

Agents: New Rules For Compliance with FINTRAC



By Brian Madigan LL.B.

Effective 23 June 2008, real estate agents must be aware that there is an obligation to comply with the provisions of the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*. This Act is federal legislation and it is administered throughout the country by FINTRAC (the Financial Transactions and Reports Analysis Centre of Canada).

So, who are they looking for? Actually, they are looking for both terrorists and money launderers. The method of enforcement is: not to allow them to hide among everyone else. The result is that everyone gives up a little bit of privacy in the interests of keeping the country safe. It's a reasonable "trade-off".

Hopefully, this will not cause undue anxiety to real estate agents and their clients.

The obligation is now to identify everyone with whom you are doing business. Up until now, the obligation was merely to report suspicious transactions, and it was mandatory to report cash transactions involving sums in excess of \$10,000. Those rules still continue.

The Act is federal legislation and is designed for a certain purpose. The Act applies in a non-technical fashion. It includes its own definitions. Any technical issues that may arise under the *Real Estate and Business Brokers Act* (REBBA) are not applicable. So, agent has a much broader definition than that contained in REBBA 2002. The doctrine of paramountcy would require federal legislation to prevail over provincial legislation. So, the term agent is to be considered in the light of the federal act and not a provincial one. Client and customer status are not relevant. The payment of commission is similarly irrelevant.

I. The triggering event: what gives rise to the obligation to report?

- 1) a receipt of funds, and
- 2) a transaction.

Receipt of Funds

A simple receipt of funds is sufficient to trigger the operation of the Act. It is noteworthy that in a real estate deal, this would at first entail the deposit moneys. Let's assume that the vendor and purchaser are separately represented. The

purchaser's agent first receives the funds in the form of a cheque and has the obligation to deliver it to the vendor's agent, or the vendor's solicitor, or another third party stakeholder. Whatever the obligation, the purchaser's agent is deemed to have received the money and the provisions of the Act apply.

Similarly, this applies to the vendor's agent who may acquire the funds for deposit into the firm's brokerage trust account. But, the role of the purchaser's agent in the first place will preclude the involvement of the second agent, that is, the vendor's agent. There is no need to double up the obligation. One responsible party is sufficient.

However, if the purchaser is unrepresented, then, this obligation transfers to the vendor's agent.

While the material published so far concerning the obligations and liabilities does not address the issue, non-agency transactions should similarly give rise to an obligation under the Act.

The legislation seems to circle around the issue, but, if neither the buyer nor the seller were truly represented by an agent, and the brokerage and sales representative merely provided customer service, the obligations under the Act should be imposed. So, to err on the safe side, any person who is a registrant under the Real Estate and Business Brokers Act should assume they have obligations under the Proceeds of Crime (Money Laundering) and Terrorist Financing Act. It would be foolhardy to assume the contrary.

A Transaction

Basically, there must be a transaction. Here, transaction means a purchase or sale of real estate. It excludes property management or leasing. I don't know the reason for this. I assume that on the basis of the research they have undertaken so far, FINTRAC knows that terrorists are buyers and not renters.

II. What Records need be kept?

On the assumption that you have a triggering event which gives rise to an obligation under the Act, what records do you need?

Receipt of Funds

If you receive funds, or transmit them in some way, then you are required to:

- 1) keep a receipt of funds record, and
- 2) identify the client from whom the funds are received.

A Transaction

For a transaction, there is one additional obligation. So, here we are speaking about a deal that is completed and closed, not simply a deposit on a deal that does not materialize. Here, you must:

- 1) keep a receipt of funds record,
- 2) identify the client from whom the funds are received, and
- 3) make a third party determination.

II. What is in the Records?

Receipt of Funds Record

If you receive funds, then you have to record it. Specifically, you would need to record the following:

- Amount and currency of the funds
- The date of the transaction
- The purpose, details and type of transaction
- If the funds were cash, and particulars concerning the delivery of any cash
- If an account were affected, the number and type, the full name of the client holding the account and the currency in which the transaction was conducted
- The account into which the deposit was made (ie. brokerage's trust account)
- If an individual, then the name, address, date of birth and principal business of the individual
- If an entity, then the name, address and principal business of the entity (this could be a partnership, trust or joint venture)
- If a corporation, then copy of official corporate records showing "power to bind the corporation", (ie. certificate of incumbency, articles of incorporation, by-laws etc. setting out signing officers, and any changes by corporate resolution).

Client Information Records

Most of the time, you will already have reached the record keeping threshold because a deposit will have been involved. However, there are situations when this threshold is not reached until later. No matter when the occasion arises, these records include:

- If an individual, then the name, address, date of birth and principal business of the individual
- If an entity, then the name, address and principal business of the entity (this could be a partnership, trust or joint venture)
- If a corporation, then copy of official corporate records showing "power to bind the corporation", (ie. certificate of incumbency, articles of incorporation, by-laws etc. setting out signing officers, and any changes by corporate resolution).

IV. No Records Required

There are several situations that do not require records. The first two relate to records that are already being maintained under the Act. For example, suspicious transactions and large cash transactions; if you have records already, then, you don't need to do it again, once is enough!

You do not need to maintain the two new records, namely receipt of funds, or client identification if you act for either a very large corporation or a public body. As you might imagine, there is a definition for each of them.

Very large corporation: this means a corporation that has net assets of at least \$75,000,000 on its last audited balance sheet. The company need not be a Canadian company but its shares must be traded on a Canadian Stock Exchange. There are special rules for large companies that are traded on other stock exchanges, if they are not traded in Canada. Subsidiaries are included provided the financial statements are consolidated. If their statements are not consolidated, then the subsidiary would have to qualify on its own. So, a company with \$74 million in assets would be large, but not "very large", and in order to meet the criteria for an exemption from the rule, the company needs to be very large.

Public Body: this means a federal or provincial department or agency, a municipal body or a hospital authority. Hospital Authority is defined in the memoranda dealing with the application of the GST by Canada Revenue Agency. It includes public hospitals, various regional health authorities and would specifically preclude private hospitals and various charities and non-profit organizations.

V. Third Party Determination

Don't forget about this requirement under the Act. This is the one that really might catch the terrorists. Osama Bin Laden wouldn't likely open up an account, and submit an Offer to purchase in his own name. Surely, he would use an intermediary. So, that's why you have to ask the question!

If you are required to keep a client information record, then you are also required to "take reasonable measures to determine whether the client is acting on instructions of a third party". Is this deal being undertaken for someone else? Is the purchaser a nominee only? Is this deal "in trust" for someone else? FINTRAC considers employees to be undertaking transactions on behalf of their employers, being third parties.

Once, you have determined that a third party is involved, such information concerning that individual, entity or corporation is then to be recorded, or if it is

not available, then this might give rise to a suspicion on your behalf and a corresponding obligation to report.

VI. Fines and other Penalties

The penalties are serious. Non-compliance may be treated as a criminal offence and the fines can be up to \$500,000 and imprisonment can be up to five (5) years. In fact, both penalties could be imposed.

So, be careful and be aware of the new rules!

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