

Canada in catch-up

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Canadian lawyers may yet be outside the anti-money laundering regime but the country is closing other long-standing sectoral gaps – progress acknowledged by the Financial Action Task Force and reported on by **Keith Nuthall**, in Ottawa.



Heading north

June reckoning

The Canadian government has extended and expanded its AML rules, with a series of amendments under the Proceeds of Crime (Money Laundering) and Terrorist Financing Act (PCMLTFA), most having come into force on 1 June [2021]. The reforms have been recognised by the Financial Action Task Force (FATF) in a follow-up report released in October [2021], which concluded: “Canada has made progress in addressing most of the technical compliance deficiencies identified” in

a 2016 mutual evaluation report. [1]

Owning UBO collection

One key step forward has been an expansion of requirements to gather ultimate beneficial ownership (UBO) information: all anti-money laundering/counter financing of terrorism (AML/CFT)-obliged entities now have to collect this data. In the past, this duty was restricted to financial institutions, securities dealers, life insurance companies and money services businesses. Under the revised legislation, accountants, government officials who handle finance (called ‘crown agents’), casinos, precious metal and stone dealers and real estate agents must also collect BO data. The requirement now also covers notaries in British Columbia (BC), where there has been more political pressure to boost AML controls than elsewhere in this decentralised country, notably because of concerns that ML has inflated the real estate market. So, Canadian lawyers (and all other notaries – who play a strong role in Québec legal services) remain free of AML/CFT reporting obligations. [2]

While the threshold for UBO collection largely remains as before – “individuals who directly or indirectly own or control 25% or more of a corporation or an entity other than a corporation” – there are new special rules for gathering it on widely-held or publicly-traded trusts: going forward, obliged entities must collect all trustee names and addresses with 25% or more direct or indirect ownership or control. [3]

There has also been progress on creating a UBO register in Canada, but operational details remain outstanding. In the government’s April [2021] budget, it allocated C\$2.1 million (US\$1.6 million) over two years to the Innovation, Science and Economic Development Canada ministry “to support the implementation a publicly accessible corporate beneficial ownership registry by 2025”. [4]

Also, a similar expansion of AML/CFT duties regarding is mandated in the latest reforms to gathering information on politically exposed persons (PEPs). PEP screening requirements were, on 1 June [2020], extended to accountants, crown agents, casinos, precious metal and stone dealers, real estate agents and BC notaries. Until then, only financial entities (banks and credit unions), securities dealers, life insurance and money services businesses had been forced to comply with the PEP assessment rules. [5] There were also some changes to general PEP assessment rules, notably that assessments of ex-spouses, not just current partners, of PEPs are undertaken.

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FATF upgrade

A key result of these changes is that FATF has upgraded Canada's ratings on UBO disclosure, notably for designated non-financial businesses and professions (DNFBPs). As Canada lacked key requirements for DNFBPs in 2016, including on customer due diligence (CDD) and filing suspicious transaction reports (STRs), FATF had then rated the country non-compliant with its DNFBP Recommendations 22 and 23. But these were subsequently mandated in reforms that came into force before last year, and following the latest changes around UBO and PEPs, FATF has now ruled Canada partially and largely compliant with these Recommendations, respectively. The country is now also rated largely compliant with Recommendation 12, on PEPs, having been declared non-compliant in 2016. And it is compliant with Recommendation 17, on life insurance and securities dealers' AML/CFT, having been non-compliant in 2016. However, "having some of the relevant DNFBPs (i.e. lawyers, Québec notaries, and company service providers)... not covered affects the overall outcome," said FATF. The Canadian legal profession has resisted inclusion in the federal AML/CFT system, with a recent note from the Law Society of Ontario claiming that its professional guidance requires lawyers "to conduct sufficient diligence on client transactions to avoid unwittingly becoming involved in or assisting with money laundering, terrorist financing, or other illegal activities". But it also stresses that self-regulation is designed to "preserve solicitor-client privilege, confidentiality, and the independence of the legal professions..." [6]

Payment reports and records – virtual and otherwise

Outside DNFBPs, another significant change in the latest Canadian AML reforms, effective 1 June [2021], is that obliged bodies are now required to file 'large virtual currency transaction records' (LVCTR) to Canadian financial intelligence unit (FIU) FINTRAC (the Financial Transactions and Reports Analysis Centre of Canada), for C\$10,000 (US\$7,750) worth received in one or more payment over a 24-hour period. [7]

FINTRAC is also planning to release revised guidance on a '24-hour rule' for reporting payments of cash, electronic wires and casino disbursements within a day. The threshold in these cases will again be C\$10,000. The FIU has already advised that reporters can set their own 24-hour period and do not have to stick to a calendar day. [8]

Another broad-based change is a revised 'travel information' rule for financial institutions and money service businesses (MSBs), which must now retain the name, address and account or other reference number of a person or entity requesting a wire or virtual currency transfer. [9]

The changes do not all require more information. One rule, now repealed, had, from 2016, insisted that obliged entities keep a record of any "unsuccessful reasonable measures" taken to secure information required under Canadian AML/CFT laws. A FINTRAC note said: "It was determined (through stakeholder feedback) that this was too onerous, and imposed a significant administrative burden on reporting entities."

Accountants and casinos

There have also been detailed changes to Canadian AML/CFT rules affecting DNFBP reporting.

As regards accountants, the reforms exempt them from AML/CFT reporting duties when acting as bankruptcy trustees or insolvency practitioners.

Casinos must undertake additional client verification requirements for large virtual currency transactions of C\$10,000 or more.

MSBs and real estate

The amendments also extend full AML/CFT requirements to foreign money services businesses (FMSBs) operating in Canada, which, until 1 June [2021] only applied to domestic MSBs. [10]

As for real estate brokers, agents and developers, the new rules tightly define when they must consider a client a business associate (and hence conduct CDD and submit STRs) – namely, the first time they verify a client's identity. Also, from 1 June [2021], the real estate sector must assess whether their clients are PEPs or not, and conduct additional checks if that is the case. [11]

Prepaid cards and precious stones

Another change is that from 1 June [2021], any financial institution releasing prepaid payment products must verify account-holders' identity and submit STRs if necessary. [12]

As for precious metals and stones dealers, additional client verification requirements apply for large virtual currency transactions of C\$10,000 or more. From 1 June [2021], these dealers have also had to screen clients to check if they are PEPs. [13]

Budget matters

Lincoln Caylor, senior partner, Bennett Jones LLP, Toronto, and an AML specialist, said that the batch of reforms was "positive", seeing Canada "catching up to international standards" on AML/CFT. The changes come, he noted, as the Canadian government has committed to strengthen enforcement around trade flows. In a December [2021] release, the country's public safety and emergency preparedness ministry said the government was spending C\$28 million (US\$22 million) over four years (2019-21), and C\$10 million (US\$7.8 million) annually thereafter, to create and run a Trade Fraud and Trade-Based Money Laundering (TBML) Centre of Expertise (COE) at the Canada Border Services Agency, enabling its officers to investigate TBML. It added that C\$19.8 million (US\$15.5 million) would be spent on staffing positions in new Royal Canadian Mounted Police (RCMP) enforcement teams dedicated to investigating ML and proceeds of crime. [14]

“They are committing significant resources,” said Caylor. He has detected a sea change in public and political opinion on ML, with Canadians better understanding that illicit fund flows are far more than a financial problem: “They are tied to the opioid crisis,” he noted – with the government announcing 1,720 opioid toxicity-related deaths between April and June 2021. Also, ML has been linked in the public mind to higher property prices in real estate hotspots such as Vancouver, as well as to an increase in gun and gang crime, he said. Since 2013, gang-related murders in Canada’s largest cities have almost doubled, with 20% of the 743 homicides in 2020 linked to organised crime or street gangs, according to a government note. [15] Fuelled by such concerns, the Canadian government and law enforcement is “moving towards being more aggressive” in AML, said Mr Caylor.

The major impact of the new legal reforms will be pushing some sectors to establish more comprehensive KYC and STR reporting systems, he said – highlighting demands on foreign money service businesses, precious metal dealers and virtual asset service providers (VASPs): “They are going to have to catch on quickly,” he said, predicting that these sectors may be a focus of the anticipated tougher enforcement of Canadian AML laws.

Legal impediment

As for lawyers, Mr Caylor said the decision not to expand Canadian AML explicitly to that profession was a recognition of the constitutional difficulty of doing so since a 2016 supreme court ruling that lawyers should not be forced to file STRs to FINTRAC. [16] By then explicitly ruling that client confidentiality was more important than AML rules, Mr Caylor said any federal government effort to legislate to force lawyers into AML/CFT was rendered unlikely in the short term.

Steve Alsace, Toronto-based global investigations & compliance director of Guidehouse Consulting, agrees that the Canadian reforms were “significant”, with the country playing “catch-up” with international AML/CFT standards. One important step he said was a new requirement that FINTRAC name any companies or people who are the subject of its enforcement action over failures to comply with AML/CFT rules. For instance, in 2016, the FIU refused to name a financial institution fined C\$1.15 million (US\$900,000) over AML/CFT failings – the next year insurer Manulife admitted that its banking division had been punished. Fears of being “named and shamed” would encourage compliance with AML/CFT, said Alsace.

He hoped that the new investment in enforcement would be spent wisely, and reduce the time taken to send effective financial intelligence via FINTRAC to police forces. He said an existing system, where financial institutions flag transactions as potentially associated with human trafficking, and those STRs are swiftly forwarded to specialist law enforcement units, has demonstrated how focused utilisation of financial intelligence can fight crime.

A common goal

Mr Alsace said the federal government will need to be creative when establishing a UBO system that works nationwide, given it has no constitutional jurisdiction to force provinces to create registers for provincially-incorporated companies – rather than federal corporations, where it does. He suggested that the government create a national UBO registry that has clear rules and which is designed to enable provinces to opt in and link similar provincial registries into a federal UBO structure, whose systems are maintained federally. Political pressure could then be applied to provinces to join a national UBO system voluntarily.

Concerns about ML in Canada may increase later this year [2022], when the Cullen Commission of Inquiry into Money Laundering in British Columbia releases its final report in May. It is expected to make practical recommendations influencing Canadian AML policy nationwide, said Mr Alsace. This may increase public and political concern about Canadian ML which has fuelled the latest reforms and may spark more action, especially on enforcement.

Notes

1. <https://www.fatf-gafi.org/media/fatf/documents/reports/fur/Follow-Up-Report-Canada-2021.pdf>
2. <https://lso.ca/about-lso/initiatives/money-laundering-model-rules>
3. <https://www.fintrac-canafe.gc.ca/guidance-directives/client-clientele/bor-eng>
4. <https://www.budget.gc.ca/2021/report-rapport/p4-en.html>
5. <https://www.fintrac-canafe.gc.ca/publications/general/faq-pep-eng>
6. <https://lso.ca/about-lso/initiatives/money-laundering-model-rules>
7. <https://www.fintrac-canafe.gc.ca/guidance-directives/transaction-operation/lvctr/lvctr-eng>
8. <https://www.fintrac-canafe.gc.ca/guidance-directives/transaction-operation/24hour/1-eng>
9. <https://www.fintrac-canafe.gc.ca/guidance-directives/transaction-operation/travel-acheminement/1-eng>
10. <https://www.fintrac-canafe.gc.ca/guidance-directives/client-clientele/brr-eng>
11. <https://www.fintrac-canafe.gc.ca/guidance-directives/client-clientele/client/real-eng>
12. <https://www.fintrac-canafe.gc.ca/guidance-directives/prepaid-prepaye/1-eng>
13. <https://www.fintrac-canafe.gc.ca/re-ed/dpms-eng>
14. <https://www.canada.ca/en/public-safety-canada/news/2021/12/strengthening-canadas-anti-money-laundering-regime-through-collaboration-and-capacity-building.html>
15. <https://www.publicsafety.gc.ca/cnt/cntrng-crm/gn-crm-frrms/index-en.aspx>
16. <https://www.acfcs.org/canadian-supreme-court-ruling-excluding-lawyers-from-aml-monitoring/>