Federation of Law Societies of Canada

Fédération des ordres professionnels de juristes du Canada

Submission of the Federation of Law Societies of Canada in response to the Department of Innovation, Science and Economic Development and the Department of Finance's *Consultation Paper: Strengthening Corporate Beneficial Ownership Transparency in Canada*

May 15, 2020

Introduction

1. The Federation of Law Societies of Canada ("the Federation") appreciates the opportunity to provide written comments on the Consultation Paper: Strengthening Corporate Beneficial Ownership Transparency in Canada ("the Consultation Paper") prepared by Innovation, Science and Economic Development Canada ("ISED Canada") and Finance Canada.

2. The Federation is the coordinating body of the 14 governing bodies of the legal profession in Canada. Our member law societies are mandated by provincial and territorial legislation to regulate more than 130,000 lawyers across the country, 3,800 notaries in Quebec and nearly 11,300 licensed paralegals in Ontario in the public interest. An important role of the Federation is to express the views of the regulators of the legal profession on national and international issues relating to the administration of justice and the rule of law.

3. The Federation and its member law societies have been actively engaged in the fight against money laundering and terrorist financing for over 15 years and support the government's efforts to fight these crimes. It is the Federation's position that a beneficial ownership registry would be a valuable tool in this fight and would assist the legal profession in complying with law society anti-money laundering and terrorist financing rules and regulations. As with all other anti-money laundering initiatives, a beneficial ownership registry must respect the constitutional principles on which Canadian society rests including the rule of law and the protection of solicitor-client privilege and professional secrecy.

Anti-money laundering and anti-terrorist financing initiatives in the legal profession

4. In 2015 the Supreme Court of Canada recognized that the provisions in federal anti-money laundering legislation requiring legal counsel to collect and retain information not required for client representation, granting expansive powers to search law offices, and providing inadequate protection for solicitor-client privilege violated provisions of the *Canadian Charter of Rights and Freedoms.* The Court also held that the legislation undermined the ability of lawyers and Quebec notaries to comply with their duty of commitment to the client's cause, a principle of fundamental justice.[1]

5. There has not, however, been a vacuum in the regulation of legal counsel with respect to money laundering and terrorist financing. Members of the legal profession in Canada have been subject to comprehensive anti-money laundering regulations for more than a decade. Canada's law societies are committed to protecting the public through regulatory measures that mitigate the risks of money laundering and the financing of terrorism that may arise in the practice of law. This commitment has been demonstrated by the adoption and enforcement of rules limiting the ability of legal counsel to accept cash, regulating the use of trust accounts and imposing extensive client verification obligations.[2] In combination with comprehensive rules of professional conduct and rules that govern financial accounting, these regulatory requirements effectively address the risk of potential involvement in money laundering or terrorism financing by legal professionals.

---

[1] *Canada (Attorney General) v. Federation of Law Societies of Canada*, [2015] 1 SCR 401, 2015 SCC 7 (CanLII).

[2] The Model Rules are available here: https://flsc.ca/national-initiatives/model-rules-to-fight-money-laundering-and-terrorist-financing/

6. A model rule developed by the Federation and implemented by all Canadian law societies, ensures that legal counsel engage in rigorous client due diligence. The Client Identification and Verification rule, which closely tracks the obligations contained in the federal client verification regulations, has been in force in all Canadian jurisdictions since 2008. Members of the legal profession must identify all clients by recording basic information such as the client's name, address, telephone number, and occupation and must verify the identity of clients, those giving instructions on behalf of clients, and third parties represented by clients when providing legal services in respect of the receipt, payment or transfer of funds.

7. In 2018, the Federation amended the Client Identification and Verification rule, closely tracking federal regulatory changes. The revised rule requires legal counsel acting for an organization (e.g. a corporation, trust, or partnership) in a matter involving a financial transaction to make reasonable efforts to identify the persons who own or control 25 per cent or more of the organization (beneficial owners). However, in the absence of access to reliable information in a central registry, legal counsel and others obliged to identify beneficial owners as part of due diligence requirements are left with no choice but to rely on information provided by their clients or the entities themselves with limited means of verifying the accuracy of the information.

Beneficial ownership registry

8. There is a clear international consensus that transparency in ownership and control of entities enhances anti-money laundering efforts. Like the federal regulations, the Federation's due diligence rules include obligations to obtain and record beneficial ownership information. For such requirements to be effective, however, there must be ready access to reliable information identifying those who own and control corporations and other entities.

9. The Federation is on record as supporting a public registry (or registries) of beneficial owners.[3] This consultation by ISED Canada and Finance Canada allows us to address important considerations about the scope of access to information in such a register.

10. Providing broad public access to beneficial ownership information would be consistent with the objective of greater transparency and would enhance efforts to fight money laundering and the financing of terrorism. The Federation recognizes, however, that there are competing public policy interests, including protecting privacy and confidentiality, and encouraging investment and economic activity, that must be considered in determining who should have access to a registry and what the extent of that access should be.

11. The Consultation Paper states that the primary goal of a central registry model would be to ensure authorities have immediate access to corporate ownership information to allow for more rapid investigations with reduced risk of tipping off parties. In the Federation's view, restricting access to government authorities would significantly limit the registry's utility and effectiveness. It is the Federation's position that access to the registry must be provided

[3] See the Federation's May 2018 submissions in response to Finance Canada's consultation paper: *Reviewing Canada's Anti-Money Laundering and Anti-Terrorist Financing Regime* and the submission of the Federation to the House of Commons Standing Committee on Finance Statutory Review of the Proceeds of Crime (Money Laundering) and Terrorist Financing Act, https://flsc.ca/wp-content/uploads/2018/03/MONEYLaunderENMarch2018F.pdf.

both to competent authorities (e.g. law enforcement) and all persons with due diligence obligations under federal anti-money laundering and terrorist financing legislation or provincial/territorial law society rules. As noted above, access to reliable beneficial ownership information is essential if the obligations on reporting entities under federal regulations and those imposed on legal counsel by the law societies are to be meaningful and effective.

12. The Federation agrees, however, that careful consideration must be given to how to balance the goal of greater corporate transparency with the need to respect the reasonable privacy interests of individuals whose information would be accessible through a registry (i.e. individuals with significant control). Highly restricted access would undermine the objective of corporate transparency as a means of combatting money laundering, while providing unfettered public access to personal and sensitive information would create risks that the information might be used improperly or for illicit purposes (e.g. identity theft, extortion). The models adopted in the United Kingdom and France, provide contrasting examples of how these competing interests have been addressed elsewhere.

13. The UK Companies House regime, described in some detail in the Consultation Paper, provides a publicly accessible and searchable registry, although access to some personal information, including full date of birth and residential address, is restricted. This approach is consistent with the requirements of the European Union's Fifth Anti-Money Laundering Directive ("EU Fifth Directive").[4] In contrast, France restricts access to its central register to a prescribed list of positions and entities, including judges, law enforcement officials, customs officials, and officials from the Public Finances General Directorate.[5] Other individuals, including members of the public, may obtain access to information in the French register through a court order where they demonstrate a "legitimate interest" (not defined) in the information.

14. While the EU Fifth Directive calls for public access to beneficial ownership information it does not propose unfettered access, stating that "a fair balance should be sought in particular between the general public interest in the prevention of money laundering and terrorist financing and the data subjects' fundamental rights." To that end the EU Fifth Directive calls for clearly defining and limiting the information made publicly available and also allows for exemptions to the disclosure of beneficial ownership information and access to the information in exceptional circumstances (e.g. where disclosure would expose the subject to a risk of fraud, kidnapping, blackmail, extortion etc.).[6]

15. Establishing a beneficial ownership registry would mark a significant shift in Canadian policy on corporate transparency. This is a shift that the Federation supports, but we understand that achieving the appropriate balance between the benefits of greater corporate transparency and privacy interests is essential. This may require a tiered approach to access to the information in a registry with different categories of persons and organizations being granted different levels of access. There may also be merit in phasing-in access over time. The French approach of restricting access to specified persons and organizations but providing an avenue for broader access based on demonstrating a legitimate interest is another option. In that case, however, it would be important to clearly define "legitimate interest" and to ensure that the definition is not overly narrow. Another, and perhaps

[4] https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2018.156.01.0043.01.ENG.
[5] https://www.legifrance.gouv.fr/eli/decret/2017/6/12/ECOT1706881D/jo/texte.
[6] Supra note 4 at para 36.

preferable option, would be to allow exemptions from disclosure in certain specified circumstances including those identified in the EU Fifth Directive.

16. In the Federation's view, whichever model is pursued, legal professionals and other reporting entities must be given access to the registry from the start to ensure that they have an objective, reliable means of fulfilling their obligations to identify beneficial owners.

Additional comments about implementation

17. While lawyers and Quebec notaries will benefit from accessing information in the proposed beneficial ownership registry, such a registry must not, directly or indirectly, require legal professionals to report information protected by solicitor-client privilege or professional secrecy to government authorities. It is thus imperative that the registry regime be designed and implemented in a manner that respects the constitutional protections for solicitor-client privilege and professional secrecy recognized by the Supreme Court of Canada.

18. Since the regulation of corporations is an area of shared responsibility, federal, provincial and territorial jurisdictions should adopt a consistent approach to beneficial ownership registries. The Federation recommends that ISED Canada and Finance Canada work closely with their provincial and territorial counterparts in this regard to develop a national, unified registry or a series of linked registries accessible through a single portal.

Conclusion

19. In the submission of the Federation, the creation of a public beneficial ownership registry for privately-held federally incorporated companies is an appropriate, necessary and welcome measure to combat money laundering, terrorist financing and other illicit activities. While there are many factors to consider in determining the extent of public access to such a registry, for the reasons outlined above it is essential that legal counsel be provided access. We look forward to further engagement with the federal government on this important issue.