and maintain, at its

registered office or at any other place in Canada designated by the directors, a register of individuals with significant control over the corporation that contains

- (a) the names, the dates of birth and the latest known address of each individual with significant control;
- (b) the jurisdiction of residence for tax purposes of each individual with significant control;
- (c) the day on which each individual became or ceased to be an individual with significant control, as the case may be;
- (d) a description of how each individual is an individual with significant control over the corporation, including, as applicable, a description of their interests and rights in respect of shares of the corporation;
- (e) any other prescribed information;

<sup>1</sup> Henry Holt and Co., 2017.

and

(f) a description of each step taken in accordance with subsection (2).<sup>2</sup>

Section 21.1 of the CBCA came into effect on June 13, 2019. It created a new register for non-distributing (i.e. private) CBCA corporations to disclose information regarding registered or beneficial owners with “significant control” (i.e. 25% ownership) over the corporation. Public companies were exempted from the requirements as they already have a duty to disclose information about shareholders with a 10% ownership or control stake in the corporation.<sup>3</sup>

However, the register was not meant to be a report as it was not publicly available information. This was met with harsh criticism. James Cohen, the executive director of Transparency International Canada, called this a “tepid” action in stopping corruption in Canada.<sup>4</sup> Canada remained one of only two G7 countries that did not require beneficial ownership to be reported.<sup>5</sup>

## **2021 Annual Budget**

The proposed 2021 Annual Budget goes much further in addressing money laundering concerns. The new budget, released on April 19, 2021, “proposes to provide \$2.1 million over two years to Innovation, Science and Economic Development Canada to support the implementation a publicly accessible corporate beneficial ownership registry by 2025.”<sup>6</sup>

<sup>2</sup> *Budget Implementation Act, 2018*, No. 2 (Bill C86).

<sup>3</sup> Todd L. Archibald and Kenneth E. Jull, *Profiting from Risk Management and Compliance I* (Toronto: Thomson Reuters, 2020), Chapter 15. Bribery and Corruption.

<sup>4</sup> <https://www.terracestandard.com/news/canada-slowly-pushes-for-corporate-transparency-as-part-of-anti-corruption-push>.

<sup>5</sup> *Supra* note 3.

<sup>6</sup> <https://www.budget.gc.ca/2021/report-rapport/p4-en.html>.

This will provide a significant change to how regulated entities under the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act* (PCMLTFA) carry out their Know-Your-Client (KYC) obligations. The amendments to the PCMLTFA come into force on June 1, 2021 and provide that regulated entities must obtain or make reasonable efforts to obtain beneficial ownership information from their clients.<sup>7</sup> With a public registry, these entities will be able to access beneficial ownership more easily.

This brings Canada closer to the other G7 countries in terms of transparency and should significantly improve Canada’s attempts to curb money laundering and similar illegal activity. However, James Cohen suggests that the public registry is a good start, but makes five points for how the public registry must operate to be truly useful:

1. The registry must be fully accessible and easy to use;
2. The 25% threshold is arbitrary and may be more useful if it was 10%;
3. The registry should include data verification systems and carry penalties for false information;
4. The federal government must work with the provinces and territories to ensure proper use and a tip-line should be set up to bolster investigations; and
5. The registry as proposed is only for private corporations. It should be expanded to include trusts and partnerships.<sup>8</sup>

<sup>7</sup> <https://www.fintrac-canafe.gc.ca/guidance-directives/client-clientele/bor-eng>.

<sup>8</sup> <https://ipolitics.ca/2021/05/17/fighting-tax-evasion-and-corruption-with-a-beneficial-ownership-registry/>.



## **Potential Risks of a Public Registry**

A public registry of beneficial ownership, while theoretically a good thing for combatting snow washing, may be regulatory overreach.<sup>9</sup> The proposed registry does not provide for any privacy protection or challenges by the controlling person to the release of information. As an example of a potential issue, there is the potential for creditors to obtain personal information about a controlling person from a corrupt country. That information could then be sent to the taxing authority of the corrupt country, and the information may be used to harm the business or the controlling person's family.<sup>10</sup> While this may be a remote possibility and does not take away from the positives the registry can bring, the potential harm is great. Will the government seek to address this potential harm with potential amendments to the registry in the future, or will the drive for transparency and public access remain the focus?

## **Conclusion**

The Financial Transactions and Reports Analysis Centre of Canada (FINTRAC) has announced that they will take a somewhat flexible approach with regard to compliance with new anti-money laundering measures. FINTRAC has noted that, while many new measures come into force June 1, 2021, it will generally assess based on the pre-June 1, 2021 standards until March 31, 2022 in order for regulated entities to properly adapt to the newest regime.<sup>11</sup> The next year will see these changes implemented and operationalized by regulated entities. This should bring Canada up to par on combatting

<sup>9</sup> *Supra* note 3.

<sup>10</sup> Lorne Saltman, "The New Tax World: No More Secrecy, But Instead, Transparency and the Automatic Exchange of Information", Presentation to Canadian Association of Management Consultants (February 14, 2019).

<sup>11</sup> <https://www.fintrac-canafe.gc.ca/covid19/assessment-eng>.

money laundering, terrorism and other illegal activity being done in Canada, and is certainly a step in the right direction. Hopefully the issues discussed here will be taken into consideration for future improvements to the registry.

## **Contact us**

If you have a legal matter and are in need of advice, please contact either [Kenneth Jull](mailto:kjull@grllp.com), at 416.865.2964, [kjull@grllp.com](mailto:kjull@grllp.com) or [Ian Spiegel](mailto:ispiegel@grllp.com) at 416.865.6658, [ispiegel@grllp.com](mailto:ispiegel@grllp.com).

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