# BENEFICIAL OWNERSHIP REGISTRIES AS AN ANTI-MONEY LAUNDERING TOOL: AN EVALUATION OF CANADA'S APPROACH IN ITS INTERNATIONAL AND COMPARATIVE CONTEXT

**by**

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## DEDICATION

***First to Almighty Allah, then my mother (Shaheen), Professor Rob Currie and to friends who turned into family***

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## Abstract

Money laundering has been a significant issue in Canada. It is estimated that $45 billion to $113 billion is laundered annually in Canada.[1] Shell corporations are chosen by launderers for their dirty money because they provide anonymity, encourage cash transactions and hide the financial transactions formed and government surveillance. The process involves depositing funds into shell companies, generating invoices and passing the dirty money through numerous other shell companies to wash or "launder" the dirty money. These shell companies hide the identities of those involved and obstruct law enforcement efforts, thereby posing serious risks to Canada's economy and international financial security.

Globally, there has recently been an increasing adoption of Beneficial Ownership (BO)[2] rules to combat money laundering. To counter the persistent rise of money laundering risks in Canada, a state known for providing a safe haven to launderers, has recently adopted BO rules at the federal level to ensure transparency. This thesis will holistically evaluate the rules of Beneficial Ownership Transparency (BOT) in the context of the AML framework by comparing Canada's approach with those of other countries, examining the shortcomings in Canada's approach to this crucial tool by analyzing historical challenges, evaluating how Canada's current approach aligns with international recommendations from organizations like the Financial Action Task Force (FATF)[3], Organization of Economic Co-operation and Development (OECD)[4], G7, and G20, and considering the broader implications of using BOT. It will also suggest recommendations for improvement geared towards strengthening BOT measures, ensuring that Canada adheres to international best practices and plays a more effective role in the worldwide battle against financial crimes and corporate secrecy.


[1] Government of Canada, Criminal Intelligence Service Canada, *Public Report on organized Crime in Canada 2020*, (February 18, 2021) at 7

[2] In this thesis I will use the defined term "BO" to refer to the concept of "beneficial ownership" or "beneficial owner" (noun) interchangeably, which use is intended will be obvious to the reader from the context.

[3] The Financial Action Task Force (FATF) is an international organization founded in 1989 with the purpose of combating the illicit activities of money laundering and the terrorism financing. It establishes worldwide benchmarks and oversees adherence to avoid illicit financial transactions. FATF, International Standards on Combating Money Laundering and The Financing of Terrorism & Proliferation, (2012).

[4] The Organisation for Economic Co-operation and Development (OECD) is an international organization with 38 member countries founded in 1961 to build better policies for better lives.

## List of Abbreviations Used

1. AML – Anti-Money Laundering
2. AMLD – Anti-Money Laundering Directives
3. API – Application Programming Interface
4. ASTR – Attempted Suspicious Transaction Report
5. BC – British Columbia
6. BCLC – British Columbia Lottery Corruption
7. BCSC – British Columbia Securities Commission
8. BO – Beneficial Ownership
9. BOI – Beneficial Ownership Information
10. BOT – Beneficial Ownership Transparency
11. BODS – Beneficial Open Data Standards
12. BOSS – Beneficial Ownership Secure System
13. BIS – Bank of International Settlements
14. CAL – Collaborative Analysis Learning
15. CBCA – *Canada Business Corporations Act*
16. CBA – Canadian Bar Association
17. CTA – *Corporate Transparency Act*
18. CFREU – *Charter of Fundamental Rights of the European Union*
19. CJEU – Court of Justice of the European Union
20. CEO – Chief Executive Officer
21. GC – General Counsel
22. CFO – Chief Finance Officer
23. COO – Chief Operating Officer
24. CSO – Civil Society Organizations
25. DRA Digital Recording Ammeter
26. DNFP – Designated Non-Financial Business and Professions
27. ECCTA – *Economic Crime (Transparency and Enforcement) Act*
28. EITI – Extractive Industry Transparency Initiative
29. ESP – Eligible Scottish Partnerships
30. EU – European Union
31. FATF – Financial Action Task Force
32. KYC – Know Your Customer
33. FinCEN – Financial Crimes Enforcement Network
34. FINTRAC – Financial Transactions and Reports Analysis Centre of Canada
35. FIU – Financial Intelligence Units
36. GDPR – *General Data Protection Regulation*
37. ICCPR – International Covenant on Civil and Political Rights
38. HMRC – His Majesty's Revenue and Customs
39. HOC – House of Commons
40. ICIJ – International Consortium of Investigative Journalists
41. IRS – International Revenue Service

42. LCTR – Large Cash Transactions
43. LOC – Large Operating Companies
44. LOTA – *Land Owner Transparency Act*
45. LOTR – Land Owner Transparency Register
46. LLC – Limited Liability Company
47. LLP – Limited Liability Partnerships
48. LP Limited Partnerships
49. LPA – *Limited Publicity of Enterprise*
50. MSB – Money service Businesses
51. NCA – National Crime Agency
52. NDAA – *National Defense Authorization Act*
53. NFIP – National Federation of Independent Businesses
54. NSBA – *National Small Business Association*
55. OBCA – Ontario *Business Corporations Act*
56. OCCRP – Organized Crime and Corruption Reporting Project
57. OECD – Organization of Economic Co-operation and Development
58. PBOR – Public Beneficial Ownership Registry
59. PCMLTFA – *Proceeds of Crime Money Laundering Terrorist Financing Act*
60. PCMLTFR – *Proceeds of Crime (Money Laundering) and Terrorist Financing Regulations*
61. PEP – Politically Exposed Persons
62. PIPEDA – *Personal Information Protection and Electronic Documents Act*
63. PSC – Persons with Significant Control
64. QER – Quebec Enterprise Register
65. RCMP – Royal Mounted Canadian Mounted Police
66. REQ – *Registraire des entreprises du Québec*
67. ROE – Register of Overseas Entities
68. SE – Societates Europaeae
69. SLP – Scottish Limited Partnerships
70. SMB – Small and Medium Businesses
71. SODR – Subject to its Own Disclosure Requirements
72. SQP – Scottish Qualifying Partnerships
73. STR – Suspected Transaction Reports
74. TEU – *Treaty of European Union*
75. TIN – Tax Identification Number
76. TRS – Trust Registration Service
77. TRSS – Thomson Reuters Special Services
78. UBO – Ultimate Beneficial Owner
79. UDHR – *Universal Declaration of Human Rights*

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## Chapter 1: Introduction

Economic crimes like money laundering divert resources from legitimate businesses to criminals and significantly impact the economy and financial integrity of the country.[5] Over the last decade, Canada has developed its reputation for money laundering. The risk of money laundering has become so common that there has been a term coined for money laundering in Canada known as "snow-washing."[6] This term highlights the ease of dirty money entering into Canada and is discussed later in the thesis. One major factor that contributes to this problem is the lack of BOT, which allows criminals to establish shell companies without reporting the true identities of BO. Canada has been criticized for its weak AML laws that allow the use of shell companies with various complex structures to obscure the Ultimate Beneficial Owner (UBO) behind entities.[7] This has enabled criminal organizations to operate with impunity and has posed difficulties for law enforcement and agencies to trace the origin of illicit money.

Despite efforts by law enforcement and government agencies, criminals always remain one step ahead and continue finding loopholes or shortcomings in the currently existing system to avoid reporting obligations and continue enjoying illicit funds. In response, to address the risk of money laundering through BO, Canada has recently passed Bill C-42,[8] which aims to establish a public BO registry and requires all entities to report BOI.

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[5] Calvin Lee Pacleb, "International Money Laundering: A comprehensive Review and General theory of Corruption" (MA Thesis, Texas Tech University, 2023), online: <https://ttu-ir.tdl.org/server/api/core/bitstreams/181f57b6-61f9-4039-a7b8-524c85bbd48b/content>.

[6] Jordan Deering, Eric Belli-Bevar, Bamdad Attaran, "Federal beneficial ownership registry announced: Canada proposes new legislation to combat money laundering and terrorism financing", (29 March 2023), online: <https://www.dlapiper.com/en/insights/publications/2023/03/canadian-federal-beneficial-ownership-registry>.

[7] *Ibid*

[8] *Canada Business Corporations Act* RSC 1985, c. C-44. as amended by *An Act to amend the Canada Business Corporations Act and to make consequential and related amendments to other Acts,* SC 2023, c 29 ("Bill C-42")

In this thesis, I aim to examine Bill C-42 and ask if it effectively closes all gaps by requiring BOI to be publicly disclosed, or if there still remain some limitations that can allow launderers to misuse it. What sets my research apart, however, is that I am exploring the new BO rules in Canada, which remain largely untouched. This research aims to provide insights that will strengthen Bill C-42, and help Canada safeguard its financial system and prevent the misuse of shell companies.

This project consists of five substantive chapters. In this Chapter 1 of my thesis, I will provide a brief introduction to the concept of organized crime and money laundering generally, the role of shell companies and the understanding of BO and the significance of BOT.

In Chapter 2, the focus will be primarily on Canada. I will explore in detail the issue of money laundering, the role of shell companies in facilitating illicit financial flows in Canada and how the lack of transparency measures gave Canada a reputation as a haven for money laundering. I will also provide an historical overview of AML in Canada, including the Cullen Commission, its impact and the progress made towards strengthening Canada's AML framework to date.

In Chapter 3, I will explore the significance and role of Public Beneficial Ownership Registry (PBORs) in promoting transparency and combatting money laundering. I will discuss the privacy concerns raised in the European Union (EU) regarding public access to the BO registry with fundamental rights. This will be done by discussing a European court decision and critically examining it to highlight whether similar privacy concerns can also be raised in Canada. Additionally, it will assess whether Canada's move towards BOT is a balanced approach by allowing Canada to combat money laundering by ensuring transparency while respecting privacy rights.

In Chapter 4, I will discuss the BO frameworks of the United Kingdom (UK), the United States (U.S.) and Canada. I will do a comparative analysis to discuss differences and identify the challenges in Bill C-42 to assess if it requires further reforms.

Lastly, in Chapter 5, I will propose some recommendations and global best practices to enhance BOT in Canada. This will hopefully contribute to Canada's efforts to play a more effective role in the worldwide battle against financial crimes and end corporate secrecy.

**The Problem of Organized Crime and Money Laundering**

In the dynamic landscape of Canadian governance, organized crime has been a longstanding pervasive problem. As Public Safety Canada noted in a 2006 strategy document, organized crime presents a significant threat to Canada; its impact may not be as serious as regards government, peace and order in the country, but it still affects in one way or another through increased victimization, inflated insurance rates, and diminished resources for social programs.[9] It erodes the integrity of institutions, depletes consumer resources, and perpetuates a cycle of illicit influence and instability across the nation, as no community is immune.[10]

The Nathanson Centre for the Study of Organized Crime and Corruption articulates a stark reality: countries with less effective regulatory and enforcement systems are prime targets for organized crime.[11] This global perspective underscores the necessity for a robust national crime suppression regime to safeguard domestic interests and contribute to a stable international order. The repercussions of inaction or inadequate response are not contained within borders; they ripple outward, affecting interconnected global networks. Thus, governments must collaborate extensively, domestically and internationally, to counteract these criminal networks effectively.

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[9] Public Safety Canada, "Working Together to Combat Organized Crime" (2006) at p. 1, online: <https://www.publicsafety.gc.ca/cnt/rsrcs/pblctns/cmbtng-rgnzd-crm/index-en.aspx>.
[10] *Ibid*
[11] As quoted *ibid*

Central to the mechanics of organized crime is the process of money laundering. Money laundering is defined as the concealment of the origins of money or assets obtained through illegal activities, typically comprising three stages: (a) placement, which introduces illicit funds into the financial system; (b) layering, which involves complex financial transactions to obscure the source of funds; and (c) integration, where laundered proceeds re-enter the economy to appear legitimate, perpetuating a continuous cycle of introducing "dirty" money into the financial system.[12] This nefarious process fuels the expansion of criminal enterprises, enabling them to benefit from their unlawful activities without any official scrutiny and ultimately undermining society's economic and moral fabric.[13]

Globally, money laundering is acknowledged as a significant impediment to the integrity of international financial markets, eroding economies and undermining public trust through the gradual corruption of financial systems. In response to this challenge, the FATF was established in 1989 to counter money laundering and criminal activities by advocating for the development and implementation of Anti-Money Laundering (AML) legislation. Its work has shaped global efforts for over three decades through “The Forty Recommendations” document.[14] Consequently, governments and legislators worldwide have continuously fortified their AML regulations to adapt to evolving money laundering tactics and close existing domestic financial system vulnerabilities. One of those tactics that has recently emerged as a successful tool for money launderers is the use

[12] Margaret Beare, “The Enemy is Us: Understanding Corruption, Money Laundering and Organized Crime” (Presented at the Money Laundering and Corruption Conference, International Centre at UBC & the International Society for the Reform of Criminal Law) (28 October 2016), online (pdf) <https://icclr.org/wp-content/uploads/2019/06/Margaret-Beare-Presentation.pdf?x73602>.
[13] Margaret E. Beare & Stephen Schneider, *Money Laundering in Canada: Chasing Dirty and Dangerous Dollars* (Toronto, University of Toronto Press 2007) at 3
[14] FATF, *International Standards on Combatting Money Laundering and the Financing of Terrorism & Proliferation: The FATF Recommendations* (2012, as amended 2023) at 10-30, online: <http://www.fatf-gafi.org/publications/fatfrecommendations/documents/fatf-recommendations.html>. [*FATF Recommendations*].

of shell companies for money laundering, which allows them to hide the origins of illicit money and evade detection.

**The Role of Shell Companies in Money Laundering**

One of the most sophisticated money laundering operations is using opaque ownership by shell companies. A shell company is a legal entity, often with minimal or no active business operations or substantial assets; as they are typically structured as domestic limited liability companies (LLCs), partnerships, or trusts. Despite their often "empty" nature, these entities are recognized as legal persons capable of owning property, holding bank accounts, and engaging in legal actions, exploiting legislative loopholes for secrecy and asset concealment.[15] In this way, criminal operations hide behind the veil of secrecy, creating illusions of business success and covering their tracks as illicit funds are concealed and cleaned through complicated, high-volume trade transactions of goods and payments.[16] The Panama Papers leak[17] and other investigations have shed light on criminals' extensive use of shell corporations and the sophisticated methods employed to evade detection, creating multi-layered corporate structures. This process requires professionals with specialized finance, trading, banking, and law skills. It would be impossible without the help of these services.[18] This makes it attractive for criminals to use shell companies to launder the money, which poses significant challenges to governmental oversight, hindering the global fight against wealth inequality and destabilizing economic and social orders. This deprives

[15] Victoria Vieira "The impact of the beneficial ownership regulatory amendments under the Canadian AML regime to combat money laundering through shell companies in Canada" (LLM Thesis, Queen's University Belfast, 2022), online: <https://pureadmin.qub.ac.uk/ws/portalfiles/portal/312691663/LAW8511_JD_Thesis_Final_VVieira_April_2022.pdf>.

[16] Transparency International Canada, "Why it Matters" (December 24, 2023), online: <https://transparencycanada.ca/beneficial-ownership-transparency/why-it-matters>.

[17] Jake Bernstein, *Secrecy World: Inside the Panama Papers Investigation of Illicit Money Networks and the Global Elite* (Henry Hold and Company, 2017).

[18] Beare, *supra* note 12

the government of tax revenue, hinders data collection, and impedes the efforts of Financial Intelligence Units (FIUs) and law enforcement agencies to unveil the actual operators.

While establishing anonymous companies is not illegal,[19] the main issue with the use of shell companies is that criminals take advantage of that by creating complex chains of cross-border financial transactions[20] and using various tools for layering structures. For example, a shell company owning another shell company or using trusts, nominees, partnerships, and shareholders that provide a veil of secrecy aiding money launderers in building intricate networks for their operations in order to facilitate illicit financial flows, making it difficult for law enforcement to figure out who is the UBO of them.[21]

The inadequacy of BOT was highlighted by James Cohen in his opening statement to the Cullen Commission: "It is no wonder criminals set their sights on Canada, which has some of the weakest corporate transparency laws in the world."[22] He also noted "There are more rigorous checks to obtain a library card rather than to set up a shell company."[23] Both of these factors permit the anonymity of shell companies in Canada.

**The Concept of Beneficial Owner and Beneficial Ownership Transparency and why it is increasingly seen to be a useful tool in AML**

Combating these illicit activities requires access to detailed records of BOs of companies that are particularly involved in such crimes in order to ensure BOT. The term BO for legal persons is

[19] James Cohen, "Tackling Money Laundering in Canada Through Beneficial Ownership Transparency" in Robert J. Currie, *Transnational and Cross-Border Criminal Law: Canadian Perspectives,* (Toronto: Irwin Law, 2023) 251 at 251

[20] Katarzyna McNaughton, "The Powers, Operation, and Limits of the Financial Transactions and Reports Analysis Centre of Canada (FINTRAC)" in Christian Leuprecht & Jamie Ferril, *Dirty Money: Financial Crime in Canada*, (Montreal: McGill-Queen's University Press, 2023) 177 at 181

[21] Cohen, *supra* note 19 at 251

[22] Transparency International Canada, et al., "Cullen Commission Opening Statement" (26 February 2020) at 4, online: <https://cullencommission.ca/files/OpeningStatement-Coalition.pdf>.

[23] *Ibid*

defined in the *Canada Business Corporations Act*.[24] The term "Beneficial owner" denotes any individual who owns or controls a legal entity. If the BOs are not known, then the authorities do not have any knowledge of who is hiding under the name of a shell corporation that is involved in money laundering, terrorist financing, or any other illicit activities across borders.

BOT is a tool for policy reform[25] which requires Beneficial Ownership Information (BOI) from corporations that conduct a wide variety of financial deals, in order to find those that are being used for illicit financial activities. The report from FATF and Egmont Group, published in 2018, included a review of 106 cases, including different financial institutions and anonymous shell companies, which were utilized to hide the identities of launderers and their activities.[26] Since corporate institutions and their utilization in money laundering, tax crimes, and terrorist funding is an inevitable fact, many preventative measures have been employed at national and international levels to maintain BOT. This requires countries to maintain up-to-date records of BOs of such institutions. These precautionary measures also include FATF Recommendations 2012 and, in particular, recommendations 24 and 25, which detail international measures and important guidelines for countries on BOT.[27]

BOT has been a significant tool in the fight against financial crime as it reveals the identity of UBOs behind companies or complex corporate structures. It puts the responsibility on the corporations to disclose their BO and ends the secrecy that many criminals exploit to carry out their illicit activities. At present, 149 countries have created BOT in accordance with international

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[24] *Canada Business Corporations Act*, RSC 1985, c C-44 [*CBCA*]
[25] Open Ownership, *An Introduction to Beneficial Ownership Transparency and Open Ownership* (2021), online: <https://www.openownership.org/en/publications/an-introduction-to-beneficial-ownership-transparency-and-open-ownership/>.
[26] Ramandeep Chinna, *Beneficial Ownership Transparency in Asia and the Pacific: Technical and Legal Barriers* (2022) at 1, online: <https://www.adb.org/sites/default/files/publication/849876/beneficial-ownership-transparency-asia-pacific.pdf>.
[27] *FATF Recommendations*, *supra* note 14 at 22

standards and have different levels of accessibility to BOI.[28] These transparency measures allow access to BOI to law enforcement, tax authorities, and private and public entities with some success. For example, the UK public registry, which was established in 2016, helped the UK National Crime Agency (NCA) to find the UBO behind a company that was involved in smuggling glass eels, which is considered one of the world's biggest wildlife crimes.[29] Additionally, Denmark's BO registry has also been useful in identifying those who were either linked to suspicious transactions or were under investigation for money laundering.[30] This led the authorities to conduct due diligence and report any suspicious transactions. Furthermore, the BO registry of Myanmar also implemented the BO register, which allowed the uncovering of the owners of companies in the extractive sector. This register allowed the search of BOs who owned shares of 5% or higher in the oil and mining sectors, enhancing transparency and accountability.[31] This promotes compliance, contributes towards the integrity of the financial sector and ultimately makes it difficult for criminals to hide behind the veil of corporate opacity.

Despite these international standards and the benefits of BOT, Canada lagged behind in transparency measures. However, recently, Canada has made a big move to strengthen BOT by establishing the first public federal BO registry. This move targets BOs who are using opaque ownership structures to hide their identities and engage in money laundering and other illicit activities. By doing so, Canada aims to enhance corporate transparency measures and

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[28] Athenian Team, "Snapshot of Beneficial Ownership Registries in G7 Countries" (1 June 2023), online: <https://www.athennian.com/post/snapshot-of-beneficial-ownership-registries-in-g7-countries#:~:text=As%20of%20March%202024%2C%20there,to%20which%20countries%20must%20adhere>.

[29] Transparency International, "How Public Beneficial Ownership Registers Advance Anti-Corruption" (10 September 2021), online: <https://www.transparency.org/en/news/how-public-beneficial-ownership-registers-advance-anti-corruption>.

[30] *Ibid*

[31] Sam Eastwood, Chris Roberts, Daniel J. Leveson, "Beneficial Ownership Transparency: A Spotlight on International Beneficial Ownership Registration" (03 December 2020), online: <https://www.mayerbrown.com/en/insights/publications/2020/12/beneficial-ownership-transparency-a-spotlight-on-international-beneficial-ownership-registration>.

accountability, dismantle the corporate structures that money launderers use, improve Canadian's trust in corporate institutions, and strengthen the integrity of Canada's financial system.

**Scope of the study**

This thesis is centered on the topic of money laundering through BO. It will not cover all aspects of the AML framework, but it is limited only to BOT, given its role and significance as an emerging policy tool in the AML system around the world. In terms of geographical scope, while the thesis will discuss the BO rules of other countries, the primary focus will be on Canada. This is to provide a specific analysis of the Canadian context rather than a broader, less focused international perspective. The specific aim of this thesis is to analyze the recent legislative measures of Bill C-42[32], which plays a significant role in aligning Canada's AML framework with international standards. It will discuss Canada's problem of money laundering due to the lack of BOT by discussing these new rules around BO and comparing those with other countries to explore the challenges in Bill C-42. Furthermore, it will propose some global best practices and standards which will include the implementation of a centralized registry for BO, ensuring the integration of provincial registries with a centralized registry and verifying the information provided by corporations. It will also recommend using advanced technology tools for discrepancy reporting and implementing identification mechanisms to enhance the accuracy of the information and increase the benefits of the PBOR in preventing money laundering effectively.

[32] *Supra* note 8

**The Research Methodologies**

**Doctrinal Research:**

Doctrinal research systematically outlines the legal principles that pertain to a specific legal research area.[33] Doctrinal research in a legal context, often referred to as the "black letter" methodology, focuses on the letter of the law rather than the law in action. This approach involves a descriptive and detailed analysis of legal rules found in primary sources such as cases, statutes, or regulations.[34] Doctrinal scholarship provides the best way of understanding law.[35] The doctrinal approach typically involves two processes: First, it entails identifying the legal sources and then interpreting and analyzing them.[36] In this first step, the aim is to ascertain an objective reality, essentially capturing the essence of the law as embodied in statutory provisions or established common law principles.[37] The law is analyzed in this second process, encompassing contemporary and historical legislative acts and administrative regulations. The process involves various techniques, including legal analysis, analogical reasoning, and inductive and deductive logic.[38]

Doctrinal research requires a literature review, that is, a critical analysis of the existing research literature, which informs us of "what is known and not known about the topic."[39] The literature review includes texts, journal articles, government reports, policy documents, and law

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[33] T. Hutchinson & N. Duncan, "Defining and describing what we do: doctrinal legal research" (2013) 17:1 Legal Education Digest 83–119, online: <https://www.austlii.edu.au/cgi-bin/viewdoc/au/journals/LegEdDig/2013/41.html>.
[34] Maggie Kiel-Morse, "Research Guides: Legal Dissertation: Research and Writing Guide: Home" (24 October 2019), online: <https://law.indiana.libguides.com/dissertationguide>.
[35] Stephen A. Smith, "ARTICLE: Taking Law Seriously " (2000), online: <https://plus.lexis.com/ca/document?crid=79a3c72c-cfff-45c1-845c-b53d16e733bc&pddocfullpath=%2Fshared%2Fdocument%2Fanalytical-materials-ca%2Furn%3AcontentItem%3A62BB-HV41-JFKM-654N-00000-00&pdsourcegroupingtype=&pdcontentcomponentid=281537&pdmfid=1537339&pdisurlapi=true&cbc=0>.
[36] Kiel-Morse, *supra* note 34 at 110
[37] *Ibid* at 110
[38] Paul Chynoweth, *Legal research*, (The University of Edinburgh).
[39] Kiel-Morse, *supra* note 34 at 113

reform documents and media reports.[40] As a relevant example here, the FATF provides numerous reports and guidelines on BO. Policy analysis from organizations like Transparency International and Open Ownership often discusses BO frameworks for financial regulation and Transparency.

*The relevance of Doctrinal research to my thesis*

I will use doctrinal research to locate the relevant primary and secondary sources of law on my research topic and then critically analyze them. The primary sources of law that I will collect and organize in my thesis include laws such as Bill C-42,[41] and international AML laws and instruments regarding the beneficial BO regime and decisions. Concerning secondary sources, I will rely on relevant books, journal articles, media documents, government reports, policy documents, and law reform documents.

**Comparative Research**

Comparison is defined as the process where two things are measured by one another, and Jansen views comparison as the "construction of relations of similarity or dissimilarity between different matters of fact."[42] Comparative methodology in the legal context often aims to make a practical contribution to the local national system,[43] where comparison allows for greater expertise about particular problems in a systematic and structured way.[44] Comparative law research systematically compares different legal systems, specific laws,[45] legislative techniques, codification styles, statutory interpretation methods, or precedents' authority.[46] The comparative analysis serves

[40] *Ibid* at 112
[41] *Supra* note 8
[42] P. Ishwara Bhat, "Comparative Method of Legal Research: Nature, Process and Potentiality" (2015) 57:2 Journal of the Indian Law Institute 147–173, online: <https://www.jstor.org/stable/44782499>.
[43] Geoffrey Wilson, "Comparative legal scholarship" in Mike McConville & Wing Hong Chui, eds, *Research Methods for Law* (Edinburgh: Edinburgh University Press, 2017) at 164
[44] *Ibid* at 167
[45] Kamba, W. J, "Comparative Law: A Theoretical Framework" (1974) 23:3 The International and Comparative Law Quarterly 486, online: <https://www.jstor.org/stable/757885>.
[46] Konrad Zweigert & Hein Kötz, *An Introduction to Comparative Law* (3rd ed, translated by Tony Weir, Oxford: Oxford University Press, 1998) at 4

several purposes, including (1) to understand better a particular area of law or a legal system, (2) to identify common themes across different legal systems, (3) to aid the harmonization of laws or other law reform, (4) to test whether a particular idea about the law is true across different systems,[47] and (5) to aid the interpretation of rules of national law, particularly when the construction of the rule is doubtful or where there is a lacuna in the system.[48]

*Relevance of Comparative research to my thesis*

I will compare Canada's BO regime, particularly Bill C-42, against the comparable frameworks of the UK and the U.S. Comparing Bill C-42 with the BO framework of these countries will aid in assessing how this recent amendment strengthens Canada's AML framework and identify potential areas for further reform to address the gaps in Bill C-42.

**Conclusion**

In conclusion, this first chapter has introduced the main goal of the thesis and has provided an understanding of the concepts of organized crime, money laundering, the role of shell companies in money laundering and an introduction to the concept of BOT. It has further discussed the scope of the thesis and different methodologies and their relevancy. In the next chapter, the focus will be primarily on Canada. I will discuss the process of money laundering and the use of shell companies for this purpose in Canada. I will discuss why the term snow-washing is being used to describe the scale of money laundering in Canada. Another important aspect of the next chapter will be the introduction to the issue of BOT in Canada and the discussion of the historical overview of the AML framework in Canada, including analyzing the report of the Cullen Commission, particularly how implementing its recommendations can strengthen the existing system of BOT in Canada.

[47] *Ibid*
[48] *Ibid* at 17-18.

## Chapter 2: Money Laundering in Canada: Shell Companies and The Historical AML Framework in Canada.

### Definitions

### What is Money Laundering and What Are Its Impacts?

Money laundering is a pervasive global challenge that distorts economies and undermines the rule of law. Generally, it involves the intricate process of laundering illicit funds through placement, layering, and integration.[49] The initial stage, placement, sees criminals introducing illegal funds into the financial system, often through small deposits or investments in various accounts. As the process advances to structuring, these funds are entangled in complex financial transactions, like wire transfers or investments in securities, to obscure their illegal origins and make tracing difficult. Ultimately, in the integration stage, laundered money re-enters the economy appearing legitimate, commonly through real estate purchases, stock investments, or luxury acquisitions, effectively "cleaning" the illicit gains.[50]

Definitions of money laundering emphasize its goal to conceal the identity or origin of illegally obtained proceeds, making them appear legitimate. The sheer scale of money laundering is reflected in estimates suggesting that 2-5% of global GDP is laundered annually, translating into a substantial economic, social, and political impact worldwide.[51] On an economic level, money laundering introduces large volumes of illegal capital into markets, distorting demand and inflation

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[49] Candice Ribeiro, "A National Database with All Beneficial Ownership Information for Stakeholders to Combat Money Laundering" (MSc Thesis, Utica College, 2020) at 1, online: <https://www.proquest.com/docview/2404651428?pq-origsite=gscholar&fromopenview=true>.

[50] Denis Meunier, *Hidden Beneficial Ownership and Control: Canada as a Pawn in the Global Game of Money Laundering* (2018) Commentary No. 519 (Toronto C.D. Howe Institute, December 2021) at 4, online: <https://www.cdhowe.org/sites/default/files/2021-12/Final%20for%20advance%20release%20Commentary_519_0.pdf>.

[51] Rhoda Weeks-Brown, "Cleaning Up: Countries Are Advancing Efforts to Stop Criminals from Laundering their Trillions" (2018) *Finance & Development*, online: International Monetary Fund <https://www.imf.org/en/Publications/fandd/issues/2018/12/imf-anti-money-laundering-and-economic-stability-straighte>.

and causing volatility in international capital flows. Furthermore, it contributes to crime in society by allowing criminals to fund illegal activities, resulting in increased lawlessness and corruption in society. The influence of that dirty money can extend to exerting undue influence or corruption in the political sphere, as evident in a well-known case such as the Panama Papers which exposed a network of shell companies used by wealthy people to conceal their wealth and avoid taxes.[52]

To address these challenges government and several international organizations such as the EU with its Anti-Money Laundering Directives (AMLDs),[53] FATF, and Extractive Industries Transparency Initiative (EITI)[54] have stepped up their efforts by providing comprehensive guidelines on enhancing BOT and combating money laundering. Additionally, the OECD also support these efforts through its Global Forum on Transparency and Exchange of Information for Tax Purposes (Global Forum Tool kit),[55] which aligns with FATF recommendations to enhance transparency and combat financial crimes effectively. They are focusing on increasing transparency, implementing regulations for banks and other financial institutions, and promoting cooperation and information sharing on a global scale.[56] One important measure is the identification of the records of BOs and individuals in control of entities, which is crucial for

[52] Bernstein, *supra* note 17

[53] EU Anti-Money Laundering Directive (AMLD): "A set of regulatory requirements issued by the European Union to combat money laundering and terrorist financing by EU member states based closely on FATF Guidance" see IDnow, "Anti-Money Laundering Directive (AMLD)" (2024) online: <https://www.idnow.io/glossary/anti-money-laundering-directive-amld/#:~:text=Anti%2DMoney%20Laundering%20Directive%20(AMLD)%20is%20a%20set%20of,based%20closely%20on%20FATF%20guidance>.

[54] EITI is an organization that seeks to promote accountability in oil, gas and mineral resources by requiring member countries to disclose beneficial ownership of companies. See Extractive Industries Transparency Initiative, "Beneficial Ownership" (2024), online: EITI <https://eiti.org/beneficial-ownership#:~:text=The%20EITI%20Standard%20requires%20implementing,covered%20by%20EITI%20Requirement%202.5.>.

[55] Global Forum on Transparency and Exchange of Information for Tax purposes & Inter-American Development Bank, *Building Effective Beneficial Ownership Frameworks: A joint Global Forum and IDB Toolkit* (OECD, 2021), online: <https://www.oecd.org/tax/transparency/documents/effective-beneficial-ownership-frameworks-toolkit_en.pdf>.

[56] *FATF Recommendations*, *supra* note 14 at 10

tracking activities and ensuring accountability.[57] However, despite these efforts, money laundering tactics are constantly evolving due to the complex corporate structures of entities and the global nature of this crime.[58] As a result, regulatory bodies and law enforcement agencies must continuously adapt to combat this ever-changing threat by incorporating regulations, international collaboration and continual adaptation to evolving methods and technologies.[59] This ongoing issue underscores the importance of understanding the concept of BO which is essential for developing strategies by requiring the BOs to reveal their true identities to combat the effects of this crime and safeguard the integrity of the global financial system.

**Who is the beneficial owner?**

When it comes to financial regulations, understanding the concept of BO is crucial. It helps us understand the control and interests within legal entities, which play a significant role in money laundering and maintaining good corporate governance. BO can be divided into two roles: the control person and the BO. The control person is an individual who holds decision-making power within an entity in high-ranking positions, like chief executive officer (CEO), chief finance officer (CFO), chief operating officer (COO) or President.[60] This role is crucial in steering the entity's strategic, operational, and financial direction. On the other hand, a BO is defined as any individual who directly or indirectly owns or controls 25% or more of the equity interests of a legal entity.[61]

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[57] Cyriane Coste & Fredric Meunier, "Beneficial ownership: increasing transparency in a simple way for entrepreneurs" (2021), online: World Bank Blogs <https://blogs.worldbank.org/en/developmenttalk/beneficial-ownership-increasing-transparency-simple-way-entrepreneurs>.

[58] Moody's Analytics, "Money Laundering 101: How Criminals Launder Money" (2024), online: Moody's <https://www.moodys.com/web/en/us/kyc/resources/insights/money-laundering-101-how-criminals-launder-money.html>.

[59] Interpol, "Metaverse: A Law Enforcement Perspective" (January 18, 2024) at 18 online: <https://www.interpol.int/Metaverse>.

[60] Ribeiro, *supra* note 49 at 2

[61] *Ibid*

This definition encompasses various control or ownership mechanisms, including contracts, arrangements, understandings, or relationships.

The identification of BOs is not merely a procedural formality; it is a fundamental practice that enhances transparency within corporations and is instrumental in deterring and detecting illicit activities, particularly money laundering. By mandating the disclosure of individuals holding substantial equity interests or control in entities, regulatory bodies empower not only law enforcement agencies but also civil society and investigative journalists to deter criminals, trace funds and attribute legal responsibility effectively by scrutinizing data.[62] The drive towards enhancing BOT is reflected in global regulatory trends and national laws, underscoring its importance in piercing the corporate veil of shell companies maintaining financial integrity, safeguarding the economy from the detrimental effects and preventing illicit financial flows.

**What Are Shell Companies: Understanding the Mechanisms of Financial Anonymity**

Shell companies are defined by the OECD as entities not primarily established for conducting legitimate business but rather for concealing the identities of the BOs and individuals in control.[63] These entities effectively act as a barrier, separating the criminal activities and the individuals behind them. According to Findley, the anonymity provided by shell companies presents significant challenges to regulatory and law enforcement efforts, as it is extremely difficult to trace the real parties in control.[64] Furthermore, the issue is exacerbated by shelf companies,[65] which are

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[62] *Ibid*

[63] John Hatchard, "Money Laundering, Public Beneficial Ownership Registers and the British Overseas Territories: The Impact of the Sanctions and Money Laundering Act 2018 (U.K)" (2018) 30:1 Denning LJ, online: <https://doi.org/10.5750/dlj.v30i1.1652)

[64] Michael Findley, Daniel Nielson & Jason Sharman, *Global Shell Games: Testing Money Launderers' and Terrorist Financiers' Access to Shell Companies*, (Griffith University, Centre for Governance and Public policy,2012), at 5 online: Global Financial Integrity <https://www.gfintegrity.org/wp-content/uploads/2014/05/Global-Shell-Games-2012.pdf>.

[65] Shelf company is a registered company, but it is "put on the shelf" where it is left dormant for a longer period even if a customer relationship has already been established. They meet all the legal criteria, registration and payments.

pre-established entities with their own history and officials, allowing corrupt individuals to take advantage of all the registration procedures and use them to facilitate money laundering more easily.

Financial crime is booming, facilitated by readily available legal structures that provide cover for perpetrators and enable them to launder their ill-gotten gains.[66] Almost every financial crime involves the use of corporate vehicles.[67] Anonymous companies, or shell companies, are valuable tools for criminals because they can be used as cover to conduct business, buy and hold assets, and use the financial system. Many jurisdictions, including Canada, make it easy to set up a company without disclosing any details that could trace it back to the individual controlling it.[68]

These shell companies have been dubbed the getaway cars of financial crime because they exist only on paper, without business operations or presence in the real world and it is extremely hard, if not impossible, to track down the people behind them.[69] The utilization of shell companies by money launderers is a sophisticated strategy aimed at obscuring the identities of BOs and maintaining a veil of secrecy over illicit financial activities. Three primary factors contribute to the effectiveness of this approach. Firstly, many countries create an environment of opacity, which increases the secrecy surrounding the identities of parties involved, such as owners and directors. Additionally, money launderers often seek the assistance of professionals like accountants, lawyers and financial advisors[70] who possess expertise in setting up structures to hide assets and facilitate

[66] Transparency International Canada, Publish What you Pay Canada, & Canadians for Tax Fairness, *Snow-Washing Inc: How Canada is marketed abroad as a secrecy jurisdiction*, at 8 online: <https://static1.squarespace.com/static/5c8938b492441bf93fdbc536/t/6231f07b006c167227c965aa/1647439997583/TIC-Report-Snow-Washing-Inc-2MB.pdf>.
[67] *Ibid*
[68] *Ibid*
[69] *Ibid*
[70] Often referred to as "Gatekeepers and Facilitators" – Peter M German, "Gatekeepers–The Lawer Enigma" in Robert J Currie, KC, eds, *Transnational and Cross-Border Criminal Law: Canadian Perspectives* (Toronto: Irwin Law Inc, 2023) 227 at 230

money laundering. Lastly, by establishing shell companies across different jurisdictions, they create complex networks that make it extremely challenging for authorities to trace the flow of funds across borders and identify key individuals involved. This complex network of shell companies has infiltrated Canada's financial system, impacting the economy and integrity of the financial system as it has made it challenging for authorities to detect such structures in order to combat money laundering and terrorist financing.

**Money Laundering in Canada through shell companies and Hidden Beneficial Ownership**

According to a World Bank study, shell companies and concealed ownership are involved in 70% of significant corruption cases.[71] The use of shell companies and complex ownership structures poses a significant threat to the integrity of Canada's financial system.[72] Canada's reputation as a haven for international and domestic money laundering has grown over the past decades due to the hidden BO of corporate entities and the lack of strict regulations under the *Proceeds of Crime Money Laundering Terrorist Financing Act* (PCMLTFA)[73] The act's inefficiency is highlighted by the concealed ownership that maintains detection rates below 1% and conviction rates at only 11%, signaling an urgent need for a shift towards a preventive regulatory framework rather than solely relying on criminal enforcement.[74] Furthermore, the prevalent use of non-disclosure of BO

[71] José-de-Jesús Rocha-Salazar, María-Jesús Segovia-Vargas & María-del-Mar Camacho Miñano, "Detection of shell companies in financial institutions using dynamic social network" (2022) 207 Expert Systems with Applications 117981 at 3, online: <https://doi.org/10.1016/j.eswa.2022.117981>.
[72] Transparency International Canada, "2023 Corruption Perceptions Index results" (30 January 2024), online: <https://transparencycanada.ca/news/cpi2023>.
[73] *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*, S.C. 2000, c. 17 [*PCMLTFA*].
[74] Remington Latanville, "The effects of money laundering on the Canadian real estate market" (1 April 2021), online: <https://ir.library.ontariotechu.ca/handle/10155/1290>.

and "smurfing"[75] techniques complicates the detection of illicit funds, allowing criminals to bypass scrutiny effectively.[76]

Transparency International underscores the use of mixed funds and shell companies which serves the primary objective of converting dirty money into clean money, subsequently integrating these funds into the financial system through various laundering techniques.[77] For example, purchasing expensive properties anonymously, further entrenching the proceeds of crime within the Canadian economy.[78] One important example of this is British Columbia (BC), which is known for significant money laundering in casinos, real estate, and banks.[79] The structural complexity of these companies is often designed using complex corporate structures to obscure criminal intent, and presents additional challenges; corporations, unlike individuals, can deflect culpability, making it difficult to pinpoint responsibility within the layered hierarchy of corporate misconduct.[80] The issue is exacerbated by the fact that elite criminals, utilizing both operational and shell companies, leverage their financial resources for protection within the justice system, often creating complexity between legitimate business operations and criminal endeavors.[81]

Furthermore, recent incidents suggest that these companies have managed to infiltrate specific sectors, such as the tow truck industry in Montreal.[82] Also, there have been instances

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[75] Smurfing is a practice of breaking up a large sum of money and dividing it into smaller amounts in order to prevent the detection of the reporting threshold. It is done to avoid the detection by regulatory authorities. See IDenfy blog, online: <https://www.idenfy.com/blog/smurfing-in-money-laundering/>.
[76] Stephen Schneider, "Money Laundering in Canada: A Quantitative Analysis of Royal Canadian Mounted Police Cases" (2004) 11:3 J Financial Crime at 5
[77] *Ibid* at 27
[78] Transparency International Canada, Publish What you Pay Canada, Canadians for Tax Fairness, *Opacity: Why Criminals Love Canadian Real Estate (And How to Fix It)*" at 12 online: <https://www.taxfairness.ca/en/resources/reports/report-opacity-why-criminals-love-canadian-real-estate>.
[79] "Criminality in Canada - The Organized Crime Index", (2023), online: <https://ocindex.net/country/canada>.
[80] Latanville, *supra* note 74 at 32
[81] Findley, *supra* note 64 at 7
[82] Yvon Dandurand, *Tow Truck Wars How organized crime infiltrates the transport industry* (2021) at 8-10, online: <https://icclr.org/wp-content/uploads/2021/06/Tow-Truck-Wars-How-organized-crime-infiltrates-the-transport-industry-GITOC.pdf?x73602>.

where the entertainment sectors have been implicated in money laundering schemes as well, acting as facades for the operations of organized crime groups.[83] Additionally, an investigation conducted by Thomson Reuters Special Services (TRSS) has uncovered that the establishment of 700 shell companies in the guise of legitimate businesses has not only contributed to the growth of organized crime but has also worsened serious problems such as drug and sex trafficking.[84] These shell companies have been found to have alarming links to illicit massage parlors, which serve as hubs for highly profitable transnational criminal activities.[85] The situation has earned Canada a bad reputation, a haven for corporate secrecy, also known as "snow-washing."

**Canada as a haven for Money Laundering and the term *Snow-Washing***

Canada has emerged as a hotspot for money laundering fueled by various factors that make it an appealing destination for activities. The criminal groups take advantage of Canada's system to launder billions of dollars each year from illegal activities like drug trafficking, arms trading and organized crime.[86] This not only has an impact on the economy but also highlights how effortlessly illicit funds can be integrated into Canada's financial system, particularly through real estate transactions. Unlike countries like the UK and most of Europe, where property purchases undergo checks, Canada's system is less stringent, especially when it comes to transparency in property ownership by companies. This regulatory loophole results in 99.9% of money laundering activities going unnoticed, causing harm to the economy and contributing to inflated real estate prices, especially in BC.[87]

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[83] Global Initiative Against Transnational Organized Crime, "Global Organized Crime Index Canada" at 6, (2023), online: <https://ocindex.net/assets/downloads/2023/english/ocindex_profile_canada_2023.pdf>.
[84] Rita Trichur, "Sex traffickers are using shell companies to launder illicit profits in Canada" *The Globe and Mail* (10 March 2023), online: <https://www.theglobeandmail.com/business/article-human-trafficking-shell-companies-money-laundering/>.
[85] *Ibid*
[86] *Ibid*
[87] James Dobson, "Does Canada need to wake up and smell the dirty money?" (1 June 2019), online: <https://www.linkedin.com/pulse/does-canada-need-wake-up-smell-dirty-money-james-dobson/>.

BC has been identified as one of the country's entry points for money laundering and causing harm to the real estate market, as highlighted by the BC Cullen Commission[88], that how the large sums of money derived from corrupt activities in China have been funneled into the Vancouver housing market, especially in the lower mainland area, through anonymous transactions.[89] Such anonymous transactions by corrupt foreign nationals using complex corporate structures have raised a lot of concerns about the empty condos which have exacerbated the housing crisis by making housing unaffordable by artificially raising prices.[90] Such practices make it difficult for locals to ever own a house and raise social and economic concerns, necessitating strict regulatory measures to prevent money laundering. Additionally, Canada's AML framework, perceived lawfulness and veneer of stability contribute to its growing reputation as a haven for money laundering where dirty money is converted into clean money under the guise of legitimate transactions.

Canada faces a paradoxical challenge: the surging tide of snow-washing. The term "snow-washing" was coined by the *Toronto Star* and refers to the process of illicit funds into Canada, which was discovered during the investigation of the Panama Papers.[91] These funds were used for the purposes of tax evasion or terrorist financing.[92] It implies that dirty money passes through Canada's financial systems; it comes out as clean as the country's characteristic pure white snow.

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[88] The Honourable Austin F. Cullen, "Commission of Inquiry into Money Laundering in British Columbia: Final Report" (June 2022), online (pdf): <https://cullencommission.ca/files/reports/CullenCommission-FinalReport-Full.pdf>.

[89] Jared Ferrie & Robert Cribb, "Following a Trail of Tainted Money from Chine into Vancouver Real Estate," (26 May 2022), online: <https://www.occrp.org/en/investigations/following-a-trail-of-tainted-money-from-china-into-vancouver-real-estate>.

[90] Transparency International Canada "End Snow-Washing Coalition Applauds Accelerated Timeline For A Publicly Accessible Beneficial Ownership Registry by 2023" (22 March 2022), online: <https://transparencycanada.ca/news/end-snow-washing-coalition-applauds-accelerated-timeline-for-a-publicly-accessible-beneficial-ownership-registry-by-2023>.

[91] James Cohen & Sasha Caldera, "Putting an End to Snow-Washing: The Case for Publicly Accessible Corporate Registry of Beneficial Owners in Canada" (2021) 4:4 J of Financial Compliance 379 at 379

[92] End Snow-washing, what is snow-washing?" online: *End Snow-washing* <https://endsnowwashing.ca/what-is-snowwashing>.

This phrase is now used internationally, which sums up Canada's weaknesses in terms of AML measures, mostly because it is estimated that $45 to $113 billion is laundered annually in Canada.[93] Some of these funds are stolen by corrupt foreign officials, such as Chinese and Russian oligarchs who use complex corporate structures to support their illicit activities.[94] Even if they are on sanctions lists, they can get away without being identified due to the unavailability of a thorough BO registry that is open to the public.

Additionally, snow-washing is a problem because Canada's position as a center for trade, manufacturing and distribution of prohibited items, along with its reputation as a source of goods, adds to its appeal for money laundering.[95] Canada's prestige, which no one thinks of and no one scrutinizes, attracts criminal entrepreneurs and illicit networks to take advantage of Canada's permeable borders, as well as gaps in governance and outdated legal systems.[96] Also, Canada is being advertised for those looking to conceal their dirty money.[97] Many Professionals, consultants, and tax advisors exploit these structural weaknesses, marketing Canadian entities as reputable fronts for opaque offshore structures, thereby attracting a wide range of illicit activities from tax evasion to hiding proceeds from criminal enterprises.[98] This allows shell companies to use Canada as a haven to hide their dirty money because of its inadequate measures and lax corporate transparency. The future of offshore business relies on using more complex structures, incorporating not only classic offshore but also mid-shore, as well as completely onshore entities.[99] An example of this hybrid offshore-onshore structure, as detailed by the Organized Crime and

[93] Criminal Intelligence Service Canada, *supra* note 1
[94] Transparency International Canada, et al., *supra* note 78
[95] Calvin Chrustie & David M. Luna, *The Growing Harms of Cross-Border Illicit Trade vectors and Threat Convergence to Canada's National Security,* (2023) at 8
[96] *Ibid*
[97] Transparency International Canada, et al., *supra* note 66 at 7
[98] *Ibid*
[99] *Ibid*

Corruption Reporting Project (OCCRP)[100], involved using shell companies to channel funds out of Azerbaijan, illustrating the global and multifaceted nature of shell companies as instruments for financial secrecy and crime.[101] Due to this, corruption is spreading within Canadian societies and criminal organizations are growing in power in major urban centers in Canada like Vancouver, Toronto, and Montreal.[102] They have emerged as convergence points and operational hubs for networks including cartels, Chinese Triads and Iranian-backed illicit finance networks, making it difficult for law enforcement agencies to prosecute. Such prevalent use of shell companies facilitated by the opacity of corporate ownership and the ease of establishing shell companies[103] contributes to the issue of snow-washing[104] and poses challenges in tracing the BOI, which is crucial to combat the anonymous use of corporate entities involved in snow-washing.

**The veil of secrecy and the challenges in tracing the Beneficial Ownership**

BOI is utilized across multiple jurisdictions to investigate money laundering. In Canada, there has been a concern regarding the lack of transparency in ownership, especially concerning money laundering and financial crimes, but Canada has been slow in making efforts regarding BOT.[105] Due to the lack of transparency implementation and fewer reforms in BOT, Canada has consistently been a low performer in the Transparency International Corruption Perception Index.[106] The lack of a database containing ownership information challenges law

[100] "The Organized Crime and Corruption Reporting Project (OCCRP) is a global network of investigative journalists that was founded in 2006 and specializes in organized crime and corruption." See "OCCRP" online: <https://www.occrp.org/en>.
[101] Transparency International Canada, et al., *supra* note 66 at 9
[102] Chrustie, *supra* note 95 at 9
[103] Transparency International Canada, *supra* note 66
[104] Robert Cribb & Marco Chown Oved, "Canada is the world's newest tax haven" *Toronto Star*, (25 January 2017), online: <https://projects.thestar.com/panama-papers/canada-is-the-worlds-newest-tax-haven/>.
[105] James Cohen, "Tackling Money Laundering in Canada Through Beneficial Ownership Transparency" in *Transnational and Cross-Border Criminal Law: Canadian Perspectives,* edited by Robert J. Currie, (Toronto: Irwin Law, 2023) 216
[106] Senate Canada, "Debates of the Senate (Hansard) 1st, Session, 44th Parliament" (19 September 2023), online: <https://sencanada.ca/en/content/sen/chamber/441/debates/139db_2023-09-19-e?language=e#65>.

enforcement and regulatory agencies in effectively investigating and prosecuting financial crimes.[107] Transparency International's report has identified that Canada's compliance with the G20 Principles on ownership transparency is insufficient.[108] According to a report by the FATF in 2016, Canada did not have provisions to ensure that legal entities and individuals maintain and record BOI and that private companies cannot be established anonymously.[109]

The country's approach to international cooperation in corruption and money laundering investigations is hindered by the lack of a centralized database for consulting information on legal ownership and ultimate control. FINTRAC has no authority to inspect securities registers maintained by business corporations that fall outside the scope of money laundering obligations. This limitation restricts its ability to investigate and enforce compliance measures effectively.[110] Furthermore, financial institutions also encounter difficulties verifying the accuracy of ownership details because there is no registry for this information. In Canada, as a result, they frequently depended upon approaches like obtaining written certifications from their senior executives and customers or seeking legal and accounting opinions to confirm BO.[111] This situation poses a challenge to the effectiveness of money laundering measures because there is no obligation for financial institutions and Designated Non-Financial Businesses and Professions (DNFBPs) to disclose the true owner of their customers in specific situations. For instance, this exemption applies to professionals like accountants and lawyers.[112] The issue of exempting certain sectors, such as lawyers and law firms, from the AML regulations has sparked debate and issues.

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[107] Justin Ling, "Canada's beneficial ownership problem" *National Magazine* (19 December 2022), at 3 online: <https://nationalmagazine.ca/en-ca/articles/law/business-corporate/2022/canada-s-beneficial-ownership-problem>.
[108] Transparency International, "Just for Show: Reviewing G20 Promises on Beneficial Ownership" (2015), online (pdf) <https://www.transparency.org/en/en/publications/just-for-show-g20-promises>.
[109] FATF, *Anti-Money Laundering and Counter Terrorist Financing Measure: Canada, Fourth Round Mutual Evaluation Report* (2016) at 170 [*Mutual Evaluation Report*]
[110] Transparency International, *supra* note 108 at 2
[111] *Ibid*
[112] *Ibid* at 4

FINTRAC faces limitations in its ability to request information from lawyers, which hampers analysis and law enforcement actions against suspicious financial activities. According to FATF observations, this limitation in the legal profession contributes to the inadequacy of combating money laundering, resulting in prosecutions and weak enforcement efforts. In the 2015 decision of the Supreme Court of Canada in *AG v. FLSC,*[113] the legal profession and regulators of the legal profession argued that they should not be subject to the PCMLTFA which covers a wide array of reporting entities (Banks, Casinos, money service businesses, real estate brokers, accountants, etc.) The court held that legislation requiring lawyers to report suspicious activities violated solicitor-client privilege, and hence, they are not subject to PMCLTFA.[114] As a result, this exemption unintentionally enabled money laundering activities as lawyers conducted transactions on behalf of clients, including shell companies, without having to report them to FINTRAC.[115] A lawyer in West Vancouver was found guilty of misconduct for allowing $26 million from sources to pass through his trust account, disregarding multiple warning signs.[116] Also, in another case, a lawyer was involved in helping a client to move more than $31 million through his trust account, knowing that his clients were being investigated by U.S authorities for stock manipulation and he was disbarred for money laundering the law society tribunal.[117] These incidents highlight how Canada's legal framework, particularly concerning lawyers' trust accounts, can be misused to evade the scrutiny imposed by banks and regulators. Unlike Australia and Britain,[118] where lawyers face

[113] 2015 SCR 401
[114] Diane Francis, "Legal loopholes Give Canada a Bad Name When It Comes to Money Laundering" (14 July 2017), online: *Financial Post* <https://financialpost.com/news/fp-street/legal-loopholes-give-canada-a-bad-name-when-it-comes-to-money-laundering>.
[115] Vieira, *supra* note 15
[116] Ian Mulgrew, "Ian Mulgrew: B.C Law Society panel finds West Van lawyer guilty of flowing $26m through trust account" (May 26, 2017) online: <https://vancouversun.com/news/local-news/ian-mulgrew-b-c-law-society-panel-finds-west-van-lawyer-guilty-of-washing-26m-through-trust-account#:~:text=A%20Law%20Society%20of%20B.C.,million%20through%20his%20trust%20account>.
[117] 2023 LSBR 03R
[118] Adam M Dodek, *Regulating Law firms in Canada*, (2011) 90 *Can Bar Rev* at 385-386

regulations to report suspicious financial transactions beyond law societies to national agencies, Canada has a gap in its system to report suspicious transactions as flagged by the FATF.[119] This situation allows BOs to conveniently conceal their identities by utilizing bearer shares, nominee shareholders, and directors, and it has given the country an unwanted reputation for corporate secrecy.[120]

The Panama Papers dataset highlighted that perpetrators usually seek refuge by hiding their wealth at places where the BOT system is incapacitated. The more components there are between the owner and the assets, the more difficult it is to catch the culprit.[121] In 2021, the Pandora Papers[122] investigation by the International Consortium of Investigative Journalists (ICIJ) also uncovered how wealthy individuals from Canada utilized secrecy within the country and beyond to evade taxes. This investigation relied on a collection of leaked documents revealing the assets of politicians and prominent public figures across over 90 countries.[123] Furthermore, money laundering cases like those involving BC casinos and foreign bribery that involved Quebec engineering firm SNC-Lavalin have further contributed to this worsening reputation.[124] Recognizing all of these risks to its international standing, economic integrity, and the preference of targeting Canada as a jurisdiction for money laundering due to the inadequacy of information collected is now being addressed by requiring private companies to disclose BOs in BC,[125]

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[119] Francis, *supra* note 114
[120] Vieira, *supra* note 15
[121] Senate Canada, *supra* note 106
[122] International Consortium of Investigative Journalists (ICIJ), *Pandora Papers: Secrets of the Global Elite* (3 October 2021), online: ICIJ <https://offshoreleaks.icij.org/investigations/pandora-papers>.
[123] Brenda Medina, "Canada poised to create public company registry to curb financial secrecy - ICIJ" (3 November 2023), online: *ICIJ* <https://www.icij.org/investigations/panama-papers/canada-poised-to-create-public-company-registry-to-curb-financial-secrecy/>.
[124] Ling, *supra* note 107
[125] Ministry of Finance, British Columbia, "Public registry would end hidden ownership in private businesses" (29 March 2023), online: *BC Gov News* <https://news.gov.bc.ca/releases/2023FIN0025-000395#:~:text=A%20beneficial%20owner%20is%20a,public%20corporate%20beneficial%20ownership%20registry>.

Quebec.[126] Also, now at the federal level. Changes have been made notably through Bill C-42[127] to align Canada with international standards and best practices[128] aiming to increase corporate transparency and accountability in relation to the BO of Canadian corporations governed by the CBCA.[129] It lays the foundation of a federal corporate database through a publicly accessible and searchable registry whose data will be verified to prevent fraud by deterring billions of illicit funds from entering Canada. It can undoubtedly enhance transparency, accountability, and public trust in corporate institutions, aid in the investigation and repair Canada's reputation as a "secrecy jurisdiction" that facilitates snow-washing through shell companies.[130] Such challenges in tracing BO and the introduction of a significant tool to enhance transparency require the need to explore the historical AML framework of Canada to better understand the background, evaluation, changes, and progress made to enhance AML measures in order to prevent financial crimes in Canada.

**Historical Background and the Overview of AML Framework in Canada**

The legislative history of AML in Canada reveals a significant evolution, initially sparked by the need to disrupt drug cartels' financial networks and later expand to encompass a broader range of financial crimes. The foundation of Canada's AML efforts can be traced back to the global initiative against drug trafficking. The Vienna Convention of 1988,[131] where 43 countries, including Canada, agreed to a collective approach against money laundering, marked a pivotal

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[126] Gouvernment du Québec, "New Obligations for Corporate Transparency" (19 September 2023) online: *Gouvernment du Québec* <https://www.quebec.ca/en/businesses-and-self-employed-workers/start-entreprise/register-constitute-enterprise/new-obligations-transparency/about>.
[127] *Supra* note 8
[128] Jennie Hornick, "Bill C-42: What Business Owners Should Know About New Reporting Requirements - Caravel Law" (3 November 2023), online: *Caravel* <https://caravellaw.com/bill-c-42-what-business-owners-should-know-about-new-reporting-requirements/>.
[129] CBCA, *supra* note 24
[130] Trichur, *supra* note 84
[131] United Nations, Vienna Convention on the Law of Treaties, 23 May 1969, 1155, UNTS 331, art 2(1)(a), defines a treaty as "an International agreement concluded between states in written form and government by International Law".

moment in developing international AML legislation.[132] This effort was fortified by the G7's creation of the FATF, which issued a set of 40 recommendations instrumental in shaping the AML frameworks of countries such as Canada, the U.S., and the UK.[133]

Following these global initiatives, Canada began its legislative response to money laundering. Initially, the focus was on drug-related offences, but this expanded with the incorporation of Part XII.2 into the *Criminal Code of Canada,*[134] specifically criminalizing the laundering of proceeds of crime and granting extensive powers to law enforcement to seize such proceeds.[135] According to section 462.31 of the *Criminal Code*, money laundering takes place when an individual or a group engages in activities such as using, transferring, sending, delivering, transporting, altering, disposing of or dealing with any property or proceeds obtained from a "designated offence"[136] either directly or indirectly in Canada.[137] The purpose behind these actions is to hide or convert assets. It is worth noting that the term "indirect" broadens the scope of the offence and enables authorities to trace the proceeds of the crime whenever necessary.[138] Additionally, section 462.3 provides definitions for "designated offence" and "proceeds of crime" to clarify any uncertainties related to the money laundering offence outlined in section 462.31. Although the legislation was in effect, it was not until 1990, after the FATF establishment, that literature started addressing jurisdictional concerns in combating money laundering.[139] There were

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[132] Fasken, "Anti-Money Laundering: "A Comparative Review of Legislative Development" (November 2018), online: *Fasken* <https://www.fasken.com/fr/knowledge/2018/11/anti-money-laundering-a-comparative-review-of-legislative-development>.
[133] Norm Keith, "Anti-Money Laundering: A Comparative Review Of Legislative Development - Money Laundering Canada", (16 November 2018), online: <https://www.mondaq.com/canada/money-laundering/755758/anti-money-laundering-a-comparative-review-of-legislative-development>.
[134] *Criminal Code*, RSC 1985, c C-46
[135] Vieira, *supra* note 15
[136] *Criminal Code*, RSC 1985, c C-46, s 462.31(1); before 2001, the *Criminal Code* listed 48 predicate offences under section 462.3(1). It was repealed following the *Organised Crime and Law Enforcement Amendments Act,* SC 2001, c 32, renaming predicate offences as 'designated offences'
[137] *Criminal Code*, RSC 1985, c C-46, s 462.31
[138] Vieira, *supra* note 15 at 18-19
[139] *Ibid* at 19

suggestions to create and enforce AML laws specifically targeting crimes like drug trafficking, tax evasion and tobacco smuggling. These regulations primarily targeted institutions but also applied to other industries involved in illicit profit-making activities.[140]

The PCMLTA[141] was enacted in Canada in 1991, and the Regulations in 1993. These laws have been amended over time and are now known as the PCMLTFA[142] and the *Proceeds of Crime (Money Laundering) and Terrorist Financing Regulations* (PCMLTFR)[143] These measures were implemented based on recommendations from FATF to establish a comprehensive set of tools, including reporting obligations, record-keeping of large cash transactions (LCTRs) as well as reports on suspected money laundering activities such as attempted suspicious transaction reports (ASTRs) and suspected transaction reports (STRs).[144] Furthermore, the legislation also led to the establishment of the FINTRAC, Canada's intelligence unit for financial crimes.[145] Before 1991, the Office of the Superintendent of Financial Institutions started issuing guidelines for combating money laundering in 1990, and the Royal Canadian Mounted Police (RCMP) established Integrated Proceeds of Crime units in 1991, bolstering the enforcement mechanism. As per this legislation, all regulated financial institutions, casinos, currency exchange businesses, and other financial intermediaries are required to submit reports. These reporting requirements are outlined in section 5 of the PCMLTFA[146], which also mandates these entities to maintain records and verify identities.[147] Additionally, the PCMLTFR also provides guidelines for all organizations to comply with the Act and specific guidelines for particular entities that require detailed customer

[140] *Ibid*
[141] PCMLTFA
[142] *Ibid*
[143] PCLMLTFR
[144] FINTRAC, "Guidance and Resources for Businesses (Reporting Entities)" (2023) online: *Government of Canada* <https://fintrac-canafe.canada.ca/guidance-directives/guidance-directives-eng>.
[145] Keith, *supra* note 133
[146] PCMLTFA
[147] Vieira, *supra* note 15 at 21

identification information.[148] These changes marked a strategic shift from a reactionary to a proactive approach, emphasizing early detection and prevention of money laundering activities.

Following the terrorist attacks in the U.S. in September 2001, the PCMLTFA[149] was amended as part of Canada's efforts to combat terrorism.[150] The renamed *Proceeds of Crime (Money Laundering) and Terrorist Financing Act* is designed to assist law enforcement and other government agencies in detecting and deterring terrorist financing by prohibiting reporting entities from dealing with property linked to known terrorists and terrorist groups and by requiring reporting entities to report any such properties to FINTRAC.[151]

FINTRAC serves as the repository for all transaction reports. It is a government body that implements the FATF's Recommendations.[152] Its main objective is to provide information to law enforcement agencies, such as the RCMP, in cases where there are reasonable grounds to suspect money laundering or terrorist financing activities based on reported data. FINTRAC has the authority under the PCMLTFA to request and receive reports from sectors if there are grounds to believe that a transaction or attempted transaction is linked to money laundering or terrorist financing offences.[153] These requirements exist independently of the privacy obligations imposed on organizations by the *Personal Information Protection and Electronic Documents Act* (PIPEDA),[154] which governs how private sector entities collect, use, and disclose personal

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[148] *Ibid*
[149] PCMLTFA
[150] Law Society of Saskatchewan, "Why we have these requirements" online <https://www.lawsociety.sk.ca/lessons/why-we-have-these-requirements/>.
[151] Canada, Senate Standing Committee on Banking, Trade and Commerce, *Follow the Money: Is Canada Making Progress in Combatting Money Laundering and Terrorist Financing? Not really*, 41st Parl, 1st, Sess, No 10 (March 2013) at 4 online (pdf) <https://sencanada.ca/content/sen/committee/411/banc/rep/rep10mar13-e.pdf>
[152] Vieira, *supra* note 15 at 21
[153] Office of the Privacy Commissioner of Canada, *Audit report of the Privacy Commissioner of Canada: Financial Transactions and Reports Analysis Centre of Canada, Section 37 of the Privacy Act, Section 72 of the PCMLTFA, Final Report* (2009-2010) at 11, online: <https://www.priv.gc.ca/media/1136/ar-vr_fintrac_200910_e.pdf>.
[154] *Personal Information Protection and Electronic Documents Act,* S.C. 2000, c.5 [*PIPEDA*]

information in accordance with privacy rights outlined in section 8 of the *Canadian Charter of Rights and Freedoms.*[155] This legislative framework paves the way for understanding the implications of the Cullen Commission and its connectedness with Canada's AML/ATF framework, which leads to an understanding of its workability for the country's economic stability by providing findings and suggesting recommendations.

**The Cullen Commission: A Moment of Change**

In 2018, the province of BC saw a significant issue with money laundering, and it became a public concern[156] primarily due to the provincial government's revenue sharing with gaming service providers,[157] making the laundering of money through game venues a matter of both political and criminal concern. This was an estimated yearly amount of $7 Billion being laundered inside the province of BC.[158] In response to this, the Commission of Inquiry into Money Laundering in BC, headed by BC Supreme Court Justice Austin Cullen, released its final report on June 15, 2022.[159] The report identified problems in multiple sectors, focusing on the actions or inactions of regulatory authorities, individuals with relevant duties, and law enforcement and provided recommendations to address the complex issues of money laundering. This extensive investigation took years and included 200 witnesses, 1,063 exhibits, and 130 days of evidence and arguments.[160]

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[155] *Canadian Charter of Rights and Freedoms,* Part I of the Constitution Act, 1982, being Schedule B to the *Canada Act 1982* (UK), c 11, online: <https://www.canlii.org/en/ca/laws/stat/schedule-b-to-the-canada-act-1982-uk-1982-c-11/latest/schedule-b-to-the-canada-act-1982-uk-1982-c-11.html>. [*The Charter*]

[156] Sam Cooper, *Wilful Blindness: How Criminal a Network of Narcos, Tycoons and CCP Agents Infiltrated the West* (Optimum Publishing International, 2022).

[157] Rhianna Schmunk, "Money Laundering flourished in B.C. because of RCMP inaction on Casinos, inquiry hears" *CBC News* (5 November 2020), online: <https://www.cbc.ca/news/canada/british-columbia/money-laundering-bc-fred-pinnock-kash-heed-rich-coleman-1.5791754#:~:text=Money%20laundering%20flourished%20in%20B.C.,last%20decade%20and%20a%20half>.

[158] British Columbia, "Billions in Money Laundering increased B.C housing prices, expert panel finds" (9 May 2019), online: *BC Gov News* <https://news.gov.bc.ca/releases/2019FIN0051-000914#:~:text=The%20panel's%20report%2C%20which%20was,through%20the%20real%20estate%20market>.

[159] Cullen, *supra* note 88

[160] The Canadian Press, "B.C. government reviewing money laundering inquiry report before release, officials say" (4 June 2022), online: *CBC* <https://www.cbc.ca/news/canada/british-columbia/cullen-commission-report-review-1.6477888>.

The Commission Report has over 1800 pages and 101 recommendations, highlighting money laundering as a major issue in BC at the federal and provincial levels and the government's perceived ineffectiveness in combating it.

The Cullen Commission's findings highlighted complex money laundering practices in BC, notably the use of cash, estimating that nearly $75 million to $100 million had been laundered via casinos.[161] This typology became known as the "Vancouver Model," which was coined by transnational crime and financial expert John Langdale, in 2017.[162] This model involved the laundering of money through a sophisticated and structured manner of laundering, exploiting the lax regulatory framework of Canada. Due to the currency controls in China, which prevents citizens from taking more than $50,000 a year. Many wealthy Chinese individuals were not able to transfer large amounts of money, therefore, they collaborated with cash facilitators who were linked with criminal organizations. They provided cash advances to wealthy casino patrons in Vancouver, and they repaid the advances using their offshore bank accounts in jurisdictions that were at high risk of money laundering and drug trafficking including China, Mexico, and Columbia.[163] Subsequently, the cash was laundered through casinos in BC through buying chips and betting minimally then cashing out such dirty money as clean money. Such laundered clean money was then invested into the real estate market, increasing housing prices significantly and making housing unaffordable.[164]

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[161] David Moscrop, "British Columbia's money laundering is an emergency. The public deserves an inquiry" (27 February 2019), online: *Dalhousie University* <https://www.proquest.com/docview/2186475933?accountid=10406&parentSessionId=Pzlz0cIK35fY6xBHKRESZiQ0TxkKUO4%2FRTIJHqCuLao%3D&sourcetype=Blogs>.

[162] Ashleigh, Rhea Gonzales, "Grey Zone Enablers: The Impact of Canada's Pacific Rim Strategy on the Vancouver Model of Money Laundering" (MA Thesis, Simon Fraser University, School of Criminology, 2023) at 14 online: <https://theses.lib.sfu.ca/file/thesis/7822>.

[163] Cullen, *supra* note 88 at 10

[164] *Ibid* at 124

Cullen noted that despite repeated requests and warnings from multiple law enforcement authorities, the British Columbia Lottery Corporation (BCLC) refused to put actions in place and continued enabling casinos to accept illegal cash. This resulted in launderers using cash openly in front of staff and guests to purchase chips.[165] The casino authorities turned a blind eye showing a lack of interest without reporting it to FINTRAC as the transactions should have raised suspicions on money transfers above $10,000 about lower mainland casinos receiving significant volumes of profits of crime.[166] Furthermore, the FINTRAC and RCMP's willful blindness to probing money laundering operations in the province was also highlighted by revealing that 31 million reporting questionable transactions from the public and private sectors were received in the year 2019-20, but just 2,000 were transferred to the RCMP for action after months of delays.[167]

Cullen's findings also highlighted the major issue of laundering in the real estate market in Canada by highlighting the absence of mandatory financial reporting requirements for the BC real estate market. The mortgage brokers were not required to report suspicious transactions[168] when depositing the funds toward a mortgage; there was also no requirement to file a large transaction report for depositing funds towards a mortgage in increments below $10,000.[169] This allowed launderers to use illicit funds to purchase property and sell it to convert their dirty money into clean. This issue gained public attention due to concerns about the ownership and anonymity of empty condos in the lower mainland region. The Cullen Commission also exposed the regulatory failures of Money Service Businesses (MSBs)[170] required to be subject to regulations under the

[165] *Ibid* at 255
[166] *Ibid* at 15
[167] *Ibid* at 3
[168] *Ibid* at 847
[169] *Ibid* at 816
[170] Money Service Businesses (MSBs) are non-bank entities that provide at least one type of financial service such as remitting or transmitting funds, issuing money orders, dealing in virtual currency, or operating a crowdfunding platform.

PCMLTFA were found operating without registration and also with pending criminal charges. This commission criticized FINTRAC for conducting a limited number of MSB compliance examinations, resulting in increasing inadequacies that contribute to financial crimes. The Cullen Commission also highlighted the complexity of a growing technology relating to cryptocurrencies. While the PCMLTFA applies to virtual currency dealers, this has only recently become the case, potentially creating a regulatory gap in terms of who is most prepared to regulate decentralized financial schemes.[171] Since cryptocurrencies are new, they also become attractive for criminals to provide anonymity using various cryptocurrencies and unregulated exchange platforms to complicate the tracing of funds.[172] This highlighted the lack of knowledge and expertise for law enforcement and agencies to deal with this new technology of cryptocurrencies.

Furthermore, the issue extended to Luxury goods which became a target for money laundering because of minimal regulations for small vendors, which enabled them to use large funds to purchase expensive luxury goods such as watches, yachts, art, jewels, and precious metals using dirty money with little oversight. Such luxury goods became attractive to criminals as they were less suspicious than bulky cash and provided high value, transferability, and portability.[173] They could also be retained as an asset, increasing value over time, and ultimately sold to get money at some other locations. Additionally, luxury goods provided a layer of legitimacy by using the proceeds of crime to buy such expensive goods as it appears to be standard for the use of consumers.[174] Such lack of regulatory measures increased the risk for money laundering in BC

[171] McCarthy Tétrault, "Cullen Report Sets Out Recommendations to Address Money Laundering in British Columbia" (29 June 2022), online: *Dalhousie University* <https://www.proquest.com/docview/2681901787?parentSessionId=dTeYjmdchQ7zWDFVkyVZEFVxfxmPW%2FxgGbxDEaCsbSc%3D&pq-origsite=primo&accountid=10406&sourcetype=Blogs>.
[171] *Ibid*
[172] Cullen, *supra* note 88 at 29-30
[173] *Ibid* at 1327
[174] *Ibid*

and facilitated money laundering through luxury goods and goods service providers, making it difficult for authorities to investigate and trace the origins of funds.[175] Similarly, the lack of ownership information about private companies has allowed criminals to use corporations with complex structures, such as shell companies and trusts, by hiding their true identity.[176] This anonymity allows criminals to launder the money without revealing the UBO behind such companies or corporate arrangements, which is a barrier to ensuring transparency as it makes it difficult for law enforcement and investigation agencies who are misusing corporations. Also, in the case of the private lending companies, the insufficient inquiry and responsibility at the lenders' end to interrogate the source of money of borrowers have allowed perpetrators to take loans and repay them by buying properties using dirty money through private lending mortgages.[177] These issues underscored the importance of effective regulation to address the gaps in many sectors that posed significant money laundering risks.[178]

In response to highlighting these challenges, the Cullen Commission also played a significant role by making 101 recommendations[179] for reshaping Canada's strategy against money laundering to make it more effective. The recommendations emphasized the need for strong, robust reforms and a coordinated approach among various stakeholders, government agencies, financial institutions, law enforcement, and regulatory bodies. Additionally, recommendations called for strong implementation of AML measures across all sectors. It included transparency in real estate, reporting regime in the luxury goods,[180] regulations of MSBs,[181] pursuant of asset forfeiture,[182]

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[175] *Ibid* at 26
[176] *Ibid* at 1060-1061
[177] *Ibid* at 16
[178] *Ibid* at 17
[179] Cullen Commission, "Final Report: Consolidated Recommendations" (2022) online: (pdf) <https://cullencommission.ca/files/reports/CullenCommission-FinalReport-Recommendations.pdf>.
[180] Cullen, *supra* note 88 at 26
[181] *Ibid* at 1013.
[182] *Ibid* at 8

strict regulation for casinos,[183] unexplained wealth orders,[184] enhanced BOT for private corporations,[185] strict oversight, and strong compliance with the creation of a special provincial money laundering intelligence and investigation unit.[186] Such comprehensive analysis of money laundering into various sectors and recommendations have set a new standard for regulatory actions. They have encouraged more strict rules and coordinated approaches to combat financial crimes and contribute to maintaining the integrity of Canada's financial system.

Although the Cullen Commission recommendations were not addressed directly to the federal government, they are important for improving Canada's anti-money laundering and anti-terrorist financing AML/ATF regime, which is significant in breaking up the complex networks facilitating illicit flows of money. The Commission's impact goes beyond just BC as the federal government welcomed the Cullen Commission's recommendations and promised to address any relevant recommendations within its competence.[187] The commission report has brought significant changes in legislative and policy reforms at both provincial and federal levels.[188] The government's recent efforts to implement these recommendations have greatly strengthened Canada's economic integrity and improved its ability to fight financial crime. It has resulted in amending regulatory frameworks and more openness in sectors that are prone to such activities.

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[183] *Ibid* at 33

[184] An Unexplained Wealth Order (UWO) is an investigative tool used in the United Kingdom that allows an enforcement authority to compel a person to provide information related to any purchase or ownership of any particular assets when there are reasonable grounds for suspicion that such person is involved in criminal activity.

[185] Cullen, *supra* note 88 at 1085-1087

[186] *Ibid* at 6

[187] Canada, Department of Finance, "Government of Canada welcomes final report of the Commission of Inquiry into Money Laundering in British Columbia" (16 June 2022), online: <https://www.canada.ca/en/department-finance/news/2022/06/government-of-canada-welcomes-final-report-of-the-commission-of-inquiry-into-money-laundering-in-british-columbia.html>.

[188] Canada, Department of Finance, "Consultation on Strengthening Canada's Anti-Money Laundering and Anti-Terrorist Financing Regime" at 11 (6 June 2023), online: <https://www.canada.ca/content/dam/fin/consultations/2023/Consultation-amlatfr-rclrpcfat-eng.pdf>

These findings and recommendations serve as a road map for Canada's continued efforts to strengthen its AML/ATF frameworks.

**Efforts and Progress made After Cullen Commission for Strengthening Canada's AML regime.**

After the Cullen Commission,[189] the Canadian Government recognized its findings and took steps to address the challenges in combating money laundering and terrorist financing. These efforts are crucial to address not only domestic issues but to align with global challenges. The Government's strategy for 2023-2026[190] focuses on increasing operational effectiveness, addressing legislative and regulatory gaps, improving regime governance and enhancing international collaboration. The government has increased funding for FINTRAC to strengthen its intelligence and compliance operations, facilitate information sharing and provide law enforcement with actionable intelligence.[191] Since 2019, significant investments have been made, amounting to 319.9 million, with 48.8 million ongoing, to strengthen data resources, financial intelligence and investigative capacity to support money laundering and investigation in Canada.[192] This includes the proposed creation of the Canada "Financial Crimes Agency," which is aimed at increasing money laundering charges, prosecutions, convictions and asset forfeiture results.[193] The work is still in progress, defining its areas of responsibility and how it will work with existing enforcement players at

[189] Cullen, *supra* note 88

[190] Government of Canada, "2023-2026 Data Strategy for the Federal Public Service" (2023), online: Government of Canada <https://www.canada.ca/en/treasury-board-secretariat/corporate/reports/2023-2026-data-strategy.html>.

[191] *Ibid*

[192] Government of Canada, "Strengthening Canada's Response to Financial Crime" (28 March 2023), online: https://www.canada.ca/en/public-safety-canada/news/2023/03/strengthening-canadas-response-to-financial-crime.html>.

[193] Government of Canada, "Canda's Anti-Money Laundering and Anti-Terrorist Financing Regime Strategy 2023-2026" (2023), online: <https://www.canada.ca/en/department-finance/programs/financial-sector-policy/canadas-anti-money-laundering-and-anti-terrorist-financing-regime-strategy-2023-2026.html>.

various levels of government. This is not a quick fix but a long-term solution, so it will take some time.

In an effort to update the *Criminal Code*, legislative changes have been made to allow police to search and seize (through a special warrant obtained pursuant to the new section 462.321 of the *Criminal Code*) virtual assets connected to illegal activity. Additionally, some behaviors, such as running unregistered money service businesses and manipulating transactions in such a way as to avoid FINTRAC, have been made illegal by parliament through amendments to both *Criminal Code* and PCMLTFA. The government has also focused on tightening regulations in high-risk sectors. This includes extending AML and FATF requirements to real estate transactions, title insurance companies, and mortgage lending companies.[194] The AML regulation has been extended to include new industries like payment service providers, crowdfunding websites, and armoured cars.[195] These regulations aim to control white-label ATMs[196] because of their susceptibility to money laundering in response to the Cullen Commission.[197] The government, through budget 2023, has introduced legislative amendments to PCMLTFA to provide whistle-blowing protections for employees who want to report information to FINTRAC and encourage information sharing among regime partners.[198] Also, it has announced amendments to the Criminal Code and the PCMLTFA that will enhance information sharing between CRA and Law enforcement to help protect Canada's Financial System from National Security risks.[199] However, these amendments have not yet been passed into law but reflect the government's effort to protect

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[194] *Supra* note 188 at 56
[195] Canada, "Regulations Amending Certain Regulations Made under the Proceeds of Crime (Money Laundering) and Terrorist Financing Act: SOR/2023-193 (2023) *Canada Gazette II*, 157:21
[196] White Label ATMs are cash machines that are not owned by traditional financial institutions.
[197] Canada, House of Commons, *Confronting Money Laundering and Terrorist Financing: Moving Canada Forward,* 1st, Sess, 42nd Parl, No 436 (November 2018 at 10 (Hon Wayne Easter).
[198] Government of Canada, "Budget 2023, Chapter 5: Canada's Leadership in the World" (2023), online: <https://www.budget.canada.ca/2023/report-rapport/chap5-en.html>.
[199] *Ibid*

Canada against financial crimes. The government continues investigating new and high-risk areas through public consultation and ongoing reviews.[200] All of these extensive efforts show Canada's dedication to fortifying its AML and ATF regime, tackling domestic challenges, and aligning with international standards, particularly in response to the evolving nature of financial crimes and global AML standards set by bodies like the FATF.

Following the Cullen Commission, significant changes and efforts have been made to enhance transparency and prevent financial crimes. One notable development is forming the Individuals with Significant Control (ISC) register[201] which was an important step taken back in June 2019 to mitigate the risks of abuse of corporate structures for illicit activities and to have a clear approach to BO under the CBCA.[202] Corporations operating under the CBCA were required to participate in the ISC register. This registration contained information such as the ISC name, date of birth, level of control, tax residency and residential address[203] to maintain records of tax evasion, money laundering and financing terrorists.[204] However, this information was selectively available only to several important stakeholders, such as tax and police authorities, regulatory bodies and creditors of CBCA[205] corporations.[206] This limited access was a barrier to transparency and accountability and presented a hurdle in dealing with money laundering and maintaining

[200] Government of Canada, *supra* note 190
[201] Individuals with Significant Control are defined as "Individuals who have owned or controlled 25% or more of the company's shares or has factual control without owning shares.
[202] CBCA, *supra* note 24
[203] Jagdeep S. Shergill, Amit Chandi on November 21 & 2023, "Federal Government To Require Public Disclosure of Corporation Ownership Information" (21 November 2023), online: <https://www.lawsonlundell.com/the-business-law-blog/recent-changes-to-the-isc-reporting-requirements>.
[204] Corporations Canada, "Individual with Significant Control" (2023) online < https://ised-isde.canada.ca/site/corporations-canada/en/individuals-significant-control)
[205] CBCA, *supra* note 24
[206] Dierk Ullrich et al., Measure for Measure – Federal Government to create New Public Transparency Register for Private Federal Business Corporations, (12 January 2024), online: <https://www.fasken.com/en/knowledge/2024/01/federal-government-to-create-new-public-transparency-register>.

systems.[207] This change was driven by several factors, including domestic and international factors, which highlighted the widespread use of corporate structures. The revelations of information leaks such as Panama Papers,[208] Paradise Papers,[209] FinCEN files[210] and money laundering in BC scandals increased the risks of money laundering and led to increased efforts in AML efforts and BOT in Canada, which has not been compliant with FATF standards for at least fifteen 15 years.[211] In budget 2021, the federal government announced to provide 2.1 million to Innovation Science and Economic Development Canada to support the implementation of PBOR by 2025, but it was accelerated to the end of 2023 following the invasion of Ukraine by Russia as global efforts to combat financial crimes and prevent the misuse of Canadian corporations for hiding their dirty money trail.[212] Also, in 2022, the FATF revised its global standards to address significant gaps and risks of kleptocrats and corrupt officials using corporate structures threatening the integrity of the global financial system. These revisions emphasized greater transparency in companies' BO and required several countries to establish PBORs to prevent the misuse of corporate structures for illicit purposes.[213] In alignment with this global standard and along with the Cullen Commission recommendations, Canada introduces establishing a PBOR at the federal level in order to prevent the misuse of corporations and strengthen its financial system.

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[207] Dierk Ullrich, Brenden Sawatsky, Emilie Clairoux, "Measure for Measure — Federal Government to Create New Public Transparency Register for Private Federal Business Corporations" online: <https://www.fasken.com/en/knowledge/2024/01/federal-government-to-create-new-public-transparency-register>.
[208] *Supra* note 15
[209] ICIJ, "Paradise Papers: Secrets of the Global Elite" (2017) online: <http://www.icij.org/investigations/paradise-papers/>.
[210] ICIJ, "FinCEN Files" online: < https://www.icij.org/investigations/fincen-files/>.
[211] Denis Meunier, "Canada: Combatting Money Laundering — Leader or Laggard?" in Christian Leuprecht & Jamie Ferril, *Dirty Money: Financial Crime in Canada*, (Montreal: McGill-Queen's University Press, 2023) 123 at 147-148
[212] *Ibid* at 147-148
[213] Transparency International, "Financial Action Task Force Adopts New Standards on Transparency of Company Beneficial Ownership" (2022) online: <https://www.transparency.org/en/press/financial-action-task-force-adopts-new-standard-transparency-company-beneficial-ownership>.

To enhance access to and improve transparency the Canadian Parliament passed Bill C-42,[214] mandating public disclosure of certain ISC details.[215] It expanded corporate reporting requirements by requiring federal corporations to report detailed information on ISCs[216] from their registers to the federal government which will enter that information into what is to become a publicly accessible database.[217] The new rules regarding BO under CBCA,[218] which came into force on January 22, 2024, require that the corporations must maintain an ISC database with Corporations Canada.[219] This will include the name, starting and ending dates of being an ISC and their control. Information such as the name and level of their control is made available to the public, while other details are kept private.[220] A critical aspect of Bill C-42[221] is that it amends the PCMLTFA to enable regulations for addressing discrepancy reporting[222] on BOI of entities to government authorities.[223] This work is still in progress,[224] but the regulation aims to improve the federal registry by leveraging the Know your Customer (KYC) processes,[225] which require financial institutions and law enforcement agencies to verify the identity of clients, assess the risks,

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[214] *Supra* note 8
[215] Jagdeep S. Shergill, Amit Chandi on November 21 & 2023, "Federal Government To Require Public Disclosure of Corporation Ownership Information" (21 November 2023), online: <https://www.lawsonlundell.com/the-business-law-blog/recent-changes-to-the-isc-reporting-requirements>.
[216] *Ibid*
[217] Janene Charles et al., "CBCA Corporations to Begin Submitting Transparency Registers to the Government: Public Access to Follow" (22 December 2023), online: <https://www.stikeman.com/en-ca/kh/canadian-ma-law/cbca-corporations-to-begin-submitting-transparency-registers-to-the-government>.
[218] CBCA, *supra* note 24
[219] Corporations Canada is the country's federal corporate regulator. It administers the laws that allow Canadians to create and maintain a corporation under the federal laws governing corporations in Canada.
[220] Government of Canada, "Bill C-42: An Act to Amend the Canada Business Corporations Act (CBCA) and to make consequential and related amendments to other Acts" (2023), online: <https://www.justice.gc.ca/eng/csj-sjc/pl/charter-charte/c42.html>.
[221] *Supra* note 8
[222] Discrepancy reporting means if there is any inconsistency in the information regarding BOs, such discrepancy must be reported to the government authorities.
[223] PCMLTFA, SC 2000, c 17, s 73(1)(c) (as amended by clause 18 CBCA)
[224] The Canadian Institute for the Administration of Justice, "The Cullen Commission 18 Months Later - Where Do We Stand?" (4 January 2023), at 1h:48m:12s online: <https://www.youtube.com/watch?v=HKDtbthawT4>.
[225] Know your Customer (KYC) is a term that reflects the onus on a person or entity that provides goods or services to know with whom they are transacting business.

and ensure that financial transactions are not used for illicit purposes. This will prevent the misuse of corporations and maintain the registry's integrity.[226] These measures will ensure accuracy, increase corporate transparency and allow access to the public to create a deterrence effect and prevent the misuse of corporations by holding them accountable.[227] Such efforts will supplement the compliance and verification efforts of Corporation Canada by forming a registry available to the public, allowing for greater public scrutiny of ISCs over corporations.[228] However, this approach reflects a commitment to learning as Canada was following international standards and the government was influenced by the Cullen Commission recommendations and adapted them to the Canadian context, ensuring that the registry meets high standards of integrity and usefulness. The registry can only be effective if the data is reliable and accurate.[229] This also represents similar interventions taken worldwide and in Canadian provinces such as Quebec and BC.

**Conclusion**

This chapter has discussed the issue of money laundering in Canada, followed by the prevalent use of shell companies and challenges in tracing the BOs due to the lack of BOT measures. The misuse of corporate structures and dirty money entering Canada has given it a bad reputation and made Canada a safe haven for money launderers to hide their origin of illicit money. Furthermore, it has discussed in detail the historical AML framework in Canada, the report of the Cullen Commission and the recommendations made. Moreover, it also highlighted the efforts and progress made to strengthen Canada's AML framework, especially by the introduction of PBOR which will prevent the misuse of entities and protect Canada's financial integrity.

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[226] *Supra* note 224 at 1h:48m:29s online: <https://www.youtube.com/watch?v=HKDtbthawT4>.
[227] Jagdeep S. Shergill, Amit Chandi on November 21 & 2023, "Federal Government To Require Public Disclosure of Corporation Ownership Information" (21 November 2023), online: <https://www.lawsonlundell.com/the-business-law-blog/recent-changes-to-the-isc-reporting-requirements>.
[228] Ullrich et al., *supra* note 207
[229] *Supra* note 224 at 1h:48m:55s

However, the proposed measure of establishing a PBOR has greater benefits and is part of a larger initiative to strengthen its financial crime-fighting capabilities to combat money laundering, but it also raises significant privacy concerns in Bill C-42 as in the EU access to public BOI has been restricted to maintain privacy.[230] Therefore, in the next chapter, I will discuss a ruling which invalidated public access to the BO registry due to a violation of the fundamental rights[231] and examine if there could be similar challenges as a result of this PBOR.

[230] Ullrich et al., *supra* note 207
[231] *Supra* note 107

## Chapter 3: Public Beneficial Ownership Registries and the Right to Privacy

## Introduction

Interestingly, the initial primary purpose of collecting and publishing BOI was not prevention or investigation of illegal money movement but rather to ensure the efficient operation of markets by enabling consumers, investors, and business partners to assess the credibility and financial stability of those who own and manage such companies.[232] However, as has been explored above, this mechanism has emerged as an anti-crime tool, specifically to eliminate some of the secrecy that enables financial criminal activities.

In this chapter, I will discuss the role and significance of PBORs in enhancing corporate transparency and preventing financial crimes. These registries have raised significant privacy concerns, particularly in the EU, where transparency has interfered with privacy rights. To examine such privacy concerns, I will do a case study of *WM and Sovim SA vs Luxembourg Business registers*,[233] which is a judgment of the Court of Justice of the European Union (CJEU) on BOI. It is useful to look at the *WM and Sovim* case because it's a case on BOI, of which there are not many and is issued by a major supranational court. Additionally, this case was cited by the Canadian Bar Association (CBA) to raise similar privacy concerns regarding public access to the BO registry in Canada.[234] Therefore, it is interesting to ask the question of whether a similar challenge, as seen in the EU, might occur in Canada. Furthermore, this chapter will discuss whether

[232] Andres Knobel*, Privacy- Washing & Beneficial Ownership Transparency Dismantling The Weaponisation Of Privacy Against Beneficial Ownership Transparency* (Tax Justice Network, March 2024) at 5

[233] *WM and Sovim SA v. Luxembourg Business Registers,* (Joined Cases C-37/20 and C-601/20) [GC], ECLI:EU:C:2022:912, (CJEU), 22 November 2022). [*WM and Sovim*]

[234] The Canadian Bar Association, "Limit Access to the beneficial ownership registry" online: <https://www.cba.org/Our-Work/cbainfluence/Submissions/2023/September/Limit-access-to-the-beneficial-ownership-registry>.

Bill C-42 complies with the charter rights and has provided a balance between transparency and privacy.

**The Significance of Public Access to Beneficial Ownership Registry**

Public access to BOI democratizes power. Information is power, particularly if that knowledge stays hidden. Public access to BOI is about rebalancing power[235] and making sure that nobody is above the law. PBORs play a crucial role in the worldwide effort to fight money laundering and terrorist funding. Historically, different complex techniques such as the use of bearer shares, nominee arrangements, and complex corporate structures in shell companies, have facilitated the evasion of transparency for some individuals. These methods have created a divided system in business registers, where most entities appear in compliance with transparency requirements on the surface, but their true identities of BO always remain hidden. The rich and powerful people who look for gaps or loopholes in the laws continue abusing the system making it difficult for the authorities to see who actually owns the company. However, for combatting the most complex methods deployed by determined criminals, it has become more evident that public access to these registries is vital. The very presence of PBORs serves as a deterrent. When criminals are aware that their ownership information can be easily known and tracked, they are less inclined to use corporate structures for illegal activities. As a reaction, global norms have evolved, led by organizations such as the FATF which has updated Recommendation 24, encouraging potentially over 200 jurisdictions to establish a centralized register and provide authorities with access to such information on the UBOs who own and control companies and other legal structures.[236] By 2023,

[235] Knobel, *supra* note 232 at 21

[236] FATF, "Guidance on Beneficial Ownership of Legal Persons" (10 March 2023), online: <https://www.fatf-gafi.org/en/publications/Fatfrecommendations/Guidance-Beneficial-Ownership-Legal-Persons.html>.

it was widely agreed that the most efficient approach to guaranteeing widespread access to BOI was the establishment of centralized government-operated registers.[237]

PBORs help not only law enforcement but also enable media and investigative journalists to do comprehensive due diligence regarding Politically Exposed Persons (PEP) and examine entities under the ownership of persons subject to sanctions or those with a track record of financial impropriety. Financial institutions also get advantages from this publicly available information, which enables them to detect warning signs linked to suspicious conduct or transactions.

One of the great benefits of using PBORs is that it allows anyone to access and verify the information. One of the best examples of this was shared on the social media platform currently known as X (previously known as Twitter) by a Russian investigative journalist, which illustrates the power of the BO registry and how anyone can access BOI. In a very detailed thread, it is revealed that a luxurious resort in Spain worth €40m is owned by a company named "Citerene Holdings" in Cyprus, which is further owned by Pianta Investments, which is registered in a jurisdiction called Seychelles—a jurisdiction which is famous for secrecy and its lack of transparency. Through access to the public registry of Cyprus after paying just a nominal fee, it was revealed that the actual owner is the stepson of a high-ranking Russian government official.[238] This example provides the importance of the public registry in exposing individuals who hide behind the veil of corporate anonymity, using various corporate structures to complicate the process of finding UBO and preventing dirty money laundering and corruption.

Moreover, another example demonstrates the crucial role that the public registries play in uncovering financial wrongdoings in Brazil. Aécio Neves, a Brazilian politician, was found to

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[237] Knobel, *supra* note 232

[238] Maria Pevchikh, "1/20 Dear friends, I need to draw your attention to something super bad and super important (as it doesn't originate from Russia for once)" (29 November 2022), online: <https://threadreaderapp.com/thread/1597588203439284225.html>.

have a connection to a company in Luxembourg that was uncovered due to information in a registry. The ownership of that company, which belongs to Neves' mother, had not been previously disclosed to Brazilian authorities.[239] The data from the public registry enabled journalists and investigators to track unreported financial transactions and assets, resulting in subsequent probes. This case exemplifies the indispensability of BO registries as crucial instruments for enhancing transparency and helping in the battle against corruption.[240]

In addition, public registries have played a significant role in highlighting when the banks have violated AML requirements, resulting in the cancellation of their licenses. An exemplary case is Denmark's Andelskasse, which was involved in the illicit activity of laundering more than $600 million over the period of 2017-2018.[241] An inquiry conducted by the Danish daily 'Børsen,' using the public registry of individuals who benefit from ownership, established some serious connections between various bank customers and suspicious activities as well as current investigations into money laundering.[242] This has raised suspicions over bank compliance and has underscored the significant impact of PBORs enhancing transparency and improving accountability. All of these examples mentioned above indicate that public access to BO data has become a useful tool in combatting financial crimes and other criminal activities.

However, the establishment of PBORs has raised some serious privacy concerns regarding the risks of data misuse, identity theft, and kidnapping.[243] The publication of personal information

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[239] Abdurasul Abdurakhimov, *Balancing Corporate Transparency with the Rights to Privacy and Data Protection* (LLM Thesis, Lund University, (2023) at 29, online: <http://lup.lub.lu.se/student-papers/record/9124757>.

[240] Luiz Fernando Toledo, et al., "Luxembourg Companies Add Evidence for Brazilian Investigations Into Corruption, Crime" (11 February 2021), online: *OCCRP* <https://www.occrp.org/en/openlux/luxembourg-companies-add-evidence-for-brazilian-investigations-into-corruption-crime>.

[241] Abdurakhimov, *supra* note 239 at 29.

[242] *Ibid* at 29

[243] Open Ownership, The B Team & The Engine Room, *Data Protection and Privacy in Beneficial Ownership Disclosure,* (May 2019) at 32

such as name, address, and ownership details without adequate measures can violate privacy rights enshrined in domestic or international laws such as the *International Covenant on Civil and Political Rights* (ICCPR),[244] of which article 17 protects arbitrary or unlawful interference with the privacy rights[245] or the *Charter of Fundamental Rights of the European Union*[246] (CFREU) itself. These viewpoints have driven a notable trend towards more corporate transparency, as legislative frameworks are being adjusted to better match the requirements of contemporary financial control while at the same time safeguarding privacy rights, as guaranteed by the CFREU and the *Canadian Charter of Rights and Freedoms.*[247]

**Historical overview of the Right to Privacy and legal developments in the EU regarding public access to beneficial ownership data**

Traditionally, privacy was considered a protection against state interference in one's personal life, but it has a new dimension in the modern era of technology where breaches of data and misuse of personal information pose significant challenges. However, the foundation of the right to privacy was recognized as a fundamental right in international instruments such as the *Universal Declaration of Human Rights* (UDHR)[248] in 1948 in Article 12 and the ICCPR Article 17[249] in 1966 (in force in 1976). These provisions were designed to provide protection from arbitrary or unlawful interference with privacy.

Article 12 of UDHR provides:

> "No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks

[244] *International Covenant on Civil and Political Rights*, 16 December 1966, 999 UNTS 171 [*ICCPR*]
[245] *Ibid*, art 17
[246] *Charter of Fundamental Rights of the European Union,* 2000, O.J. (C 364) 1 [*CFREU*]
[247] *The Charter*, *supra* note 155
[248] Universal Declaration of Human Rights (UDHR) is a landmark international document in the history of Human Rights, adopted by the United Nations General Assembly which enshrines the rights and freedoms of all human beings. See *Universal Declaration of Human Rights,* United Nations, 10 December 1948, UNGA Res 217 A (III) UN Doc A/810, art 12
[249] ICCPR, *supra* note 244 art 17

> upon his honor and reputation. Everyone has the right to the protection of the law against such interference or attacks"[250]

Based on the principle set out in the UDHR, the ICCPR further repeated the framework for the protection of privacy rights.

Article 17 of ICCPR as:

> (1) "No one shall be subjected to Arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attack on his honor and reputation."
>
> (2) "Everyone has the right to the protection of the law against such interference or attacks."[251]

These documents laid the foundation for recognizing privacy rights and made it legally binding upon the signatories of the ICCPR to take measures to protect individuals from violation of their privacy rights.[252] In the 21st century, the concept of privacy has evolved, and as will be seen the scope of privacy has sometimes been extended to the area of financial transparency, such as BOI, and brings an important nuance to the issue of BOI transparency in the AML context.

The European experience in the interaction between privacy and BOI transparency is instructive. In 1991, the European Economic Council adopted the first Anti-Money Laundering Directive (AMLD 1) to prevent the use of financial systems for money laundering and to ensure financial stability across all member states.[253] Afterwards, other AML Directives followed, such as the second Anti-Money Laundering Directive (AML 2)[254] in 2001, which came three months

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[250] United Nations, "Universal Declaration of Human Rights" (1948), online: *United Nations* <https://www.un.org/en/about-us/universal-declaration-of-human-rights#:~:text=Article%2012>.

[251] ICCPR, *supra* note 244, art 17

[252] Rhona K.M. Smith, *International Human Rights Law*, 10th, ed, (Oxford, Oxford University Press, 2021)

[253] EU, *Directive 91/308/EEC of 10 June 1991 on prevention of the use of the financial system for the purpose of money laundering,* [1991] O.J. L 166 at 77 [*AMLD 1*]

[254] EU, *Directive 2001/97/EC of 4 December 2001, Amending Directive 91/308/EEC on prevention of the use of the financial system for the purposes of money laundering – Commission Declaration*, [2001] OJ L 344 at 76 [*AMLD 2*]

after the terrorist attacks in the U.S., and the third Anti-Money Laundering Directive (AMLD 3)[255] came quickly in 2005 to respond to the new war on terror. In 2012, the FATF published its 40 recommendations to establish international rules to prevent money laundering,[256] and in 2015 it published guidance on transparency measures and BO.[257] Meanwhile, the fourth Anti-Money Laundering Directive (AMLD 4) came into force on 26 June 2017,[258] and it required all EU member states to establish a centralized register containing personal details of BOs and provide access to the competent authorities and FIUs without any restriction[259] in order to create more transparency. Although the AMLD 4 was viewed as a good step, some countries like Italy, Hungary, and Lithuania had failed to create any type of BO records even after 4 years.[260] Additionally, in countries where such registries were operating, access to important data was typically hampered by tight registration procedures and restricted search functionality.[261]

Another major issue in AMLD 4 was that the register was accessible to law enforcement, but the general public that wished to get access to BOI had to establish a legitimate interest.[262] However, the directive itself failed to provide a definition of "legitimate interest,"[263] and the lack of a uniform definition created many challenges in its implementation across many

[255] EU, *Directive 2005/60/EC of the European Parliament and of the Council of 26 October 2005 on the prevention of the use of the financial System for the purpose of money laundering and terrorist financing*, [2005] OJ L 309 at 15 [*AMLD 3*]
[256] *FATF Recommendations*, *supra* note 14
[257] FATF, Guidance on Beneficial Ownership Transparency: Legal Arrangements (July 2015 as amended 2024), online: <https://www.fatf-gafi.org/content/dam/fatf-gafi/recommendations/Guidance-Beneficial-Ownership-Transparency-Legal-Arrangements.pdf.coredownload.inline.pdf>.
[258] EU, *Directive 2015/849 of the European Parliament and of the Council,* 20 May 2015, OJ L, 141, at 73 [*AMLD 4*]
[259] EU, *Directive 2018/843 of the European Parliament and of the Council of 30 May 2018,* OJ L 156, at 43 [*AMLD 5*]
[260] Transparency International, *"Access denied? Availability and accessibility of beneficial ownership data in the European Union"* (2021) at 5
[261] *Ibid* at 7
[262] The AMLD 4 has not defined the term 'Legitimate interest'; however, generally, in the context of beneficial ownership, it means having a genuine reason in order to have access to the register.
[263] AMLD 4, *supra* note 258

EU member states.[264] This led to the implementation of the AMLD 5, which came into force on 10 Jan 2020[265] and aimed to address these deficiencies and enhance the transparency and accessibility of such information by giving access to such registers to the public without the need to establish a "legitimate interest." The directive provided justification for this move by stating that:

> 25) "The need for accurate and up-to-date information on the beneficial owner is a key factor in tracing criminals who might otherwise be able to hide their identity behind a corporate structure. The globally interconnected financial system makes it possible to hide and move funds around the world, and money launderers and terrorist financers as well as other criminals have increasingly made use of that possibility."[266]
>
> 30) "Public access to beneficial ownership information allows greater scrutiny of information by civil society, including by the press or civil society organisations, and contributes to preserving trust in the integrity of business transactions and of the financial system."[267]

These initiatives taken by EU AMLD 5 certainly moved towards greater transparency by causing the establishment of BO registers in all EU member countries to unveil the BOs. These BO registers provided up-to-date information regarding the true owners of companies that were publicly accessible—until the argument emerged that access to the general public was in conflict with the right to privacy and the protection of the personal data of the BOs, which came to a head in the *WM and Sovim* case before the CJEU.[268] This raised some serious concerns and complexity

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[264] European Commission*, Commission Staff Working Document: Impact Assessment Accompanying the Document proposal for a Directive of the European Parliament and of the council*, (5 July 2016), online: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52016SC0223>

[265] AMLD 5, *supra* note 259

[266] *Ibid*, rec 25

[267] *Ibid*, rec 30

[268] Daniel Zigo, "CJEU: WM and Sovim SA v. Luxembourg Business Registers (Joined Cases C-37/20 and C-601/20): Rethinking Transparency of Ultimate Beneficial Owners Registers" (2021) BLR 227 at 229

about the state ensuring financial transparency while justifying the intrusion in privacy in the larger public interest in order to maintain accountability of the BOs.

**The Balancing of Transparency and Privacy.**

The balancing of state interests against the privacy rights of BOs is a complex issue, in that it requires identifying the point at which public interest justifies the infringement of an individual's reasonable expectation of, and right to, privacy. It is an axiomatic privacy law norm that where there is a public interest regarding state seizure or disclosure of any personal information, there is a need to maintain the balance between privacy and sharing personal information for the public interest. The EU's legislative framework is based on the principles of transparency and democracy, positing that transparency provides more legitimacy to public authorities and strengthens democratic governance by fostering active citizen engagement in decision-making processes.[269] However, the growth of digital technologies has underlined the necessity of privacy, especially as regards personal data, which in the EU is protected by the CFREU and the *General Data Protection Regulation* (GDPR).[270] That said, some private acts greatly impact society, producing a public interest in the disclosure of information about what would ordinarily be private affairs. This overlap may lead to conflicts between the demand for transparency and the protection of privacy and personal data, requiring difficult balancing between public interest and individual rights.

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[269] Anoeska Buijze, *The Principle of Transparency in EU Law*, (Utrecht University 2013) at 53, online: <https://dspace.library.uu.nl/handle/1874/269787>.

[270] *General Data Protection Regulation* (GDPR) is a legal framework that sets guidelines for the collection and processing of personal information from individuals who live in and outside of the EU. See The Investopedia team, "General Data Protection Regulation (GDPR): Meaning and Rules" online: <https://www.investopedia.com/terms/g/general-data-protection-regulation-gdpr.asp#:~:text=The%20General%20Data%20Protection%20Regulation%20(GDPR)%20is%20a%20legal%20framework,the%20European%20Union%20(EU)>.

Even prior to *WM and Sovim*, the CJEU has attempted to find an adequate balance between transparency and privacy where data was connected with the element of protection of public resources. For example, in *Volker und Markus Schecke and Eifert,*[271] the court concluded that the publication of nominative data about the beneficiaries of agricultural aid promoted transparency, specifically enabling the general public to have control over the distribution and usage of public funds. This case highlights the CJEU's careful balancing of the necessity for transparency with the protection of individual privacy rights.[272] More germane to the topic of this chapter, in the *Jyske Bank* case,[273] the CJEU addressed the difficulty of balancing AML regulations against the financial institutions' right to provide financial services including banking, money transfer, and other AML measures that require financial institutions to conduct extensive customer due diligence, collect, verify and provide personal data—all of which could interfere with certain fundamental rights. The court recognized that fighting financial crime such as money laundering serves a genuine public purpose and offers a convincing rationale for some limits on fundamental rights, holding that interference with the rights could be deemed justifiable in the public interest to protect greater society's security and integrity.[274]

Returning to the EU, the rights to privacy and data protection, as specified in Articles 7 and 8 of the CFREU,[275] include safeguards for any data affecting an "identified or identifiable individual."[276] This legal framework is important to the data of BOs as specified in Article 3(6) of the AMLD 4, where BOs are regarded as identifiable natural people.[277] Consequently, the personal

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[271] *Volker und Markus Schecke GbR, Hartmut Eifert v Land Hessen,* [2010] ECR I-11063, Case C-92/09
[272] *Ibid*
[273] *Jyske Bank Gibraltor Ltd v Administración del Estado,* [2013] ECR 1-0000, Case C-212/11
[274] *Ibid* at para 66-64
[275] CFREU, *supra* note 246
[276] *Opinion 1/15 of the Court (Grand Chamber),* 26 July 2017*,* ECLI:EU:C:2017:592, at 36, online: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62015CV0001(01)>.
[277] AMLD 4, *supra* note 258, art 3(6)

data of BOs published in public registries comes within the protective scope of the CFREU, and therefore, if the data is made publicly available, then this may be an interference with people's rights to privacy and data protection. AMLD 5, although intended to increase transparency, stipulates that such measures must respect other fundamental rights and adopt apply the concept of proportionality.[278] Despite legal efforts to balance these concerns via particular exemptions,[279] the appropriateness and rationale of public access to such sensitive data continue to be controversial.

This ongoing issue provides the setting for addressing, in the next section, *WM and Sovim*, an important decision by the CJEU that struck down provisions of AMLD 5, holding that the general public's access to the data in the BO registry was incompatible with the right to privacy and the protection of the personal data of the BOs.

**The *WM and Sovim* Case**

**Background of the case**

The landmark CJEU decision in *WM and Sovim SA v Luxembourg Business Registers*[280] arose from two joined cases, brought by a Luxembourg company and one of its BOs against the Luxembourg authorities at the Luxembourg District Court. This Case involved key EU institutions, such as the European Commission, the European Parliament, and the Council of the EU who were party to this. Both companies sought to restrict access to information about themselves to the general public, though for different reasons. Their initial petitions were refused by Luxembourg Business Registers, and they appealed to the Luxembourg District Court, where the court stayed the proceedings in both cases and referred the case to CJEU for clarification on the interpretation

[278] *Ibid*, rec 5
[279] AMLD 5, *supra* note 259, art 30 (9)
[280] WM and Sovim, *supra* note 233

of Article 30 AMLD 4 (as amended by AMLD 5) and its compliance with the provision of CFREU.[281]

In the first case, the owner of the real estate company YO, WM, demanded that his information should be accessible only to concerned authorities rather than the general public since it would create significant risks for him and his family.[282] Since his position as an executive officer required him to make official foreign visits to countries with weak political regimes and high levels of crime, making his information public would pose the threat of his being abducted or killed.[283] In the second case, Sovim argued that allowing access to the general public to identify information regarding BO infringed privacy rights protected by CFREU in Articles 7[284] and 8[285] and as well as several provisions of the GDPR[286] and its fundamental principles.[287] Moreover, Sovim also submitted that it was unclear how public access to BOI can help in combatting money laundering. Therefore, Sovim argued that infringement of rights to address money laundering is not a logical solution.[288]

The law under attack in these cases was an element of EU law targeting money laundering and terrorist financing, which started with considering drug trafficking as a predicate offence in the AMLD 1 and then progressed to targeting money laundering and terrorist financing.[289] The

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[281] Magdalena Brewczyńska, "Privacy and Data protection vs public Access to Entrepreneurs' Personal Data Score 2:0: How did the ECJ Balance the Rights to Privacy and Data Protection Against Transparency of Ultimate Beneficial Owners Registries in WM and Sovim SA v Luxembourg Business Registers?" *European Law Blog* (15 December 2022) at 3, online: <https://pure.uvt.nl/ws/portalfiles/portal/66764643/ELB_Blogpost_542022.pdf>.
[282] WM and Sovim at para 21
[283] *Ibid*
[284] CFREU, *supra* note 246, art 7
[285] *Ibid*, art 8
[286] WM and Sovim at para 30
[287] *Ibid* at para 11
[288] International Regulatory Strategy Group, *Anti-money laundering and beneficial ownership*, (December 2023) at 33
[289] Council Directive 91/308/EEC of 10 June 1991 on prevention of the use of the financial system for the purpose of money laundering, [1991] OJ L 166/77

EU later broadened the scope of the law by encouraging member states to expand the list of predicate offences, and account for the crime proceeds that help in funding terrorists. In its decision, the CJEU examined AMLD 4 as amended by AMLD 5. The AMLD 4 required members of the EU states to ensure that information regarding BO was only accessible to "any person or organization that could demonstrate a legitimate interest in it" as well as to lawful authorities.[290] However, in case of any risk of fraud, kidnapping, blackmailing, violence, or where a BO is a minor, then such access could be restricted as well.[291] The AMLD 4 was amended by AMLD 5, and it allowed public access to registries about companies' BOs (that is, the real people who own or actually control them).[292] The amended directive also provided an exception to this mandatory disclosure rule, where disclosure could be refused in situations where it could potentially put the BO at risk of his life, fraud, kidnapping, violence or intimidation or where the BO is a minor.[293]

In order to examine the CJEU judgment, it's important to look at and understand the relevant provisions. Article 30(5)(c) of AMLD 5 requires the BOI to be made available to the public to enhance transparency and ensure accountability. Alongside this, articles 7 and 8 of the CFREU provide measures for safeguarding privacy and the protection of personal data for individuals. These laws will help in understanding how the court interpreted these or tried to create a balance between transparency and privacy.

**Relevant Legislative provisions**

Article 30(5)(c) of the fifth AMLD 2018/843 amending the previous (AMLD 4)

> 5) "Member States shall ensure that the information on the beneficial ownership is accessible in all cases to:

[290] AMLD 4, *supra* note 258, art 30(5) (c)
[291] *Ibid* art 30(9)
[292] Matti Kohonen, "EU Court of Justice Ruling on Beneficial Ownership, a Major Blow to the Fight Against Environmental Crimes", (12 December 2022), online: *Financial Transparency Coalition* <https://financialtransparency.org/european-court-justice-ruling-beneficial-ownership-major-blow-fight-environmental-crimes/>.
[293] AMLD 5, *supra* note 259, art 30(9)

a) competent authorities and FIUs, without any restriction;
b) obliged entities, within the framework of customer due diligence in accordance with Chapter II.
c) any member of the general public.

The persons referred to in point (c) shall be permitted to access at least the name, the month and year of birth and the country of residence and nationality of the beneficial owner as well as the nature and extent of the beneficial interest held.

Member States may, under conditions to be determined in national law, provide for access to additional information enabling the identification of the beneficial owner. That additional information shall include at least the date of birth or contact details in accordance with data protection rules.

5a) Member States may choose to make the information held in their national registers referred to in paragraph 3 available on the condition of online registration and the payment of a fee, which shall not exceed the administrative costs of making the information available, including costs of maintenance and developments of the register."[294]

However, prior to the Directive 2018/843 (AMLD 5), the Directive 2015/849 (AMLD 4) stated:

(c) "any person or organisation that can demonstrate a legitimate interest.
The persons or organisations referred to in point (c) shall access at least the name, the month and year of birth, the nationality and the country of residence of the beneficial owner as well as the nature and extent of the beneficial interest held."[295]

**Charter of the Fundamental Rights of the European Union**

The right to respect for private and family life, home and his correspondence (Article 7);

and

The right to protection of personal data (Article 8).[296]

[294] *Ibid*, art 30(5)(c)
[295] AMLD 4, *supra* note 258, art 30(5)(c)
[296] CFREU, *supra* note 246, art 7 and 8

**Judgment of the CJEU**

In its decision, the CJEU examined the validity of AMLD 5's requirement that every EU member state establish a publicly available register of BOs. The court held that public access to such information in a BO registry constituted a serious infringement of fundamental rights to privacy and data protection guaranteed by the CFREU enshrined in Articles 7 and 8.[297] This was because the information disclosed enabled countless people to have access to information and know about the financial status of a BO, and once the data is made available to the general public, then it could be retained or disseminated.[298] The court held that the main objective of AMLD 5 was to combat money laundering, but it did not achieve a proper balance of this aim with privacy rights and data protection.[299] More efforts were needed in order to protect against the misuse of information and ensure that such information is accessible only for the sake of legitimate purposes such as promoting transparency and preventing money laundering.

The court examined whether the aspect of justifying serious interference with fundamental rights in question satisfied the EU's general interest objective—a standard that justifies the actions that may impact any fundamental rights— and the court made a distinction between the two aspects of transparency. The first is creating a robust transparency framework to deter criminals, and the second is transparency, where the general public can participate in the decision-making process. In considering the first aspect, the CJEU stated that building a deterrent environment against illegal actions through enhanced transparency was an EU-wide recognized purpose of general interest.[300] This purpose was held to be adequate to authorize interference in the rights of privacy provided in

[297] WM and Sovim at para 44
[298] *Ibid* at para 42-43
[299] *Ibid* at para 42
[300] *Ibid* at para 59

Articles 7 and 8 of the CFREU.[301] The EU's regulations on AML and counter-terrorism financing are comprehensive and sustainable in protecting its system's usage for criminal activities. Furthermore, AMLD 5 ensured that transparency is essential for maintaining accountability and achieving this main objective.[302] Therefore, public access to BOI is necessary to enhance transparency and cover the goals and objectives of government and society, as this would allow more scrutiny by the general public, press, and Civil Society Organizations (CSOs) and ultimately would uncover the UBOs behind the complex corporate structures using shell companies to hide their illicit activities.[303]

Regarding the second aspect of transparency, the CJEU took a nuanced stance, holding that while the principle of transparency is fundamentally integral to democratic societies and is anchored in the EU's primary law, specifically within Articles 1 and 10 of the *Treaty on European Union* (TEU),[304] its application in this context did not automatically serve as a general EU interest. The Court argued that the transparency outlined in the TEU principally refers to the disclosure of information about public authorities, such as governmental activities, and does not extend to the private sector, such as the disclosure of names of BOs together with the nature of their interests.[305] However, the court did not dismiss the relevancy of transparency but recognized the broader objective of combatting money laundering and terrorist financing that constitutes a public interest and could justify interference. Therefore, to ensure that this measure was appropriately justified, the court proceeded to assess the proportionality of this measure.

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[301] *Ibid* at para 48
[302] AMLD 5, *supra* note 259, rec 4
[303] *Ibid*, rec 35
[304] *Treaty on European Union,* [2012] OJ C 326/13
[305] Abdurakhimov, *supra* note 239 at 20

**Balancing exercise by the Analysis of the proportionality of interference**

Following this, the court proceeded to a balancing exercise to determine whether the measure in question, which provided access to the public regarding BOs, was appropriately balanced with the main objective of combating money laundering and terrorist financing. The court applied a three-step proportionality test to assess whether the interference with privacy rights is justified in light of the objectives pursued. The first step analyzed whether the provision under review—public access to BOI as specified by AMLD 5-- was acceptable for accomplishing its stated purpose. The court ruled that giving the general public access to data on BOs increases business transparency and plays a key role in fostering a less favourable environment for illegal acts, such as money laundering and terrorist financing.[306] Consequently, the court concluded that the establishment of PBORs is an appropriate measure to fulfill the general interest goal pursued in this instance, effectively supporting the directive's objectives of increasing security and transparency within the EU financial system.[307]

After this, in the second step, the court evaluated whether the measure in issue was absolutely essential for attaining the claimed public interest. It underlined that where numerous viable solutions are available to fulfill legitimate goals, the least onerous should be adopted.[308] The court examined this by evaluating the modifications from the previous framework under the AMLD 4 where access to BOI was limited to people or organizations establishing a legitimate interest. This approach was examined to see whether extending access was necessary to effectively satisfy the EU's transparency and security goals. In defense of the provision, the Commission contended that the idea of "legitimate interest" presented considerable issues both in legal

[306] WM and Sovim at para 67
[307] *Ibid* at para 74-76
[308] *Ibid* at para 63

definition and practical implementation and this led to the removal of the condition to establish a legitimate interest in order to access BOI.[309] The Court rejected the commission's argument and held that since it is difficult to establish in what circumstances or conditions the legitimate interest exists, the EU Parliament should not have allowed access to the information to be publicly available.[310]

The commission further relied on Recital 30 of the AMLD 5,[311] which argues for wide public access to BOI to improve civil society's involvement in investigating and combatting financial crimes and terrorist funding and for prospective business partners to make informed business decisions. However, the court recognized the importance of requiring legitimate interest in order to have access to CSO for preventing money laundering and terrorist financing[312] and pointed out-- while comparing the seriousness of interference against the main goal of preventing money laundering-- that the responsibility to prevent money laundering actually lies with public authorities and financial institutions. These authorities previously had pre-defined access to BOI as having a legitimate interest under Article 30 of AMLD 4 prior to its amendment by AMLD 5. Thus, the court concluded that giving access to any member of the general public is not strictly necessary to achieve the objectives stated in AMLD 5.

Finally, in the third step, the court examined the provision giving public access to BOI with the requirement of "proportionality stricto sensu."[313] This means that a stricter evaluation was done examining whether the purposes of this public access were suitably balanced against the implicated fundamental rights and whether there were suitable safeguards in place to avoid possible abuses

[309] *Ibid* at para 68 -72
[310] *Ibid* at para 72
[311] AMLD 5, *supra* note 259, rec 30
[312] WM and Sovim at para 72
[313] Proportionality stricto sensu is a final test of proportionality. It is used by courts for balancing or justifying the benefits of a measure against its impact on the fundamental rights. See Aharon Barak, *Proportionality: Constitutional Rights and their Limitations* (Cambridge: Cambridge University Press, 2012)

of the rules.[314] The Commission, citing Recital 34 of the AMLD 5, argued that the directive clearly outlines what information should be publicly released and that these requirements are adequate to avoid misuse concerns.[315] Furthermore, the Commission, together with the European Parliament and the Council, argued in support of the derogation alternatives offered under Article 30(9) of the AMLD 5, which provided exceptions where such access would expose BO to disproportionate risks such as fraud, kidnapping and harassment. They operated as additional protective measures against abuse thus, increased the proportionality of the public disclosure obligation.[316] However, the Court noted that Article 30(5) of the AMLD 5 provided that the information published via public registers shall contain "at least" the data listed in that article, implying that member states may elect to disclose more information.[317] This interpretation led the Court to determine that the rules providing general public access to BOI lacked the requisite clarity and precision needed to fulfill the strict applicable legal criteria.[318] This ambiguity might possibly lead to variations in the implementation across various member states, undercutting the directive's goal to standardize transparency measures throughout the EU.

In summary, the court held that allowing access to BOI to any member of the general public is disproportionate to the purposes achieved by AMLD 5.[319] Therefore, in the dispute between corporate transparency and privacy protection, the CJEU sided with privacy[320] and ruled that the 2018 amendment to article 30(5)(c) of AMLD 4, which provided access to BOI to the public, was invalid and breached the CFREU, and only those who have a legitimate interest (justified and lawful reason) could access to such information.

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[314] WM and Sovim at para 77
[315] AMLD 5, *supra* note 259, rec 34
[316] WM and Sovim at para 79
[317] *Ibid* at para 81
[318] *Ibid* at para 82
[319] *Ibid* at para 86
[320] Zigo, *supra* note 268

**Critical Analysis of the CJEU Judgment**

The CJEU's ruling in the *WM and Sovim* case has sparked a critical debate and garnered mixed opinions regarding BOI transparency and the interference with individual privacy rights under Articles 7 and 8 of the CFREU. As noted, this ruling invalidated provision 30(5)(c) of 5AMLD, reasoning that it enabled a large number of people and businesses to find out about their BOs, and such data publicly available could be retained or abused.

One of the appellants was WM, who was a public figure serving as chief executive of a company and as director for various others, showed a concern that open access to his information is a concerning issue. Therefore, he wanted his private information to be safeguarded from the public. He had owned 35 commercial firms and one property investment.[321] As noted, he claimed that his personal information, if made public, could be used to kidnap, threaten, or harass him. However, as Egan notes, being such a public individual the personal information WM was trying to hide from the public was already accessible with his comprehensive biography available online and also through his active public profile such as LinkedIn with thousands of followers where WM willingly shared tons of personal data and showing indications of his wealth.[322] Therefore, this shows an angle of the complexity of balancing transparency and privacy, and it also raises concerns that the reason to hide personal information that is already available in the public domain might be just to avoid scrutiny, when scrutiny is in the larger public interest, especially in the context of BO framework to combat money laundering and terrorist financing.

With regard to the seriousness of the interference with Article 7 and 8 rights, commentators have noted that the evaluation done by the court is completely speculative as there is no evidence

[321] Opinion of Advocate General Pitruzzela, Joined Cases, C-37/20 and C-601/20, WM and Sovim SA v Luxembourg Business Registers, ECLI:EU: C:2022:39 at 6

[322] Paul Egan, "Who are you?" (June 2023) *Law Society Gazette* at 44, online: <https://www.lawsociety.ie/globalassets/documents/gazette/gazette-pdfs/gazette-2023/june-2023-gazette.pdf>.

highlighting kidnapping or tracing of an individual's wealth.[323] The court provides no explanation or evidence to support the argument about BOI ever being misused in such a way, nor does it explain why public availability of information about any person's wealth or economic activities would be a serious infringement of privacy rights.[324] In addition to this, the court considers that public registries contribute to preventing money laundering, yet it considers the benefits insufficient to justify the infringement of privacy rights, potentially undermining the additional increment of deterrent effect that comes from public access. Rather, the court simply concluded that the interests of transparency could not justify the objective of general interest by interfering with fundamental rights by granting access to the general public for BOI.[325]

The court further said that AMLD 5, which required the information to be available to the public, has certain legal standards, such as that the data shared must be accurate and must include certain information such as name, month and year of birth, and nationality. However, it allowed member states to provide other additional information; in the court's view, such irrelevant information should not be exposed because an important limitation was sharing only the information that is relevant to the main objective without disclosing other sensitive data.[326] This was in spite of the fact that AMLD 5 has provided a balanced approach by providing exceptions to limit access to the information in case of potential risks to BOs.[327] The court said that the optional provisions to restrict public access to BOI did not adequately balance fundamental rights

[323] Open Ownership, *supra* note 243 at 32
[324] Matthew Stephenson, "The European Court of Justice's Invalidation of Public Beneficial Ownership Registries: A Translation" (13 December 2022), online: *The Global Anticorruption Blog* <https://globalanticorruptionblog.com/2022/12/13/the-european-court-of-justices-invalidation-of-public-beneficial-ownership-registries-a-translation/>.
[325] WM and Sovim at para 62
[326] *Ibid* at para 51
[327] AMLD 5, *supra* note 259, art 30(9)

or provide sufficient safeguards without providing any explanation.[328] Additionally, the court said that despite the limited information provided in the register, it could allow anyone to draw up a profile of a natural person to misuse because there are no strict measures to protect the data from being misused,[329] but without an explanation on why those exemptions would not address the issues adequately. Also, the court may overstate the public importance of privacy over this particular information. In the UK, for example, there are over a million companies, but most people are not actually worried about their information being made public, as only a small number of 270 BOs have requested such an exception.[330] This highlights the trust of corporate entities will not necessarily be lost in a system which allows public access to BOI in order to balance transparency and privacy in the larger public interest.

Furthermore, AMLD 5 also provided that the processing of such information is subject to the rules of GDPR[331] to ensure that the rights to privacy are not violated in making such information publicly accessible.[332] By way of this requirement, the court concluded that it satisfies the "principle of legality" and that the disclosure of such information does not violate the rights,[333] but it also creates confusion by concluding that it does interfere with the rights protected by the CFREU in Articles 7 and 8. Therefore, such access should not create unjustified interference with any of the privacy rights as the court acknowledged the importance of public transparency and the additional deterrence effect that comes from public access, in comparison to the previous AMLD 4.

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[328] WM and Sovim at para 86
[329] *Ibid* at para 41
[330] Knobel, *supra* note 233 at 10
[331] General Data Protection Rights (GDPR) governs how the personal data of individuals in the EU may be processed and transferred.
[332] WM and Sovim at para 53
[333] *Ibid*, para 47-49

Moreover, the court rejected the arguments of the EU Council and the EU Commission that the lack of a clear definition of "legitimate interest" could lead to arbitrary decisions.[334] This means that if legitimate interest had been defined, it would have led to complexity and inconsistency either by being too restrictive or too lenient in proving a legitimate interest for individuals. However, despite this, the court did not create a balance between transparency and proportionality and left the term "legitimate interest" undefined. and stated that there was no need for general public access to the BO registry.

The court further stated that combatting financial crime is the responsibility of the relevant authorities, not the general public or civil society.[335] Sadly, investigative authorities have limited access to resources, and in some countries, people do not rely on them to disclose such information. Also, the volume of workload on FIUs has kept increasing, which is likely to overload these government authorities and affect their efficiency.[336] Previously, journalists and CSOs could easily access the register; however, now it is challenging as it requires them to establish a legitimate interest in order to access that information.[337] This can lead to delays in the work of these organizations and create hurdles in timely access to information either by making it subject to the discretion of the authority to grant access or by having a very narrow definition of who is deemed to have a legitimate interest such as only shareholders of the company.[338] Argentina provides an illustrative example of the significance of public access to BOI for maintaining accountability. Shareholder information in the commercial registry of (Buenos Aires) was always publicly

[334] *Ibid*, para 71
[335] *Ibid*, para 83
[336] Abdurakhimov, *supra* note 239 at 27
[337] Open Ownership, "European Parliament Issues Proposals to Improve Beneficial Ownership Data Access and Quality" (29, March 2023), online (blog): <https://www.openownership.org/en/blog/european-parliament-issues-proposals-to-improve-beneficial-ownership-data-access-and-quality/>.
[338] Knobel, *supra* note 233 at 22

accessible. However, after findings of corruption against the Vice President in 2013, the registry access was denied to the public and was allowed only to those with a "legitimate interest" in the process. However, attempts to obtain a court order to access shareholder information failed, which required the Supreme Court to get involved.[339] This underscores the importance of public access to BOI for promoting transparency and ensuring accountability and suggests the court may have been short-sighted or undervalued the public/CSO contribution.

Transparency International[340] criticized the court's decision to restrict public access to BOI along these lines:

> "Access to beneficial ownership data is vital to identifying – and stopping – corruption and dirty money. The more people who are able to access such information, the more opportunity there is to connect the dots. We have seen time and time again … how public access to registers helps uncover shady dealings. At a time when the need to track down dirty money is so plainly apparent, the court's decision takes us back years."[341]

The idea is a simple one: where there is transparency, active members of civil society can independently trace the ownership of any company, much like a neighborhood watch for those whom they find suspicious. Also, having a PBOR allows the investigative authorities of third countries to use BO registers to trace the real owners and functioning of a company without getting into the hustle of paperwork or dealing with any bureaucracy.[342]

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[339] *Ibid*, at 43

[340] Transparency International is the global civil society organization leading the fight against corruption. It is working in over 100 countries to promote transparency, accountability and integrity. See "Transparency International" online: <https://www.transparency.org/en/about>.

[341] Transparency International, "EU Court of Justice, delivers blow to beneficial ownership transparency" (22 November 2022), online: <https://www.transparency.org/en/press/eu-court-of-justice-delivers-blow-to-beneficial-ownership-transparency>.

[342] French National Assembly, "Question No. 3974 - Assemblée Nationale" (13 December 2022), online: <https://questions.assemblee-nationale.fr/q16/16-3974QE.htm>.

Another important element is the transparent functioning of media in covering BO stories since an independent media will have no conflict of interest and journalists can act as watchdogs; otherwise, ambiguity in ownership of media companies will also result in conflict of interest and biased reporting of truth. However, the court did not give any recognition to the necessary role of investigative journalists, media, and CSOs, and it also did not recognize the freedom of information at all, which is also a human right enshrined in Article 19 of the ICCPR,[343] that advocates for a free and open society. Such recognition would have been significant for the court to maintain a balance between transparency and privacy.[344]

Furthermore, the court provided access to law enforcement and financial institutions to BOI to conduct due diligence, making them solely responsible for addressing money laundering. This stance makes it hazy as to why the court has then ignored the role private-public organizations such as civil media and investigative journalists play in preventing financial crimes. However, the CJEU was limited to going back and assessing the AML provisions completely about whether the measures were strictly necessary for preventing money laundering. Since the case was referred to the CJEU by the Luxembourg district and parameters were confined only to assessing the compliance with CFREU. Nonetheless, it still had this responsibility to uphold the "respect the rights, observe the principles and promote the application thereof."[345]

Lastly, the AMLD 5 directive proviso mentioned that the public is to be permitted to access "at least" the data required to identify the BO;[346] it is clear that the provision was talking clearly about the bare minimum information in order to identify so the court should have imposed a

[343] ICCPR, *supra* note 244, art 19
[344] Ádám Földes, "Personal data protection has a sole purpose, and shielding corporate…" (5 September 2023), online: <https://www.transparency.org/en/blog/personal-data-protection-has-sole-purpose-cjeu-ruling-beneficial-ownership-transparency>.
[345] *Ibid*
[346] AMLD 4, *supra* note 258, art 30(5)

limitation under which no more additional information should be provided than necessary rather than completely considering it as invalid. Also, the court's LinkedIn statement clarified that journalists will still have access to BOI.[347] However, this right allows journalists to place standing requests with BO registers, which can inform BOs who have requested information about them. This makes this right of no use to the journalists since it does not contribute to the independent working nature and can also lead to threats.[348]

In conclusion, the CJEU in the *WM and Sovim* case considered that public access to registers is not a sufficiently tailored AML tool as it did not provide a balance between transparency and privacy. As a result, several EU member states, including Belgium, Luxembourg, Malta, the Netherlands, Germany, Ireland, and Austria, closed their registries to limit public access to BOI.[349] Where public access is prohibited, the only companies enjoying secrecy are those that are engaged in complicated ownership structures that hide BOs behind offshore shell companies. On average, EU countries that closed their registries in response to the court's ruling provided three times more financial secrecy to the world by increasing the difficulty of uncovering ownership structures than those countries that chose not to close their registries,[350] such as France, which continued public access to allow access for those with legitimate interests.[351]

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[347] Court of Justice of the European Union, "Review of Judgment in Joined Cases C-37/20 and C-601/20" online: <https://www.linkedin.com/posts/european-court-of-justice_review-of-the-judgment-in-joined-cases-c-activity-7005505340528033792-1Pnt/>.
[348] Egan, *supra* note 322 at 43
[349] Solvej Krause, "Who should have access to beneficial ownership registries? ECJ revokes public access in the EU but confirms access for journalists and civil society" (26 January 2023), online (blog): <https://star.worldbank.org/blog/who-should-have-access-beneficial-ownership-registries-ecj-revokes-public-access-eu-confirms>.
[350] Florencia Lorenzo, "Split among EU countries over beneficial ownership ruling mirrors rankings on Financial Secrecy Index" online: <https://taxjustice.net/2023/07/13/split-among-eu-countries-over-beneficial-ownership-ruling-mirrors-rankings-on-financial-secrecy-index/>.
[351] France Assemblée nationale, "Question n°3974" (13 December 2022), online: <https://questions.assemblee-nationale.fr/q16/16-3974QE.htm>.

Restricting public access to BO registries resonates with the concept of "giving with one hand and taking it with another" and "will leave fraudsters rubbing their hands with glee"[352] because it creates secrecy for those individuals who create complexity by using corporate structures and hide behind offshore companies. Also, such restriction makes it very difficult, or almost impossible, for CSOs and foreign authorities to access the data. Additionally, this also raises unfair competition by allowing private institutions to have access, whereas journalists have to place standing requests with BO registers.[353] There is currently a proposal for AMLD 6 that appears to respond to the CJEU's decision, providing that access is limited to only persons with a legitimate interest, including journalists, media, and CSOs[354] without providing a definition of legitimate interest. No matter what happens, this is not a long-term solution.

Recently, as discussed earlier, the federal government of Canada passed Bill C-42[355] to promote transparency and deter financial crimes such as money laundering and tax evasion. This action aligns with global trends of the public BO framework that contribute towards more financial responsibility and transparency. Therefore, it is highly relevant to explore the possibilities of privacy concerns that might be raised regarding Canada's BOI registry, to which I will now turn.

**Potential Privacy Issues with Canada's Beneficial Ownership Registry**

The passage of Bill C-42[356] promises to strengthen corporate transparency and the integrity of Canada's economy and financial system by creating a free, publicly accessible registry where

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[352] Jon Felce, "Transparency torpedoed by CJEU", (6 January 2023), online: *The Law Society Gazette* <https://www.lawgazette.co.uk/practice-points/transparency-torpedoed-by-cjeu/5114670.article>.

[353] Egan, *supra* note 322 at 43

[354] Jenny Gesley, "Beneficial Ownership Transparency's Evolving Paradigms: An Overview of the Latest Reforms in the US, the EU, and the UK (Part 2)" (20 February 2024), online (blog): <https://blogs.loc.gov/law/2024/02/beneficial-ownership-transparencys-evolving-paradigms-an-overview-of-the-latest-reforms-in-the-us-the-eu-and-the-uk-part-2/>.

[355] S*upra* note 8

[356] *Ibid*

federally-incorporated corporations are required to report detailed information about ISC in order to verify the data and prevent money laundering via complex layers of shell companies. However, the prospect of public access to the registry may raise privacy concerns regarding the protection of personal data and its misuse, similar to those raised in *WM and Sovim*. The CJEU decision serves as a lesson for Canada to carefully consider the balance between transparency and privacy by aligning registry practices with privacy rights enshrined in the *Canadian Charter of Rights and Freedoms*.[357] The CJEU decision signals to Canada and other countries putting BOI registries in place that they should carefully consider the need to strike a balance between transparency and respect for privacy law, including the right to privacy enshrined in section 8 of the *Canadian Charter of Rights and Freedoms*.[358] This balanced approach would ensure that BOs are adequately safeguarded by the broader public interest, similar to the global practices discussed while balancing transparency and respect for privacy in personal information. Below I will discuss whether such a balance is capable of being struck for BOI transparency under the new C-44 regime.

**Ensuring balance between transparency and privacy in Canada's Beneficial Ownership framework**

The protection of privacy, particularly privacy in one's personal data, is generally framed as a right in western liberal democracies such as Canada and comparator states being discussed here. However, these rights are not absolute and can have restrictions imposed on them for legitimate public interests. This is especially important in the context of identifying UBO, where the need for disclosure must be weighed against the right to privacy. The challenge lies in finding the balance rather than debating whether these rights can be limited. We must ensure that any limitations placed on privacy and data protection are not inherently unlawful or unethical but instead carefully

[357] *The Charter*, *supra* note 155
[358] *Ibid*, s 8

considered based on their impact on interests. As commentators have offered, achieving this balance requires a proportionality lens, an approach that acknowledges privacy's significance while recognizing situations where privacy intrusion can be justified to achieve important government objectives—specifically, in this case, for preventing, detecting, investigating the misuse of legal entities, law enforcement and social accountability in the AML space.[359]

To be proportional, regulatory measures must be structured so that they infringe privacy rights minimally in order to achieve their objectives.[360] This becomes particularly significant when considering the matters of transparency and the need to combat corruption. Although privacy rights hold great significance, they are not immune to restrictions, especially when balanced against compelling public interests such as promoting transparency in financial matters and tackling corruption.[361]

Before the passing of Bill C-42,[362] concerns were expressed that disclosure requirements should align with the principles set out in both the *Privacy Act*[363] and the *Canadian Charter of Rights and Freedoms*.[364] For example, a letter was sent by the CBA[365] to the Chair of the House of Commons Standing Committee on Industry and Technology regarding Bill C-42,[366] showing concerns similar to those raised in the EU to consider the implications of the law in the larger public interest of preventing money laundering. They urged the House of Commons to ensure that

[359] Open Ownership, The B Team & The Engine Room, "IV. How Can We Balance Beneficial Ownership and Privacy Concerns?" (20 May 2019), online: <https://www.openownership.org/en/publications/data-protection-and-privacy-in-beneficial-ownership-disclosure/iv-how-can-we-balance-beneficial-ownership-and-privacy-concerns/>.
[360] Office of the Privacy Commissioner of Canada, "Submission to the Federal Consultation on the Future of Privacy Protection in Canada" (10 August 2023), online: <https://www.priv.gc.ca/en/opc-actions-and-decisions/submissions-to-consultations/sub_fc_230810/?wbdisable=true>.
[361] Stephenson, *supra* note 324
[362] S*upra* note 8
[363] *Privacy Act*, R.S.C., 1985, c. P-21
[364] *The Charter*, *supra* note 155
[365] *Supra* note 234
[366] S*upra* note 8

the legislative achieves the main goal of transparency while respecting the right to privacy and confidentiality of personal information. However, in order to uphold and promote transparency, it requires a balance between the privacy interest of individuals and the public interest in the disclosure of personal information.

In balancing transparency with privacy in Canada's BO registry, several mechanisms are employed to protect sensitive information and respect privacy rights. Only part of the information collected by authorities is put in the public domain, as necessary to support the purposes of identifying BO. Information such as the name, address for service or residential address, and description of interest of each ISC would be accessible to the public and be searchable, whereas other sensitive information, such as date of birth, and citizenship, would only be accessible to law enforcement officials, tax authorities, and other regulatory bodies upon request while protecting against unreasonable intrusions into personal privacy.[367] Additionally, it also provides safeguards to restrict public access to BOI in case of risks such as threat to life, safety, and security or in cases where the BO is a minor. Moreover, it also provides protections for whistleblowers who volunteer to report on financial crimes, promoting transparency and accountability to protect their safety and privacy.[368] This ensures that information that is necessary to achieve the aims of BOT is only disclosed to the public, which can allow authorities to identify suspicious patterns and deter criminals from being attracted to Canada.

Canada's approach accords with that in provinces that have enacted BO registries and with that of other states. Private companies in BC under the *British Columbia Business Corporations Act*[369] are required to establish a transparency register, but access to the register is not made public.

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[367] House of Commons Debates, 44-1, No 177, (1st Session 31 March 2023), at 1005 (Hon. François-Philippe Champagne) online: <https://www.ourcommons.ca/DocumentViewer/en/44-1/house/sitting-177/hansard>.
[368] Government of Canada, *supra* note 220
[369] *Business Corporations Act*, SBC 2002, c 57.

Recently, the BC government, through Bill 20, known as the *Business Corporations Amendment Act*,[370] will create a publicly accessible BO registry of private BC companies to increase corporate accountability. Such public registry of BC aims to balance privacy concerns similar to the BC Land Owner Transparency Register (LOTR) by disclosing only a portion of the information to the public that is already required in the existing register such as full name, year of birth, citizenship status and if an individual is not a Canadian citizen or permanent citizen then their citizenship.[371] However, other information such as date of birth, personal residence address, social insurance number, tax numbers and other detailed descriptions of ISC will not be made public but only accessible to law enforcement authorities. Additionally, it also provides measures to protect the safety of individuals below the age of 19 years, those who are not able to control or manage their affairs or those who can establish a reasonable threat to their life or physical or mental health.[372]

A similar practice is also followed in Quebec by establishing a public corporate transparency registry through Bill 78,[373] which was introduced to combat financial crimes and enhance transparency under the *Legal publicity of Enterprises*[374] (LPA). This Bill amends the LPA and introduces several reporting obligations with the Québec Enterprise Registrar (REQ)[375] to disclose their ultimate beneficiaries, which includes names, domiciles or professional addresses, types of controls or the percentage of shares held by ultimate beneficiaries.[376] However, other

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[370] Bill 20, *Business Corporations Amendment Act*, 4th Sess, 42nd Parl, 2023 (assented on 31 May 2023), SBC 2023, c 12, online: <https://www.bclaws.gov.bc.ca/civix/document/id/bills/billsprevious/4th42nd:gov20-1>.
[371] *Ibid*, s 399.44
[372] *Ibid*, s 399.52 - 399.53
[373] Bill 78, *An Act to mainly improve the transparency of enterprises*, 1st Sess, 42nd Leg, Quebec 2021, (assented to 8 June 2021), SLQ 2021, c 19
[374] Government of Quebec, *Act respecting the legal publicity of enterprises*, CQLR c P-44.1, online: <https://www.legisquebec.gouv.qc.ca/en/document/cs/P-44.1>.
[375] The Québec Enterprise Registrar (Registraire des entreprises du Québec or REQ) is a register responsible for registering, maintaining and disseminating data for all enterprises doing business in Québec. It is also considered a public information bank available to the public easily and free of charge. See "About the Enterprise Register" online: <https://www.quebec.ca/en/businesses-and-self-employed-workers/find-information-about-enterprise/search-enterprise-register/about>.
[376] *Supra* note 374, s 98

information such as domicile address if a professional address is declared by an individual, dates of birth, and names and domiciles of minors who are ultimate beneficiaries of the registrant are not made public.[377]

Furthermore, the UK has also implemented a similar system[378] by restricting access to personal addresses, and dates of birth to law enforcement and competent authorities.[379] Also, several other countries such as Ireland, Netherlands, Malta and Portugal, in order to address privacy concerns and mitigate the risks of PBORs, have implemented measures by limiting the data, such as full date of birth, and residence address, to be protected from identity theft, robbery, fraud, and kidnapping.[380]

Most international jurisdictions also collect the same information regarding their BOs that CBCA does, such as names, dates of birth, address, and nationality. It is pertinent to mention here that such information provided about BO does not constitute "personal information" under Canadian privacy law, and as a general rule, the information provided about individuals in business, professional, and official capacity does not fall in the ambit of personal information.[381] Such difference is crucial to understanding the scope of privacy law and its applicability to personal information.

Moreover, many countries have provided exemptions from public disclosure in the case of minors for the protection of their safety. Such exemptions have been adopted in Austria, the

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[377] *Ibid*, s 99.1

[378] Department for Business Innovation & Skills, "Transparency & Trust: Enhancing the Transparency of UK company ownership and increasing trust in UK Business, Government Response" (2014) at 33-34, online: <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/304297/bis-14-672-transparency-and-trust-consultation-response.pdf>.

[379] Brian Beamish*, Office of the Information and Privacy Commissioner of Ontario Submission on Consultation Paper: Strengthening Corporate Beneficial Ownership Transparency in Canada*, (2020) at 14

[380] *Ibid* at 13

[381] *Ibid* at 4

Netherlands, the UK and Finland in case of minors or in case there is a serious risk/threat to life.[382] However, this is subject to providing some supporting documents. Although this limits some information from public disclosure, this ensures that crucial data remains available to competent authorities such as law enforcement agencies aligning Canada with global best practices. All of these practices reflect global efforts toward a balanced approach enhancing transparency to combat financial crimes while protecting individuals' privacy and security risks.

Having explored the functional steps taken regarding privacy protection in Canada's jurisdiction and other states, the next step is to review the federal government's use of information and briefly examine how the federal BO registry is proposed to comply with the Federal *Privacy Act*.[383] Additionally, it's also crucial to consider whether Bill C-42 is in compliance with the Charter and balances transparency while protecting individuals' privacy. This will allow some preliminary conclusions to be drawn about whether the C-42 regime is vulnerable to a privacy-based court challenge like that in *WM and Sovim.*

**Bill C-42: A Balance between Transparency and Privacy**

The federal government's use of information is regulated by the *Privacy Act*.[384] It protects personal information held by a government institution from public disclosure and ensures that personal information collected by the government is directly linked to one of its ongoing programs or activities.[385] The *Privacy Act* requires personal information to be used under sections 7 and 8 without consent. Sections 7 and 8 of the *Privacy Act* require the personal information to be used

[382] *Ibid* at 15
[383] *Supra* note 363
[384] The Privacy Act is a Canadian Law whose purpose is to protect the privacy of individuals with respect to their personal information. This act regulates how the federal government institutions collect, use, disclose and manage such information. It also provides individuals with the right to access their personal information. See Alexander Kenny Scott & Colin H.H McNairn, *Privacy Law in Canada* (Butterworths, 2001).
[385] *Supra* note 363, s 4

only for the purposes for which it was collected. The federal government requires consent to share information, but it provides exceptions for the disclosure of information without consent under section 8(2), where it is authorized by an Act of Parliament or a legitimate interest. These sections constitute the right to access or use the information consistent with the purposes for which it was collected. However, it is left to the government institutions to decide by weighing actions against individuals' rights to privacy and proceed only if it satisfies the privacy protection of individuals.[386]

In my view, the proposed BO registry under Bill C-42 that contains BOI to be disclosed to non-governmental actors, including the public, financial institutions, and entities with statutory due diligence obligations, aligns with these principles of transparency by ensuring that the disclosure is authorized by legislation and have a clear legislative purpose. Public disclosure of BOI is necessary to achieve greater corporate transparency of BO, which is crucial in reducing unlawful or illegal activities and enhancing a fair business environment. Due to the requirements under the act requiring the collection, use and disclosure of BOI as part of the BO registry and also because of the larger public interest in preventing money laundering and enhancing transparency and accountability within corporate governance, C-44's modes of transparency appear to be in compliance with basic principles of privacy and the disclosure mechanisms. It enhances the openness of corporate ownership and represents a balance between the need for information to be recorded in the registry while protecting private data, by providing some exceptions to manage the disclosure. The exceptions provide safeguards to sensitive information such as date of birth and country of citizenship while allowing public access to only essential information such as the name of ISC, description of interest or control and address of service or residential address in order to

[386] Government of Canada, "Archived - Privacy and Data Protection Guidelines - Use and Disclosure of Personal Information" online: <https://www.tbs-sct.canada.ca/pol/doc-eng.aspx?id=25498§ion=html#:~:text=Paragraph%208(2)(b>.

identify and verify BOs. This ensures that the information and type of sensitivity of the personal information collected, used, and disclosed under the proposed BO registry is consistent, proportionate and in compliance with the *Privacy Act* because the personal information is used only for the purposes for which it was collected and is authorized by statute. Thus, it protects personal information from any misuse, promotes transparency and protects the right to privacy. Having discussed Bill C-42, compliance with the *Privacy Act*, now it is essential to discuss section 8 of the Charter and the Department of Justice Charter Statement which plays a significant role in evaluating how privacy rights are protected against unreasonable search and seizure and how Bill C-42 is aligned with the Charter.

**Section 8 of the Canadian Charter of Rights and Freedoms**

The Charter under section 8 states that "Everyone has the right to be secure against unreasonable search or seizure."[387] It provides protection against unreasonable search or seizure, ensuring that any search or seizure is deemed reasonable and justified only if it is authorized by law, the law itself is reasonable, and it has been carried out in a reasonable manner.[388] This means that "what is not authorized by law violates the charter, but what is authorized by law does not."[389] The protection provided by section 8 is essential in maintaining a balance between an individual right to privacy and the government's interest in enforcing the law. This section provides protection against unreasonable search and seizure only over places, things and information in which individuals have a reasonable expectation of privacy.[390] If there is no reasonable expectation of privacy then section 8 is not violated.[391]

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[387] *The Charter,* s 8
[388] *R. v. Collins*, [1987] S.C.J No 15, [1987] 1 S.C.R. 265, at 278 (S.C.C)
[389] Steve Coughlan, *Criminal Procedure,* 4th ed (Toronto: Irwin Law, 2020) at 74
[390] Hamish Stewart, "Normative Foundations for Reasonable Expectations of Privacy" (2011) 54 SCLR 12, online: <http://digitalcommons.osgoode.yorku.ca/sclr/vol54/iss1/12>.
[391] Coughlan, *supra* note 389 at 76

In the case of *Hunter v. Southam Inc.* the Supreme Court held that the purpose of section 8 was to protect the individual's reasonable expectation from unjustified state intrusion.[392] This delicate balance is the cornerstone of section 8, which ensures that Canadians are protected from any unjustified intrusion into their personal lives while allowing the government to perform its duties and responsibilities within the limits of the law. Having discussed section 8 of the charter, now it is essential to explore the Department of Justice Charter compliance statement to examine whether Bill C-42 is in compliance with the Charter rights and whether the justifications provided are adequate.

**Department of Justice: Charter Compliance Statement**

In the context of Bill C-42, the Department of Justice Charter statement plays a crucial role in ensuring that the privacy in Bill C-42 aligns with fundamental rights provided under the Charter, particularly under section 8.[393] The Charter guarantees the right to privacy under section 8 which protects against unreasonable search or seizure. The government provides a statement to inform the public that they do not foresee any Charter issues arising out of this bill.[394]

The Charter statement explained how the Bill C-42 provisions related to the collection and disclosure of BOI are consistent with section 8 of the Charter. The government outlines that the bill requires corporations to provide public access to the information, which includes information such as name, date of birth, service address and description of interest of each ISC. However, other sensitive information, such as full date of birth, residential address, and citizenship, is only made accessible to law enforcement authorities.[395]

[392] *Hunter et. al. v. Southam Inc.,* [1984] 2 SCR 145
[393] Government of Canada, *supra* note 220
[394] *Ibid*
[395] *Ibid*

The government highlighted in a statement that the bill targets only limited necessary information to identify ISC, which is crucial for preventing the misuse of corporations, combatting money laundering and providing timely access to law enforcement agencies. Given the limited nature of information, the government asserts that the disclosure is justified, particularly within the commercial and regulatory context where privacy expectations are generally lower to reflect the need for transparency. Additionally, the statement mentions that incorporation under CBCA reflects a choice to enter a highly regulated sector sphere of activity, where a higher level of public scrutiny is expected, which reduces the expectation of privacy in corporate governance by making the public disclosure of BOI justifiable and with regulatory objective.[396]

Moreover, the statement also highlights that the creation of a public registry aligns with international standards to improve corporate transparency and allow individuals and financial institutions to make more informed decisions about the companies with whom they are doing business[397] Thereby justifying the disclosure of BOI in the larger public interest. Lastly, it mentions that Bill C-42 provides safeguarding measures that align with international standards to restrict public access to BOI in case of minors or in cases where there is a serious risk/threat to life. This ensures that Bill C-42 balances transparency with privacy by providing exceptions from public disclosure for those who may be at risk.

In summary, the government's Charter statement compliance provides reasonable justification for Bill C-42's alignment with section 8. I agree with the government's view, considering the larger public interest, and limited nature of information subject to public disclosure. Additionally, the inclusion of safeguarding measures adopted under Bill C-42 for the protection of minors and those who may be at risk of life. This reinforces its consistency with

[396] *Ibid*
[397] *Ibid*

section 8 of the Charter and balances transparency with privacy. Following this, the next step is to assess whether there is a reasonable expectation of privacy for the information disclosed in the public registry of BO proposed under Bill C-42,

**Reasonable Expectations of Privacy**

Under Bill C-42, it is essential to understand the lower reasonable expectation of privacy in the commercial and regulatory sectors where privacy interests are diminished due to the nature of the business and regulatory requirements. However, to understand the concept of reasonable expectation of privacy in corporate information and address the scope and limitation of privacy rights, particularly in relation to BO, I will briefly discuss the cases of the Supreme Court of Canada in the next section. These cases will provide information regarding the extent of privacy protection and will evaluate whether there is a reasonable expectation of privacy in the corporate information.

In the *R. v. Plant* case,[398] the Supreme Court dealt with the issue of privacy of electric consumption records and addressed whether police constituted a violation of section 8 by accessing such records. The police had received a tip regarding the cultivation of marijuana and used utility records to confirm the electricity usage.[399] The accused argued that it violated his right under section 8. The court emphasized that reasonable expectation of privacy must consider the nature of information and the context in which it was collected. The court found that the electricity consumption record did not engage any higher privacy interests because it did not reveal any personal details about a person's life but only revealed information that was more administrative and less sensitive in terms of privacy. The court referred to "biographical core data which individuals in a free and democratic society would wish to maintain and control from the

[398] *R. v. Plant*, [1993] 3 SCR 281
[399] *Ibid* at 285

dissemination of the state" as a key factor in determining the reasonable expectation of privacy.[400] Furthermore, the court also highlighted that the relationship between the accused and the commission did not constitute any privacy because the records were prepared in a commercial context and were not subject to any privacy protection under section 8.[401] This principle highlights that privacy interests are diminished, especially when it comes to commercial or regulatory contexts.

In addition to this, the *British Columbia Securities Commission v. Branch*,[402] case is another example of how privacy interests are diminished in highly regulated sectors. The Supreme Court of Canada upheld the powers granted under 128(1) *Securities Acts*[403] to the security regulators, which allows them to compel the production of documents from individuals such as security traders, and brokers involved in the securities market for investigation and to ensure compliance. The court provided reasoning that "in a highly regulated industry, such as the security market, the individual is aware, and accepts justifiable state intrusions."[404] This case highlights that when individuals engage in highly regulated sectors, they understand that they have lower expectations of privacy, and such state interferences are necessary, logical, and inevitable for regulatory compliance and balancing transparency and privacy.

Also, in another case of *R. v. Gomboc*,[405] the Supreme Court of Canada discussed how the reasonable expectations of privacy are diminished. The case involved police requesting a company to install a Digital Recording Ammeter (DRA) without a warrant to assess the pattern of electricity for growing marijuana in a house. The accused argued it was against section 8 "to be secure against

[400] *Ibid* at 293-295
[401] *Ibid* at 294
[402] *British Columbia Securities Commission v Branch*, [1995] 2 SCR 3
[403] *Securities Act*, S.B.C, 1985, c 83, s. 128(1)
[404] *British Columbia Securities Commission v Branch*, [1995] 2 SCR 3 at para 64
[405] *R. v. Gomboc*, 2010 SCC 55

unreasonable search or seizure."[406] However, the court concluded that the information stored in DRA was administrative, indicating the consumption of electricity usage, and it did not reveal any details about his private life.[407] The court further mentioned that this does not contain any biographical core data that society would want to protect from the dissemination of the state. This reinforces that not all information expects the same level of privacy protection, especially when the data is in commercial and regulatory contexts that have lower expectations of privacy.

Similarly, these principles apply in the context of Bill C-42 and reflect that the reasonable expectations of privacy are lower due to the highly regulated commercial environment. As highlighted above, the Supreme Court's decision in *R. v. Plant* establishes that privacy protections are reserved only for the information that constitutes the biographical core of an individual's personal life. Thus, the information that is disclosed under Bill C-42 concerning corporate transparency does not reach the level of the biographical core, and therefore, it attracts less stringent privacy considerations. Furthermore, in the other two cases, *British Columbia Securities v. Branch* and *R. v. Gomboc*, it is established that the reasonable expectation of privacy is diminished, especially when the information is disclosed in a highly regulated sector. These cases reinforce that privacy expectations are inherently lower under Bill C-42 due to the highly regulated commercial sector that Bill C-42 regulates for ensuring corporate transparency.

It is important to note that the C-42 regime has not yet been contested or considered by the courts. However, it seems clear from the foregoing that privacy interests in BOI are diminished in the commercial and regulatory context. Also, I would argue that there is no reasonable expectation

[406] Hamish Stewart, "Normative Foundations For Reasonable Expectations of Privacy" (2011) 54 SCLR 12, online: <http://digitalcommons.osgoode.yorku.ca/sclr/vol54/iss1/12>.
[407] *R. v. Gomboc*, 2010 SCC 55, at para 43

of privacy under Bill C-42 as the information disclosed is far from the notion of a biographical core. Thus, at least on an initial view, Canada's Bill C-42 appears to be Charter-compliant.

**Practical Benefits of Balancing Privacy and Transparency in the Operation of Public Beneficial Ownership Registries.**

Concerns have been expressed about the level of privacy intrusion inherent in making UBO data publicly accessible, but such registries provide safeguard measures and exceptions and also reveal data that is limited. Despite concerns about privacy due to legal challenges within the EU, the demand for such transparency remains robust. Many jurisdictions, including the UK, Canada and EU member states, have shown that it is feasible to balance privacy concerns with the need for transparency by implementing measures to safeguard sensitive personal information, restricting access to that class of data to law enforcement and government authorities, while maintaining public access to essential data.[408] Both FATF and OECD, while providing guidance on implementing an effective BO framework, also recognize the need for balancing transparency with privacy. [409] Notably, even in the face of EU court rulings, many member states, such as Latvia[410] have chosen to maintain public registries due to the larger interests of ensuring market integrity, protecting democratic processes, and preventing tax abuse.[411] This evolving landscape suggests that the strategic benefits of PBORs in promoting a transparent, accountable, and stable financial

[408] Department for Business United Kingdom Energy & Industrial Strategy, "Supplementary ECHR memorandum: amendments made to parts 1-3 Economic Crime and Corporate Transparency Bill (BEIS measures)", (30 January 2023), online: <https://www.gov.uk/government/publications/economic-crime-and-corporate-transparency-bill-2022-echr-memoranda/supplementary-echr-memorandum-amendments-made-to-parts-1-3-economic-crime-and-corporate-transparency-bill-beis-measures>.

[409] FATF, "Guidance on Beneficial Ownership of Legal Persons" at 42 (10 March 2023), online: <https://www.fatf-gafi.org/en/publications/Fatfrecommendations/Guidance-Beneficial-Ownership-Legal-Persons.html>.

[410] "Latvijā arī turpmāk informācija par patiesajiem labuma guvējiem būs publiski pieejama, (6 April 2023), online: <https://www.tm.gov.lv/lv/jaunums/latvija-ari-turpmak-informacija-par-patiesajiem-labuma-guvejiem-bus-publiski-pieejama>.

[411] Lorenzo, *supra* note 350

environment are being increasingly acknowledged, outweighing the arguments for stringent privacy that often serve the interests of those favoring financial secrecy.

An important benefit to public access to BOI is that it enhances data accuracy and integrity by facilitating the identification of errors or inaccuracies in the BO register. Although this is the responsibility of the government while conducting verification, this allows the public, who may have specialized knowledge, to identify suspicious activities and counterbalance what the government might miss.[412] More eyes enable more users to review and report. For example, the UK has had a public BO register since 2016, and having public access not only allowed the general public to report errors in the data but also allowed civil society groups such as Global Witness to identify inaccuracies in the UK public register.[413] Having such public access allows the general public to scrutinize the data and have more chances to mitigate the risks by raising the alarm about serious inaccuracies or errors in the registered data.[414] Furthermore, the public access to the registry is also essential in protecting journalists and activists[415] as this does not require them to place standing requests with BO registers, and it does not require them to provide their details in order to establish a legitimate interest which could later be tracked and pose serious life-threatening risks, as has occurred in Mexico,[416] Slovakia[417] and Malta.[418]

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[412] Open Ownership, *supra* note 243 at 25
[413] Knobel, *supra* note 233 at 6
[414] *Ibid* at 6
[415] *Ibid* at 19
[416] "Mexico: Call for investigation as number of murdered journalists rises" (1 June 2022), online: *Article 19* <https://www.article19.org/resources/mexico-murdered-journalists/>.
[417] Pavla Holcová Kubaniova Eva, "Four Years After Journalist's Murder, Slovakia Has Changed", (21 February 2022), online: *OCCRP* <https://www.occrp.org/en/a-journalists-undying-legacy/four-years-after-journalists-murder-slovakia-has-changed>.
[418] BBC, "Daphne Caruana Galizia: Two brothers guilty of killing Maltese journalist", *BBC News* (14 October 2022), online: <https://www.bbc.com/news/world-europe-63261744>.

**Conclusion**

This chapter discussed the significance of PBORs, analyzed CJEU's decision in *WM and Sovim* case and its criticisms, and discussed how Canada's Bill C-42 addressed privacy concerns by ensuring a balance between transparency and privacy within the framework of the Charter. As discussed, PBORs play a crucial role in enhancing transparency and promoting accountability. However, they raised privacy concerns in the EU, and the CJEU invalidated the provision that provided public access, citing that it allowed the misuse of BOI and infringed the fundamental rights enshrined in articles 7 and 8 of the CFREU that led in resulting in the shutting down of registries across the EU without sufficient evidence.

Critics of the court ruling pointed out that the Court followed a speculative means of evaluation, which not only lacked evidence for BOI ever being misused for fraud, kidnapping, or finding out any individual's wealth but also lacked an explanation of why finding an individual person's wealth or economic activities would be a serious invasion of privacy in the first place. In addition to this, the court created tension by concluding first that public access interfered seriously with privacy rights, and then it also acknowledged the deterrence effect of public access in recital 30 of AMLD 5, contributing to preventing the main goal of combatting money laundering and terrorist financing. However, this remained inadequately balanced in the judgment as the court did not provide any rationale for dismissing the preventive benefits of public access. Also, the court did not consider the exemptions provided in AMLD 5 but just asserted that those exemptions in article 30(9) of AMLD 5 did not protect against the risks of abuse.

Moreover, the court did not clarify the concern about the "at least" requirement to report which could have been resolved by making it clear that it would be impermissible to provide information more than necessary rather than nullifying it completely. Also, the court left the term

"legitimate interests" undefined, making it challenging and ambiguous for CSOs and others to establish legitimate interests. Additionally, restoring the requirement to legitimate interest poses a threat to risks of intimidation or threat to life as to request access to the BO register; it requires them to place a standing request with the BO registry, ultimately exposing their identities. This lacked a clear basis indicating a need for more specific rules for providing clarity and that respect both press freedom and privacy rights.

Overall, while the EU public access to the BO registry raised privacy concerns, however, Canada's BO framework has adopted a balanced approach, which means it may avoid the kind of privacy challenge that was mounted in the *WM and Sovim* case. As discussed above, the information collected in the commercial and regulatory sector does not constitute any biographical core data, and it carries a lower expectation of privacy. Similarly, the information disclosed under Bill C-42 is not considered private because it does not constitute any biographical core data and is administrative and less sensitive in nature. Along with this, specific safeguarding measures are also provided to limit sensitive information in case of minor or security risks and additionally, due to the larger public interest in preventing money laundering and terrorist financing. This aligns Canada's Bill C-42 with the global best practices and the principles mentioned in the Charter without compromising individuals' privacy unduly. This ensures that Canada's Bill C-42 is well-structured, balances transparency and privacy effectively and withstands any risks of privacy challenges similar to those seen in the EU, which prioritized privacy over transparency by restricting public access to BO registries. Considering the main goal of combating money laundering, the next chapter will discuss the different approaches of BO frameworks of the UK, U.S. and Canada to enhance transparency and privacy concerns. It will also discuss the challenges

of these BO frameworks for improving transparency and suggest recommendations for Canada's Bill C-42 in the subsequent chapter.

# Chapter 4: Beneficial Ownership Framework of UK, U.S and Canada

## Introduction

BOI is a fundamental yet multifaceted aspect of business and legal frameworks. In several countries, it plays an essential role in enabling accurate identification of the true identity of UBOs of business entities. It enhances accuracy, discourages anonymity and prevents the use of corporate structures for financial crime. Effectively understanding the role of BOI in combating money laundering and terrorist financing requires looking at the global guidance on BO and the current practices in place, in order to understand the similarity in trends and discrepancies. For my purposes this will assist in analyzing where further work is required to be done to tackle regulatory fragmentation in Canada's BO regime and to promote greater transparency and effectivity. Understanding international cooperation in the BO sphere is crucial to strengthening the existing BO framework and understanding how countries could help each other in fighting against crimes.

In this chapter, I will look at the different approaches to BOI frameworks across three countries that offer unique insights and effective strategies to enhance their approaches regarding increasing transparency to tackle money laundering. In particular, I will examine the BO framework of the UK, the U.S., and Canada. By examining the current guidance on BOI across these jurisdictions and reviewing Canada's BO regime, this chapter seeks to compare and highlight the main differences and challenges in BO frameworks. Furthermore, a comparative analysis will be done between Canada and the UK with its People with Significant Control (PSC) Register,[419] to discuss the challenges in the BO framework, approaches and the progress made to enhance transparency. In addition to this, the efforts of the U.S., with its recent implementation of the

[419] Government of U.K, "People with Significant Control Register" (9 November 2020), online: <https://www.gov.uk/guidance/people-with-significant-control-pscs>.

*Corporate Transparency Act* (CTA),[420] which introduces new BO rules, will be compared with Canada's new BO rules, through Bill C-42.[421]

**Overview**

The revelation of data leaks such as the Panama Papers,[422] FinCEN Files,[423] and more recently, the Pandora Papers,[424] and the Cullen Commission report[425] in Canada has starkly highlighted the misuse of corporate vehicles for money laundering and other illicit purposes. These series of leaks have exposed not only the inadequate compliance of companies but also the improper use of offshore financial services by various politicians and celebrities across the globe which have underscored the critical need for countries like the UK, U.S., and Canada to strengthen their regulatory framework to fight against money laundering.[426]

BOI registries are crucial tools in several countries for improving business transparency and combatting economic crimes including money laundering. As explored below, the UK takes the lead in maintaining its publicly available PSC registry, which mandates companies to reveal persons who have significant control.[427] The U.S., which has historically been slower in adapting transparency measures, has made notable progress with the implementation of the CTA.[428] This Act, which amends the *Bank Secrecy Act*,[429] establishes a registry of BO overseen by the Financial

[420] *Corporate Transparency Act,* 2021 [*CTA*]
[421] *Supra* note 8
[422] Bernstein, *supra* note 17
[423] FinCEN files are documents from the U.S Treasury's Financial Enforcement Network (FINCEN) that have been leaked to buzzfeed news and International Consortium of Investigative Journalists (ICIJ), "FinCEN Files" online: <https://www.icij.org/investigations/fincen-files/>.
[424] ICIJ, *supra* note 122
[425] Cullen, *supra* note 88
[426] Malcolm Aboud, "Federal government tables long-awaited legislation for a corporate beneficial ownership registry" (2023), online: <https://www.osler.com/en/blogs/risk/may-2023/federal-government-tables-long-awaited-legislation-for-a-corporate-beneficial-ownership-registry>.
[427] Hatchard, *supra* note 63
[428] CTA
[429] *The Bank Secrecy Act,* 31 USC 5311 [*BSA*]

Crimes Enforcement Network (FinCEN).[430] Under this Act, certain corporations, LLCs, and similar entities are required to disclose specific information about their BOs. Canada has used a decentralized strategy that aligns with larger trends. Recent changes to the CBCA[431] now require federally incorporated corporations to keep registries of substantial control. These registries are required to be made accessible to regulatory agencies. Despite the variety of approaches and frameworks, these measures reflect a global shift towards greater responsibility and accountability, with differences in implementation and accessibility and highlighting the balance between transparency and privacy concerns in the fight against financial crime. The UK government has maintained three BO registers. The first one is the PSC register, the second one is the Register of Overseas Entities (ROE), and the last one is the Trust Registration Service (TRS).

**The UK Persons with Significant Control Register**

The UK started its trajectory of BOT and accountability with the *Small Business, Enterprise and Employment Act* 2015[432], modifying the *Companies Act* 2006[433] which subsequently led to the development of the PSC register and had a huge impact around the world to promote BOT by making progress on BO registries.[434] In 2017, Ukraine and Denmark established their registers, and Ukraine became the first country to integrate their register with an open ownership database.[435] Also, this led the EU to adopt the 5th AMLD,[436] which required all EU member states to establish

[430] "The Financial Crimes Enforcement Network (FinCEN) is a bureau of the United States Department of the Treasury that collects and analyzes information about financial transactions in order to fight domestic and international money laundering, terrorist financing and other crimes."
[431] CBCA, *supra* note 24
[432] *The Small Business, Enterprise and Employment Act,* 2015 c. 26
[433] *Companies Act* 2006 c. 46
[434] Alice Powell, *Early Results: United Kingdom Beneficial Ownership (2018),* online (pdf)*:* <https://www.opengovpartnership.org/wp-content/uploads/2018/09/Early-Results_UK_Beneficial-Ownership_2018.pdf>.
[435] CIFAR, Beneficial Ownership: The State of Play (2017) at 2, online: <https://cifar.eu/wp-content/uploads/2017/03/Beneficial-ownership-the-state-of-play-2017.pdf>.
[436] AMLD 5, *supra* note 259

BOI via a public register, which was later struck down by the CJEU as being inconsistent with privacy laws.[437] There has never been a "legitimate interest" test like the EU[438] in the PSC register, but in case there is any serious concern regarding violation or intimidation for the PSC, such details are always accessible to the public.[439] The PSC register, which is an open ownership database for collecting and publishing BOI under an open data license, can be used by anyone without any restrictions.[440] It requires companies operating in the UK to reveal their true owners and keep the record updated and listed with Companies House, which assigns a registration number that could be used by anyone to look into the details of BOI.[441] This publicly accessible information provides records of the owners of companies operating in the UK. This ultimately provides transparency in the corporate environment to prevent opaque corporate structures. It became the first country in the world in 2016 to have a publicly accessible register and the first in the G20.[442] Before the creation of PSC, this information was only accessible through the organization's yearly returns, which shared the list of stakeholders. However, there was a possibility of the owners' identities being concealed.[443]

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[437] On November 2022, the Court of Justice of the European Union ("CJEU") ruled that unconditional access to information relating to the beneficial owners of EU-registered companies constituted an infringement of individual's rights. Therefore, CJEU revoked public access in the EU, but confirmed access for journalists and civil society. The CJEU's decision is considered in more detail in Chapter 3.

[438] The "legitimate interest" test was originally required by the EU's AMLD 4 in order to determine whether any member of the public had a valid reason to access beneficial ownership information. This requirement was removed by the fifth Anti-Money Laundering Directive AMLD 5, and it allowed access to the general public without establishing any legitimate interest. The UK never implemented such a test in its PSC register because no corporation moved an application to restrict access to the public based on some serious risks. Therefore, it has always been public and has never implemented such a "legitimate interest" test.

[439] Macfarlanes, "Transparency versus privacy: where will we end up on beneficial ownership registers?" (29 January 2024), online: <https://www.macfarlanes.com/what-we-think/in-depth/2024/transparency-versus-privacy-where-will-we-end-up-on-beneficial-ownership-registers/>

[440] Open Ownership & Global Witness, *Learning the lessons from the UK's public beneficial ownership register A joint briefing,* (October 2017) at 26

[441] United Kingdom, Department for Business & Innovation Skills, *Enhancing transparency of beneficial ownership information of foreign companies undertaking certain economic activities in the UK Enhancing transparency of beneficial ownership information of foreign companies*, (March 2016) at page 7

[442] Ali Shalchi, & Federico Mor, *Registers of Beneficial Ownership,* House of Commons Library, Number 8259 (6 April 2022) at 9 online (pdf): <https://researchbriefings.files.parliament.uk/documents/CBP-8259/CBP-8259.pdf>.

[443] *Ibid* at 10

### a) Registration requirements

All UK entities, Societates Europaeae (SEs), and limited liability partnerships (LLPs) are required to keep a register except eligible Scottish Partnerships (ESPs), Scottish Limited Partnerships, (SLPs) and Scottish Qualifying Partnerships, (SQPs), but they must file their PSC information into the central public register at the Companies House.[444]

A person must be registered as PSC if the person satisfies any of the five conditions which define a person (either an individual or entity) as having significant control over the company: directly or indirectly holding more than 25% of the shares in the company; directly or indirectly holding over 25% of the voting rights in the company; directly or indirectly holding the right to appoint the majority of the board of directors; having the right to or actually exercising significant influence or control over the company; and exercising significant influence or control over a trust or firm that itself meets the control conditions, where that trust or firm is not a legal person.[445] Such information is required to be filed in the Companies House, where it becomes a part of the Public record.[446]

### b) Disclosure requirement

The UK PSC register will include the individual's name, month and year of birth, nationality, service address, usual residential address (which must not be disclosed when making the register available for inspection or providing copies of the PSC register unless it's also used as their service address), details of their control over the company and date when he or she became a PSC in relation to the company.[447] The Companies House will hold such PSC information, and will make

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[444] Norton Rose Fullbright, *Regulation Around the World Beneficial Ownership Registers,* (March 2023), online (pdf): <https://www.nortonrosefulbright.com/-/media/files/nrf/nrfweb/publications/v3-50108_emea_brochure__regulation-around-the-world---beneficial-ownership-registries.pdf?revision=c8e6fc90-bf31-4999-9698-00cb17a9861a&revision=5249855980737387904>

[445] United Kingdom, Department for Business & Innovation Skills*, supra* note 439 at 7

[446] Shalchi & Mor, *supra* note 442 at 9

[447] *Supra* note 419

it publicly accessible to everyone through their central register.[448] Also, it is mandatory to confirm if any application has been forwarded to keep any individual's information protected from public access.[449]

**c) Threshold for Disclosure**

In the UK, determining the BO threshold is considered a crucial part of AML efforts aimed at promoting transparency and accountability in corporate structures. To be recognized as a PSC, an individual must hold a 25% interest in a company, whether directly or through other entities.[450] This criterion is consistent across EU registers,[451] although there may be variations in how UBOs are identified. In the UK, the PSC Register categorizes disclosures into three groups based on ownership levels: 25-50%, 51-75%, and over 75%, providing insight into control dynamics within companies.[452] This 25% threshold adheres to standards set by the FATF, striking a balance between transparency needs and avoiding needlessly onerous burdens on companies.[453] The rationale behind this benchmark is that ownership below this level typically does not confer authority to influence or control a company's resolutions.

To address ways of bypassing transparency requirements, the UK's regulatory framework includes measures to identify individuals who may wield influence without meeting the numerical threshold of 25% requiring them to be registered, ensuring a thorough approach to identifying PSCs.[454] Companies and their officials are required to identify, record, and keep the PSC

[448] *Supra* note 441 at 7
[449] Norton Rose Fullbright, *supra* note 444
[450] *Supra* note 419
[451] Council of the European Union, press release, "Anti-money laundering: Council and Parliament strike deal on stricter rules" (18 January 2024), online: <https://www.consilium.europa.eu/en/press/press-releases/2024/01/18/anti-money-laundering-council-and-parliament-strike-deal-on-stricter-rules/>.
[452] Transparency International Canada, Publish What you Pay, Canadians for Tax Fairness, *Comparison of Information Fields Amongst Beneficial Ownership Registries in International Jurisdictions,* (2020) at 2.
[453] Government of U.K, "Economic Crime and Corporate Transparency Act 2023: Factsheets" (1 March 2024), online: <https://www.gov.uk/government/publications/economic-crime-and-corporate-transparency-act-2023-factsheets>.
[454] *Ibid*

information updated on their records as well as the public register managed by Companies House.[455]

**d) Reporting requirements**

In the UK, both companies and certain business entities are required to record and update details of PSC on the company's own register within 14 days if any changes are made,[456] and also confirm the identity of PSC over the company and their information in the public register to confirm that such information is accurate when it has not been updated in a year.[457] Furthermore, the information on PSC is accessed almost 20,000 times a day. It can be retrieved through the Companies House Application Programming Interface (API),[458] allowing anyone to analyze and cross-check the full data. This also enables investigative bodies such as journalists and civil societies to cross-check with other datasets regarding those who are politically exposed or on sanctions and also point out any discrepancies.[459] In case of failure to disclose where a person is found exercising significant control, then the person and company could face legal consequences.[460] This is meant to incentivize attention to ensuring up-to-date records of ownership and any oversight.

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[455] *Ibid*

[456] UK Government, "People with Significant Control (PSCs)" (9 November 2020), online: <https://www.gov.uk/guidance/people-with-significant-control-pscs#:~:text=Almost%20all%20information%20about%20your,we%20can%20hold%20your%20register>.

[457] UK Government, "Confirmation Statement Guidance" (15 January 2018), online <https://www.gov.uk/guidance/confirmation-statement-guidance#:~:text=Every%20company%2C%20including%20dormant%20and,company%20during%20the%20review%20period>.

[458] "Companies House API provides access to all of the public data we hold on companies free of charge. This includes information about companies, officers and people of significant control and more". See "Companies House API" online: <https://www.api.gov.uk/ch/companies-house/#companies-house>.

[459] Powell, *supra* note 434 at 5

[460] *Supra* note 453

**e) Violation or Penalties**

In the UK PSC register, the enforcement mechanism is rigid, reflecting the significance of non-compliance. Companies are required to provide accurate information to Companies House initially by filing annual confirmation statements (annual returns) and allowing access to or providing copies to the register.[461] Afterwards, they must keep this information up to date every 12 months. In case of any failure to update information or comply with any requests from Companies House regarding information, there are criminal offences that could result in imposing a fine and a sentence of imprisonment up to 2 years.[462]

**Register of Overseas Entities**

The second one is the ROE, which came under the *Economic Crime (Transparency and Enforcement) Act* (ECCTA).[463] The ECCTA is based on the PSC's rules to prevent money laundering and promote greater transparency in the UK property market.

**a) Registration requirements**

Where any overseas entity, either being a corporation, partnership or any legal person such as a trust registered overseas, owns or leases UK real estate, they must be registered in the ROE with the BOI with Companies House so that UBO of any overseas entity could be identified through such publicly accessible register. This ROE is applicable to all UK real estate, and therefore, it can have an effect on the following land registers.

a) In England and Wales, His Majesty's Land Registry.

b) In Scotland, the General Register of Sasines and the Land Register of Scotland.

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[461] U.K Government, "Guidance on filing company's confirmation statement" online: <https://www.gov.uk/guidance/confirmation-statement-guidance#how-to-file-your-confirmation-statement>.
[462] *Supra* note 419
[463] *Economic Crime (Transparency and Enforcement) Act,* 2022 c. 10 [*ECCTA*]

c) In Northern Ireland, the Land Register.[464]

**b) Threshold requirements**

Any overseas entity must disclose its BOs if an individual or entity owns or holds more than 25% of the shares or voting rights, holds the power to appoint or remove a majority of the board of directors of the entity or has significant control over an entity.[465]

**c) Access to the Reporting information**

In the ROE, the access to information is publicly accessible through Companies House.[466] However, in the case of non-UK trusts holding property through an overseas entity, they are required to register with ROE, but access to their information is not made public because the Companies House will share the information on the trusts with HMRC.[467] This guarantees that Companies House gets the same information from an overseas entity, where an individual trustee is a registrable BO, as when a legal entity trustee is a registrable BO.

**d) Disclosure requirements**

The ROE requires overseas entities to report detailed information about BOs to Companies House. This information included names, dates of birth, nationality, residential address and service address of BOs along with their nature of control. Also, it requires the date on which the individual became BO of the overseas entity. Moreover, if the BO is a legal entity, then information such as name, registered address, legal form and the law under which it is governed must be disclosed.[468]

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[464] Ross Caldwell, "UK Registers vs Human Rights" (9 December 2022), online: <https://www.morton-fraser.com/insights/are-uk-beneficial-ownership-registers-incompatible-fundamental-human-rights>.
[465] Government of the United Kingdom, "Register an Overseas Entity" (2024), online: < https://www.gov.uk/guidance/register-an-overseas-entity>.
[466] Ocorian, "Understanding the UK beneficial ownership registers: what information is publicly accessible" (10 August 2023), online: <https://www.ocorian.com/insights/understanding-uk-beneficial-ownership-registers-what-information-publicly-accessible>.
[467] *Ibid*
[468] *Supra* note 419

### e) Reporting requirements

Overseas entities are required to file an update statement one year after its registration and every year after thereon with Companies House to confirm or update any changes. The statement is required to be filed within 14 days after the due date. However, it can be filed earlier if the overseas entity needs to update any information.[469] This ensures that information provided by overseas entities remains up to date and contributes towards promoting transparency in the ownership of UK property by overseas entities.

### f) Violation or Penalties

In case of any non-compliance with ROE, both the entity and its officers can face fines and penalties. If the overseas entity makes a disposition in contravention of the restriction, fails to provide an annual update of the information on the register, or intentionally provides false, misleading or deceptive information to the register, then a daily fine of up to £2,500 can be imposed on the entity and its officers. Additionally, in case if a person knowingly provides false information, then he can face imprisonment of up to two years. Such penalties underscore the importance of adhering to the ROE rules.[470]

**Trust Registration Service**

The third BO register maintained by the UK government is the TRS, which is maintained by His Majesty's Revenue and Customs (HMRC). Unlike corporations, trusts are used by private individuals to manage family-owned assets, especially those belonging to minors or vulnerable family members.[471]

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[469] *Ibid*
[470] Carl McConnell, Abiola Motajo, "Registration of Overseas Entities holding UK Property" (December 2023), online: <https://www.lexology.com/library/detail.aspx?g=4e16451e-a454-4e7e-88dc-079d5885d775>.
[471] United Kingdom, Department for Business, Energy & Industrial Strategy, *Government Response to the Call for Evidence: Register of Overseas Entities Beneficial Ownership* (March 2018) at 4

### a) Registration requirements

All express trusts need to be registered whether they have a tax liability or not. Also, non-UK express trusts, like those who acquire land or property in the UK or those who have established new businesses by having at least one trustee resident in the UK, are required to register with TRS.[472] However, there are exceptions for certain trusts, which include charitable trusts, trusts imposed by legislation or court, estates and trusts created on death, etc.[473]

### b) Disclosure requirements

The trust register requires the details of the trusts including the name of the trust, the date on which the trust was set up, a statement of account of the trusts describing the trust asset and identifying the value of each category of the trust assets at the date of settlement, trust tax residence, and location where the trust is administered. In addition to this, it requires names of BOs and potential beneficiaries, which includes full names, dates of birth, nature and individual's role in that trust, national insurance number or unique taxpayer reference (if any).[474]

### c) Access to the reporting information

In the TRS, access to the reporting information is only available to those who have a "legitimate interest" such as law enforcement agencies and investigative bodies; such access could also be refused by HMRC in case there is a serious apprehension of fraud, blackmail, or intimidation.[475]

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[472] United Kingdom, HM Revenue & Customs, "Register a trust as a trustee" online: <https://www.gov.uk/guidance/register-a-trust-as-a-trustee>.
[473] United Kingdom, HM Revenue & Customs, "TRSM23000 – Trust Registration Service Manual" (9 August 2023), online: <https://www.gov.uk/hmrc-internal-manuals/trust-registration-service-manual/trsm23000>.
[474] Irwin Mitchell, "UK Trusts Register" online: <https://www.irwinmitchell.com/personal/wills-trusts-estates/trusts/uk-trusts-register#responsible>.
[475] Macfarlanes, "Beneficial ownership registers: recent developments" (22 March 2024), online: <https://www.macfarlanes.com/what-we-think/2024/beneficial-ownership-registers-recent-developments/#:~:text=The%20Register%20of%20Overseas%20Entities%20(ROE)%20regime%2C%20which%20requires,transparency%20landscape%20since%20August%202022>.

The government said, "Publishing these person details would not be proportionate and effective, especially as disclosure would undermine the family confidentiality."[476]

**d) Reporting requirements**

Trusts are required to register details with TRS within 90 days of the creation of the trust or within two years of death in case of a will trust created by a person's will.[477] Furthermore, any amendments to the trust details are also required to be updated within 90 days.[478]

**e) Violation or Penalties**

In case of failure to update or comply with reporting obligations within a certain period of time. HMRC may impose a fixed penalty of £5000. However, the penalty will not be imposed if the failure to comply was not deliberate.[479]

Having explored the three registers above, it becomes essential to briefly highlight the challenges in the PSC register that impede its effectiveness in achieving full transparency objectives.

**Challenges of the UK Public Beneficial Ownership Framework Register.**

The UK has made great efforts to enhance transparency by establishing a PBOR. However, major challenges to effectiveness remain in the UK. First, over 5 million companies[480] have been registered with Companies House, but there are very minimum efforts for verification and analysis of the information provided. One major reason is the reliance of Companies House largely on self-

[476] Sovereign Group, "UK to Introduce Beneficial Owner Register for Overseas Companies" online: <https://www.sovereigngroup.com/uk-to-introduce-beneficial-owner-register-for-overseas-companies/>.
[477] United Kingdom, HM Revenue & Customs, "Register a trust with HMRC" online: <https://www.gov.uk/trusts-taxes/registering-a-trust>.
[478] United Kingdom, HM Revenue & Customs, "Manage Your Trust's Registration Service" (20 December 2023), online: <https://www.gov.uk/guidance/manage-your-trusts-registration-service
[479] United Kingdom, HM Revenue & Customs, "When HMRC Will Issue a Penalty Charge for Not Registering or Maintaining a Trust" (20 December 2023), online: <https://www.gov.uk/guidance/when-hmrc-will-issue-a-penalty-charge-for-not-registering-or-maintaining-a-trust>.
[480] Blaine Peakall, "5 million companies in the UK" (21 December 2021), online: <https://www.informdirect.co.uk/opinion/5-million-companies-in-the-uk/>.

reporting.[481] Second, the ambiguity of subjectivity in the definitions of significant influence and control is an issue. Third, searchability is a problem because searching parameters are limited to determine the complex ownership structure.[482] Also, a significant rise during the pandemic was seen in fraudulent companies with sanctions on Russia, and this also resulted in an increase in overseas companies in the UK to evade controls. This underscored the need for strict efforts to prevent money laundering and terrorist financing.[483]

**Recent Changes and Developments**

The UK has continued to make significant changes to enhance transparency. Recently, there have been some changes under the ECCTA[484] as of March 2024, which was notoriously flawed, had no verification system and was significantly abused.[485] Changes particularly focused on enhancing identity verification, stronger checks on company names, more power for the registrar to investigate and share information with law enforcement and other agencies, increase in Companies House fees, new rules for registered office addresses, new lawful purpose statements and requirements to provide additional shareholder information and restrictions on the use corporate directors.[486] In addition to this, a requirement was also made to provide a registered email address (which will not be made publicly available) for the Companies House to communicate with the company.[487]

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[481] Martin Kenney, "Can The UK Teach The US How To Manage Beneficial Ownership Registers" (April 17, 2024) IFC Review at 17-18

[482] *Ibid*

[483] Deborah Sabalot, "Fight against money laundering collides with the right to privacy" (2023), Financial World at 51-52

[484] ECCTA

[485] Nikki Blair, "New Identity verification requirements for directors and others" (28 March 2024), online: <https://www.lewissilkin.com/en/insights/new-identity-verification-requirements-for-directors-and-others>.

[486] U.K Government, "Changes at a glance" online: <https://changestoukcompanylaw.campaign.gov.uk/changes-at-a-glance/>.

[487] U.K Government, "Confirmation statement changes" online: <https://changestoukcompanylaw.campaign.gov.uk/confirmation-statement-changes/>.

Moreover, changes were also made in ROE to confirm the identity of non-UK trusts that hold UK land. The ROE under ECCTA acts as a deterrent to those who want to hide their illicit money in land or properties in the UK.[488] This has empowered Companies House to verify the ID of BOs and also to question any information submitted and request more information from shareholders if required to ensure the accuracy of information and transparency.[489] This requires foreign entities to provide information regarding any entity that holds land in the UK, so as to ensure there is information on BOs and register with Companies House.[490] The changes were made to expand the registration of all corporate trustees, which previously required if the corporate trustee was subject to its own disclosure requirements (SODR), but now, regardless of its registration status in its own jurisdiction, it is required to register.[491] Also, the ROE has been extended to uncover the UBO of the land, which previously focused on the BO of overseas entities, not on the landowners.[492] With the recent changes complete, the UK is currently working to deal with any loopholes or gaps for an effective land ownership registry to focus on trusts by suggesting some registration timelines for certain post-settlor deaths and establishing a lower threshold requirement for the registration of a trust.[493] Having discussed the UK BO frameworks, it is now essential to discuss the U.S. BO framework that has adopted a different approach towards corporate transparency and BO disclosure.

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[488] Mike Ward, "Register of Overseas Entities —What, why and when" (21 November 2022), online: <https://companieshouse.blog.gov.uk/2022/11/21/register-of-overseas-entities-what-why-and-when/>.
[489] U.K Government, "Register of Overseas Entities: approach to enforcement" (20 May 2024), online: <https://www.gov.uk/government/publications/register-of-overseas-entities-approach-to-enforcement/register-of-overseas-entities-approach-to-enforcement>.
[490] *Ibid*
[491] Jennifer Smithson, Clare Wilson, Klara Kronbergs, "Beneficial ownership registers: recent developments" (March 25, 2024), online: <https://www.lexology.com/library/detail.aspx?g=4de1d8ef-42d7-49f2-a72b-9cf41573a063>.
[492] *Ibid*
[493] Macfarlanes, "Beneficial ownership registers: recent developments" (22 March 2024), online: <https://www.macfarlanes.com/what-we-think/2024/beneficial-ownership-registers-recent-developments/#:~:text=The%20Register%20of%20Overseas%20Entities%20(ROE)%20regime%2C%20which%20requires,transparency%20landscape%20since%20August%202022>.

**United States**

The U.S., long seen as a stronghold of financial confidentiality, has played a crucial role in facilitating the hiding of illegal cash via complex corporate structures. The lack of strict regulations on BOI in several states has made it easier for individuals to use legal structures, such as LLCs, to launder significant sums of money, particularly in the high-end real estate sector. A recent Global Financial Integrity report[494] highlighted money laundering of over 2.6 billion USD, which was suspiciously channeled through commercial properties using various shell companies.[495] This alarming situation spurred the U.S. Treasury Department's FinCEN to adopt procedures to trace the BOs behind high-value, all-cash real estate transactions. Shockingly, investigations discovered that a considerable proportion of these transactions included businesses previously reported in suspicious activity reports.[496] More than two million domestic corporations and LLCs are created each year, with the majority being formed in states without transparency or reporting requirements.[497] Also, it has been found previously that states like Delaware and Nevada are frequently labeled as "business-friendly,"[498] which has exacerbated these issues, making it simpler to form untraceable businesses in the U.S. than in practically other states.[499] In the 2016 Mutal

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[494] Global Financial Integrity, FACT Coalition, & Anti-Corruption Data Collective, *Money Laundering Risks in Commercial Real Estate: An Analysis of 25 Case Studies,* (1 May 2024).

[495] It is consistent with the previous report by Transparency International Canada on money laundering in the real estate sector in Toronto and Vancouver as well, which highlighted how illicit funds were used to buy commercial and residential properties in Canada from 2016 to 2018. See *supra* note 78 at 12.

[496] Alexandra, S Bieler, "Peeking Into The House Of Cards: Money Laundering, Luxury Real Estate, And The Necessity Of Data Verification For The Corporate Transparency Act's Beneficial Ownership Registry" (2022) 27:1 J Corp Fin L 196, online: <https://ir.lawnet.fordham.edu/jcfl/vol27/iss1/4/>.

[497] CTA, Preamble, s 6402(1)-(2)

[498] Delaware has been considered business-friendly due to its flexibility in corporate laws, professional knowledgeable Judges, developed case law and efficient corporate services. See Amy Simmerman et al., "Delaware's status as the favored Corporate Home: Reflections and Considerations" Harvard Law School Forum on Corporate Governance (8 May 2024), online <https://corpgov.law.harvard.edu/2024/05/08/delawares-status-as-the-favored-corporate-home-reflections-and-considerations/>. Nevada is considered business-friendly due to significant tax benefits, privacy protections, liability protection for corporate officers and directors, and favorable legal environment. See Alexander A. Graham, "Nevada Doesn't Have Corporate or Personal Income Taxes: Should I form there? (13 May 2024), online <https://www.pillsburypropel.com/guidance/nevada-company-formation>.

[499] Bieler, *supra* note 496 at 196

Evaluation Report, FATF pointed out that despite having a strong AML framework, the U.S. was considered as non-compliant with Recommendation 24—Transparency and BO of legal persons.[500] It represented a major vulnerability in access to adequate, accurate, and current BOI. Recognizing the urgent need for change, the U.S. has made legislative advances to reduce these vulnerabilities by enacting the CTA[501] to enhance transparency. This Act is a cornerstone of wider attempts to update the *Bank Secrecy Act,*[502] which involves the adoption of advanced measures, including specialist subcommittees and whistleblower programs intended at improving the U.S.'s AML strength.[503] This CTA (which amended the BSA as part of the AML act in the 2021 *National Defense Authorization Act* (NDAA)[504] created reporting obligations for entities to enhance the U.S. corporate transparency framework, close loopholes, empower law enforcement agencies institutions and regulatory bodies to address deficiencies of the AML framework. The aim was to protect the economy and U.S. national security from bad actors and financial systems and prevent various mechanisms of corruption, tax evasion, money laundering, fraud, and other illicit activities.[505] The new CTA rules created an obligation for federal corporations, LLCs, and similar entities (including foreign entities that use shell companies or other opaque corporate structures to hide illicit money) to report BOI or ultimate controllers of such organizations[506] in a secure non-public database where regulations regarding BOI in a corporate registry will be organized and

[500] FATF, *Anti-Money Laundering and Counter-Terrorist Financing Measure: United States, Fourth Round Mutual Evaluation Report* (2016) at 18
[501] CTA
[502] BSA
[503] Lawrence E. Ritchie, "The Pandora Papers: associated risks and the rising importance of beneficial ownership" (2021), online: <https://www.osler.com/en/blogs/risk/november-2021/the-pandora-papers-associated-risks-and-the-rising-importance-of-beneficial-ownership>.
[504] *National Defense Authorization Act for Fiscal Year 2024,* Pub L No 118-31, 137 Stat. 136 (2023)
[505] Thomson Reuters, "New Report: US is catching up with beneficial ownership" (24 January 2024), online: <https://www.thomsonreuters.com/en-us/posts/corporates/beneficial-ownership-report-2024/>.
[506] Robert Appleton, Jason Saltsberg, & Brian Roe, "Reporting Beneficial Owners under the Corporate Transparency Act" (10 December 2023), online: (blog) The Harvard Law School Forum on Corporate Governance, <https://corpgov.law.harvard.edu/>.

operated by the FinCEN. The CTA not only shifts the burden of declaring BO from financial institutions to the organizations themselves but also creates significant penalties for non-compliance.[507]

Comprehending the compliance requirements for BOI under the CTA necessitates a clear understanding of the definition of a "beneficial owner." The legislation specifies which individuals qualify as BOs, a critical element in ensuring accurate reporting and adherence to the new regulatory framework. This comprehension is fundamental for reporting entities required to disclose BO under the CTA, as it directly influences the reporting process, and the accuracy of the information provided.

**a) Definition of Beneficial Ownership**

The CTA[508] in the U.S. has a two-pronged approach to defining “beneficial owners” including both direct and indirect methods of control and ownership. Under the first approach, “beneficial owner” is defined as any individual with at least 25% ownership in a legal entity.[509] Under the second approach, it includes any individual who directly or indirectly controls or exercises substantial control over a reporting entity.[510] Although substantial control is left undefined in the CTA, the Treasury Regulations define “substantial control” to mean any individual who is a senior officer, which includes a President, CFO, General Counsel (GC), CEO, COO,[511] or any individual who has the power to either appoint or remove any officers, or any individual who has the ability to make very important decisions in terms of the nature, scope, attributes, expenditure, investments, ventures, incentives, entry or termination of the contracts of the business,

[507] United States Code, 31 U.S.C, s 5336(c)(8)
[508] CTA
[509] 31 U.S.C. s 5336(a)(3)(A)
[510] *Ibid*
[511] Code of Federal Regulations, 31 C.F.R, s 1010.380(d)(1)(i)(A)

amendments to any governance documents or if there is any other form of substantial control over a reporting company.[512] In order to determine if any individual owns or controls, directly or indirectly, at least 25%, a reporting company would have to first identify the types of ownership interest and then see if any one of the types of interest exceeds 25%; such ownership could be equity, stock, voting rights a capital or profit interest, convertible instruments, or any other mechanism used to create ownership interest. There are certain exceptions to the definition of the BO, which include a minor child, a nominee, an intermediary, a custodian or agent, an employee, an inheritor, or a creditor.[513]

**b) Reporting Entities**

Companies that are required to report certain BOI are called reporting entities. There are two types of reporting companies: Domestic Reporting Companies and Foreign Reporting Companies:

1) Domestic companies are corporations that include LLCs or any other entities that are created by the filing of a document with a secretary of state, territory, or Indian tribe.
2) Foreign reporting companies are those that are established under foreign law but are registered to conduct their business by the filing of a document with a secretary of state or similar office.[514]

Furthermore, FinCEN takes the position that the broad definition of a domestic reporting company includes other companies beyond traditional corporate structures, including LLPs, limited partnerships (LPs), and business trusts because such entities are created by filing with the secretary of state or similar office.[515] There are 23 entities that are exempted from the reporting

[512] 31 C.F.R. s 1010.380(d)(1)(i),
[513] 31 U.S.C. s 5336(a)(3)(B)
[514] *Ibid*, s 5336 (a) (11)(A)(i)-(ii)
[515] Financial Crimes Enforcement Network (FinCEN), "Fact Sheet: Beneficial Ownership Information Reporting Notice of Proposed Rulemaking" (December 07, 2021), online: <https://www.fincen.gov/news/news-releases/fact-sheet-beneficial-ownership-information-reporting-notice-proposed-rulemaking>.

requirements, which include government entities, large operating companies, publicly traded banks, credit unions, other financial institutions, registered investment companies and advisors, pooled investment vehicles, and registered broker-dealers and exchanges.[516]

FinCEN imposes no limit on the number of BOs that reporting companies must disclose. Therefore, companies are required to report every BO who meets the criteria of BO. The objective is that mandating every individual being reported will not only aid in preventing money laundering or making complex corporate structures more difficult but will uphold the standards of financial accountability and integrity.[517] The new rule comes into force from January 1, 2024, and companies registered before this date will have until January 2025.[518] Companies registered after this date will have 90 days, and those registered on or after January 1, 2025, have to file their initial report within 30 days. As initial reports are filed, companies are obliged to update the registry within 30 days in case of any error or changes in their BOI.[519]

**c) Reporting information**

Each reporting company will have to report BOI for the BO or a company applicant who is an individual filing the document that establishes the reporting company or registers a foreign reporting company or any individual who is responsible for directing or controlling such filing[520]

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[516] 31 U.S.C. s 5336 (a)(11)(b)

[517] Tracy Moore, "Understanding the New US Beneficial Ownership Reporting Requirements" (8 January 2024), online: <https://resources.fenergo.com/blogs/understanding-the-new-us-beneficial-ownership-reporting-requirements>.

[518] 31 C.F.R. s 1010.380(a)(1)(iii), 31 C.F.R. s 5336(b)(1)(B) requires the reports of reporting companies formed or registered before January 1, 2024, (the effective data of the regulations) to be filed not later than two years from the date, but the statute does not preclude FinCEN from adopting a shorter deadline.

[519] *Ibid*, s 1010.380(a)(2)(i). The CTA requires updates to be filed no later than one year after a change regarding any reported information but does not preclude a shorter deadline. 31 U.S.C. 5336(b)(1)(D).

[520] Jeffrey S. Dinerstein, Carl A. Valenstein, Gregg S. Buksbaum, "Corporate Transparency Act: Beneficial Ownership Reporting Requirements for Small, Medium Businesses Effective Jan. 1" (6 December 2023), online: <https://www.morganlewis.com/pubs/2023/12/corporate-transparency-act-beneficial-ownership-reporting-requirements-for-small-medium-businesses-effective-jan-1>.

will report information through FinCEN's secure portal.[521] Reporting information includes the full legal name or name under which it is conducting business, the current address of the business, the jurisdiction of formation or registration, Internal Revenue Service (IRS), and Tax Identification Number (TIN). In the case of a foreign entity that has not been issued a TIN, then a TIN issued by a foreign jurisdiction is reported.[522] In the case of the BO, the reporting company must submit the BOs name, date of birth, current residential address or business street address, and a unique identification number along with an image such as a US Passport or driver's license.[523]

**d) Access to the reporting information**

Unlike the UK, BOI data will not be available to the public.[524] FinCEN is responsible for storing the data electronically through a portal that is secure, and non-public data-based, known as the Beneficial Ownership Secure System (BOSS).[525] FinCEN is authorized to report BOI after following some protocols regarding certain security and confidentiality requirements and is prohibited from re-disclosing any such information.[526] Access to the BOI would be given to federal agencies engaged in national security, intelligence, or law enforcement activities (which include both civil and criminal investigations and also a variety of civil actions such as imposing civil penalties, civil forfeiture action through administrative proceedings) and state, local, and tribal law enforcement agencies.[527]

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[521] Danny Bradbury, "What is beneficial ownership information reporting?" (30 January 2024), online: <https://www.legalzoom.com/articles/what-is-beneficial-ownership-information-reporting>.
[522] 31 U.S.C. s 5336 (b) (2) (A)
[523] Andrew James Lom, "The Corporate Transparency Act is here—are you ready?" (January 2024), online: <https://www.nortonrosefulbright.com/en/knowledge/publications/55b72cd0/the-corporate-transparency-act-is-here>.
[524] Financial Crimes Enforcement Network, "Beneficial Ownership Information Reporting Requirements, Final Rule" (30 September 2022), online: <https://www.federalregister.gov/documents/2022/09/30/2022-21020/beneficial-ownership-information-reporting-requirements>
[525] *Ibid*
[526] FinCEN, *supra* note 515
[527] 31 U.S.C. s 5336(c)(2)(B)(i)

Foreign requests are to be made through intermediary federal agencies. Foreign requests for access to BOI have to satisfy two conditions: either it has to be made under an international treaty (such as a mutual legal assistance treaty) or at the requests of law enforcement agencies such as judges, prosecutors, and other authorities.[528] Additionally, with the consent of a reporting company, an agency can obtain BOI for oversight of financial institutions, or to conduct customer due diligence requirements of a financial institution.[529] Failure to update any information or comply with any rules will result in civil and criminal penalties.[530]

**e) Violation or penalties**

Penalties will be applied to any person violating the rules and breaching the confidentiality of the BOI. It is unlawful for a person to advertently or inadvertently disclose BOI received from a report or an authorized disclosure made to FinCEN. Any person who willfully provides false information or fails to file an initial report will be subject to a fine of $500 per day up to $10,000 and imprisonment for up to two years.[531] Also, the criminal penalty includes a fine of up to $250,000 and a possible detention of up to 5 years or both[532]. Furthermore, if a person is also caught violating the laws of the U.S. or is involved in illicit activities involving $100,000 in a 12-month period, the person can be charged with a fine of up to $500,000 and imprisonment of up to 10 years.[533] However, such penalties could be avoided if a person, after learning about any inaccuracy in a report, corrects the information in a report within 90 days.[534] These penalties are applicable not only to the reporting company and senior officer but also to any individual who provides BOI to

[528] *Ibid*, s 5336(c)(2)(B)(ii)
[529] *Ibid*, s 5336(c)(2)(B)(iii)
[530] *Ibid,* s 5336(h)
[531] *Ibid*, s 5336 (h)(1) and 3(A)
[532] *Ibid*, s 5336(h)(2) and (3)(B)
[533] *Ibid*, s 5336(h)(3)(B)(ii)
[534] *Ibid*, s 5336(h)(3)(C)(i)

another person for inclusion in a report.[535] Furthermore, people with substantial control are not liable for any penalty for reporting or updating any BOI, but this responsibility falls on senior officers; hence they are personally liable[536] for willful failure to provide BOI to a reporting company.

**f) Certification of report**

It is the responsibility of a reporting company or an agent filing on its behalf to certify under penalties of perjury that the BOI in a report is true, correct and complete.[537] Thus, senior advisors and reporting companies must verify the accuracy of the information reported by the BOs and company applicants.[538] These new U.S. reporting requirements reflect a major step in enhancing transparency and curtailing the prevalent use of shell companies but also introduce significant challenges that need to be explored for addressing. While the U.S. BO framework provides penalties for enforcing compliance, however, these measures do not address the challenges that exist in the current framework. Therefore, in the next section, I will examine the challenges in the U.S. BO framework to highlight the gaps that may impact its overall effectiveness.

**Challenges in the U.S. Beneficial Ownership Framework**

**a) Difficulty in Reporting**

BO is required to report BOI when each individual owns 25% directly or indirectly. However, this information can be complex in terms of multiple ownership structures which can continue changing from time to time for several reasons. For example, in case of additional buying of stocks, equity interests, derivative securities being expired, BO moves, or their license is expired. Any

[535] 31 C.F.R. s 1010.380(g)(1) and (3)
[536] *Ibid*, s 1010.380(g)(4)(iii)
[537] *Ibid*, s 1010.380(b).
[538] Kevin S. Matthews & Donald T. Williamson, "Reporting to FinCEN Under the Corporate Transparency Act of 2020" (27 February 2023), online <https://www.taxnotes.com/featured-analysis/reporting-fincen-under-corporate-transparency-act-2020/2023/02/23/7fyws#7fyws-0000033>.

such changes in ownership structure would trigger an obligation to file a new updated BOI report.[539] However, gathering, verification and updating of BOI in just 30 days is short as it can be time-consuming, especially when these individuals are residing in different jurisdictions and also when businesses are relying on manual systems rather than having a centralized registry, which can ensure data accuracy by ensuring any updates or changes in ownership structures.[540] In case of failure to comply, the companies could face harsh civil and criminal penalties of 10,000 fines and two years of incarceration for willful negligence.[541]

**b) Compliance burden on small companies**

The CTA requires all domestic and non-U.S. entities to report BOI to FinCEN. Previously, the responsibility to report BOI was on financial institutions, but now the responsibility has been shifted to reporting companies. This broader approach imposes significant compliance burdens on small entities which are not heavily regulated to report, update and comply with regulations and deadlines, and furthermore puts pressure in case of non-compliance resulting in significant fines or penalties. Such compliance can affect the economics of small entities seriously that are not well equipped or staffed to comply with BO reporting obligations and may not be involved in any illicit activities.

**c) Access limitations**

The access to limitation of BOI presents significant challenges. It is not only crucial for law enforcement and competent authorities to conduct due diligence but also for businesses to manage

[539] Seth W. Ashby, et.al., "Corporate Transparency Act: Beneficial Ownership Challenges for Business Startups" (January 8, 2024), online: <https://www.varnumlaw.com/insights/corporate-transparency-act-beneficial-ownership-challenges-for-business-startups/>.
[540] Cathy Cartieri, "The Corporate Transparency Act: Understanding reporting requirements and overcoming compliance challenges" (July 12, 2024), online: <https://www.diligent.com/resources/blog/CTA-corporate-transparency-act>.
[541] Sue Reisinger, "GCs Worry About keeping up with new transparency act" (May 15, 2024), online: <https://www.law360.com/pulse/articles/1836418>.

their risks by identifying patterns of shell companies that are involved in illicit activities. Such access to limitations creates hurdles and complexity in the process of conducting effective due diligence to identify potential risks and bad actors.[542]

**d) Compliance challenges for foreign-based companies**

The CTA applies to U.S. companies, including foreign-based companies that are operating in the U.S. for business purposes at various locations. This adds more complexity and burden for businesses to comply with various regulatory requirements across different jurisdictions and also international reporting requirements.[543]

**e) Lack of clarity in terms**

The broader definition of "substantial control" and "ownership interests" lacks clarity and raises more confusion. For example, it's unclear whether it refers to someone making day-to-day decisions or strategic oversight or who has major decision rights. Also, it's unclear whether a third-party manager, through a contractual right or agreement or more than one person, could exercise substantial control.[544]

**f) Limitation to exemptions**

The U.S. CTA[545] has a different approach to exemptions that has a significant impact on reporting obligations. There are 23 exemptions set forth in CTA.[546] According to the CTA, entities holding

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[542] Moody's "7 things to know about US beneficial ownership information (BOI) reporting" (Feb 1, 2024) online: <https://www.moodys.com/web/en/us/kyc/resources/insights/7-things-to-know-about-us-beneficial-ownership-information-boi-reporting.html>.
[543] Cartieri, *supra* note 540
[544] American Bar Association, "The Corporate Transparency Act – Preparing For The Federal Database Of Beneficial Ownership Information" (May 2021), online: <https://www.americanbar.org/groups/business_law/resources/business-law-today/2021-may/the-corporate-transparency-act/>.
[545] CTA
[546] Sandra Feldman, "The 23 exemptions from the Corporate Transparency Act's beneficial ownership information reporting requirement" (2 January 2024), online: <https://www.wolterskluwer.com/en/expert-insights/the-23-exemptions-from-the-corporate-transparency-act>.

stocks registered under section 12 of the U.S. *Securities Exchange Act*[547] of 1934 or those subject to periodic reporting requirements under Section 15(d) of the same act are excluded from the BOI reporting requirements.[548] This exemption also covers any "Exempt Subsidiary," which are described as companies whose ownership is “controlled or wholly owned,” directly or indirectly, by other certain exempt entities or by an SEC Reporting Company.[549] However, the criteria for subsidiary exemptions are narrow and are only applicable if ownership interests are fully owned by a parent entity. Such a narrow interpretation excludes many exemptions for subsidiary entities who thought they were exempted but now need to ensure compliance, which increases administrative burdens for compliance.

Furthermore, another important challenge that remains is the exemption of non-profits from providing their BOI, which has been exploited by 70 individuals who are facing a series of federal criminal cases in Minnesota for stealing $250 million from the pandemic federal child nutrition program.[550] In addition to this, family offices[551] also face complex and nuanced challenges under the CTA. However, it is still not clear whether family offices, the majority of which are not registered, will qualify for such exemptions. While some exempt entities include tax-exempt entities and charitable trusts, such family offices could qualify under such exemptions and be potentially misused leading to difficulty in balancing compliance under the CTA.[552]

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[547] *Securities Exchange* Act 1934

[548] The CTA provides exemptions from reporting obligations for Securities Reporting Issuers (who are corporations issuing securities) under section 12 of the *Securities Exchange Act* and under sec 15(d) for those who are required to file supplementary or periodic information because they are already required to register on a national securities exchange and have fulfilled initial reporting requirements. See sections 12 and 15(d) of the *Securities Exchange Act* of 1934 (15 U.S.C section 781 and 780(d)). Also see, 31 U.S.C. s 5336(a)(11)(B)(i); 31 C.F.R. s 1010.380(c)(2)(i).

[549] 31 U.S.C. s 5336(a)(11)(B)(xxii); 31 C.F.R. s 1010.380(c)(2)(xxii).

[550] Associated Press, “First seven of 70 defendants in alleged $250m Covid relief funds scam go to trial” (29 April 2024), online: <https://www.theguardian.com/us-news/2024/apr/29/covid-scam-minnesota-trial>.

[551] Family offices are private companies providing services to the richest individuals or families, providing them with financial and personal services according to their needs.

[552] Nick Niles, et.al, “FinCEN Beneficial Ownership Reporting—Implications for Family offences (Part 2 of 2) <https://www.kirkland.com/publications/private-investment-and-family-office-insights/2024/02/fincen-beneficial-ownership-reporting-implications-for-family-offices>.

### g) Misunderstandings about exemptions in Large Operating Companies

Large operating companies are one of those 23 exemptions under the CTA. These companies may qualify for exemptions on the basis of size, employees, and gross receipts, but the requirements are complex and can make them qualify for exemption now, but later, they can lose exemption and be required to report obligations. For example, to qualify for an exemption, an entity must employ 20 full-time employees in the U.S.,[553] have a physical office in the U.S.,[554] and generate 5,000,000 in gross receipts or sales from the U.S.[555] declared to the IRS. However, the FinCEN allows aggregation of gross receipts or sales receipts for large operating exemptions, but it does not allow gross receipts from outside of the U.S. Additionally, it also does not allow aggregation of employees in physical offices.[556] Such disaggregation can complicate the process and make it challenging for companies to meet the exemption criteria independently.

Furthermore, the large operating company exemptions are too broad, for example not specifying in the language of insurance companies' exemption to what extent insurance companies which FinCEN recognizes can vary in size and structure and can claim the insurance companies exemption[557] may result in complexity and compliance challenges. It can allow high-risk captive insurance companies to avoid reporting as well. All of this underscores the need for clarity, careful analysis and continuing monitoring to ensure compliance.

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[553] U.S.C s 5336(a)(11)(B)(xxi)(i)
[554] *Ibid*, s 5336(a)(11)(B)(xxi)(iii)
[555] *Ibid*, s 5336(a)(11)(B)(xxi)(ii)
[556] Pierson Ferdinand, "The Corporate Transparency Act: Implications and Challenges for U.S Companies and Owners" (16 February 2024), online <https://pierferd.com/insights/the-corporate-transparency-act-implications-and-challenges-for-us-companies-and-owners>
[557] Alexandria P. Murphy, "The Impact of the Corporate Transparency Act on Companies in a Captive Insurance Structure" (29 May 2024), online: <https://www.lexology.com/library/detail.aspx?g=3e19e256-edaa-44e5-83df-e0b6e4a36168&utm_term=>.

### h) Structural Challenges

In the case of an entity being a BO rather than an individual, then the process of conducting due diligence upon such an entity could be challenging. This may involve collecting BOI through various structural challenges or complex ownership structures.[558] Additionally, complex investment structure in the renewable energy sector, such as tax equity partnerships and joint ventures, makes it more challenging due to multiple layers of ownership and control in identifying BOs due to continuously changing income, loss, taxes, and benefits.[559] Similarly, in terms of trusts, which involve various individuals such as trustees, beneficiaries, and settlors having specific powers and interests, it is complicated to report BOI.[560] As a result, this complicates the compliance process and makes it time-consuming and difficult to identify BOs.

### i) Privacy concerns and legal challenges

BOI under the CTA is confidential and not publicly available.[561] There have been concerns that the CTA decreases privacy protections for unauthorized access to BO. Some organizations such as ABC, S-Corp and Main Street employers, along with the National Small Business Association, (NSBA) opposed the CTA by initiating a legal battle in the case *National Small Business Association v Yellen*[562] on the basis of violation of constitutional protections.[563]

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[558] Ashby, et.al., *supra* note 539

[559] Carson Haddow, Carl A. Valenstein, Shabeena Sharak, "Corporate Transparency act update: Beneficial ownership reporting in tax equity transactions" (March 8, 2024), online: <https://www.morganlewis.com/pubs/2024/03/corporate-transparency-act-update-beneficial-ownership-reporting-in-tax-equity-transactions>.

[560] Amy R. Lonergan, "Estate Planning and the Corporate Transparency Act" (May 2024) online: <https://www.reuters.com/practical-law-the-journal/transactional/estate-planning-corporate-transparency-act-2024-05-01/>.

[561] 31 U.S.C. s 5336(c)(2)(A)

[562] *National Small Business United, v Yellen*, (Case No 5:22-cv-1448-LCB)

[563] ABC Newsline "ABC-Opposed Corporate Transparency Act Struck Down for Plaintiffs; Further Legal Action Expected" (March 19, 2024), *ABC Newsline,* online: <https://www.abc.org/News-Media/Newsline/abc-opposed-corporate-transparency-act-struck-down-for-plaintiffs-further-legal-action-expected>.

In the case of the *National Small Business Association* and others *v. Janet Yellen and others,*[564] NSBA contended that CTA has put an unfair burden on small businesses, requiring them to give highly personal details and impose additional burden of compliance costs which can average around $8000.[565] The Judge Liles C. Burke of the U.S. District Court of Alabama declared the CTA unconstitutional and introduced uncertainty regarding regulations. The decision holds that the CTA exceeded Congress's authority to regulate interstate commerce and refrain the federal government from enforcing the CTA's BOI reporting requirements against the plaintiffs NSBA and its 60,000+ members.[566] This case highlights the apprehension among corporations, efforts to combat financial crimes and the limits of constitutional legislative power. This ruling applies only to 0.1% - 0.2% of small entities in Northern Alabama and does not have a broader legal impact compared to over 30 million small businesses.[567] However, West Virginia, Arkansas, Florida, Georgia and 18 other states have filed an amicus brief in support of appellees in NSBA and have initiated a battle against the CTA's constitutionality for BO requirement, arguing that the CTA "raises all the federalism red flags."[568] Also, the National Federation of Independent Businesses (NFIP) has written draft legislation that seeks to repeal CTA, and all small businesses are supporting the Bill to end BOI[569] due to additional compliance and administrative burdens. As

[564] *Supra* note 562
[565] Matthew, Erskine, "Corporate Transparency Act ruled Unconstitutional by Federal District Court" (May 4, 2024), online: <https://www.forbes.com/sites/matthewerskine/2024/03/04/corporate-transparency-act-ruled-unconstitutional-by-federal-district-court/>.
[566] Mark Friedlich, ESQ & CPA, "Corporate Transparency Act ruled unconstitutional: What it means for Beneficial Ownership Reporting" (5 March 2024), online: <https://www.wolterskluwer.com/en/expert-insights/corporate-transparency-act-ruled-unconstitutional-what-it-means-for-beneficial-ownership-reporting>.
[567] *Ibid*
[568] Andrew Velarde, "22 States Attack Transparency Act As Unconstitutional" (22 May 2024), Online: <Https://www.Taxnotes.Com/Content-Viewer?Rid=7k6yn&Type=Saa&Str=Ywiznti3ntfazgfslmnh&Token=4f6da653-540d-4be4-8ae2-Bb399806f4a8>.
[569] Michael Guta, "Small Businesses Support Bill to End Beneficial Ownership" (20 May 2024), online: <https://smallbiztrends.com/small-businesses-support-bill-to-end-beneficial-ownership/>.

discussed above, the challenges experienced by the USA BO framework, it is now essential to explore the Canadian approach to BOT and its challenges in Bill C-42.[570]

**Canada**

As discussed in Chapter 1, in recent years, Canada has gained a reputation as a haven for money laundering, now so common it is referred to as "snow-washing."[571] Also, it was criticized by a global “watchdog” for money laundering in the 2016 FATF Mutal Evaluation report[572] for lacking efforts to address the issue of money laundering. Several Canadian jurisdictions, except Alberta, Yukon, the Northwest Territories, and Nunavut, have adopted major changes, in response to the combination of factors, including FATF International Standards, Cullen Commission and ongoing legislative efforts to improve the transparency of BO.[573] These changes have mostly been focused on making information about the UBO public. The goal of these registries is to promote a secure and stable environment in Canada to enhance corporate transparency and accountability by listing those who have significant control. This could also prevent the misuse of corporations and harm to individuals, investors, and the community.

In BC, BO transparency was recommended by the Cullen Commission[574] in 2022, which identified complex corporate structures of private companies being used for money laundering and other crimes. Therefore, BC made changes to the *Business Corporations Act*[575] that required companies to create a public registry. Previously, private companies in BC were required to

[570] *Supra* note 8
[571] Sanaa Ahmed, “Running with the Hare, Hunting with the Hounds: The Canadian State and Money Laundering” in Christian Leuprecht & Jamie Ferril, eds, *Dirty Money: Financial Crime in Canada* (Montreal: McGill-Queen’s University Press, 2023) 91 at 91
[572] *Mutual Evaluation Report*, *supra* note 109
[573] PwC, Federal Government enhances corporate ownership transparency” (1 May 2023), online: <https://www.pwc.com/ca/en/legal/tax-law/publications/fed-corp-ownership-transparency-2023.html>.
[574] Cullen, *supra* note 88
[575] *Business Corporations Act,* SBC 2002, c 57 [*BCBA*]

maintain this information in the record office of each company. However, after the Bill-20,[576] also known as the *Business Corporation Amendment Act* companies are required to provide this information to the registrar of companies, and such information will also be made publicly accessible to prevent the use of private BC companies for money laundering and other financial crimes. The structure of this registry aligns with the LOTR, which was established under the *Land Owner Transparency Act* (LOTA)[577] in 2020 and makes it easier for police, regulators, journalists and the public to access the BOI and uncover the true ownership of real estate without any search fees.[578] The new transparency rules regarding public registry in private businesses will come into effect in the year 2025.[579] Both registries will make it difficult for money launderers and those who provide any professional services in money laundering, such as lawyers or accountants.[580]

In Québec, the government has also made some changes to the LPA which governs REQ and its registrants, after adopting *An act mainly to improve transparency of enterprises* (Bill 78).[581] This amendment essentially mandates all registrants, regardless of their legal form or administration, to share certain information with the REQ and allows for free public access to information on the UBOs. In contrast to other Canadian jurisdictions, Québec's transparency rules apply not only to Québec companies but also to any corporations regardless of their jurisdiction of formation or their form of business organization to do business in Québec.[582]

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[576] Bill 20, *Business Corporations Amendment Act,* SBC 2023, c 20
[577] *Land Owner Transparency Act,* SBC 2019, c 23.
[578] Mike Hager, "British Columbia dropping fees originally imposed to search its beneficial ownership registry" (16 February 2024), online: <https://www.theglobeandmail.com/canada/article-british-columbia-dropping-fees-originally-imposed-to-search-its/>.
[579] Ministry of Finance, *supra* note 125
[580] Dan Fumano, "Financial crime still a 'free-for-all' in B.C. and Canada, expert says" (13 June 2024), online: <https://vancouversun.com/news/local-news/financial-crime-free-for-all-in-bc-and-canada>.
[581] Bill 78, *An Act to mainly improve the transparency of enterprises,* SLQ 2021, c 19
[582] Alex Gorka, et al., "Impact of transparency register requirements on financial sponsors" (1 December 2023), online: <https://legaloutlook.ca/impact-of-transparency-register-requirements-on-financial-sponsors/>.

Following the domestic leaders in Quebec and BC, the federal government also planned to introduce a federal public registry on ISCs searchable by the public.[583] Since June 2019, private federally incorporated business entities have been obligated to establish and maintain ISC registers to enhance transparency. Such information in the ISC registers is only available to tax and police authorities, some regulatory bodies, shareholders, and creditors of CBCA corporations.[584] In order to tackle the issue of money laundering, Canada has shown its commitment by amending the PCMLTFA,[585] the *Income Tax Act*[586] (to permit access to tax records of corporations and their significance at least 10% of the shareholders for the purpose of verifying data registered),[587] and the *Access to the Information Act.*[588] Also, Since 2016, Canadian federal, provincial, and territory governments have been engaged in discussions over the most efficient methods for tracking BO.[589] As a result, in 2020, the federal government conducted public consultations on strengthening corporate BOT and received the views of several stakeholders, including law enforcement agencies, tax authorities, and privacy commissioners.[590] The consultation supported the idea of creating a publicly accessible centralized registry for BO data.[591] After the 2021 federal election,

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[583] Transparency International Canada, "Civil Society Coalition Welcomes Release of Federal Government Beneficial Ownership Consultation Report And Challenges Excessive Risk-Averse Approach" (9 April 2021), online: <https://transparencycanada.ca/news/civil-society-coalition-welcomes-release-of-federal-government-beneficial-ownership-consultation-report-and-challenges-excessive-risk-averse-approach>.
[584] Ullrich, et al., *supra* note 207
[585] PCMLTFA
[586] *Income Tax Act*, RSC 1985, c 1 (5th Supp)
[587] Charles, et al., *supra* note 217
[588] Amendments to the PCMLTFA, Income tax and the Access to the Information Act were introduced to enhance the detection and prevent money laundering. Specifically, these amendments implemented strict reporting obligations for entities, enhanced information sharing between agencies and tax authorities, and balanced transparency by protecting sensitive or personal information during investigations. See *supra* note 8
*Access to Information Act*, RSC 1985, c A-1
[589] Ivan Angelovski & Zach Dubinsky, "Federal pledge to publicly disclose who owns some private companies catches provinces off-guard" (28 April 2021), online: <https://www.cbc.ca/news/canada/federal-private-ownership-registry-1.6004004>.
[590] Government of Canada, "Consultation on strengthening corporate beneficial ownership transparency in Canada – Home" online: <https://ised-isde.canada.ca/site/consultation-strengthening-corporate-beneficial-ownership-transparency-canada/en>.
[591] Government of Canada, "Public consultations on strengthening corporate beneficial ownership transparency in Canada: What we heard" (6 April 2021), online: <https://ised-isde.canada.ca/site/consultation-strengthening-

Prime Minister Justin Trudeau instructed the Minister of Finance to establish a BO register, as stated in the mandate letter.[592] The establishment of a PBOR for disclosing BOs is in line with similar practices followed by more than 130 countries, which sets the way for enhancing Canada's BO framework through the introduction of Bill C-42.[593]

**Bill C-42**

Parliament passed Bill C-42 in November 2023.[594] The statute amends the CBCA[595] to create a free, searchable, and publicly accessible BO registry for all federal corporations registered under the CBCA. The registry is scalable to enable access to the BO data stored by provinces and territories that consent to take part in a pan-Canadian approach.[596] The main objective of this registry is to be a pan-Canadian cooperative solution that complies with international standards[597] to enhance transparency and discourage the misuse of shell companies for unlawful activities. The Bill also amends the PCMLTFA to allow government institutions and agencies to establish regulations for discrepancy reporting by law enforcement agencies, which will support corporate

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corporate-beneficial-ownership-transparency-canada/en/public-consultations-strengthening-corporate-beneficial-ownership-transparency-canada-what-we-heard>.

[592] Justin Trudeau, "Minister of Innovation, Science and Industry Mandate Letter" (15 December 2021), online: *Prime Minister of Canada* <https://www.pm.gc.ca/en/mandate-letters/2021/12/16/minister-innovation-science-and-industry-mandate-letter>.

[593] The Professional Institute of the Public Service Canada, "PIPSC welcomes enhanced transparency of corporate beneficial owners" (2 February 2024), online: <https://pipsc.ca/news-issues/tax-fairness/pipsc-welcomes-enhanced-transparency-corporate-beneficial-owners>.

[594] Transparency International Canada, "Canada passes landmark legislation to fight corruption, money laundering, tax evasion, and terrorist financing" (2 November 2023), online: <https://transparencycanada.ca/news/billc42updatesnovember2-2023>.

[595] CBCA, *supra* note 24

[596] Innovation Science and Economic Development Canada, "Government of Canada tables new legislation to create a beneficial ownership registry" (22 March 2023), online: <https://www.canada.ca/en/innovation-science-economic-development/news/2023/03/government-of-canada-tables-new-legislation-to-create-a-beneficial-ownership-registry.html>.

[597] "The need for Beneficial Ownership Registry was a key finding of the mutual evaluation by FATF, the Financial Action Task Force, and of the Cullen Commission and the 2018 Parliamentary review of the Proceeds of Crime and Terrorist Financing Act." Canada, House of Commons, Standing Committee on Finance, Evidence, 44th Parl, 1st Sess, No. 126 (February 8, 2024) at 1105 (Mr. Julien Brazeau, Associate Assistant Deputy Minister, Department of Finance), online: <https://www.ourcommons.ca/DocumentViewer/en/44-1/FINA/meeting-126/evidence>. See also *supra* note 188 at 18

compliance and verification.[598] The registry will allow law enforcement and other regulated agencies to investigate money laundering, terrorism financing, and tax evasion.[599] The federal government is interacting with the governments of the provinces and territories to join and be part of this PBOR,[600] which is an important requirement due to the fact that most Canadian companies are incorporated under provincial rather than federal legislation. The hope is that this publicly accessible and searchable registry will be a powerful tool in preventing billions of illicit funds from entering Canada, which will help Canada strengthen the integrity of its economy.[601]

### a) Definition of Beneficial Owner

In Canada, private corporations are required by the federal *Canada Business Corporations Act* (CBCA)[602] to keep and update a register of "individuals with significant control" (ISCs), sometimes known as "beneficial owners," of the corporation.

> "An individual with significant control" over a corporation is defined by the Act as "an individual who:
>
> (a) has any of the following interests or rights, or any combination of them, in respect of a significant number of shares of the corporation.
> (i) the individual is the registered holder of them,
> (ii) the individual is the beneficial owner of them, or
> (iii) the individual has direct or indirect control or direction over them.
> (b) has any direct or indirect influence that, if exercised, would result in control in fact of the corporation; or
> (c) to whom prescribed circumstances apply.
> Two or more individuals will be considered ISC if they jointly hold shares that surpass the threshold or if they act

[598] *Supra* note 8
[599] Innovation Science and Economic Development, "PIA – Corporations Canada Beneficial Ownership Transparency" (31 March 2023), online: <https://ised-isde.canada.ca/site/atip-services/en/references/pia-corporations-canada-beneficial-ownership-transparency>.
[600] Government of Canada, *supra* note 596
[601] Open Ownership, "Canada passes law to create public beneficial ownership register" (6 November 2023), online: <https://www.openownership.org/en/news/canada-passes-law-to-create-public-beneficial-ownership-register/#:~:text=A%20publicly%20accessible%20and%20searchable,fentanyl%20crisis%2C%20and%20foreign%20interference>.
[602] CBCA, *supra* note 24

> under an agreement regarding shares that surpass one of them.[603]
>
> And 'Significant number of shares' is defined as
>
> (a) any number of shares that carry 25% or more of the voting rights.
> (b) any number of shares that is equal to 25% or more of all of the corporation's outstanding shares measured by fair market value (regardless of voting rights)."[604]

**b) Beneficial Ownership information**

The CBCA requires all federal corporations to provide information on individuals with significant control (ISC).

The following information is required to be provided and maintained by corporations.

- Full legal name
- Starting and ending of the significant control
- Description of the significant control
- Residential address (address for service)
- Date of birth
- Countries of residence for tax purposes
- Countries of citizenship.[605]

**c) Information available to the public**

- Full legal name
- Date of the individual to become an ISC and ceased to be an ISC, as applicable
- Description of the ISC

[603] *Ibid*, s 2.1(2)
[604] *Ibid*, ss 2.1(1)-(3)
[605] World Bank, *Beneficial Ownership Guide for Canada*, (April 2024) at 7

- Residential address (if an address for service is not provided)
- Address for service (if it is provided).[606]

**d) Information that is not available to the public**

- Date of Birth
- Country or countries of citizenship
- Country or countries where the ISC is considered a resident for tax purposes
- Residential address (if an address is given).[607]

If both residential and service addresses are provided, then only the address for the service will be made public. This will ensure that many ISCs provide the address of service in order to avoid the disclosure of their residential addresses to the public.

**e) Reporting authorities**

Prior to Bill C-42, access to BOI was limited to the Government of Canada, various law enforcement, and the corporation shareholders, creditors, and investigative bodies.[608] Also, an earlier CBCA provision, which provided shareholders and creditors a right to access to review and obtain an abstract of corporations that are registered as ISC, has been repealed.[609] Now, Corporations Canada[610] will provide information to competent authorities such as law enforcement, investigative bodies, the police force, tax authorities, and other government entities. Furthermore, it can also provide access to provincial agencies or departments to ensure

[606] Government of Canada, "Individuals with significant control - File your information" (26 February 2024), online: <https://www.ised-isde.canada.ca/site/corporations-canada/en/individuals-significant-control-file-your-information>.
[607] *Ibid*
[608] Charles, et al., *supra* note 217
[609] CBCA, s 21.3(2)-(6) (repealed)
[610] Corporations Canada defined, *supra* note 219

transparency and enforcement.[611] However, the corporations themselves would continue to keep the register.[612]

**g) Requirements to file**

Federal corporations incorporated under the CBCA are required to collect not only information on ISC but also to file information with Corporations Canada.

- Annually
- Within 15 days of any change to their ISC
- Upon incorporation and within 30 days after amalgamation and after continuance (import to federal jurisdiction).[613]

Furthermore, according to section 138(1) of the PCMLTFR,[614] individuals and entities who have an obligation to report BOI must verify the existence of an entity and take some measures to validate the information on the BOs of such businesses.

**h) Exemptions from filing disclosure**

Private companies have been required to maintain an ISC register since June 2019.[615] However, public companies established under the CBCA that have securities listed for trading on exchanges and their subsidiaries, as well as crown corporations, continue to remain exempted from the

[611] Jonathan Bilyk & Marie-Andrée Latreille, "Corporate Transparency Updates for CBCA Corporations: New Reporting and Public Access Rules Effective January 22, 2024" (20 December 2023), online: <https://www.dwpv.com/en/insights/publications/2023/new-reporting-public-access-rules-for-cbca-corporations>.
[612] Andrew S. Cunningham, Denise Duifhuis, et al., "CBCA Beneficial Ownership Register 2.0: Public Access, Stronger Investigatory Powers and Better Guidance are Coming" (30 May 2023), online: <https://www.lexology.com/library/detail.aspx?g=78d4f328-944d-447c-a3ad-aed22ab70b0f>.
[613] Government of Canada, *supra* note 606
[614] PCMLTFR, s 138(1)
[615] Andrew Pollock, "CBCA registers of individuals with significant control: Public disclosure and enhanced penalties starting January 22" (5 January 2024), online: <https://www.nortonrosefulbright.com/en-ca/knowledge/publications/7685b11a/cbca-registers-of-individuals-with-significant-control-public-disclosure>.

requirement to maintain a register but are required to confirm their exemption with Corporations Canada at the time of filing their annual return.[616]

Furthermore, there are additional exceptions to public disclosure,

- Where an individual is a minor or someone who, in other circumstances or in future regulations, is considered a minor. However, Corporations Canada has not provided any information regarding the procedure that would be followed to ensure the exclusion of minors from publicly accessible information. However, presumably, the date of birth might determine whether the information will be available in the public database or not.[617]
- If Corporations Canada, on the application of the individual, is satisfied with certain circumstances.
- If there is a reason to believe that disclosure of such information would pose a serious risk to the safety of an individual.
- Also, in a case where there is a reason to believe that the individual is incapable of making any decisions.
- In the case of public officials with regard to the confidentiality of information under the *Conflict of Interest Act*[618] or any similar provincial legislation.[619]

**i) Whistleblower Protection**

Bill C-42 provides protection for any person who provides any information about the commission of wrongdoings; Corporations Canada is prohibited from making available any information that could reveal the identity of a whistleblower unless consent is provided by the whistleblower or

[616] *Ibid*
[617] Charles, et al., *supra* note 217
[618] Canada, *Conflict of Interest Act*, SC 2006, c 9, s 2, online: <https://laws-lois.justice.gc.ca/eng/acts/C-36.65/>.
[619] *Supra* note 8

when such disclosure is necessary for investigations conducted by the police, CRA or FINTRAC.[620]

**j) Violation or Penalties**

A company that contravenes the new filing requirements "without reasonable cause" is guilty of a crime and is subject to summary conviction to a fine not exceeding $100,000 (previously $5000).[621] However, for breaches by directors, officers, and shareholders, there is a penalty of a fine not exceeding $1 million and imprisonment for at least 5 years, which is a significant change from the maximum fine of $200,000 and imprisonment of at least 6 months.[622]

**k) Other consequences for failure to report information.**

In case of any failure or breach of reporting obligations by CBCA corporations, Corporations Canada can refuse to issue a certificate of compliance to an existing company and dissolve a non-compliant corporation if it remains in default for more than a year[623] or fails to submit the required information within 30 days after amalgamation or continuance under CBCA.[624] This could result in delays in the context of transactions and financial activities where officers are required to affirm that the corporation is in compliance and where a certificate of compliance is required from Corporations Canada.[625]

**l) Increased authority for making inquiries.**

Furthermore, Corporations Canada has been given the authority to make any inquiries of any person regarding compliance for verification purposes by requesting an affidavit or any statutory

[620] Ullrich, et al., *supra* note 207
[621] CBCA, s 21.21(4)
[622] *Ibid*, s 21.4(5)
[623] *Ibid*, s 212(1)(a)(iii)
[624] *Ibid*, s 212(3.1)
[625] CBCA, s 263.1(2)

declaration.[626] After examining these provisions of Bill C-42, it is now essential to discuss the challenges that arise from implementing these requirements under this law.

**Challenges in Bill C-42 (An Amendment to the CBCA)**

**a) Compliance Cost**

Bill C-42 raises some concerns regarding the compliance costs associated with new transparency rules. Establishing a registry requires a significant amount of money for operation, maintenance, compliance, verification, and updating to ensure accuracy and reliability  It might not be a big concern for large corporations, but for small and medium-sized companies, it would result in increasing their expenses, which would definitely be burdensome as they would already lack the means to collect and maintain all the relevant information and submit it.[627] Also, the varied costs across different jurisdictions further complicate the economic effect and create disparities for various businesses to be affected. The entire system will cost money as various parties have access; it requires ensuring the data is updated and is not abused.[628]

**b) Limited Scope: Exclusion of provinces under Bill C-42**

The registry is applicable to federal companies incorporated under CBCA. As a result, it applies only to 15% of corporations, because the rest are under provincial legislation.[629] This constraint causes a difference in the implementation of transparency requirements between federal and provincial governments. In contrast, countries like the UK have developed BO registries that cover all entities established in the UK, establishing a common level of transparency across all corporate

[626] *Ibid*, s 237(1)
[627] CPA Canada, *Beneficial Ownership Transparency Submission,* (April 2020) at 9, online (pdf): <https://www.bccpa.ca/getmedia/56941e32-96b7-4f6b-b8ee-3abb13f03913/01895-SC-CPACanada-BeneficialOwnershipSubmission-EN.pdf>.
[628] *Ibid*
[629] Open Ownership, *supra* note 601

organizations.[630] Similarly, the U.S., under the CTA, covers all entities, including domestic and foreign, across all states.[631] However, Bill C-42 provides a mechanism to share data with provinces and law enforcement agencies in order to harmonize data across various jurisdictions. Several Canadian jurisdictions have implemented BO registries. For instance, Ontario requires private companies to establish an internal register and provide access to law enforcement and relevant authorities. BC has launched its LOTR[632] to improve real estate data and Quebec has also made a move towards creating a registry with public access. However, companies that are not required by legislation to disclose their BO remain outside of such responsibilities. It remains uncertain whether provinces will join this federal BO framework.[633]

**c) Challenges in the definition of ISC under complex ownership structures.**

As a general rule, an ISC is an individual who has direct or indirect control over 25% or more of shares of the corporation, either by voting rights or fair share market value. Moreover, an individual may also be considered an ISC without having 25% ownership, which can be done through unanimous shareholder agreement. Quebec's BO framework covers partnerships, trusts, and other forms of organizations, providing a broader scope than other Canadian jurisdictions.[634]

A federally incorporated company that does business in Quebec is required by the CBCA to report obligations to the REQ with details on its ultimate beneficiaries. While most ISCs of a

[630] Ryan D. Junck, Vanessa K. McGoldrick & Jason Williamson, "Economic Crime and Corporate Transparency Act 2023 – Key Developments" (26 February 2024), online: <https://www.skadden.com/insights/publications/2024/02/economic-crime-and-corporate-transparency-act-2023>.
[631] Matthew Bisanz, Marcella Barganz, "Groundbreaking US Corporate Transparency Act Takes Effect January 1, (20 December 2023), online: <https://www.mayerbrown.com/en/insights/publications/2023/12/groundbreaking-us-corporate-transparency-act-takes-effect-january-1>.
[632] Government of British Columbia, "Land Owner Transparency Registry - Province of British Columbia" (25 May 2024), online: <https://www2.gov.bc.ca/gov/content/housing-tenancy/real-estate-bc/land-owner-transparency-registry>.
[633] Aboud, *supra* note 426
[634] Gorka, et al., *supra* note 582

federally incorporated company will also be the ultimate beneficiaries under the LPA[635] and vice versa, an ISC and ultimate beneficiary are not defined in precisely the same manner by the two acts. Without necessarily being an ISC under the CBCA, an individual may be an ultimate beneficiary under the Act (and vice versa). Thus, the information of a federally incorporated company submitted under the CBCA may not be the same as the ultimate beneficiary information that the company will have disclosed to the REQ.[636]

Under the CBCA and Ontario *Business Corporations Act*[637] (OBCA), there is some undefined terminology that causes ambiguity and could lead to potential inconsistencies in the disclosure practice across jurisdictions. For example, the term "influence" and "control in fact" are not defined within this legislation, which causes interpretation issues. For example, an individual owns 40% of a company called X, and the company itself owns 80% of another company called Y, and the question arises whether the individual who owns shares in company X needs to disclose his indirect interest in company Y and also whether such individual needs to be registered in the transparency register or not. This produces such complexity as the individual does have an indirect interest in a company but does not have any control over the company.

The complexity of ownership increases when an individual or business entity is bound by a shareholder agreement that provides more governance rights, and it is further complicated when other corporate structures, such as partnerships, trusts, and LPs, are included. Furthermore, other types of agreements that could exert an influence, such as management agreements or other agreements that involve directors and officers, could further complicate the application of

[635] *Supra* note 374
[636] André Vautour, "New corporate transparency requirements in Canada, Québec and the U.S. - What Canadian and Québec companies need to know" (21 February 2024), online: <https://www.lexology.com/library/detail.aspx?g=0c553f17-d2d0-4da9-a20f-fbca54c7bbcf>.
[637] *Business Corporations Act*, R.S.O. 1990, c. B.16

transparency requirements. Moreover, other types of agreements that might have an impact, such as management agreements, agreements involving related parties, or the responsibilities played by directors and officers, obscure and complicate the clarity with which transparency rules are implemented.[638]

**d) Public company exemptions and practical difficulties in compliance**

The public companies' exemptions under Bill C-42 pose significant compliance challenges that undermine its effectiveness. Many BO frameworks provide exemptions for maintaining a transparency register for entities that are already listed on exchanges or subsidiaries thereof; however, such exemptions are not uniform for various types of entities across different jurisdictions.[639] For instance, public corporations in Canada are exempted. However, this does not apply to trusts, partnerships, and foreign public companies which means that a private corporation that is a subsidiary of a U.S. public company would still be subject to the reporting obligations to maintain a register.[640]

Moreover, in Quebec, the only public companies recognized as reporting issuers are eligible for exemptions from the transparency register requirements. Therefore, a subsidiary of a publicly traded company that is recognized as a reporting issuer in other Canadian provinces or territories but not in Québec is still required to adhere to the transparency requirements under the laws of Quebec. Such variance of obligations across jurisdictions presents significant difficulties for corporations reflecting and emphasizing the complex nature of compliance duties. These corporations must be diligent in their attempts to comply with the unique legal requirements of

[638] Gorka, et al., *supra* note 582
[639] *Ibid*
[640] *Ibid*

each jurisdiction. These intricacies require a deep comprehension and careful handling of regulatory requirements to ensure compliance and prevent possible legal consequences.[641]

**e) Challenges in Compliance and maintaining relationships with investors.**

Bill C-42 presents financial sponsors such as private equity and venture capital firms with considerable difficulties in managing transparency registers, which is further exacerbated by the unwillingness of some investors to be identified and disclosed as ISCs. They avoid providing their personal information due to privacy concerns or instruments like non-disclosure agreements, and this creates a significant hurdle in compliance.

Also, even when the disclosure is legally required, the complexity of adhering to specific legal and procedural rules can be intimidating. Moreover, also, the requirement to update and verify this information annually could harm the relationships between financial sponsors and their investors, as continuing requests for reconfirming the sensitive information could potentially be regarded as invasive. Additionally, it becomes a considerable administrative burden for financial sponsors to manage complicated holding structures across Canada.[642]

**f) Increased liability risks**

Under recent amendments to the CBCA, severe penalties have been introduced for violation of transparency register requirements. Directors and officers of entities could be exposed to significant liability for failure to adhere to the strict transparency rules and requirements. Any director or officer who is willfully found to have authorized, permitted, or allowed violation of any transparency rule could face penalties up to $1 million or imprisonment up to five years or both.[643] Such increased liability risk may discourage persons from financial sponsors and related portfolio

[641] *Ibid*
[642] *Ibid*
[643] CBCA, s 21.4(5)

companies from taking a role as a director or officer within Canadian corporations. The fear of such severe penalties, complexities, and challenges associated with transparency rules could lead to reluctance among skilled and professional people to take on any of such governance roles in corporations, and it reflects a risky environment for corporate leadership in Canada.[644]

**g) Temporary forum shopping in Alberta**

Provinces which have not enacted BOI provisions can be weak in the enforcement framework. For example, Alberta, Canada's fourth most populous province, still does not have an ISC register. It has recently made various amendments in order to promote Alberta as business-friendly,[645] and therefore, the transparency requirements of other provinces could be evaded by establishing either a new corporation in Alberta or by continuing to operate existing companies. Such companies would have to carefully consider when conducting their business in Quebec as they would be subject to that province's transparency rules. However, this does not mean that Alberta and the other three provinces that have not yet implemented transparency registers would never enact any rules; therefore, incorporating a company in Alberta is ultimately a temporary forum for shopping.[646]

Additionally, incorporating in Alberta offers some advantages which include corporate opportunity waivers, the ability of nominee directors to put the interests of their appointing shareholders first, the creation of unlimited liability corporations that can be used as "flow-through entities" for U.S. tax purposes, and the removal of director residency requirements.[647] Though possible future legislative changes are on the horizon, these elements taken together strengthen

[644] Gorka, et al., *supra* note 582
[645] Kelsey Armstrong, et al, "A bid to attract business: amendments to Alberta's Business Corporations Act" (16 June 2022), online: <https://www.osler.com/en/resources/regulations/2022/a-bid-to-attract-business-amendments-to-alberta-s-business-corporations-act>.
[646] Gorka, et al., *supra* note 582
[647] 31 U.S.C. Section 5336(a)(11)(B)(i)-(xxiii)

Alberta's attractiveness as a state friendly to economic activities.[648] As discussed above, both the U.S. and Canada have recently implemented BO frameworks. This underscores the need to compare both frameworks and highlight various approaches taken to enhance transparency.

**Comparative analysis of Beneficial Ownership frameworks in the U.S and Canada**

In Canada and the U.S., the definitions of BO are significantly different. The definition of "substantial control" for the purposes of CTA is much broader and more specific than in Canada's legislation.[649] For example, in the U.S., details of senior officers, CEOs, CFO and GC must be reported,[650] whereas, in Canada, they are assumed to have substantial control. The U.S. identifies BO in two significantly different ways: firstly, if a person owns a 25% share of a legal entity (ownership prong) or second, if the person holds notable influence or direct control over that company (control prong). Thus, in both cases the person is considered a BO and provides a holistic description for ownership.[651] Conversely, Canada's definition of BO is segmented across different jurisdictions. At the federal level, BO is ascertained either directly, which includes registered ownership interests or shares, or indirectly, with significant influence or control over an entity. All this makes Canada's definition of ownership multilayered.

The differences between these definitions are important to consider since there is a substantial exchange between the two countries, as 20% of U.S. companies have subsidiaries operating in Canada and 15% of Canadian companies operate in the U.S.[652] These numbers indicate the need to continue collaboration and allow harmonization of the different interpretations. However, the definitional difference between the two countries can also be a source of dispute and

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[648] Gorka, et al., *supra* note 582
[649] Vautour, *supra* note 636
[650] 31 C.F.R. s 1010.380(d)(1)(i)(A)
[651] Gianmarco Del Rosario Vargas, "Navigating the Tangled Web: A Comparative Study of Beneficial Ownership in the U.S. and Canada" (August 2023), online: <https://www.linkedin.com/pulse/navigating-tangled-web-comparative-study-beneficial-gianmarco/>.
[652] *Ibid*

legal problems for companies that operate across both countries since if a company tries to comply with the U.S. rules of ownership, it might not comply with its counterpart operations in Canada. The need to introduce a uniformed definition to be implemented for both countries is essential to maintain smooth cross-national relations.[653]

Both in Canada and the U.S., the BO regime provides clear guidance regarding BOI that is to be included in the BO registries. As noted, CBCA requires ISCs to submit personal information such as name, birthdate, address, country of tax jurisdiction, and the exact date on which they either became an ISC or ceased to be an ISC, along with the description regarding their interests and rights within the company. [654] In contrast, the CTA requires a broader BOI which includes full name,[655] date of birth,[656] and street address.[657] In the case of an individual who creates or registers entities, then his business address could be used,[658] or the individual personal address could be used.[659] Furthermore, companies incorporated under CTA are required to submit a unique identification number from some official identity documents, such as a passport or driver's license[660] along with some additional information about the company and background as well such as its legal name and the country where it was established.[661] The U.S. subsidiary of any Canadian corporation will have to comply with this by submitting the passport of each of its BOs. Additionally, the U.S. also has a system of unique identifier codes issued by FinCEN upon request by an individual or entity for BOs.[662] It streamlines the process of reporting information on BOs

[653] *Ibid*
[654] CBCA, s 21.1(1).
[655] 31 C.F.R. s 1010.380(b)(1)(ii)(A)
[656] *Ibid*, s 1010.380(b)(1)(ii)(E)
[657] *Ibid*, s 1010.380(b)(1)(ii)(C)
[658] *Ibid*, s 1010.380(b)(1)(ii)(C)(1)
[659] *Ibid*, s 1010.380(b)(1)(ii)(C)(2)
[660] 31 C.F.R. s 1010.380(b)(1)(ii)(D)(3)
[661] *Ibid*, s 1010.380(b)(1)(i)
[662] 31 U.S.C. s 5336 (b)(3)

rather than submitting the personal information of each BO. However, this system is not implemented in Canada.

Furthermore, companies incorporated under CBCA, in order to identify the individuals, are required to take "reasonable steps,"[663] which means requesting any updates or changes from the individuals on the ISC register and verifying their significant control status from shareholders, and any other person who might have knowledge about an ISC.[664] The CTA has not specified what exact steps would be taken but has emphasized keeping a record of every request made, reasons, dates, and any answers received.[665] In cases where it is not possible to identify any ISC or BO, then both BO frameworks have specific procedures to follow. Under the CBCA, if no ISCs can be identified, then in such cases, a statement is supposed to be maintained in the register specifying the efforts made to identify them.[666] However, under the CTA, the corporation is required to provide comments and submit complaints to the Treasury Department if there is any issue regarding the BOI, collection, accuracy, and timeline.[667]

Under CTA, companies must report BOI to FinCEN regardless of when they were created or registered. However, if they cease operations before Jan 1, 2024, but are not dissolved completely, which means they have not completed all necessary steps such as filing dissolution paperwork, receiving confirmation, paying tax fees, and fully winding up all of its affairs, then they are still required to report BOI to FinCEN.[668] Similarly, companies created after Jan 1, 2024,

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[663] Bonnie Tsui & Grace Kim-Cho, "Canada: Canada Business Corporation Act - Register of Individuals with Significant Control (Updates)" (5 January 2024), online: <https://www.lexology.com/library/detail.aspx?g=8eb7b22a-65a8-43aa-ba60-af230d19f3ce>.
[664] *Canada Business Corporation Regulations*, 2001, s 33(1). Note: Section 33(2) specifies what information the company should request.
[665] 31 U.S.C. s 5336 (c)(3)(H).
[666] *Canada Business Corporation Regulations*, 2001, s 34.1
[667] 31 U.S.C. s 5336 (h)(4)
[668] Caitlin M. Hartsell, Yana Britain Tanck, Lauren Beeman, "Gone but not forgotten: New FinCEN Guidance on CTA reporting requirements for companies that cease to exist" (July 9, 2024), online: <https://www.lexology.com/library/detail.aspx?g=382b7899-c051-43ca-9dcd-0e8ccf0cad72>.

if they subsequently cease to exist prior to their due date of BOI reports, still have reporting obligations except where such companies are exempted. This significantly impacts private equity firms that were solely established for a brief time to facilitate mergers, acquisitions or similar other corporate transactions.[669] Thus, the U.S. imposes an additional burden on such entities to obtain TIN only for the reason of filing a report. However, Canada's Bill C-42 came into effect on January 22, 2024. It also mandates all companies to report BOI except for those which were dissolved before this date.[670] However, it focuses more on active entities after this date.

Regarding updating the BO registry under CBCA, the corporation is required to update the registry once a year to ensure the accuracy of the data, and in case any changes are made, it has to be corrected within 15 days.[671] However, companies are not required to update annually but just update or correct the information within 30 days only if needed.[672] In case of any non-compliance to BO reporting under CBCA, the penalty could be up to one million- and 5-years imprisonment or both.[673] However, under CTA, civil penalties are $500 per day, a fine of up to $10,000 and imprisonment for up to 2 years and in the case of criminal penalties fines are up to $500,000 and imprisonment up to 10 years.[674]

Furthermore, the BO framework in the U.S. provides two separate requirements for collecting and verifying BO under the CTA and Customer Due Diligence Final Rule (CDD).[675]

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[669] Braddock J. Stevenson, Ryan Swan, & Jonathan A. Dhanawade, "FinCEN Throws Another Curveball: Beneficial Ownership Reporting for Dissolved Companies" (July 11, 2024), online: <https://www.lexology.com/library/detail.aspx?g=577cdb5a-8609-4bd1-be8c-fca29067f2a4>.

[670] Government of Canada, "Policy on annual filings — Canada Business Corporations Act" online: <https://ised-isde.canada.ca/site/corporations-canada/en/business-corporations/policy-annual-filings-canada-business-corporations-act>.

[671] CBCA, s 21.1(3).

[672] 31 C.F.R. s 1010.380(a)(2).

[673] CBCA, s 21.4(5)

[674] 31 U.S.C. 5336 (h)(3)

[675] FinCEN, "Customer Due Diligence Requirements for Financial Institutions" Federal Register, Vol. 81, no. 91 (May 11, 2016), online: <https://www.gpo.gov/fdsys/pkg/FR-2016-05-11/pdf/2016-10567.pdf>.

The requirement to report BOI collected for FinCEN does not fulfill the requirements to report to financial institutions and vice versa. Both of these collect different information for different purposes. FinCEN collects information from entities regarding their BOs in order to prevent the use of shell companies for illicit purposes. Financial institutions collect information on entities seeking to open bank accounts as part of the bank's federal CDD requirements.[676] The information collected under both includes BOs name, address, and date of birth, but the only difference is that under the CTA, it requires a non-expired ID document, such as a U.S. passport, driver's license, or a foreign passport for verification, whereas in case of financial institutions under the CDD, it is required to collect social security numbers, however, this information is retained by the bank and is not disclosed to FinCEN.[677]

Moreover, the definition of BO also differs from FinCEN under CTA to financial institutions under CDD. Under CTA, there is a broader scope of BOs that must be reported to FinCEN, whereas, under the CDD rule, financial institutions are required to collect information about a single individual under the "control prong" and up to four individuals under the "ownership prong."[678] In addition to this, there is also a difference among certifications. Under CDD, the certification by the individual opening the account is "To the best of individual's knowledge, the information provided is complete and correct" whereas, the certification provided by the individual filing report with FinCEN is "The report is true, correct and complete"[679] and it also contains civil and criminal penalties in case of failure to report BOI. However, unlike the U.S., which focuses

[676] FinCEN, "Notice to Customers: Beneficial Ownership Information Reference Guide" (July 26, 2024), online: <https://www.fincen.gov/sites/default/files/shared/BOI-Notice-to-Customers-508FINAL.pdf>.
[677] Andres Fernandez, et.al, "FinCEN Reference Guide Clarifies Beneficial Ownership Reporting Requirements" (July 31, 2024) online: <https://www.lexology.com/library/detail.aspx?g=cda995ad-3c15-4cf9-a773-2781e4ad2210>.
[678] FinCEN, *supra* note 675
[679] *Ibid* at 2

on separate regulatory bodies, Canada does not have separate requirements for financial institutions.

Lastly, the BOI data under CTA is not accessible to the public as in the UK and Canada. It is made available only to federal regulatory authorities, financial institutions and law enforcement excluding stakeholders such as private civil victims of fraud who are seeking to recover any misappropriated funds.[680] It highlights the approach to protecting private financial data and managing the sharing of data. Whereas, under the CBCA, it is made publicly available, which encourages more transparency. The main goal of both BO frameworks is to minimize administrative costs for companies, safeguard individual privacy, and improve systems to track illegal financial activities within corporate structures. By ensuring such measures, each country ensures transparency in the register and protects privacy in financial dealings. As highlighted above, the differences in the BO framework of the U.S. and Canada, it is essential to focus on the comparative analysis between the UK and Canada.

**Comparative Analysis of Beneficial Ownership Frameworks between the UK and Canada**

Both the UK and Canada have implemented PBORs to enhance transparency and address corporate secrecy. In 2016, the UK implemented a new system called the PSC register. This system requires UK corporations to provide information about persons who own more than 25% of the company's shares and voting rights or exert substantial influence over the company. The register is available to the public via Companies House, enabling both law enforcement and the general public to openly search and obtain information on BO. This promotes openness and compliance. Canada has followed the same approach by implementing a PBOR in January 2024 for federal corporations.

[680] 31 U.S.C. s 5336(c)(2)(B)(i)

Canada's BO framework has some challenges regarding compliance due to complex corporate structures and applicability only to federally incorporated companies; however, it has continued in its efforts to seek to develop a pan-Canadian registry that aligns perfectly with worldwide best practices, particularly with the UK, which prioritizes accuracy, transparency, and accessibility for law enforcement, and financial institutions if there is a need. Both countries' main goal is to prevent financial crimes such as money laundering and tax evasion. The UK's strategy is an open data policy, whereas Canada's approach is to focus more on increasing the capacities of law enforcement authorities to trace financial crimes efficiently through access to BOI.

Furthermore, in the UK, BO verification has been a challenge; Companies House in the UK is responsible for only storing the information rather than doing any validation or verification to ensure whether the BOI provided is accurate or not. Such absence of responsibility for verification compromises the efficacy of a system and enables exploitation by bad actors to submit false information, greatly impacting the usefulness of the framework in fighting against money laundering.[681] For example, the *Register of Overseas Entities Act* 2022,[682] which required foreign companies holding UK land as nominees to submit their BOs did not capture the UBOs behind the veil of the nominees.

Now, significant changes have been made related to nominees and trusts where foreign entities would not only have to provide the details of BOs but also of the true UBOs behind such entities.[683] In addition to this, the UK is currently working on enhancing accuracy and reliability by enhancing powers to inquire regarding information collected, submit email addresses and a

[681] IFAC & CPA Canada, *Approaches to Beneficial Ownership Transparency: The Global Framework and Views from the Accountancy Profession* (26 May 2020) at 11-12, online: <https://www.ifac.org/knowledge-gateway/contributing-global-economy/discussion/approaches-beneficial-ownership-transparency-global-framework-and-views-accountancy-profession>.
[682] *Supra* note 419
[683] Junck, McGoldrick & Williamson, *supra* note 630

confirmation that the company has been created for lawful purposes and has also increased obligations to verify the data, though these will come into force this year (2024).[684] By contrast, Canada has adopted a more robust approach to managing its BO registry. Canada's BO registry ensures the responsibility for the verification of data by taking reasonable steps, at least once a financial year, to confirm not only the identity of all BOs but also the accuracy of the information.[685] Also, efforts have been made to enhance the authority for making inquiries on any person's compliance or challenging the information submitted, showing a strong emphasis on improving the quality of information, helping increase the trust of companies making business decisions in contrast to the UK's repository-focused approach.

**Conclusion**

In Conclusion, this chapter has discussed the BO frameworks of the UK, the U.S. and Canada. It has highlighted that each country has its own way of ensuring transparency in corporate ownership tailored to its legal environment. The UK legal system has been a pioneer in this area by establishing a public register of BOs, and a separate register for trusts and mandating overseas entities owning land or property to report their BOs under the ECCTA. This establishes a great transparency system in the UK. In contrast, both the U.S. and Canada BO frameworks are new and face some limitations.

The U.S., unlike the UK, does not provide public access to the BO registry but makes it necessary for all domestic and foreign reporting corporate entities to report their BOs to eliminate the cloak of anonymity and strengthen the BOT. This requirement to report BOI does not extend to sole proprietorships, general partnerships, or other types of trusts, as they are not created through filing with the state. However, there are more challenges to its effectiveness due to complex

[684] *Ibid*
[685] World Bank, *supra* note 605 at 7

corporate structures, limited access to BOI, and lack of clarity in exemptions, which imposes the additional burden of compliance on some exempted entities, large operating companies and small business entities. Additionally, the CTA also imposes reporting obligations for Canadian Public Companies operating in the U.S. and relying on the Exchange Act Rule 12g3-2(b),[686] which provides an exemption to entities that are listed on the U.S. national securities exchange and have registered a class of securities by already providing enough information that helps the government in knowing the BO of entities.[687] However, the CTA excludes Canadian public companies and requires them to report unless there is any specified exemption. Furthermore, in the U.S., there have been some court challenges to the CTA, and the U.S. District Court has declared it unconstitutional. However, the FATF has recently recognized the effort of the U.S. Treasury as a positive step by giving it a status of "Largely Compliant" from the previously being "Partially compliant," bringing it more in line with the international standards of BOT.[688] Finally, achieving the status of "Largely Compliant" from FATF is not the silver star, but "it's the biggest change to corporate compliance in over 100 years."[689] However, it does show that the U.S. has taken significant steps in committing to transparency and accountability, which will add value in ensuring ethical businesses, thwarting illicit activities and upholding the highest standards of corporate integrity, but still, this is an early stage like Canada which has also made efforts to enhance transparency by recent legislation in passing Bill C-42.

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[686] The U.S CTA provides an exemption to entities that are listed on the U.S National Securities Exchange and have registered a class of securities under section 12, 17 C.F.R. s 240.12g3-2 (2024)

[687] Herbert I. Ono, "Client Alert – Certain Canadian Corporations May be Subject to US Corporate Transparency Act Reporting Requirements" (November 29, 2023), online: <https://www.lexology.com/library/detail.aspx?g=b2ad678a-d55b-4d9d-972b-4c717d3b6932>.

[688] FATF, "United States" online: *www.fatf-gafi.org* <https://www.fatf-gafi.org/en/countries/detail/United-States.html>.

[689] Reisinger, *supra* note 541

Unlike the U.S., Canada's BO framework provides public access to BOI, but it also presents significant challenges that limit its efficacy. The Bill C-42 provides limited scope as it applies to only federal corporations, and does not include trusts, partnerships, and foreign corporations. Additionally, it also imposes an additional compliance burden on small entities and presents practical difficulties in compliance for some exempted entities due to a lack of clarity and inconsistency in exemption criteria. These challenges highlight the need for improvement in Canada's BO framework. Therefore, in the next chapter, I will focus on discussing recommendations to address these issues to further enhance transparency and contribute towards the goal of combatting money laundering.

## Chapter 5: Recommendations and Lessons Learned for Bill C-42

Globally, several countries have implemented BOT measures to enhance transparency and align with FATF standards. As we observe the developments over the past two decades since the FATF's initial report,[690] international harmonization around AML protocols is gradually taking shape. BO frameworks among countries such as the UK, Canada, and the U.S. have made it increasingly challenging for criminals and terrorists to launder money. Given these global developments, it is crucial for Canada to reassess its current BOT framework, particularly in light of the limitations identified under Bill C-42 in the previous chapter. These limitations, particularly the limited scope, challenges in the definitions of ISCs and difficulties surrounding the exemptions, underscore the need for reforms under Bill C-42.

This Chapter argues that Canada should enhance its BO transparency framework by adopting international best practices, addressing these limitations and promoting inter-state harmonization to combat money laundering more effectively. The recommendations include implementing: a pan-Canadian registry; a verification mechanism; and an identification requirement. Also, this chapter will discuss the need for having unified definitions for BO terms, the lack of which increases ambiguity and causes confusion regarding reporting obligations across other jurisdictions. Additionally, this chapter also discusses recommendations for extending the scope of reporting obligations for trusts, partnerships and foreign entities and allowing the option of searchability by first and last names of BOs in the registry. All of the recommendations will be useful for addressing some of the shortcomings of Bill C-42[691] and strengthening corporate

[690] Financial Action Task Force, *First FATF report on the Extent and Nature of the Money Laundering Process and FATF Recommendation to Combat Money Laundering* (28 April 1990), online: (pdf) <https://www.fatf-gafi.org/en/publications/Fatfgeneral/Firstfatfreportontheextentandnatureofthemoneylaunderingprocessandfatfrecommendationstocombatmoneylaundering.html>.
[691] *Supra* note 8

transparency as an AML measure in Canada. Given this need for recommendations, it is essential to discuss the possibility of a pan-Canadian BO registry; the effectiveness of BOT depends upon the provinces' willingness to cooperate with the federal initiatives.

### 1. Pan-Canadian Registry: A Harmonized Approach to Public Beneficial Ownership Registries Across Canadian Jurisdictions

The previous lack of transparency in Canada, exacerbated by the absence of a central company registry and the inadequacy of information collected, is now being partially addressed by Bill C-42. Although the efforts to address this issue have been slow, the bill represents a step forward in legislation enhancing transparency by establishing a federal corporate database, offering a searchable, public registry to scrutinize the data, and aiding in AML investigations. It will also address the country's "secrecy jurisdiction" reputation[692] that facilitates snow-washing through shell companies. However, this Bill's effectiveness relies heavily on cooperation from the provinces, and only a few provinces, such as BC and Quebec, have already passed legislation.[693]

As is often the case in Canada, the main logistical problem is constitutional. As noted earlier. Bill C-42 only applies to the approximately 500,000 corporations[694] incorporated under the CBCA. While this number seems substantial, the truth is that it only represents 15% of all Canadian corporations.[695] The vast majority of corporations operating in Canada are incorporated under provincial or foreign laws.[696] Over the past decade, every Canadian province except Alberta, Yukon, the Northwest Territories, and Nunavut have enacted laws requiring business corporations

[692] Transparency International Canada, Publish What you Pay Canada, & Canadians for Tax Fairness, *supra* note 66
[693] World Bank, *supra* note 605 at 8
[694] "Bill C-42, An act to amend the Canada Business Corporations Act and to make consequential and related amendments to other acts", 2nd reading, *House of Commons Debates*, 44-1 (31 March 2023) (François-Philippe Champagne) online: <https://openparliament.ca/bills/44-1/C-42/?singlepage=1>.
[695] Junck, McGoldrick & Williamson, *supra* note 630
[696] Sanaa Ahmed, *supra* note 571 at 93

to maintain registers that record the individuals who own these companies and provide relevant information to provincial directors of corporations.[697]

Alberta presents a significant obstacle as it does not even require corporations to register.[698] Alberta is not immune to money laundering and is particularly vulnerable by way of its Alberta Limited Partnerships.[699] Additionally, Ontario, being the biggest economy in the country, has millions of corporations registered in the province; it collects the information but keeps it all private.[700] Over the decade, it is estimated that around $30 billion has been involved in money laundering activities within Ontario real estate.[701] This is a significant amount considering Ontario's gross domestic product of over $800 billion.[702] Due to these factors, the true identity of BOs of almost half of companies remains hidden in Canada.[703] The fact that some other provinces are bringing in BO registries will potentially exacerbate this problem since the dirty money will seek to move to provinces without registries and presumably increase pressure on them to act.

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[697] "Bill C-42, An act to amend the Canada Business Corporations Act and to make consequential and related amendments to other acts", 3rd reading, *Debates of the Senate*, 44-1 (31 October 2023) (The Hon. Pierre J. Dalphond).
[698] Mike Hager, "Beneficial ownership registries curb money laundering, but Ontario and Alberta remain vulnerable, expert says" (12 June 2024), online: <https://www.theglobeandmail.com/canada/article-beneficial-ownership-registries-curb-money-laundering-but-ontario-and/>.
[699] Alberta Limited Partnerships are a type of business entity which have been identified as a vehicle for money laundering activities due to minimal disclosure requirements and lack of oversight. They can be established without physical presence and do not require disclose of their BOs. This opacity makes them vulnerable to being used for money laundering. See more, *supra* note 66 at 9-17
[700] Mike Hager, "Beneficial ownership registries curb money laundering, but Ontario and Alberta remain vulnerable, expert says" (12 June 2024), online: <https://www.theglobeandmail.com/canada/article-beneficial-ownership-registries-curb-money-laundering-but-ontario-and/>.
[701] Jeremy Nuttall, "Money laundering is a 'significant problem' in Ontario real estate transactions. This B.C. company wants to change that" (5 September 2023), online: <https://www.thestar.com/business/money-laundering-is-a-significant-problem-in-ontario-real-estate-transactions-this-b-c-company/article_95a83b84-6258-5680-b96e-6df42123fd23.html>.
[702] Ontario Ministry of Finance, "Fall Statement Economic Data Tables 2023", online: <https://budget.ontario.ca/2023/fallstatement/ecotables.html>.
[703] Mike Hager, "Beneficial ownership registries curb money laundering, but Ontario and Alberta remain vulnerable, expert says" (12 June 2024), online: <https://www.theglobeandmail.com/canada/article-beneficial-ownership-registries-curb-money-laundering-but-ontario-and/>.

Clearly, if the provinces are not united in their approach, any individual registry's effectiveness is reduced since criminals can pick any jurisdiction with less strict regulations and continue hiding their illicit money and gaming between provinces.[704] If the aim is for BOT to have a greater impact on ending money laundering practices, then harmonization is extremely important. In order to address the challenges, it is recommended to establish a pan-Canadian BO registry as it was previously done in the context of securities regulation. As with the incorporation of a company, each province having a requirement to have its own securities regulator, was recognized as posing coordination difficulties. Therefore, just as the Supreme Court of Canada in *Reference re Pan-Canadian Securities regulation*[705] upheld the creation of a pan-Canadian securities regulator to streamline securities trading under a unified system, [706] a similar approach is necessary for BOT to overcome potential barriers and achieve national consistency. Therefore, the federal government should make some agreement with provinces and territories wherein the provinces must pledge to work with the federal government by integrating their provincial registries with the federal government register.

Implementing such agreements to establish a pan-Canadian registry will ensure comprehensive coverage across Canada to close any gap that criminals may exploit, and promote transparency and reduce confusion. This is considered the most effective way to record BOI,[707] which will streamline finding and accessing the BOI from a single and secure database and would be less of

[704] Angelovski & Dubinsky, *supra* note 589
[705] *Reference re Pan-Canadian Securities Regulation,* 2018 SCC 48
[706] Elizabeth Raymer, "SCC rules that a national securities regulator is constitutional" (9 Nov 2018), online: <https://www.canadianlawyermag.com/practice-areas/corporate-commercial/scc-rules-that-a-national-securities-regulator-is-constitutional/275631>.
[707] Transparency International, "Technical Guide: Implementing the G20 Beneficial Ownership Principles" (July 30, 2015) at 16, online: <https://media.licdn.com/dms/document/media/D4D1FAQHgTDonbNH--Q/feedshare-document-pdf-analyzed/0/1718971645481?e=1721260800&v=beta&t=QY4yThvNalKHF2hSpSvg_h3-CfANM0z43ApCbxTTamY>.

an operational burden[708] by avoiding duplication of work and resources. This was previously recommended by the Cullen's Commission,[709] which called on the provinces to work together and establish a robust and effective framework and reach a pan-Canadian framework for BOT.[710] It will ensure consistency in standards and data as, presumably, no province would ever want to be Canada's hold-out secrecy jurisdiction,[711] and will significantly contribute to restoring Canada's reputation as a non-haven for dirty money. To further enhance the impact of such a pan-Canadian registry, it is essential to integrate it with other data sources to prevent financial crimes.

### 2. Enhancing Transparency by Integration of Beneficial Ownership Registries with Other Data Sources

The establishment of a unified, interoperable model for the BO registry will ensure seamless transparency and will integrate data from both federal and provincial registries, avoiding multiple filings. Such a federally coordinated BO registry can make the process of getting BOI easier and facilitate more efficient oversight of the registry. For example, an interoperability system as adopted in Brazil, also a federal country, could be implemented, where information is integrated across several registries and is cross-checked with trade, civil registries, tax authorities of federal and state and also among state and municipal bodies which are involved in government licensing.[712] Moreover, other countries such as Nigeria, Kenya and North Macedonia have also

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[708] FinCEN Advisors, "How to Overcome Common Challenges in Beneficial Ownership Reporting" online: <https://fincenadvisors.com/how-to-overcome-common-challenges-in-beneficial-ownership-reporting/>.
[709] Cullen, *supra* note 98 at 39
[710] Brad vis, "House of Commons of Canada debates (44-1) No. 177", (31 March 2023), online: <https://www.ourcommons.ca/DocumentViewer/en/44-1/house/sitting-177/hansard#12130180>.
[711] End Snow-washing "Canada passes landmark legislation to fight corruption, money laundering, tax evasion, and terrorist financing" online: <https://endsnowwashing.ca/>.
[712] United Nations Office on Drugs and Crime, *Implementation of Beneficial Ownership Transparency in ASEAN Member States and Timor-Leste,* (2024) at 22, online: (pdf): UNODC <https://www.unodc.org/roseap/uploads/documents/Publications/2024/Implementation_of_Beneficial_Ownership_Transparency_in_ASEAN_Member_States_and_Timor-Leste.pdf>.

integrated their BO data into the public procurement system.[713] Such interoperability not only aligns it with FATF recommendation 24[714] but also significantly aids in investigating and greatly reduces the time and resources required to verify data across all various registries. This integration will increase the reliability of the data and will help government institutions and agencies ensure compliance by continued monitoring, identifying any discrepancies, and verifying the accuracy of the information.

Furthermore, the location of a register also varies from country to country. In countries like Ecuador, Argentina, and Colombia, BO registers are managed by the tax authority, whereas in Indonesia and Spain, the Ministry of Justice is the one who oversees the business register.[715] Therefore, it is recommended that Canada integrates the BO registry and places the registry with an entity which offers the most strategic opportunities. The integration of the BO registry with various authority sources such as identification systems, PEP lists, or other registries can reduce errors and streamline compliance by confirming the authenticity of data. This will increase the reliability of the data and will help government institutions and agencies to identify any discrepancies. However, to further address the gaps, it is essential to extend the scope of the proposed registry to other entities, such as trusts and partnerships in order to ensure comprehensive coverage.

### 3. Extending the scope: The inclusion of Trusts and Partnerships

Even after the coming into force of Bill C-42[716] there is still uncertainty lingering over the inclusion of entities other than domestic corporations in the legislation, as well as the overall

[713] Till Johannes Hartmann, "8 Tips for Implementing a Beneficial Ownership Register" (25 April 2024), online: *World Bank Blogs* <https://blogs.worldbank.org/en/governance/8-tips-for-implementing-a-beneficial-ownership-register>.
[714] *FATF Recommendations*, *supra* note 14 at 22
[715] *Ibid*
[716] *Supra* note 8

integration with provincial systems. It is important to recognize that many Canadian businesses operate in other forms than corporations, such as partnerships, LPs, LLPs and other legal arrangements like trusts.[717] According to the Canadian Constitution, they all primarily fall under the jurisdiction of provinces and territories.[718] If all forms of entities are not included, there is a risk that significant loopholes will remain for financial crimes to persist, allowing foreign buyers to continue funneling their funds through various jurisdictions using anonymous Canadian business entities.

Trusts in Canada do not require a written document and can be created orally or by behaving in a certain way, without any requirement of paying a lawyer, except in Quebec where it is required to be created by a contract, will or law.[719] This is why a lot of people become trustees in Canada accidentally without even having knowledge.[720] In the UK, registering a trust is a straightforward process, and the trustees can register themselves without even requiring a trust document. However, in Canada, it is a big challenge as it is required to fill out the detailed form, which is initially designed for formal trusts, and this makes the process difficult for informal arrangements which people do not even know are considered trusts.[721]

A partnership is a form of business arrangement where two or more people jointly carry out business is known as partnership. It includes general partnerships, LPs and LLPs. In Canada, partnerships are governed by provincial laws and offer more flexibility in operating as compared to corporations. Partnerships can be created between partners without any partnership agreement.

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[717] World Bank, *supra* note 605 at 4-5
[718] *Supra* note 697
[719] World Bank, *supra* note 605 at 8
[720] Erica Alini, "Bare trusts and the UHT: How tax rules meant for crooks and global elites ensnared thousands of Canadians" *The Globe and Mail* (24 May 2024), online: <https://www.theglobeandmail.com/investing/personal-finance/taxes/article-cra-tax-rules-bare-trusts-uht/>.
[721] *Ibid*

However, it is recommended to have a partnership agreement for better functioning.[722] Partnerships are legally recognized, but they are not legal persons like corporations. In partnerships, partners are held liable for any debts or obligations of the partnership firm, unlike corporations. In Canada, unlike corporations, partnerships are not covered under Bill C-42 and lack reporting obligations for BOs. This makes them vulnerable to criminals and allows their misuse in activities such as money laundering and tax evasion.

Jeffrey Simser, a lawyer and former legal director with the Ontario Ministry of the Attorney-General, has argued that a comprehensive BO system should include trusts and partnerships apart from corporations.[723] He also quoted a failed example in the UK where the SLPs were not subject to the BO, and it affected the system's transparency.[724] Also, experts like Sasha Caldera and legal authorities underscore the need for a comprehensive approach, extending beyond corporations to include trusts, partnerships, and foreign entities operating in Canada.[725]

According to FINTRAC, 70 percent of money laundering and 50 percent of terrorist financing cases are connected to the inappropriate use of corporations and other legal entities.[726] These corporations and other forms of entities are invested in both international and domestic money laundering and not covering them is a big loophole in terms of compliance. This highlights a key finding of the Cullen Commission's[727]final report on money laundering in BC.[728] Since Canada is

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[722] Matthew Pollock, Prasad Taksal, "Partnerships: what, how and when" (October 13, 2020), online: <https://www.lexology.com/library/detail.aspx?g=687adc40-d84f-4407-b697-7c246c7dc32d>.
[723] Rita Trichur, "Exposing the owners of shell companies is a start. But Canada must do more to fight financial crime" (November 10, 2023), *The Globe and Mail,* online: <https://www.theglobeandmail.com/business/commentary/article-exposing-the-owners-of-shell-companies-is-a-start-but-canada-must-do/>.
[724] *Ibid*
[725] *Ibid*
[726] Innovation, Science and Economic Development Canada "Strengthening Corporate Beneficial Ownership Transparency in Canada" (2023), online: Government of Canada <https://ised-isde.canada.ca/site/consultation-strengthening-corporate-beneficial-ownership-transparency-canada/en/strengthening-corporate-beneficial-ownership-transparency-canada>.
[727] Cullen, *supra* note 88
[728] "Bill to Amend the Canada Business Corporations Act and to make consequential and related Amendments to the other Acts" 2nd reading, Senate Debates, 44-1, vol 153, No 139 (19 September 2023) (Hon Percy E. Downie).

preparing for another FATF evaluation round,[729] regulations for every type of entity to report information in a centralized registry are necessary. The UK has done this by establishing a Trust Registry, which imposes reporting obligations for certain trusts including bare trusts and non-UK trusts as well.[730] It has also extended these reporting requirements to certain types of partnerships, such as LLPs and Scottish Partnerships.[731] These regulations require such entities to submit BOI in order to increase transparency and close any gaps that criminals may exploit. Therefore, it is recommended for Canada to ensure that such a registry is inclusive and covers trusts and partnerships as well. However, it is also crucial for Canada to ensure that the information held in such a registry is accurate and verified. This underscores the need for implementing a verification system.

#### 4. Implementing A Verification System

To strengthen the accuracy of public information in Bill C-42[732] and to ensure the accuracy and effectiveness of the PBOR, it is very important for the data in the database to be verified. Currently, there is no such requirement and criminals can take advantage of the system by lying about their identities. Therefore, it is recommended to implement ID verification for all individuals, directors, shareholders, or any person filing submissions with the business register. This could be in the form of a pre-requisite for incorporating a company, where the registrant would have to provide government-issued identification, such as a passport, driver's license, or other document that confirms the identity. For example, in the Slovak Republic verification of BOI occurs in advance by an authorized person such as a lawyer, notary or any tax advisor to file BOI. Such authorized

[729] FATF, "Global Assessment Calendar" online: <https://www.fatf-gafi.org/en/calendars/assessments.html>.
[730] HM Revenue & Customs, "Trust Registration Service Manual" (17 May 2021), online: <https://www.gov.uk/hmrc-internal-manuals/trust-registration-service-manual>.
[731] World Bank, *Beneficial Ownership Guide for United Kingdom* (April 22, 2024) at 2
[732] *Supra* note 8

persons are responsible for ensuring the accuracy of the information in the BO registry, and in case of violation, they may be subjected to fines.[733] Additionally, the requirement to submit the ID document has been implemented in other countries such as the UK, U.S, Japan, Italy, France, and Germany, which enhances the accuracy and verification mechanism for financial institutions to cross-check information identify discrepancies and ensure the identity of those who claim to be who they are.[734] This approach would not only help in ensuring the accuracy of the information to be filed but would also reduce the use of shell companies for any fraudulent activities.

Moreover, in order to enhance accuracy, it is recommended that powers should be given to companies just as they are given in the U.S., where they can bring private actions to the federal courts and apply for putting restrictions on shareholders, such as by suspending payment of dividends in case of their failure to provide BOI.[735]

Overall, implementing such verification might come with costs as this would require some data security and system maintenance, but if it is assessed against the perceived benefits, then this would be significantly useful and increase the reliability of the work of police, tax authorities and financial analysts. Additionally, implementing advanced technologies would further enhance transparency and prevent bad actors from exploiting the system.

### 5. Implementation of Advanced Technologies and Tools for Enhancing Corporate Transparency

Technology can be a powerful tool for enhancing BOT. Implementation of advanced tools such as data analytics, machine learning, and artificial intelligence would be useful in shaping the BO registry in completely digital and automated. It would enable competent authorities in data

[733] United Nations Office on Drugs and Crime, *supra* note 712 at 21
[734] Athenian Team, *supra* note 28
[735] Transparency International, *supra* note 707 at 12

gathering and reporting processes easier. These automated tools can assist in performing thorough due diligence by screening sanctions lists while ensuring the registry information is up-to-date and protected from data breaches and security risks. The implementation of such tools can also be useful for reporting companies when they upload the ID of BOs and set automatic notifications when such ID expires.[736]

The FATF has also emphasized the use of advanced analytics and privacy-enhancing technologies when applied to payment data through Collaborative Analysis Learning (CAL)[737] methods, significantly contributing towards AML measures while ensuring data protection and upholding privacy and security.[738] The Bank of International Settlements (BIS) Innovation Hub has introduced a project named "Project Aurora,"[739] which is a proof of concept that uses AI and machine learning to analyze networks using a data-driven approach to fight against financial crimes. It does this by using CAL approaches across institutions and borders while protecting private information.[740] The results show that it is far more effective than the prevailing rules.

Recently Canada has been actively engaged in modernizing its AML/ATF regime by expanding public-private partnerships to improve data and intelligence gathering and enhance information sharing. This is evidenced by the success of many projects such as Project Protect, Project Guardian, and Project Chameleon, which aim to combat illicit financial flows associated

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[736] FinCEN Advisors, *supra* note 708

[737] Collaborative analysis learning (CAL) is an approach that uses machine learning, advanced data analytics and privacy-enhancing technologies to detect complex patterns and share data across institutions in several jurisdictions while ensuring the privacy of the data and security in order to prevent illicit activities such as money laundering.

[738] Financial Action Task Force, "Stocktake on Data Pooling, Collaborative Analytics, and Data Protection" (3 March 2023), online: FATF <https://www.fatf-gafi.org/en/publications/Digitaltransformation/Data-pooling-collaborative-analytics-data-protection.html>.

[739] Lucinity, "Project Aurora: Combatting Cross-Border Money Laundering - Transform FinCrime Operations & Investigations with AI", online: <https://lucinity.com/project-aurora?ref=lucinity.ghost.io>.

[740] Bank of International Settlements, "Project Aurora: The power of Data technology and collaboration to combat money laundering across institutions and borders" (7 March 2024), online: BIS <https://www.bis.org/about/bisih/topics/fmis/aurora.htm#:~:text=In%202023%2C%20BIS%20Innovation%20Hub>.

with sex trade, trafficking of illicit fentanyl and romance.[741] Also, an initiative of the Counter Illicit Financial Alliance of BC has been led by the RCMP to address investigative challenges to help private sectors in developing risk mitigation strategies.[742] Additionally, FINTRAC is renewing its platform for secure document sharing, which is used by businesses with reporting obligations under PCMLTFA to report financial transactions.[743] This will allow FINTRAC to collaborate with these businesses to increase compliance, efficiency and effectiveness within AML/ATF. Therefore, it is recommended for Canada to further build upon projects like these and implement new technologies integrated with data analytics to improve the accuracy of information and detection of anomalies within the BO registry. This will help authorities to investigate and act upon it while upholding data privacy standards, promoting transparency and accountability, and contributing to the global fight against financial crime. However, alongside these technological advancements, ensuring smooth communication is equally important, which includes the requirement to submit an email address.

### 6. A New Requirement to Submit a Registered Email Address

In the race to further enhance corporate transparency, integrity, and operational efficiency for communication and verification purposes, it is difficult and time-consuming for governments and authorities to use paper processes, forms and documents. Therefore, it is recommended that all entities should be required to maintain a registered email address introduced upon submitting ownership details, as has been implemented under the ECCTA for interacting with Companies House in the UK.[744] The email address should be verified to confirm its validity and should not be

[741] Government of Canada, *supra* note 193 at 9
[742] *Ibid* at 19
[743] *Ibid* at 16
[744] Johnathan Korchak, "What is the registered email address?" (12 February 2024), online: *Inform Direct* <https://www.informdirect.co.uk/company-records/registered-email-address-companies-house/#:~:text=Companies%20House%20will%20use%20the>.

made publicly available for inspection and should be kept private, as has been done in the case of residential addresses of ISCs. Furthermore, any failure to provide a registered email address, should be made subject to a penalty of a fine. Implementing this requirement will streamline the process of communication regarding any query, compliance, update, or discrepancy regarding the information on the public record with a person acting on behalf of the company. Such measures will also strengthen transparency, accountability, accuracy, and trustworthy information and will ensure that all communications are done timely in a safe and secure manner. Moreover, it is also essential to establish harmonized definitions for ISCs across Canadian jurisdictions to avoid any inconsistencies and confusion regarding reporting obligations.

### 7. Harmonized Definitions Across Canadian Jurisdictions

The CBCA and Quebec's Act, as well as the LPA,[745] have challenges and inconsistencies in the definition of ISCs and an ultimate beneficiary as discussed in the previous chapter. There is also a lack of clear and consistent definitions for terms such as "influence" or "control" under CBCA[746] and OBCA.[747] Therefore, it is recommended that Canada should come up with a unified approach following similar practices as in securities law,[748] or follow a similar approach to that taken by the *Singapore Companies Act*,[749] which differentiates between "individual controllers" and "corporate controllers" and clearly defines "significant control" and "significant interest." This would clearly define the terms and avoid any hurdles in interpretation, reduce ambiguity, and ensure consistency across all jurisdictions. However, building upon the need for harmonized definitions, it is also

[745] *Supra* note 374
[746] CBCA, *supra* note 24
[747] *Business Corporations Act*, R.S.O. 1990, c. B.16
[748] Government of Canada, *supra* note 591
[749] *Companies Act* 1967

important to consider including foreign corporations under Bill C-42, to close any gaps that criminals may exploit.

### 8. The Inclusion of Foreign Corporations and Enhancing Exemptions Criteria

Bill C-42[750] mandates that all corporations registered to do business in Canada under the CBCA are required to register BOs, but it does not explicitly mention foreign corporations. This means it remains a challenge; where any foreign corporations which are already in existence and have been operating in Canada somewhere but are not registered, then such corporations might not be subject to the same transparency obligations because the process differs from registering a company within a province.[751] Having such inconsistencies would not only have an impact at the national level in other jurisdictions but could also lead to hindrances in transparency and potential conflicts for companies doing business across borders, as a company might be compliant with BO regulations in one country, but not in another country. Also, this could lead bad actors to exploit this loophole for their illicit activities. Therefore, it is recommended that Canada follow Quebec's approach under the new transparency legislation, which requires all entities to report BOI regardless of the jurisdiction where it was formed.[752] This practice would align Canada with Quebec, which follows the global standards set by the UK, where foreign entities who buy properties in the UK are also required to register BOs in the ROE.[753]

Furthermore, there is a need to review current exemption criteria under Bill C-42 as Canadian public companies and their subsidiaries, despite being exempted from reporting requirements within Canada, face reporting obligations when operating in the U.S. They are subject to the U.S.

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[750] *Supra* note 8
[751] Trichur, *supra* note 723
[752] Gorka, et al., *supra* note 582
[753] UK Government, "Register of Overseas Entities: Where We Are Now" (23 June 2023), online: <https://companieshouse.blog.gov.uk/2023/06/23/register-of-overseas-entities-where-we-are-now/>.

CTA, and this increases compliance burdens and leads to complexity in maintaining compliance across borders. Moreover, Canada's exemptions for entities are not as detailed and specific as CTA, which provides a list of 23 exemptions. However, both CBCA and CTA put a compliance burden on exempted entities which ultimately undermines the goals of corporate transparency. Therefore, it is recommended that Canada provides more clarity and adjust exemption criteria for entities to remove unnecessary burdens for filing BO reports. Furthermore, as set out below, to implement educational programs to provide clarity and guidance regarding how to navigate and address such complexities.

**9. Implementation Of Educational Programs on Corporate Transparency**

In the realm of BO frameworks across the globe, concerns have been expressed regarding complex structures, compliance, and privacy, as discussed in the comparative overview in Chapters 3 and 4. It is recommended to implement comprehensive educational or training programs for analysts, regulators and entities focusing on the Bill C-42 provisions. This would enable a better understanding of the complex corporate structures involving multilayered ownerships, verification and identity procedures to emphasize the significance and practical aspects of compliance, the process of submitting and updating any BOI and the consequences in case of non-filing.

Additionally, organizing webinars, conferences, and workshops and introducing new collaborative projects such as Amplify,[754] whose aim is to discuss, suggest and exchange ideas regarding advocating for BO and the best lessons learned. Such programs and projects should be

[754] It is an Open Ownership Collaborative project, "Amplify," supported by the BHP foundation, which aims to leverage and amplify Canada's progress on BOT and share internationally the insights from their advocacy campaigns. See, Open Ownership, "Event: An Evening of Dialogue: Lessons learned from beneficial ownership advocates" (30 May 2024), online: <https://www.openownership.org/en/news/event-an-evening-of-dialogue-lessons-learned-from-beneficial-ownership-advocates/>.

encouraged as this would facilitate what is happening around the world and what best practices could be followed to enhance compliance by fostering a culture of sharing and collaboration and strengthening operational capabilities to meet the main goal of Bill C-42.[755]

However, the focus now shifts to lowering the threshold requirements, which will enhance the impact of Bill C-42, by requiring every BO to report.

**10. Lowering or Removing the Threshold Requirements**

Most countries have set a threshold of 25% in order to be classed as a BO, which is the minimum ownership threshold in terms of significant influence or control as classified by FATF[756] but this varies due to inconsistent definitions.[757] The level of significant influence or control is reported in three bands; more than 25%, 50-75% or over 75%.[758] Any individual with less than 25% shareholding, voting or appointment rights is considered unlikely to have significant influence or control. However, countries can set their own thresholds that mesh their views on the risks of money laundering posed by various legal persons.[759] For example, in the U.S., the *Securities Exchange Act*[760] has set a threshold of 5 percent,[761] whereas Poland, Portugal and the UK have a common threshold of 25%. However, in Sweden UBOs are identified on the basis of how much they control by specifying any interest above 25% control.[762]

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[755] Alkistis Geropoulou, "Companies House Campus: sharing user-centred thinking across the organisation – Companies House" (28 March 2024), online: <https://companieshouse.blog.gov.uk/2024/03/28/companies-house-campus-sharing-user-centred-thinking-across-the-organisation/>.

[756] FATF, *Guidance On Transparency And Beneficial Ownership*, (October 2014), online (pdf) at 15

[757] IRSG, *Anti-money laundering and beneficial ownership A report by the International Regulatory Strategy Group in association with Eversheds Sutherland (International) LLP*, (December 2023) at 6

[758] End Snow Washing, et.al, "Comparison of Information Field Amongst Beneficial Ownership Registries In International Jurisdiction" (2020) at 2, online: <https://ag-pssg-sharedservices-ex.objectstore.gov.bc.ca/ag-pssg-cc-exh-prod-bkt-ex/291%20-%20007%20TI%20Technical%20Briefing%20Note_Comparison%20of%20Information%20Fields%202020.pdf>.

[759] FATF, *supra* note 757 at 15

[760] *Securities Exchanges Act* 1934, s 13(d)

[761] Transparency International, *supra* note 707

[762] End Snow Washing, et.al, *supra* note 752 at 2

Currently, Canada sets a common threshold of 25% across several jurisdictions in order to disclose an ISC, which is arguably too high[763] and could potentially allow a small group of people to collectively own and have control without disclosing any BOI. For example, five or six people could form a corporation with 15% or 20% ownership interest, allowing them to have significant influence without disclosure, thereby enabling them to hide true ownership and carry out illicit activities. It is therefore recommended for Canada that the threshold be lowered to 10%, aligning it with the Ontario Securities Commission, which uses the same threshold and targets high-risk factors, including industries and people.[764] Similarly, the EU has also taken steps to empower the commission to lower the threshold for high-risk factors to 15%, but in cases where a higher threshold would be appropriate, it has allowed the commission to set the threshold between 15% and 25%.[765] Lowering the threshold in Canada can certainly enhance transparency and identification by recording more information than a higher one and lower the risk of anyone trying to hide their undisclosed collective control, but this could still be abused to avoid reporting requirements. There is no specific percentage that will not let criminals manipulate this; therefore, eliminating the threshold completely could be a game changer, as practiced by Botswana where any individual, even if they own a single share directly or indirectly, is required to register.[766] Having discussed the threshold requirements, the next step under Bill C-42 is recommended to allow searchability by first and last name within the registry for further enhancing transparency and ease of access in searching BOs.

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[763] Sanaa Ahmed, *supra* note 571 at 93

[764] Open Ownership, "Definition" (January 2023), online: <https://www.openownership.org/en/principles/definition/>.

[765] Council of the European Union, *Regulation Of The European Parliament And Of The Council on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing*, (2024) at 65

[766] Rachel Etter-Phoya, Idris Linge, Francis Kairu, et al., "Beneficial Ownership Transparency in Africa in 2022" (March 13, 2023) at 16, online: SSRN <https://dx.doi.org/10.2139/ssrn.4395017>.

**11. Searchability By First and Last Name**

Currently, under Bill C-42,[767] one can only search by the name of the corporation but not by the name of the BOs themselves. It is recommended to amend the Bill C-42 regime to add the feature of searchability by first name and last name of BOs, which aligns with the approach taken by Quebec that has allowed search in the REQ using the last and first name of the natural person as of July 31, 2024.[768] This will provide the first and last names of BOs in the search results, along with their service address, which will greatly enhance and streamline the use of the registry for due diligence, investigative and law enforcement. Following this, the next recommendation is to implement an advanced system to further streamline the process of BO data.

**12. Implementation Of Beneficial Open Data Standards (BODS)**

Balancing between transparency and affordability remains a technological challenge. A Beneficial Ownership Data Standard (BODS) has been developed by Open Ownership,[769] which covers both entities and arrangements with direct or indirect beneficial ownership interest.[770] It provides guidance regarding the collection, sharing, usage and exchange of BO data in a machine-readable format to ensure consistency and address the challenges regarding disparities of BOI across several jurisdictions.[771] This can help tackle transnational corruption and fill the gap between data-sharing requirements by enhancing interoperability, which can allow the government to give the real value of BO data from different countries and companies by visualizing and analyzing it. Recently,

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[767] *Supra* note 8

[768] Vautour, *supra* note 636

[769] "Open Ownership is a non-profit organization, that provides support and guidance on all aspects of BOT reforms. It has worked with over 40 countries to advance the implementation of BOT reforms." See "Open Ownership" online: <https://www.openownership.org/en/about/what-we-do/>.

[770] Stephen Abbot Pugh, "An Open Solution for Interoperability: The launch of version 0.4 of the Beneficial Ownership Data Standard" online: <https://www.openownership.org/en/blog/an-open-solution-for-interoperability-the-launch-of-version-04-of-the-beneficial-ownership-data-standard/>.

[771] Open Ownership, "European Union takes important steps towards standardised and interoperable beneficial ownership information" (25 April 2024), online: <https://www.openownership.org/en/news/european-union-takes-important-steps-towards-standardised-and-interoperable-beneficial-ownership-information/>.

Microsoft has formed a partnership with Open Ownership to scale the use of these BODS.[772] It enhances the ability to analyze complex corporate structures and keep track of current and historical data, which is crucial for enforcement. It is recommended that Canada should adopt BODS, as this would provide for common standards and the integration of data from federal and sub-national BO registries enabling easy exchange and use of BOI between stakeholders,[773] which would otherwise be expensive and time-consuming.

Additionally, recent efforts from the EU through the *Interoperable Europe Act*[774] and the development of an interoperability framework in Kenya[775] provide lessons to Canada for implementing the same just as it is done in the case of PEP and procurement information.[776] Implementing such a standardized format like BODS is crucial for ensuring consistency, detecting anomalies within BO data, enabling seamless data sharing, and interoperability between two different registries. This will also help to explore intricate connections between individuals and companies to prevent fraud and enhance ease of business and AML efforts to unveil secret corporate ownership. Beyond BODS, it is now essential to consider the implications of Bill C-42 on small and medium businesses (SMBs) and provide some measures and guidelines for them to comply with reporting obligations.

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[772] Open Ownership "Doubling down fighting corruption with beneficial ownership transparency" (17 June 2024), online: <https://www.openownership.org/en/blog/doubling-down-on-fighting-corruption-with-beneficial-ownership-transparency/>.
[773] *Ibid*
[774] Council of the European Union, Press release, "Interoperable Europe Act: Council Adopts New Law for More Efficient Digital Public Services Across the EU" (4 March 2024) online: <https://www.consilium.europa.eu/en/press/press-releases/2024/03/04/interoperable-europe-act-council-adopts-new-law-for-more-efficient-digital-public-services-across-the-eu/>.
[775] Estonian Centre for International Development, "Cybernetica to Develop Interoperability Framework in Kenya" (30 April 2024) online: <https://estdev.ee/en/articles/cybernetica-develop-interoperability-framework-kenya>.
[776] Open Ownership, *supra* note 772

### 13. Adapting Measures to Mitigate Costs for Small and Medium Businesses (SMBs)

Bill C-42 provides measures to enhance transparency by introducing reporting obligations for companies to disclose their BOs. However, this also imposes a burden on SMBs with these new requirements to comply. The SMBs may lack the resources and administrative capabilities; therefore, it is crucial to recognize these burdens and provide some means of lowering cost compliance. It is recommended that Canada follow the guidelines of the UK PSC model, which provides guidance regarding lowering compliance costs greatly, with approximately an amount of £150 per company and a straightforward and user-friendly process for submitting the BO information to the registry.[777]

Also, training programs through government institutions for clear guidance on new regulations should be emphasized as laws and regulations continue to evolve over time. Ensuring SMBs have all the required knowledge and support would enable them to meet the reporting requirements, without compromising on their operational standards and reduce inconsistencies in compliance and legal issues, increasing fiscal compliance and lowering the costs of government enforcement.[778] In this way, it will lower the costs of compliance and provide any support that SMBs may require, making sure that Bill C-42 does not inadvertently affect the usage and sustainability of the economy of SMBs. Moreover, to further strengthen transparency, it is also crucial to enhance regulations for legal professionals.

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[777] United Kingdom, Department for Business, Energy & Industrial Strategy, "Review of the implementation of the PSC Register" (2019) at 21, online (pdf): Gov.uk <https://assets.publishing.service.gov.uk/media/5d431904e5274a699238cf8b/review-implementation-psc-register.pdf>.

[778] Transparency International, *supra* note 707 at 12

### 14. Enhanced Regulations for the Legal Professionals

Lawyers are often known as "gatekeepers" regarding to the proceeds crime as they possess the skills to launder dirty money through complex legal and financial schemes.[779] Lawyers' trust accounts and their skills serve as conduits for money laundering operations for both legal and commercial activities, facilitating the shifting of illicit funds into financial systems.[780] Many countries have set out obligations for private sector actors to combat money laundering. For instance, the UK has implemented the *Money Laundering Regulations* 2017[781] which apply to financial institutions and gatekeepers. The regulation covers accountants, auditors, and legal and tax advisors. Similarly, the EU's AML directives require lawyers to implement compliance programs, conduct due diligence and report any suspicious activities.[782] However, Canada's legal profession remains exempted from the obligations under the PCMLTFA, which otherwise cover a wide range of reporting entities such as banks, casinos, money service businesses, accountants, and real estate brokers etc.

The FATF has classified lawyers under the DNFBPS and requires them under recommendations no 22 and 23 to conduct customer due diligence and record-keeping requirements and report any suspicious transactions.[783] However, Canada has failed to comply with such recommendations. The FATF evaluation report of 2016 identified the legal professionals being exempted from AML provisions as a "significant loophole" and a "serious impediment" to Canada's fight against money laundering and terrorist financing.[784] Furthermore, FINTRAC's

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[779] German, *supra* note 70
[780] *Ibid* at 233
[781] Money Laundering, Terrorist Financing and Transfer of funds (Information on the Payer) Regulations 2017 (MLR 2017)
[782] Alex Schwarzkopf, "Professional Questions Arising from The AML Policies And Regulations Implemented By Financial Institutions" (Master's thesis, Master of Social Sciences, specialization: Law and Technology, Tallinn University of Technology, School of Business and Governance, Department of Law) at 21.
[783] *FATF Recommendations, supra* note 14
[784] *Mutual Evaluation Report, supra* note 109

Financial Intelligence Report 2022 found that lawyers are involved in multiple suspicious activities through the purchase of high-value commodities, real estate, and luxury goods.[785] Additionally, it also highlighted that they have been found to facilitate deals with organized criminal groups linked with foreign banks, individuals, drug traffickers, and fraudsters who play a critical role in money laundering.[786]

In 2015, the Supreme Court of Canada in *AG v. FLSC*[787] decided that lawyers are not subject to the PCMLTFA because it infringed section 8 rights of their clients under the Charter, which provides the right to be free from unreasonable search and seizure.[788] Solicitor-client privilege bars lawyers from reporting their clients' activities. This has resulted in lawyers being involved in facilitating criminals in suspicious activities. As highlighted in Chapter One, several cases have reported lawyers' involvement in facilitating illicit transactions on behalf of their clients. All of this highlights that the legal professions' susceptibility to exploitation in money laundering schemes is significant, especially in high-risk activities such as real estate transactions, the formation of corporations and trusts and the use of trust accounts.[789] However, despite all of this, the legal profession in Canada still relies on self-regulation, and the lawyers are not required to report any suspicious transaction to FINTRAC, which limits the ability of FINTRAC to rely only on reports from third-party financial institutions. This creates difficulties for law enforcement agencies to find the ultimate source of destination of illicit money as the banks do not have this information, and law enforcement cannot investigate lawyers' trust accounts.[790]

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[785] FINTRAC, *Presentation to The Federation of Law Societies of Canada And The Government Of Canada Working Group on ML And TF*, (February 4, 2022)
[786] Zak Vescera, "Canadian lawyers play a key role in money laundering, says financial intelligence report" (27 June 2024) *CTV News* online: <https://www.ctvnews.ca/canada/canadian-lawyers-play-key-role-in-money-laundering-says-financial-intelligence-report-1.6941599>.
[787] 2015 SCR 401
[788] *The Charter*, *supra* note 155, s. 8
[789] German, *supra* note 70 at 243
[790] *Ibid*

As highlighted above, along with the UK and EU, other countries, such as Australia and New Zealand, have also mandated reporting requirements for lawyers to prevent their role as facilitators in money laundering to criminals.[791] Thus, I would argue that it is essential for the legal profession in Canada to transition from self-regulation in AML matters to independent oversight because law societies lack the expertise of the agencies that regulate money laundering risks. Therefore, it is recommended that, in principle Canada should ensure effective AML oversight, which demands independent evaluation and independent oversight according to the FATF standards. This would not only bring legal professionals more fully into compliance by requiring them to uphold the integrity of their legal profession but would also be useful in detecting those who are involved in illicit activities and create a bad reputation for the legal profession in Canada.[792]

[791] *Ibid* at 246-247

[792] I acknowledge that there is a lot of texture on the issue, involving solicitor-client privilege and questions regarding whether law societies can effectively regulate their members in this space even in the absence of reporting obligations. However, a detailed exploration of these issues and questions is beyond the scope of this thesis.

## Chapter 6: Conclusion

In this thesis, I have discussed how money laundering is enabled through a lack of BOT in Canada and what efforts have been made to address this issue. In Chapter 1, I have discussed the problem of money laundering, including the role of shell companies and have highlighted the importance of BOT. In Chapter 2, I have highlighted the historical lack of BOT in Canada and have discussed how money laundering through shell companies has given a bad reputation to Canada, followed by a review of what efforts have been made in Canada's AML framework to prevent money laundering and address the lack of BOT in Canada. In Chapter 3, I discussed the importance of PBORs, examined the CJEU judgment in *WM and Sovim*, and argued that Bill C-42 provides a solid basis for Canada to end the abuse of corporate confidentiality as part of its overall AML strategy. Furthermore, I argued that the government appears to have taken a *Charter*-compliant approach and the law overall is consistent with privacy rights and obligations, as the information is the same that the corporate business registers already have, and there is nothing personally identifiable in the information that could violate privacy rights. It also addresses the privacy challenges as mounted in the *WM and Sovim* Case. This policy direction on the part of the federal government fits in with the global efforts, particularly those of the G20 and OECD countries, to emplace PBOR so as to: create a deterrent effect; assist in investigations, and contribute to ending Canada's national reputation as a "secrecy jurisdiction." In Chapter 4, I have done a comparative analysis of the BO frameworks of the UK, U.S. and Canada. This chapter highlighted that, like the UK and U.S. CTA, Bill C-42 is a great step towards strengthening transparency and reducing the misuse of corporations with complex structures while respecting privacy and international standards. However, there are still challenges in Bill C-42, such as the limited scope of BO

reporting, inconsistencies in the definitions of ISC, compliance burden on exempted entities, and liability risks for directors.

Finally, in Chapter 5, I have suggested recommendations for Bill C-42 to address those problems. Key recommendations included the implementation of pan-Canadian agreements the federal and provincial governments, integrating the BO registry with other data sources, and expanding reporting obligations to trusts and foreign corporations. Furthermore, it also suggested implementing the BODS system, ID requirements for BOs, reducing or removing the ownership threshold, that triggers BOI obligation and introducing searchability by the name of BOs, and exploring the options around regulating the role of lawyers.

Overall, Canada has gone from laggard to being at least closer to the head of the class on this crucial AML tool as the enhanced penalties similar to the U.S for not cooperating with law enforcement or falsely recording BOI will make sophisticated criminals think twice before taking a chance of using Canadian corporations and impacting their profit margins. However, there are still questions about the effectiveness of the existing BO framework. Some provinces have been innovators, such as Quebec and BC, whereas, surprisingly, some have been reticent in upgrading their provincial business registries. For example, Alberta has been found to be a laggard and has not yet implemented the "2017 Agreement on Beneficial Ownership Transparency,"[793] meaning that it does not even maintain an internal registry for corporations, which is going to produce "forum shopping" for companies and a huge problem for Canada's upcoming mutual evaluation by the FATF in 2025.[794] Currently, over 80 countries,[795] including African countries like South

[793] Department of Finance Canada, "Agreement to Strengthen Beneficial Ownership Transparency" (2017), online: <https://www.canada.ca/en/department-finance/programs/agreements/strengthen-beneficial-ownership-transparency.html>.
[794] FATF, *supra* note 729
[795] Open Ownership, "Open Ownership map: Worldwide action on beneficial ownership transparency" online: <https://www.openownership.org/en/map/>.

Africa, Nigeria, and Uganda, have made significant progress in standardizing the global practice of enhancing corporate transparency by establishing a BO registry and providing similar solutions to similar problems. However, given the widespread scope and differences in domestic laws, assessing accurately the impact of registries in preventing illicit financial flows remains a challenge.[796]

The battle against money laundering, particularly snow-washing, is a continuous one that requires collaboration to protect Canada's reputation. If provinces do not join Canada's federal registry, the impact of the registry will be far from complete towards ending corporate secrecy. Therefore, the efforts should not be just limited to the federal corporations but also extend to working in collaboration with provinces and territories. Bill C-42's machinery provides a good opportunity for provinces to think about what the federal government is doing. Why is it doing this? What information is there? What ought to be there? What does the federal government intend to do with BOI? And what is the ultimate purpose of it? This kind of inquiry is important since the majority of corporations are incorporated at the provincial level, and as the Cullen Commission pointed out, they can still be used by launderers to launder their dirty money via the real estate sector, among others.

Finally, I would echo the Cullen Commission's suggestion[797] that Canada has become attractive to money launderers largely due to the sin of omission, in failing to build up an effective AML legislative structure, solid regulatory oversight, inadequate enforcement and fragmented information sharing. As to BOI specifically, the PCMLTFA does not cover all entities, leaving a gap which makes the process of identifying and prosecuting those who use complex corporate structures difficult. It is likely viewed as someone else's problem, and there is always the danger

[796] Hartmann, *supra* note 713
[797] Cullen, *supra* note 88

that the federal government might relax a bit in this space, considering that they have done their part by establishing a federal registry.

Lastly, I suggest that the overall AML road will be difficult for Canada, as the FATF 2021 review found Canada only partially compliant with key recommendations.[798] The upcoming FATF evaluation 2025 is significant for Canada, which was already on notice that it must strengthen its AML regime and enforcement actions. However, the evaluation should not be the main reason for Canada to close any gaps in the existing laws; it should rather do so to enhance overall compliance and address systematic weaknesses for the benefit of Canadians and others who suffer the effects that dirty money has on the economy. Furthermore, I concur with Professor Ahmed that Canada lacks the political will and commitment from the regulated sectors to fight against money laundering; the systematic shortcomings that produce "snow-washing" are not a secret anymore, but function as an acceptable practice—what Ahmed calls "Laundering as public policy."[799] Simply put, the economy of Canada largely depends upon dirty money.[800] Canada lags both in enforcement and successful prosecutions, which is problematically rare.[801] Additionally, only $1.7 Million[802] has been allocated over two years to a newly established "Financial Crime agency" to prevent financial crimes—a paltry sum considering an estimated money laundering tally of $45 to

[798] Financial Action Task Force, *Anti-money laundering and Counter-Terrorist Financing Measures: Canada, October 2021, 1st Regular Follow-Up Report & Technical Compliance Re-Rating* (FATF, 2021), online: <https://www.fatf-gafi.org/en/publications/Mutualevaluations/Fur-canada-2021.html>.
[799] Sanaa Ahmed, *supra* note 571 at 105
[800] Rita Trichur, "Opinion: Canada lacks the political will to fight financial crime because the economy is hooked on dirty money", *The Globe and Mail* (31 May 2024), online: <https://www.theglobeandmail.com/business/commentary/article-canada-lacks-the-political-will-to-fight-financial-crime-because-the/>.
[801] Fumano, *supra* note 580
[802] Department of Finance Canada, "Chapter 7: Protecting Canadians and Defending Democracy Budget 2024" (16 April 2024), online: <https://budget.canada.ca/2024/report-rapport/chap7-en.html>.

$113 billion every year in Canada, quite apart from the profits of other financial crimes.[803] This highlights that law enforcement lacks sufficient resources, staff, as well as strong political will and suffers from fragmented regulatory oversight, which hinders the AML regime's effectiveness. Therefore, comprehensive reforms are needed for enhanced cooperation and compliance to send a strong message to the world that Canada is no longer a haven for criminals who want to hide their illicit money.

[803] Criminal Intelligence Service Canada, *supra* note 1 at 7

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