

Fintrac ~ Identification of Corporations



By Brian Madigan LL.B.

As a real estate agent you are under new legal obligations to collect and maintain certain records with regard to real estate transactions.

These obligations arise under the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*. This is federal legislation and has provided for the establishment of the Financial Transactions and Reports Analysis Centre of Canada, known commonly as “FINTRAC”. It is noteworthy that breaches under this legislation may be subject to penalties under the *Criminal Code of Canada*.

It is important to realize that the definitions that are set forth in the Real Estate and Business Brokers Act are not applicable here. This is federal legislation and it supercedes provincial legislation in any circumstance where there may be conflict.

There are three matters to consider at the outset:

Agency: You are an agent for the purposes of this legislation if you are “involved” in the deal. It doesn’t matter, what capacity. Involvement is sufficient. It doesn’t matter who you represent. I have chosen to use the term “involvement” rather than the federal term “represent” since that term could be confusing with the provincial term “represent”. And, it doesn’t matter in what capacity you represent someone. So, you might have a client, a customer (without fiduciary obligations) or you may simply be providing the services of a broker at common law, not truly representing either party. But, nevertheless you are involved in the deal and that’s enough. If there are two agents, then they each take care of their own party (client or customer). If there is an unrepresented party in the deal, then every real estate agent who is involved in the deal, has a duty to identify them. Further, you can be doing this work for free, and you still have obligations under the Act.

Transaction: This refers to a real estate transaction, and means any transaction whether completed or not. So, the obligations arise at the outset, not at the end. An abortive or attempted transaction still gives rise to the obligation to identify and maintain a record.

However, it does not include property management, leasing or renting properties. It does include buying or selling a business. Under the Real Estate and Business Brokers Act, a business is considered to be “real estate”, so it will be included. Until the federal act comes up with its own definition, this provincial definition will apply.

Corporation: This means a corporate body incorporated pursuant to the laws of a recognized jurisdiction by such means as are appropriate to that jurisdiction. It does not include individuals (natural persons), trusts, partnerships, joint ventures, foundations or other entities

Client Information Record

This obligation arises for every transaction or receipt of funds occurring after 23 June 2008. You will have to maintain a record that identifies your party and any other party that you must identify.

Essentially, there are two new triggering events:

- 1) the receipt of funds, or
- 2) a transaction.

Previously, it was necessary to report suspicious transactions, and to report the receipt of funds in the form of cash in the amount of \$10,000.00 or more. Those obligations continue.

The question becomes somewhat more perplexing to the real estate industry when a corporation is involved. That is largely due to the fact that real estate brokers and sales representatives rarely deal with corporate documentation.

So, here's what you need for the Client Information Record, in essence this is the "A" list of what is required:

- 1) corporation confirmation of existence,
- 2) corporation name,
- 3) corporation address, and
- 4) names of Directors.

In addition, there is also a "B" list, this is the source material that is reasonable for you to examine in order to confirm the information required on the "A" list.

For the first three items on the "A" list, you can examine the following:

- 1) the corporation's certificate of corporate status,
- 2) a record that has to be filed annually under provincial securities legislation, or
- 3) any other record that confirms the corporation's existence.

Please note that those sources are to be read disjunctively. That means one is sufficient. You don't need all three.

What is meant by the reference to "any other record...." as noted above. Here are some examples, which are obviously not an exhaustive list:

- 1) the corporation's published annual report signed by an independent audit firm, or
- 2) a letter or a notice of assessment for the corporation from a municipal, provincial, territorial or federal government.

This information should be relatively straightforward. An application can be made to the Province of Ontario for a Certificate of Corporate Status. It is available within days upon payment of the prescribed (nominal fee). Not all corporations are required to attend to annual filings. However, if the corporation you are required to identify does, then you can use this document. The general “catch all” provision is fairly generous. While most corporations do not have audited financial statements, some do. Certainly, the larger ones will.

And, remember that a very large corporation is exempt from the record provisions. But, very large means publicly traded on a stock exchange with assets in excess of \$75million. Subsidiaries are included provided the financial statements are consolidated.

So, that brings us back to the financial statement. You are not required to determine the firm’s letter of engagement. It may be provided simply on the basis of “Notice to Reader”. That means that there was no audit. But, it’s still an annual report, and for these purposes it is sufficient. It does not have to be “audited”. In most cases, financial statements are prepared for small closely held corporations, and the shareholders know exactly what is going on. There are no arms-length independent third party investors who require proof by random audit that serves as a verification of the transactions undertaken by the corporation. A simple financial statement will suffice, and this document will meet the FINTRAC requirements.

The second example in the “catch all” provision deals with assessments. Surely, there should be at least something here. A notice of assessment from Canada Revenue Agency under the Income Tax Act or the Excise Tax Act dealing with the GST, or perhaps, there is a tax bill from the Province under the Retail Sales Tax Act, or even a tax bill from the municipality in respect to its occupied space.

Kindly note that bills from public utilities are not sufficient identifying documents for these purposes.

Any of these documents will serve to confirm the existence of the corporation. They are likely to provide evidence of the name and the address of the corporation. However, your next step is to identify the Directors, so that can become somewhat difficult. Generally, this information will not appear in any of the documents mentioned except for the annual filing, and even with the annual filing, sometimes one or more but not all Directors are mentioned.

The obligation under this legislation is to obtain the names of all of the Directors, not just some. In this regard, one method would be to undertake a corporate search of the records of the corporation, and specifically request the names of the current Directors.

Hopefully, the filings will be up to date, but more frequently than not, these filings are slightly in arrears. Often the corporation will be incorporated by its initial “incorporators” and “first directors”. Rather than using the names of the actual clients, law offices will use “in-house” personnel for this purpose. So, if three incorporators are required, then three lawyers at the firm or three support staff will sign the appropriate documents. The law firm might deliver the corporate records to the client in this fashion with instructions on how to complete “FORM 1” which is the notice dealing with the new directors. If the client does not attend to this filing, then it would appear from the corporate records that three members of the law firm are the Directors, when that is no longer the case. This practice has been discontinued to a large degree simply because law firms do not wish to receive these types of inquiries unnecessarily. However, it is nevertheless important to be aware of the fact that there are thousands of such corporations.

The Corporate Constitution

The corporate constitution is set out in the Constatting Documents. These are the documents that actually create and govern the corporation. In addition, certain amendments to the original documents may also be included. The documents could take various forms and include any one or more of the following:

- Royal Charter
- Declaration
- Statute
- Letters Patent
- Supplementary Letters Patent
- Articles of Incorporation
- Supplementary Articles of Incorporation
- Articles of Association
- Supplementary Articles of Association
- Memorandum of Association
- Articles of Amalgamation
- Court Order

By-Laws and other Corporate Documents

In addition to the constating documents there may be some other relevant documents. By-Laws are passed by the shareholders. They can arise at a Directors meeting and continue in force until ratification by the shareholders.

By-laws

The series of By-Laws are the general rules of corporate governance. There will be a General By-law and that should spell out the duties and obligations and the corporate authority as it may be delegated to various Officers and Directors of the corporation. You will also likely find a short stand-alone Borrowing By-Law, as well as a Banking By-law. The banking by-law will deal specifically with signing authority and undertaking banking business. It will be executed upon a form provided to the corporation by the bank. There can, of course, be more than one. The general authority appears in much the same way. Who signs for the company? Are two signatures required? Does the company have a corporate seal? Must the seal be affixed to contracts? The authority should be found in the general by-law, not in either the borrowing by-law or banking by-law.

Resolution is the manner in which corporations make decisions. So, if there is a decision to purchase a particular property, then the proper record for this corporate decision is by way of Resolution. The difficulty at the outset, is that the decision to acquire the premises has probably not been recorded in the corporate minute book.

The true signing authority is what you're looking for. So, if there is substantial difficulty, then you should probably seek legal counsel.

The Certificate of Incumbency is a document which will indicate the name of the individual who holds a certain office within the corporation. So, this is a document signed by the corporate secretary under the seal of the corporation confirming that John Smith is the President, and Robert Brown is the Vice-President of the company and that the two of them have corporate authority to sign documents on behalf of the corporation. You need this document to prove who holds the positions. When you looked at the general by-law it would simply indicate that the signatures of both the President and the Vice-President are required. So, this can end up being quite confusing as well. Again, if you find yourself in difficulty seek legal counsel.

Jurisdictional Issues

You must also appreciate that not all companies will have been created in Ontario. There are 9 other provinces, 3 territories and the federal government to consider any one of which may have created the corporation, and that's without going outside of the country.

This is an area which can be fraught with risk, so be careful.

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