

June 30th, 2022

Responses to ISED Discussion Document

On behalf of Publish What You Pay Canada, Transparency International Canada, and Canadians For Tax Fairness, we want to offer our thanks for these questions and we've included our insights below:

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1.0 Cullen Commission Report

Question: Based on Transparency International and PWYP's joint press release in response to the Cullen Commission Report and its 101 Recommendations, your organizations appear to be satisfied with the outcome and recommendations. Is there anything that came up during the hearing that you believe was missed in the recommendations?

We were pleased to see recommendations for B.C. to join a pan-Canadian registry, and that such a registry should be centralized with verified data. We recommend that Ottawa resource, design, and staff the registry to incentivize provinces to join a pan-Canadian framework. The main selling point will be so provinces won't have to devote resources in upgrading their own corporate registries to accommodate beneficial ownership information, or harmonizing multiple beneficial ownership registries. Instead, provincial entities can flow beneficial ownership information directly into a central registry and provincial agencies can access the back-end of the registry itself.

Things that were missed:

- **About FINTRAC: the Commissioner's comparisons are faulty and his conclusion that FINTRAC's financial intelligence is not timely, or actionable are wrong** (Cullen Commission Report - pages 205 -210). The Commission's Report, despite its overall thoroughness and solid recommendations, is flawed in its description of FINTRAC's effectiveness in the production of financial intelligence. The report improperly uses the number of all reports received by FINTRAC to assess whether the volume of reports received by FINTRAC is comparable to the volume of reports received by FIUs in the USA and the UK on a per capita basis. It is not, because FINTRAC receives other types of reports, such as electronic funds transfers, in the millions, that those countries do not receive. Furthermore, each FINTRAC disclosure may contain hundreds of reports. Contrary to the Commissioner's statement, "I have concluded that law enforcement bodies in this province cannot count on FINTRAC to produce timely, actionable intelligence with respect to money laundering threats", from experience, surveys of law enforcement's evaluation of FINTRAC's disclosure's quality, helpfulness and timeliness are very good. What is unfortunate is that these questionable arguments form foundational pieces for Commissioner Cullen's rationale for recommending the creation of a provincial AML Commissioner.
- **Lawyers. The Commissioner does not recognize the Law Society's continuing and continuously untimely gap in meeting Canadian AML legislation and regulatory standards over the last 20 years.** While the report (page 1202) states that the Law Society "... has identified ambiguities in

its Rules, including with respect to source of money, and is studying possible solutions. The Law Society also recognizes the need for stronger fines and penalties for serious breaches of the trust accounting rules. It is looking into ways in which to increase capacity for investigations and other matters, some of which may require legislative changes. In addition, the Law Society is considering whether to require law firms to have an “anti–money laundering compliance officer” and a firm risk policy...”.

Self-regulation by the Law Society would possibly be effective if it had met or exceeded the standards set in the PCMLTFA and its regulations over the last 20 years. They have not. Those requirements the Law Society is looking at are generally covered in the Canadian legislation or have been for 20 years. Law Society verification of lawyers for AML is not done on a risk-based approach, with expert AML staff, nor done independently or with public accountability. While the Commissioner does see a potential role for the provincial AML Commissioner (see para.3, page 225) when he says “the AML Commissioner’s engagement with and review of the Law Society’s anti–money laundering policies would help offset the gap created by FINTRAC’s lack of visibility into the activity of lawyers”, he really does not go far enough in addressing the lack of AML rules and supervision for lawyers. As a result, the report gives a pass to lawyers and the status quo on a major gap in the AML regime remains.

2.0 Verification

In paragraph 203 on page 46 of your final submission to the Cullen Commission, you list a number of recommendations, including that the beneficial ownership registry include “a robust validation and proactive verification process, including a registrar with the ability to vet submitted information.”

Question: What are best practices in terms of the registrar’s developing capability to identify and investigate suspicious filings?

As for best practices, we suggest a look at what is available at the following Canadian departments and agencies:

- FINTRAC for the registration of MSBs¹ to learn about their process and what they use to identify “suspicious” registrations. FINTRAC could also be consulted on training as well as developing indicators of suspicious transactions as they have experience related to MSBs and MSB registration; same with CRA Charities Directorate for the registration of charities.²

Internationally:

- Singapore by ACRA (Accounting and Corporate Regulatory Authority)³
- UK (HMRC), New Zealand and or Australia have a registration system for all reporting entities whereby they use multiple government databases to verify the registrants’ compliance/criminal histories.

¹ See: <https://www10.fintrac-canafe.gc.ca/msb-esm/public/msb-search/search-by-name/>

² See: https://apps.cra-arc.gc.ca/ebci/hacc/srch/pub/dsplyBscSrch?request_locale=en

³ See: <https://www.acra.gov.sg/corporate-service-providers/guidelines-for-corporate-service-providers>

- The EU's AMLD 6 should be looked at, especially the Chapter on Registers⁴

We recommend consulting with FINTRAC, CBSA and/or the CRA as those agencies have experience with validation, verification and or audits and examinations. The registrar's compliance functions can be broadly described as follows, consistent with many functions found generally in federal compliance programs:

1. risk, research analysis function as a foundation for the next functions
2. legal, regulation and policy interpretation function
3. client assistance function (education, awareness, outreach, guidelines, webinars, etc.)
4. verification (examination, audit) and referral to criminal investigation if necessary
5. administrative monetary penalties (AMPs) and/or if criminal investigation is involved, referral to prosecution
6. appeals to AMPs or, if criminal prosecution, appeals in the criminal justice system (liaison with the appropriate prosecution office)
7. collection of AMPs or court fines if applicable (collection of court fines are the responsibility of the DoJ)
8. publication of non-compliance either of the AMPs or criminal court decisions

Question: What are best practices in terms of sharing cross-referencing information with other government data holdings, including FINTRAC and tax authorities, keeping in mind the importance of protecting privacy?

The registry should be designed so federal and provincial competent authorities and agencies have access to the back-end anytime they need to access information for audits or investigation. More particularly, government officials from these departments should receive training about how to obtain access to the registry and handle data.

The PCMLTFA, and similarly the Income Tax Act, start with the premise that whatever data is collected by the Centre/Agency will not be disclosed. The legislation however provides exceptions when that information, or some of the information collected, may be shared with law enforcement or in the case of the PCMLTFA with specific organizations (named) and for specific purposes.

Question: What lessons from other jurisdictions may be useful to consider when contemplating a tip line regime? Has any jurisdiction wired this tool in legislation, or have they been established administratively, including protection provided by the Privacy Act equivalent?

We recommend that ISED consult with the staff from the CRA Offshore Tax Informant Program (OTIP) as this tool ensures confidentiality in line with Canada's Privacy Act, or also the Informant Leads Program at the CRA, or similar programs at CBSA and FINTRAC.^{5 6 7}

⁴ See: <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52021PC0423&from=EN>

⁵ See: <https://www.canada.ca/en/immigration-refugees-citizenship/services/protect-fraud/report-fraud.html> ; and <https://www.cbsa-asfc.gc.ca/security-securite/bwl-lsf-eng.html>

⁶ See: <https://fintrac-canafe.canada.ca/individuals-individus/vol/1-eng>

⁷ See:

<https://www.canada.ca/en/revenue-agency/programs/about-canada-revenue-agency-cra/compliance/offshore-tax-informant-program.html>

We think the tip-line (not a telephone line, but an online portal) can be an innovative made-in-Canada tool that can help improve data integrity for Canada's beneficial ownership registry. The tip-line can be accessed by anti-corruption advocates, journalists, and civil society organizations to flag suspicious entries which the registrar team can then decide to inspect at their own discretion. The aim of the tip-line is to empower informants to inform the registrar in instances that a corrupt foreign official, an international criminal under investigation, or an individual on a global sanctions list might have beneficial ownership interest or control of a corporate entity. We think this tool can be used to help Canada protect marketplace integrity from oligarchs on sanctions lists. The tool could also be used by the public to report discrepancies that are included in the registry but do not coincide with other publicly available information or personal knowledge of an informant.

Traditional registries of beneficial ownership have certain limitations and advantages:

Limitations: Criminals are not going to willingly disclose their beneficial ownership. They are going to lie. More specifically, they are going to use front persons to falsely register themselves as beneficial owners. A registry's verification system cannot possibly identify false registrants effectively and consistently. But verification of identity can effectively and consistently verify that the registrant exists.

Advantages: At present, criminals and corrupt politicians from around the world use lawyers, accountants, trust companies, and corporate service providers to act as nominee directors of Canadian companies. Many of these professional enablers conveniently don't know their clients are criminals. But once a registry of beneficial ownership is in place, these professional enablers can no longer act as fronts because they will know they themselves are not beneficial owners. And even if a professional enabler chose to falsely register himself as the beneficial owner, he would be greatly limited in the number of companies in which he could do so because registration of beneficial ownership for a high multiple of companies would attract the attention of law enforcement. As a result, criminals and corrupt politicians are forced to use relatives, trusted friends, and close business associates to register themselves as beneficial owners falsely.

The key to catching the bad guys is to maximize the ability of law enforcement to connect false registrants to the criminals and corrupt politicians who are the true beneficial owners. A non-public registry is limited in this regard because law enforcement is limited to official channels in obtaining information about foreign registrants and the criminals for whom they front. That's even more problematic when dealing with authoritarian regimes where the official channels are often controlled by criminals and corrupt politicians laundering their dirty money. A public registry greatly overcomes these limitations by making the information available to persons all around the world—investigative journalists, NGOs, and ordinary citizens—to use their local knowledge to connect false registrants to criminals. The confidential tip line then completes the circle of information. It enables persons from around the world to safely and securely send Canadian law enforcement information that connects false registrants to the criminals and corrupt politicians who are laundering their dirty money in Canada.

That system of information flow requires the registry to do four fundamental things: (i) proper verification of identity; (ii) public availability of registrant information that searchers need to easily identify those registrants; (iii) a relational database to increase searchability and discoverability, and (iv)

a confidential tip line to enable searchers to provide Canadian law enforcement with information connecting false registrants to the true beneficial owners.

Question: What are best practices for registry to efficiently remove, once detected, obviously false or fraudulent info such as references to “Santa Claus”?

One best practice being implemented by the UK is requiring obligated entities (the equivalent of FINTRAC reporting entities) to report discrepancies if there is a material difference between what is on the registry versus beneficial ownership information which they may already hold.⁸ Once a discrepancy is reported, the registrar and their team can inspect further and contact the company if necessary. If the company knowingly makes misleading statements, and if an administrative monetary penalty is issued, we believe it should be made public on the registry website in order to deter other actors from knowingly making false or misleading information about ownership or control status.

Guidance notes can be issued to FINTRAC reporting entities about what constitutes a material difference.

Information provided to the Registrar should be subject to validation rules to prevent and detect any mistakes and or deliberate false information to be provided. For example, accurate addresses, use of a PO Box, and postal codes can be programmed as validation rules, as well as other cross-references to drivers’ licences, passports or other legally available information from valid government issued-identification. The USA’s Corporate Transparency Act requires among other information “ a unique identifying number from a non-expired passport issued by the United States, a non-expired personal identification card, or a non-expired driver’s license issued by a State; and...”⁹. Any discrepancies with such information should result with the non-acceptance of the business incorporation application until the client corrects the mistake with these applications being flagged to staff for various purposes: system changes, education, guidance to the public, looking into further “suspicious” incorporations, etc. with correlation to indicators of suspicious incorporation applications.

It is worth noting that instances of false registrations, such as “Santa Claus”, have regularly occurred on registries which do not possess government verification of identity information (e.g., UK PSC). A verification system for Canada’s publicly accessible registry will eliminate those obviously false registrations.

However, even with proper verification, false and fraudulent registrations will occur. This is because the basic role of “verification” is to verify “identity”: that the registered owner exists, and that they are who they claim to be. Verification alone cannot prove or disprove whether the registrant is the true beneficial owner, and complementary tools such as a “tip-line” can assist in flagging fraudulent registrations.

Question: What are best practices in setting up and implementing requirements for regulated entities to support the accuracy of the registry information?

⁸ See:

<https://www.gov.uk/government/news/new-service-will-make-it-easier-and-faster-to-report-psc-discrepancies>

⁹ See: <https://www.congress.gov/bill/116th-congress/house-bill/2513/text>

FINTRAC has a system to verify and validate information received from reporting entities through its secure FWR (formerly F2R) system. Guidelines and instructions are also available to assist reporting entities enter and change data in the FWR reporting system.¹⁰

We recommend a guidance note be available on the registry website so companies can understand how to upload beneficial ownership information into the registry in easy steps. Communication tools using plain language and animated videos can be helpful for businesses, especially small-to-medium enterprises to follow instructions, which in turn, improves compliance.¹¹ We also recommend the creation of a FAQ page outlining obligations and a guidance document about how businesses can check that their information is accurate, and what identity records to keep at the company level. We also even suggest a telephone help-line in case businesses or ISCs have additional questions. A telephone help-line has been useful to understand filing requirements for Canada's Lobbyist Registry.¹²

3.0 Privacy

The Cullen Commission report suggested that a registry publishing names, cities or regions of residence, and unique identifiers may be an example of a balancing that achieves both the need for an effective database and respect for personal privacy.

Question: What are best practices to reconcile the need for cross-referencing between different beneficial owners (e.g. differentiating between beneficial owners with the same name) and the need to protect privacy and security of individuals, including ID theft and discrimination based on age or nationalities? Could a unique ID satisfy this purpose?

Unique IDs are used in the UK PSC Registry. We believe that unique IDs in conjunction with partial DOBs and past and present countries of residence will be helpful to positively identify beneficial owners without compromising privacy interests.

To mitigate the risk of identity theft, we recommend the Department of Justice undertake a privacy review of our suggested fields for public disclosure¹³ in order to assess if the risk of these disclosures in totality are proportionate to the goals of a publicly accessible registry: preserving national security interests of Canada, protecting the integrity of Canada's economy against the proceeds of crime, and promoting public safety.

Another innovation which could be unique for Canada would be requiring that beneficial owners provide common aliases used and, to minimize transliteration problems, to provide the name of registrants in both English and its original alphabetic script, such as Russian, Chinese and Arabic alphabets. That will enable searchers from around the world to more readily identify false registrants and connect them to criminals and corrupt politicians.

¹⁰ See: <https://www.fintrac-canafe.gc.ca/reporting-declaration/Info/f2r-eng>

¹¹ See: <https://www.ic.gc.ca/eic/site/cd-dgc.nsf/eng/cs08216.html>

¹² See: <https://lobbycanada.gc.ca/en/contact-us/>

¹³ See: <https://static1.squarespace.com/static/5c8938b492441bf93fdb536/t/5eac6dd026b8946d37f7dde2/1588358609932/endsnowwashing-public-beneficial-ownership-registry.pdf>

Question: What are international best practices for structuring on-application and class exemption regimes to prevent abuse? Would discretion or more black & white rules wired into the legislation be more effective?

As a Coalition, we unfortunately don't have a perspective on this topic; however, we emphasize that only competent authorities and law enforcement should be able to access the back-end of the registry, and access to that part of the registry should be subject to credentials in order to protect sensitive data. This provision can certainly be reflected in legislation.

4.0 Enforcement

Question: What are best practices to ensure compliance for controlling entities or individuals outside of a registrar's jurisdiction? Has any country experimented with tools other than criminal law in this realm?

As one best practice, we recommend that foreign companies operating in Canada be required to have at least one director residing in Canada. This is because it can be challenging to ensure compliance on behalf of foreign entities and foreign beneficial owners. Requiring that at least one company director remains resident in Canada will make it easier for law enforcement or any government agency to issue warnings or administrative monetary penalties; moreover, follow-up with investigations.

In 2022, The FATF has recently issued new reforms pertaining to Recommendation 24, more specifically, new obligations mitigating risks for foreign legal persons.¹⁴ In our view, foreign beneficial owners pose a higher-risk in evading domestic law enforcement due to jurisdictional limitations.

The Registrar also should be given the power to dissolve any non-compliant federal corporation. It also should notify the relevant authorities in the jurisdiction that governs the non-compliant entity.

Question: Has any jurisdiction experimented with administrative monetary penalties? If so, how effective has it been/how did they manage to operate them at scale? What alternatives civil/administrative remedies have proven effective?

The UK Office of Financial Sanctions Implementation has a guidance document describing how they deploy monetary penalties and includes case assessment and procedures.¹⁵ We also discuss this topic later in the discussion document.

Question: In your model law, you propose to empower the Registrar with significant investigative powers akin to a superior court justice. Has any jurisdictions granted such powers to their registrar? Have the powers been used, and how have courts received evidence received in this manner?

¹⁴ See:

<https://star.worldbank.org/blog/new-fatf-rules-beneficial-ownership-and-nominee-relationships-step-right-direction>

¹⁵ See:

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1083297/15.0_6.22_OFSI_enforcement_guidance.pdf

The reference to a superior court is an efficient way of summarizing exactly how the Registrar is to gather evidence. And while it may seem unusual to base an investigating official's powers on those of a court, it's actually common in Canadian federal legislation. The statutory rules for investigations by the Privacy Commissioner, the Information Commissioner, the Accessibility Commissioner and the Commissioner of Official Languages, for example, all do the same.

While it's thus not unusual in the Canadian context, we believe equipping the registrar with these powers represents a Canadian approach to ensuring that compliance remains strong, and we hope this sets a precedent for other countries to follow.

Question: Given the very large number of private corporations (400K+ federally, 4-5M total), what are best practices in terms of risk-based compliance?

We recommend consulting with the Community of Federal Regulators to begin.¹⁶ The CRA, CBSA, FINTRAC and many other government departments and agencies can offer risk-based guidance. In the case of FINTRAC, they have guidance documents published on a risk-based approach.¹⁷ The FATF has published many documents on the risk-based approach for specific sectors.¹⁸ The OECD also has published documents on risk-based approaches for tax administrations.¹⁹ All of these guidance documents can be consulted for ideas on how to build a risk-based program for just about any compliance program.

5.0 Interoperability

What are some of the best practices in terms of interoperability in federated states with decentralized jurisdiction over corporate law. In particular:

Question: How do other federated states coordinate on the identification of beneficial owners, and cross-referencing of their information?

Question: How do other federated states leverage the pre-existing relationships of sub-national entities with businesses?

We chose to respond to both of these questions together. For precedents of BO registries in federated and non-federated states in the European Union please refer to Transparency International's comparison report of different Beneficial Ownership Registers.²⁰ The report offers easy-to-understand tables comparing fees, registration requirements, access restrictions and more. Dentons also has a

¹⁶ See:

<https://www.canada.ca/en/health-canada/corporate/about-health-canada/legislation-guidelines/community-federal-regulators.html>

¹⁷ See: <https://www.fintrac-canafe.gc.ca/guidance-directives/compliance-conformite/rba/rba-eng>

¹⁸ See: [https://www.fatf-gafi.org/documents/riskbasedapproach/?hf=10&b=0&s=desc\(fatf_releasedate\)](https://www.fatf-gafi.org/documents/riskbasedapproach/?hf=10&b=0&s=desc(fatf_releasedate))

¹⁹ See: <https://www.oecd.org/tax/administration/33818656.pdf>

²⁰ See:

<https://images.transparencycdn.org/images/2021-Report-Access-denied-Availability-and-accessibility-of-beneficial-ownership-data-in-the-European-Union.pdf>

comprehensive comparison tool of BO Registries in EU countries.²¹ As an approach, we recommend for Canada to contact registrars in key European countries alongside the UK.

European partners to contact:

France - France has a publicly accessible registry that is centralized, free-of-cost, and without access barriers. Registry website: <https://data.inpi.fr/>

Denmark – Denmark has a publicly accessible registry that is centralized, free-of-cost, and without access barriers. Registry website: <https://datacvr.virk.dk/>

EU-federated jurisdictions to contact:

Germany - Germany as a federated jurisdiction has vastly augmented its transparency registry where legislation came into force In August 2021²². Companies can register in German states, yet BO information is centralized in a single public registry. Important to note the German registry requires registration, a small access fee, and searchability is limited by legal entity. Registry website: <https://www.transparenzregister.de/>

Austria - Austria is a federated jurisdiction where BO information is available on a single central registry as of November 2020.²³ Austrian registry does not requires registration, yet it does require a small access fee, and searchability is limited by legal entity. Registry website: <https://wieregms.bmf.gv.at/at.gv.bmf.wiereg-p/wiereg?execution=e1s1>

Question: How do other federated states coordinate on audits and investigations? The application of administrative sanctions, such as administrative dissolution? Criminal prosecution?

There are many Administrative Monetary Penalty provisions in federal Departments and Agencies and in Canada’s federal legislation/regulations as well as in provincial legislation.

This is an area which we suggest looking at applications of AMPs and audits within Canada at the federal and provincial levels. We also suggest looking at important court decisions (e.g., *Kabul Farms Inc. v. Canada* and *Guindon v. Canada*)^{24 25} that can guide ISED regarding possible Charter applications for AMPs. As for provinces, British Columbia has an Administrative Monetary Penalty scheme and has issued penalties for contravening its Mines Act.²⁶

As for international federated states, we recommend for Canada to connect with FIUs from Five Eyes’ partners, such as FINCEN in the US, or AUSTRAC in Australia.

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²¹ See: <https://publisher.dentons.com/experience/eu-transparency-registers>

²² See:

<https://www.aicgs.org/2021/08/the-fight-against-money-laundering-germany-expands-its-transparency-register/>

²³ See:

<https://www.bmf.gv.at/en/topics/financial-sector/beneficial-owners-register-act/Register-of-Beneficial-Owner.html>

²⁴ See: <https://ca.vlex.com/vid/kabul-farms-inc-v-679849101>

²⁵ See: <https://www.idsupra.com/legalnews/supreme-court-affirms-constitutionality-75042/>

²⁶ See: <https://mines.nrs.gov.bc.ca/enforcement-actions/administrative-penalties>

Should you have any further questions, please don't hesitate to get in touch.

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