CHAPTER 5

THE PROFESSIONAL LIABILITY OF REAL ESTATE LICENSEES

Learning Objectives

After studying this chapter, a student should be able to:

- ☑ List the three elements of negligence and give an example of a negligent act which might arise in a real estate licensee's daily activities
- ☑ List the elements of negligent misrepresentation and give an example of this tort
- ☑ Define money laundering and describe why real estate is an attractive vehicle to launder money
- ☑ List the methods by which real estate is used to launder money
- ☑ Identify the key roles of FINTRAC
- ☑ Summarize the four key obligations of licensees under the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*
- ☑ Identify common money laundering and terrorist financing indicators

INTRODUCTION

In British Columbia, real estate licensees arrange for the sale or lease of residential and commercial real estate, manage properties on behalf of owners, and assist in mortgage financing, among other things. Successful licensees work long hours and face many challenges as they deal with some of the largest assets acquired or disposed of by individuals. In all areas of the real estate industry, licensees run the risk of being exposed to liability. The courts of British Columbia require high standards of conduct from licensees acting in their professional dealings; this standard of care is not one of perfection, but it is very close to it.

As a Licensee...

You should be aware that the Courts have little sympathy for licensees, whom they think of as professionals, and insist upon high standards of conduct being met. The following quotations, taken from cases, are representative of the attitude of the Courts:

It must be remembered that offers to purchase are frequently made by and submitted to individuals with little or no knowledge of real estate transactions. Of necessity and with propriety such individuals rely on the professional knowledge and skill of the real estate [licensees] they employ for their protection when they buy or sell property. Frequently large amounts of money are involved and in view of the adequate commission charges made by real estate [licensees], the fact that under the *Real Estate Act* they are given a virtual monopoly of this type of business based on the theory that this is the best way of protecting the public interest, the vendor and purchaser are surely entitled to expect that such agents will carry out their duties without the likelihood of either the vendor or purchaser having to meet the expenses and uncertainties of a lawsuit.

Hawryluk v. Korsakoff (1956), 20 WWR 394 (MBCA)

I am of the opinion that the appellants (the licensees) were possessed of a special skill. That skill did not consist simply of bringing sellers and buyers of real estate together. It went beyond that, and, what is important to the present case, included the preparation and completion of the offer to purchase and the [Contract of Purchase and Sale].

Russell v. Wispinski, 1987 CanLII 2775 (BC SC)

In this chapter, you will be introduced to the most common grounds on which liability has been found against real estate licensees.[1] In addition to liability in the traditional court-setting, misconduct by licensees also expose them to regulatory liability through disciplinary proceedings in front of BC Financial Services Authority (BCFSA). Any liability can have a tremendous impact on one's reputation, particularly because legal and disciplinary proceedings are public. Reputational damage can occur even if the licensee is found innocent of any wrongdoing, as consumers have the power, particularly through social media, to make unfounded or unproven allegations of misconduct online, if they feel mistreated. Finally, the costs, time, and stress associated with legal and regulatory proceedings can have a profound impact on a licensee's well-being and business dealings.

Finally, this chapter will discuss the potential liability for licensees relating to their role in combatting money laundering and compliance with the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act* (the "PCMLTFA"). A failure to take this role seriously can also have extreme reputational impacts for the licensee and the industry at large. As such, this topic will be addressed in this chapter.

COMMON GROUNDS OF LIABILITY AGAINST LICENSEES

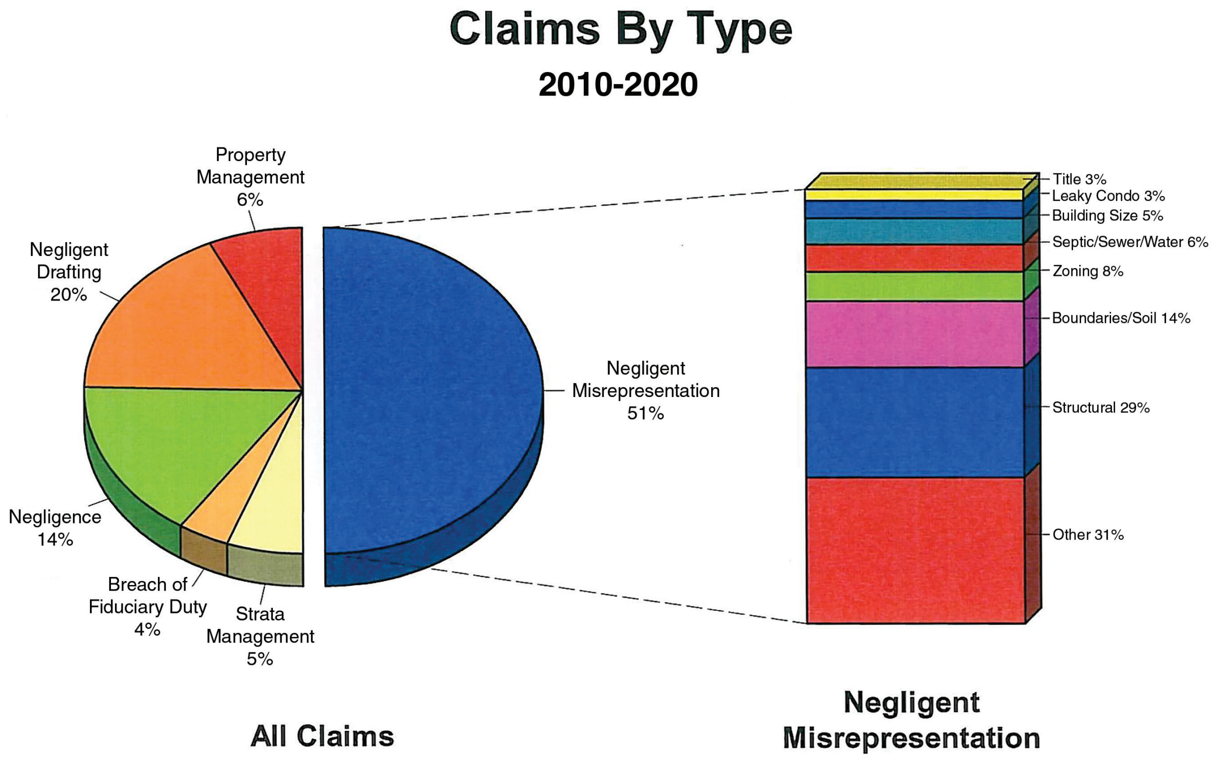
The Real Estate Errors and Omissions Insurance Corporation reports that the majority of claims that they investigate deal with trading services licensees. The most common grounds on which liability has been found against trading services licensees are:

- negligence;
- misrepresentation;
- errors in drafting agreements; and
- breach of fiduciary duties.

[1] Part of this chapter is adapted from *The Professional Liability of Real Estate Licensees*, a copyright publication of the Real Estate Errors and Omissions Insurance Corporation of British Columbia. It is used in this form with the express consent of the Insurance Corporation.

Figure 5.1 provides a breakdown of claims, by type, from 2010 to 2020.

FIGURE 5.1: Errors and Omissions Insurance Claims by Type



Source: Real Estate E&O Insurance Corp. Nov 2020

NEGLIGENCE

The tort of *negligence* involves a failure by a person to exercise a duty of care in circumstances which require that person to take care. The potential scope of negligence is very great because the number of situations in which the law may determine that a duty to take care exists is unlimited; however, not every accident will support a claim of negligence. Before a person will be held to be negligent, certain criteria must be met. The plaintiff must prove three things:

negligence
a tort that involves a failure by a person to exercise care in circumstances which require that person to take care

1. **That the Defendant Owed the Plaintiff a Duty to Take Care.** A person will be held to owe a duty to take care to all persons whom they can or should reasonably foresee as being affected by their actions. In addition to situations where foreseeability of harm exists, the courts in Canada are willing to find a duty of care in situations where, as a matter of policy, it is felt the public has a right to expect persons involved in a particular activity to take care in the way they conduct themselves in that activity.
2. **That the Defendant Breached the Standard of Care Owed.** The relevant standard of care in any situation of duty will be to take the same care that a reasonable person would take in all the circumstances of the case. Generally, the greater the risk involved in a particular activity, the higher the standard of care that will be imposed on persons engaging in that activity.
3. **That the Damages Suffered by the Plaintiff as a Result of the Defendant's Breach were not too Remote in Law.** The type of damage caused must have been reasonably within the contemplation of the defendant as a possible consequence of their acts or omissions. Types of damage not reasonably foreseeable are considered too "remote" in law, and a plaintiff will not be able to get compensation for them.

Where a plaintiff is able to prove that the defendant owed them a duty of care which the defendant failed to fulfill, and that the failure of duty resulted in reasonably foreseeable damages, the plaintiff will succeed with a claim in negligence. If any one of the required elements is not proven by the plaintiff, the action in negligence will fail.

Example

A man ran for a train that was starting to leave the train station. Two railway employees tried to help him get on board the moving train and in the process dislodged the man's package. The innocuous-looking package turned out to contain fireworks, and when it fell on the tracks it exploded. The vibrations from the explosion knocked down some scales at the opposite end of the train platform which fell on a woman and injured her. She sued the railway company in negligence but failed to prove her claim. The court held that there was no duty of care owed to the woman by the railway employees concerning the package. There was no way the railway employees could have known the package would explode and harm the woman; therefore, there was no duty owed to the woman as a person likely to be affected by their actions. In the absence of a duty to take care, the dropping of the package did not amount to negligence toward the woman.

How Does Negligence Affect Licensees?

In the context of the real estate profession, it is common for negligence to form the basis of liability on the part of licensees. A licensee can be liable to one of the parties to a transaction for failing to use reasonable care in dealing with that party. The law imposes a duty of care on the part of a licensee to maintain a reasonable standard of conduct in the performance of their professional tasks. When a licensee fails to perform to the required standard of care and damage or loss results to a party, the licensee can be found liable.

As a Licensee…

It is important to note that the facts and evidence brought forward by the various parties of a legal dispute involving a licensee are very important in determining whether there was a duty of care owed by the licensee, and ultimately if the licensee was or was not negligent.

Koerber v. Salmon, Unreported, November 23, 2018, Provincial Court of British Columbia, Action No. 18364, Nelson Registry, is an example of a case where a general disclaimer, in a MLS listing that contained incorrect square footage calculations, was found ineffective in defending the buyer's claim that the seller's licensee owed a duty of care to the buyer. The general disclaimer read as follows:

> "The enclosed information while deemed to be correct is not guaranteed."

The Court distinguished this general disclaimer from other more specific disclaimers which may have been more effective in rebutting an allegation of a duty of care owed by a seller's licensee to a buyer.

Note that no form of disclaimer will protect a licensee who knows that the information presented is inaccurate. However, when information is believed to be true, but has not been independently verified, it is advisable to use a disclaimer and to make it as specific as possible. A more specific disclaimer may read, "all measurements should not be relied upon without independent verification".

When a buyer's licensee cannot independently confirm the accuracy of the information presented by the seller, the buyer's licensee should advise the buyer to retain other professionals who can. Also, a buyer's licensee should consider advising their client to include a subject in the Contract of Purchase and Sale that shifts the risk onto the seller for the accuracy of the information presented.

Shaw v. Thody, (2014 BCSC 688), is an example of case where the standard of care of a licensee was in dispute. The plaintiff buyers argued that their licensee had breached the standard of care by failing to make inquiries about a landslide risk in North Vancouver on their behalf when they purchased their property. Subsequently, a landslide occurred three lots away from their property, which the plaintiffs later discovered had previously been the subject of a landslide. To determine the standard of care, the Court looked to the plaintiffs' expert evidence – the opinion of an experienced licensee. The expert was of the opinion that the licensee had a duty to disclose this landslide risk to the parties in the transaction. Despite this, the Court was not satisfied that the expert's report sufficiently addressed what standard of care was required of a licensee in the specific circumstances of this case; therefore, the case was dismissed.

Although this case was dismissed, it is important for you, as a licensee, to be extra vigilant in meeting the standard of care required of your profession, especially if you are not knowledgeable about certain issues. When in doubt, seek the advice of professional experts.

Vicarious Liability

A real estate brokerage will be held liable for the negligent or other wrongful acts of its licensees when those acts are committed in the ordinary course of employment. This common law principle is known as *vicarious liability*.

vicarious liability
a legal principle that holds that where an employee commits a wrongful act in the ordinary course of employment, the injured party can sue both the employee and the employer for damages caused by the employee's act

Where an employee commits a wrongful act in the ordinary course of employment, the injured party can sue both the employee and the employer for damages caused by the employee's act; however, if the wrongful act does not occur in the ordinary course of employment, the employer will not be liable.

Example

An employee of a dairy used the dairy's truck to take their family to the movies outside of work. While using their employer's truck, the employee caused a collision. The court found no vicarious liability on the facts because the employee's wrongful act did not occur in the course of performing their employment duties. The employee alone was found liable to the plaintiff.

Employers may even be vicariously liable for wrongs such as fraud or assault, if such acts are committed in the course of an employee's employment. It is important to note that representatives are treated by the courts as employees.

ALERT

There are a number of situations in which licensees have been found to be negligent. Some common examples are:

1. A real estate licensee may be found to be negligent if they fail to provide competent advice on the value of the property being sold by the vendor.

   Lewis v. Simcoe Real Estate Limited et al., (1984) 33 RPR 315 (ONPC)
   Virtue et al v. United Realty et al., (BCSC) February 15, 1985.
2. Negligence may be found against a real estate licensee who fails to recommend to the purchaser that the purchaser insert a "subject to financing" clause in an offer to purchase.

   Shulist v. Hunt et al., 1987 CanLII 3364 (ABQB)
   Lord et al v. Arts et al., (BCSC) June 10, 1986
3. A real estate licensee may be found negligent for failing to disclose or discover inadequacies in the water supply.

   Sedgemore v. Block Bros. et al., (1986) 39 RPR 38 (BCSC)
4. Negligence may be found against a real estate licensee for failing to disclose material facts about the purchaser's ability to buy the property.

   Cuttell v. Bentz, 1986 CanLII 882 (BCSC)
5. Negligence may be found against a real estate licensee for incorrectly ascertaining the boundaries of a property.

   Legendre v. Riou, (BCSC) December 12, 1985.
6. Negligence may be found against a listing licensee who fails to verify information in the listing agreement.

   Jung v. Ip (1988), 47 RPR 113 (Ontario Div. Court)
7. Negligence may be found against a real estate licensee who fails to conduct a title search.

   Price v. Malais, 1982 CanLII 751 (BCSC)
8. Negligence may be found against a real estate licensee who gives an incomplete or misleading estimate of the rental income from a property and fails to inform the purchaser of her report indicating the infeasibility of the rental yields.

   Spiewak et al v. 251268 Ontario Limited et al., 1987 CanLII 4124 (ONSC)

MISREPRESENTATIONS AND DECEIT

Misrepresentation can be defined as any manifestation by words or other conduct by any one person to another that, under the circumstances, amounts to an assertion not in accordance with the facts. Misrepresentation is the most common basis for liability against licensees. Generally speaking, real estate licensees can face liability for two types of misrepresentation:

1. negligent misrepresentation; and
2. deceit and fraudulent misrepresentation.

misrepresentation
a false assertion of fact which, if accepted, leads one to an incorrect belief about a given situation

negligent misrepresentation
a legal principle which provides that if, in the ordinary course of business, a person seeks information or advice from another who possesses special skills in circumstances in which a reasonable man would know that their special skills were being relied upon, and the person asked chooses to give the advice without clearly qualifying their answer so as to show that they do not accept responsibility if it is incorrect then they accept a legal duty to exercise such care as the circumstances require. If they are incorrect they may be liable for their negligent misrepresentation

Negligent Misrepresentation

Negligent misrepresentation is also referred to as negligent misstatement or as the rule in *Hedley Byrne*, which is the name of the English case in which this type of liability and the rules governing it were established. The principles governing liability in negligence also apply to negligent misrepresentation. The Supreme Court of Canada has stated the particular requirements for liability for negligent misrepresentation as follows:

1. there must be an untrue statement;
2. it must have been made negligently;
3. there must be a special relationship between plaintiff and defendant giving rise to a duty of care; and
4. there must be reliance by the plaintiff on the negligent statement which is reasonable.

Where the reliance results in foreseeable loss, the person who relied upon the statement may recover damages from the person who made the negligent misrepresentation.

The special relationship giving rise to a duty to take care will be created where a skilled person, or expert, gives advice in the course of their business to a person who is reasonably going to rely on that advice. In such a situation, there are three courses of action open to the skilled person:

1. the skilled person can refuse to give the advice or opinion sought;
2. the skilled person can give the advice or opinion with a clear qualification that they accept no responsibility for the accuracy or reliability of the advice; or
3. the skilled person may give the advice with no qualification or disclaimer of liability.

If a skilled person chooses option (3), then that person must take reasonable care in giving that advice or face liability for losses arising from the advice if it is negligently given.

Liability for negligent misrepresentation has been imposed on licensees, who are considered skilled persons or experts in the area of real estate. This means that where a licensee is asked for advice or an opinion in a business relationship, the licensee must be aware that if they elect to give advice or state an opinion without qualification, the licensee faces the risk of liability should the advice or opinion be negligent.

Holt v. Thompson, 2006 BCSC 1059

In *Holt*, a licensee had assured the purchaser of a condominium that was free from leaks. One week after the purchase had completed, the purchaser was notified of an assessment for water damage to the condominium. The licensee was found to be liable for negligent misrepresentation as she knew or ought to have known of the leaky condo. Moreover, she had a duty to notify the purchaser of this fact, and the purchaser acted reasonably in relying on the information given by the licensee.

Deceit and Fraudulent Misrepresentation

deceit
a fraudulent or deceptive misrepresentation used by one person to deceive or trick another person ignorant of the true facts

The tort of *deceit* is similar to the concept of fraudulent misrepresentation which applies to the law of contract. Deceit and fraudulent misrepresentation are different from negligent misrepresentation in two respects. First, they involve a sense of moral fraud as opposed to carelessness. Second, a person does not need to be an expert to be liable. When a misrepresentation is false and is made either knowingly (without a belief in its truth) or recklessly (not caring whether it is true or false), the person making the misrepresentation is liable for damages in tort, in addition to any further right the party may be able to exercise under contract law.

How do Misrepresentations and Deceit Affect Licensees?

The service performed by a real estate licensee includes providing information about a number of matters relating directly or indirectly to a particular property. Before providing information about a property, licensees should consider the following.

A licensee who provides incorrect, inaccurate or misleading information to one of the parties to a transaction might be found liable. Before providing information about a property, licensees should consider whether they have direct personal knowledge of the information. For example, you may know that the address of a property is 123 Elm Street because you have observed that property on Elm Street. You may think you know the dimensions of that property because the owner told you the dimensions. However, unless you have actually measured the dimensions of the property yourself, you do not have direct knowledge of them. It is not always possible to provide information based on direct personal knowledge. If it is necessary for you to provide information which is not based on direct personal knowledge which you have checked, it would be prudent to provide the information to the party who requested it in written form indicating the source of the information.

Disclosure statements completed by vendors and signed at the time the property is listed can be of assistance in protecting yourself from liability for providing this information. They should not, however, be considered as a coat of armour which will protect you in all situations. You can be exposed to liability if, in all of the circumstances, you knew or ought to have known that the information on the disclosure statement which you communicated to the other party to the transaction was inaccurate or misleading.

Conversely, a real estate licensee can be found liable to a vendor for non-disclosure of information about the property known to the licensee which, if not adequately disclosed, gives the purchaser a cause of action against the vendor.

If the information which you are giving to a party is in the form of an opinion, you should assume that it will be relied upon. As indicated above, this reliance forms the legal basis for your potential liability if you are wrong. Before providing the information you should consider whether or not you are competent to give the opinion. You should also consider whether you have complete factual information on which to base the opinion. Finally, you should always consider whether it is necessary for you to give the opinion or whether it would be more prudent to refer your client to someone who might be more qualified or better informed to provide the information.

In the British Columbia Supreme Court decision in *Arthur and Arthur v. Greyfriars Realty et a*l, (unreported) concerning an allegation that a real estate licensee had failed to discover a structural defect, the court stated:

> Nor is it reasonable to suppose that Sidhu should have known of the defect. He was not an engineer, he was a salesperson. He had no special knowledge or experience with structural problems although he was in the house on several occasions before the Plaintiffs' purchase, he was not reckless in failing to discover the defect, or wilfully blind to the property's condition. So far as the soundness of the house was concerned, he was in the position of any other layman...
>
> It was the Plaintiffs' responsibility as purchasers to inspect and inquire into the nature and quality of the premises they proposed to purchase. If they were not qualified to make such an inspection or inquiry themselves they could delegate that responsibility to someone who was qualified, an appraiser, a builder, or some other knowledgeable person.

These statements indicate that a Court will recognize that real estate licensees are not required to give opinions on the structural soundness of the properties they are selling. Such opinions do not fall within the expertise of a licensee. There are many other examples of opinions which licensees are often asked to provide but which fall outside a licensee's qualifications. If you offer opinions in these areas, you are inviting a lawsuit.

Sections 49 and 50 of the Rules – Representations as to Service Agreements, Sales, Resales, Purchases, etc.

In addition to the consequences that licensees face when making misrepresentations, sections 49 and 50 of the *Real Estate Services Rules* (the "Rules") address situations where licensees make representations and promises for the purposes of inducing another person to enter into a service agreement with the licensee or to buy or sell real estate in which the licensee is involved. These sections of the Rules state that such a representation or promise must not be made unless the licensee delivers to the person to whom the representation is made a signed statement by the licensee (and if applicable, anyone else involved in the representation) that clearly sets out all of the details of the representation.

For example, a licensee cannot tell a prospective seller client that they can sell the seller's property for $500,000 within 3 weeks unless that statement is signed and includes all of the details of the promise. It should be emphasized that there is nothing wrong with making such promises if they properly comply with these sections of the Rules. In making such promises, the licensee must disclose all important facts. Any intentional misrepresentation or intentional omission of such a fact would be misconduct, negligence, or incompetence, and could result in professional discipline against the licensee.

As a Licensee...

You may encounter clients who wish to speak directly to the other party. For example, the seller may wish to speak with prospective buyers directly because the seller believes that they have superb negotiating skills. While the seller may certainly do so, the seller's licensee should caution the seller that this may expose the seller to substantial legal risks for misrepresentation, and that it is safer for all parties if the real estate professional(s) handles all communications. The licensee is much more attune to the risks associated with making certain representations. Furthermore, the licensee would know exactly what information has been given to whom, which avoids situations where the licensee tells the other party one thing, but the client says something else. The licensee should advise the client that not only has the licensee received professional training, but that the licensee also has a legal duty to protect the interests of the client and mitigate legal risks, such as misrepresentation.

In one disciplinary case before the Council (now BCFSA), a licensee was disciplined for having breached section 5-6 of the Rules (now section 49 of the Rules) when he represented to an owner that if she listed and sold her manufactured home with him, he would pay the sum of $500 towards an electrical inspection once it sold. The licensee made this promise without delivering to the owner a signed statement clearly setting out all of the details of the inducement representation.

Source: 2007 CanII 71555 (BC REC)

ERRORS IN DRAFTING AGREEMENTS

A real estate licensee must understand the basics of contract law, including the principles relating to offer and acceptance, counter-offers and revocation of offers. Liability can often arise if these basic principles are not observed. The message from the courts is clear: know basic contract law if you have any doubts, seek legal advice. Contract law is dealt with in detail later in the course materials.

Real estate licensees must be able to draft legally enforceable documents such as contracts of purchase and sale which reflect the intent of the parties. These documents should be drafted in simple, accurate and understandable terms. Jargon, abbreviations, colloquialisms, and any terms or phrases which give rise to uncertainty should be avoided. When in doubt, a licensee may wish to err on the side of providing more detail and specificity.

The case of *Russell v. Wispinski* is a good example of the problem which can arise if the documents in a transaction are not drafted carefully.

Russell v. Wispinski (1987), 13 BCLR (2d) 196 (BCSC)

The Plaintiffs listed their house for sale with the Defendant Trust Company and its trading services representative, C. An offer was obtained by C from the Defendant purchaser to buy the house for $182,000 with specified financing and subject to the purchasers obtaining a second mortgage by a certain date. The parties subsequently signed two amending agreements, one altering the amount of the deposit and the other extending the time for obtaining the second mortgage. Since the purchaser was having difficulty obtaining the mortgage, C suggested to the Plaintiffs that the Defendant trust company grant "bridge financing" and drew up an amending document providing for such financing but leaving the details blank. C left the matter with another representative, W, while C was on vacation. The Plaintiffs did not understand the document and took it to their lawyer, who redrafted parts of it for clarification. W advised the Plaintiffs that she would not forward the documents to the purchaser unless the Plaintiffs initialled it and, despite their apprehension that it might be construed as a counter offer, the Plaintiffs initialled it. The purchaser refused to sign the document and refused to complete the transaction.

The Court held that the amending agreement presented to the purchaser did constitute a counter-offer which the purchaser was entitled to reject. The Court found that if the Contract of Purchase and Sale Amendment had been drafted in simple, accurate and understandable terms without statements irrelevant to the bargain as between the buyer and the seller, the transaction would have completed. In failing to conform to a reasonable standard of drafting, the licensees were found to be negligent.

BREACH OF FIDUCIARY DUTY

In most cases, real estate licensees act for their clients within an agency relationship, whereby the licensee is the agent and the client is the principal. The agency relationship between a licensee and a client is also a fiduciary relationship. Generally speaking, a fiduciary relationship involves the placing of trust, confidence, and reliance in the *fiduciary*, who has the ability to exercise their power to impact the beneficiary. Other common fiduciary relationships include doctor/patient, lawyer/client, teacher/student, director/corporation, and the federal government/Indigenous peoples of Canada.

fiduciary
a person who holds a position of trust with respect to someone else and is obliged, by virtue of the relationship of trust, to act solely for the other person's benefit

The most important duties that an agent owes to the principal are known as "fiduciary duties". The law recognizes that, because principals place their trust and confidence in their agents, they may be particularly vulnerable to their agents' misconduct. As such, the law has special duties, called fiduciary duties, to ensure that agents do not abuse their position for their own interests or the interests of someone other than the principal. The overarching "umbrella" fiduciary duty is the duty of loyalty, which requires the agent to act solely for the benefit of the principal and put the principal's interests ahead of all others, including the agent's personal interests. The fundamental undertaking or promise of a real estate agent is to act loyally and transparently, in the best interests of the client. Other fiduciary duties include the duty to avoid and disclose conflicts of interest, the duty of full disclosure, the duty of confidentiality, and the duty to obey lawful instructions.

Fiduciary duties are unique because, when a principal alleges that an agent has breached their fiduciary duties, rather than requiring the principal to prove this allegation, the law instead requires the agent to provide evidence to support the fact that they properly discharged or fulfilled their fiduciary duties.

The case of *Ocean City Realty Ltd. v. A & M Holdings Ltd.* is one of the most famous cases of breach of fiduciary duty in British Columbia.

Ocean City Realty Ltd. v. A & M Holdings Ltd., 1987 CanLII 2872 (BC CA)

A licensee arranged to sell a building as agent for the seller. Before completion, the buyer informed the licensee that the sale would not be completed unless the licensee agreed to split the commission with the buyer. The licensee was having financial difficulties. The licensee informed her managing broker about the deal but did not tell the seller. The managing broker consented and the licensee then agreed to the buyer's demand. The sale completed. When the seller learned of the "secret arrangement", it refused to pay the commission claimed by the licensee's brokerage. Consequently, the brokerage sued the seller.

The Court of Appeal held that the brokerage was not entitled to a commission. The fact that the licensee might have received no benefit from the "secret agreement" was irrelevant. An agent has a duty to disclose all relevant facts, whether good or bad for the agent, including any fact that could influence the conduct of the principal. Failure by a licensee to disclose a relevant fact will result in a forfeiture of the right to commission.

Chapter 12: "Law of Agency" explores the concept of the fiduciary relationship is much greater detail. Furthermore, Chapter 9: "Professionalism and Ethics" explores the duties owed by licensees to their clients that are set out in the Rules, with many of these duties being a mirror to the core fiduciary duties.

STATUTORY AND INDUSTRY LIABILITY

In addition to being found liable by the courts, a real estate licensee can be disciplined by BCFSA. You learned about BCFSA and its role in Chapter 2: "The *Real Estate Services Act*". BCFSA may discipline a licensee who has committed professional misconduct, which includes committing a breach of the *Real Estate Services Act*, *Real Estate Services Regulation*, or the Rules, or who demonstrates conduct unbecoming a licensee. The consequences of a finding of professional misconduct or conduct unbecoming can be severe and include discipline penalties of up to $250,000, licence suspensions or cancellations, and forfeiture of commission/remuneration.

A real estate licensee may also face disciplinary proceedings by a real estate board of which they are a member. Every Canadian real estate board is bound to adopt and enforce the REALTOR® Code, which includes both the Code of Ethics and the Standards of Business Practice.

The penalties that are available to boards range from a reprimand to suspension or expulsion from the board. Sometimes, a member can be ordered to pay the costs of the hearing and a monetary fine. The disciplinary committee of a board does not have the power to suspend the licence of a member; however, the suspension or expulsion from membership in the board precludes the expelled member from access to the Multiple Listing Service®. This consequence could be extremely detrimental to a licensee.

WHAT IS THE BOTTOM LINE?

The law is imposing increasingly strict standards on all professionals, including real estate licensees. Because the law is constantly changing and developing, accepted practices of the real estate industry will also change. It is imperative that licensees keep abreast of these changes. It may not be an adequate defence for licensees to maintain that they conducted themselves in accordance with the accepted practice at the time. The customs of the industry as a whole are evolving to meet the stricter requirements of the law, which in turn reflects a heightened sensitivity to the protection of consumers. Avoiding liability as a real estate licensee is not easy, but all licensees must take the time to learn how to recognize situations which put them at risk of liability, and how to avoid these situations.

PROCEEDS OF CRIME (MONEY LAUNDERING) AND TERRORIST FINANCING OBLIGATIONS[2]

Introduction

Money laundering is an issue that affects all British Columbians. It harms economies, makes communities less safe, and negatively impacts society. When money from criminal activities is used to buy properties in British Columbia, it opens the door to more crime.

Money laundering is the process used to disguise the source of money earned from criminal activities. Essentially, money laundering is designed to convert "dirty" money into "clean" money. Criminals launder their money in order to enjoy the profits from their criminal activities, without raising the suspicion of law enforcement. Money laundering is a criminal offence in Canada under section 462.31(1) of the *Criminal Code*, which states that an offence is committed whenever someone deals in any manner with property or the proceeds of property with the intent to conceal or convert it, knowing or believing that some or all of it was obtained or derived as a result of the commission of a designated offence (e.g., drug trafficking, fraud, stock manipulation, tax evasion).

Money laundering is about more than "bags of cash". A preconceived notion is that money laundered through real estate must involve a large payment of cash. In fact, most money laundering does not occur in the form of cash, as the dirty money has already entered the financial system electronically or by other means and is then transferred from a buyer to a seller.

[2] Much of the content is this section has been adapted from BCFSA's *Anti-Money Laundering in Real Estate* course.

The Scope and Impacts of Money Laundering

Money laundering has been identified as a problem both globally, and in British Columbia. The United Nations Office on Drugs and Crime has estimated that the amount of money laundered globally in one year is 2-5% of the global GDP, or $800 billion to $2 trillion US dollars. The Expert Panel on Money Laundering in BC Real Estate conservatively estimated that annual money laundering activity in 2018 in Canada was $46.7 billion, of which $7.4 billion was in British Columbia. It has been estimated that money laundering in the British Columbia real estate market has increased real estate prices by 5%. In fact, one particular money laundering tactic was so prevalent in British Columbia that it was labelled the "Vancouver Model" by the international community. Vancouver has been ideal for money laundering because of its highly desirable real estate, its traditionally welcoming attitude towards high-stakes gambling, the density of money transfer companies, and the high demand for illegal drugs.

There are many negative impacts of money laundering, including that money laundering:

- may lead to increased corruption of public officials, and threatens the "rule of law": the accountability of all persons, institutions, and entities under the law;
- can erode the public trust of professionals who assist money launderers;
- facilitates and encourages criminal activity;
- is linked to tax evasion, which deprives governments of funds to provide essential public services; and
- causes distortions in the market, particularly by inflating the prices of assets that are attractive to money launderers.

Real Estate and Money Laundering

The Government of Canada's 2015 "Assessment of Inherent Risks of Money Laundering and Terrorist Financing in Canada" found that the real estate sector is highly vulnerable to money laundering. In fact, the Financial Action Task Force (FATF) has estimated that real estate accounts for nearly a third of criminal assets confiscated worldwide.

Real estate is attractive for money launderers for a variety of reasons:

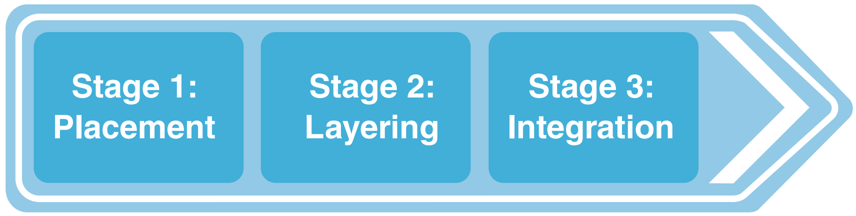
1. **High Value:** Real estate is a big-ticket, high value asset, meaning that large amounts can be laundered in a single transaction.
2. **Security:** Real estate is a fairly secure and stable asset that cannot be stolen and is less susceptible to dramatic decreases in value in the long term.
3. **Simplicity:** There is a large market for real estate and entry into the market does not require a high degree of sophistication (when compared to investing in stocks or other financial instruments, for example).
4. **Potential for Profit:** Real estate typically increases in value in the long term, and renovations and physical improvements can add to the profit potential of a property.
5. **Various Methods to Launder Money:** Money can be laundered through real estate in multiple ways, including the use of separate legal entities in real estate purchases/sales, and unregulated lenders in financing real estate.
6. **Subjective Value:** Since no two properties are exactly alike, prices can be manipulated to control the amount of money laundered in a transaction.
7. **Oversight:** Some participants in the real estate industry are unregulated, or under-regulated, meaning that there are "weak spots" in the industry that criminals can exploit.
8. **Anonymity:** The identity of *beneficial ownership* of real estate can be hidden through the use of corporations, trusts, and *nominees*.
9. **Speculative Component:** Because short-term ownership of real estate is not unusual, criminals can flip properties as part of their money laundering activities without necessarily raising suspicion.

beneficial owners (generally)
individuals who enjoy the benefits of ownership of property even though the property is registered in the name of another person or entity

nominee
an individual or entity that is legally registered as the owner of property, with true control and ownership belonging to one or more other, unregistered persons or entities (also known as a "bare trust" arrangement)

The Money Laundering Process

FIGURE 5.2: Stages in the Money Laundering Process



As shown in Figure 5.2, there are three stages in the money laundering process. First is placement, which is the process of placing the proceeds of crime into the financial system. Criminals are vulnerable when they possess large amounts of cash that can link them to an underlying crime, so by placing it into the financial system, they are better able to transfer and manipulate their funds. One example of placement includes the use of smurfs, where multiple people deposit smaller cash amounts at various financial institutions to avoid the reporting obligations and attention that larger deposits generate. Other examples include using dirty money to repay loans (which generate less scrutiny than cash deposits), using dirty money for gambling (and then converting the chips back into cash), and blending dirty money with clean money in a cash-based business.

The next stage is layering, which is the process of converting the criminal funds into another form in order to conceal the criminal origins of the proceeds. This is often the most complicated part of the money laundering process, as it typically involves several complex transactions, and may involve sophisticated professionals such as lawyers, accountants, investment bankers, and securities dealers.

The final stage is integration, which involves reintroducing and reintegrating the laundered funds into the legitimate economy to create the perception of legitimacy and having the funds appear to have been legally earned. For example, a criminal may renovate a property by paying cash from drug trafficking to tradespeople, with the sale of the improved property and the resulting profit appearing to be legally earned.

Methods Used to Launder Money Through Real Estate Transactions

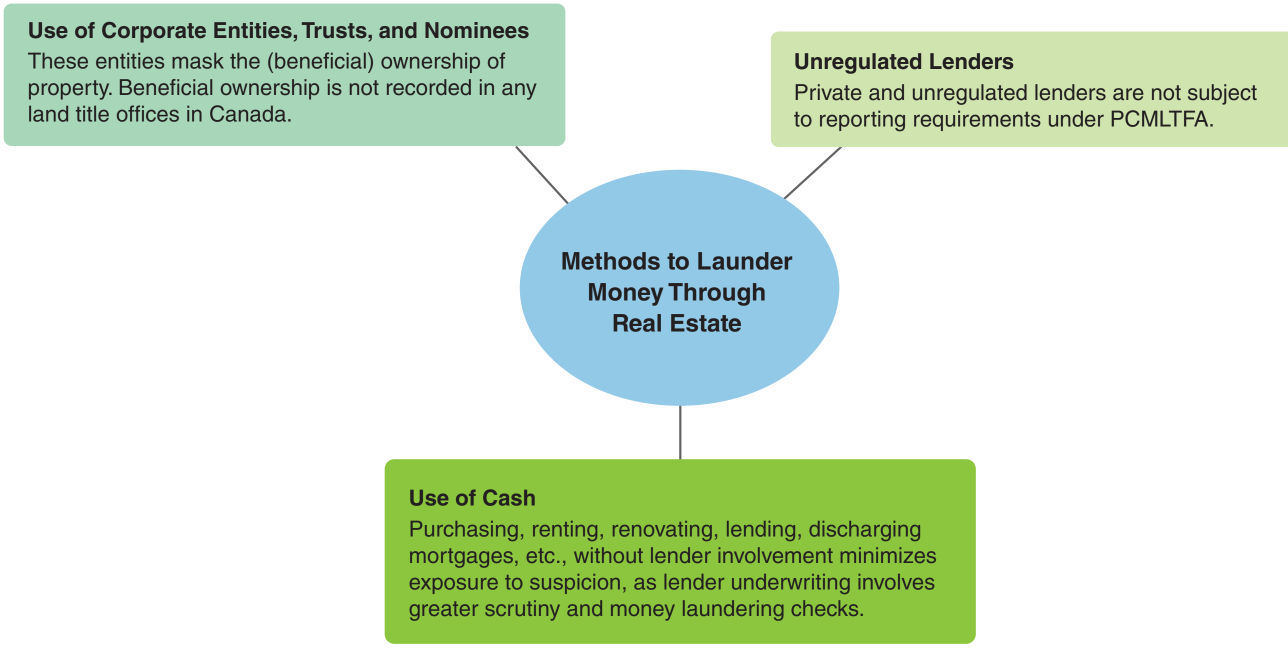
As a licensee, you can only take action to help combat money laundering if you are able to identify the red flags for money laundering in a real estate transaction. As such, it is important to have a basic understanding of how real estate is used to launder money.

There are two key misconceptions about money laundering in real estate:

- **Misconception #1 – The Only Way to Launder Money is Through Buying Property with Physical Cash.** In many cases, real estate is part of a more complex money laundering process, and the involvement of real estate only occurs after the dirty money has entered into the financial system.
- **Misconception #2 – Money Laundering is Best Dealt with by Banks and Other Financial Institutions.** While financial institutions have a large role in combatting money laundering, they are not the only ones with a role to play. Other participants in the real estate sector have different and unique perspectives that can uncover money laundering activities. For example, while a financial institution may have a brief interaction with an individual at a bank branch or office, a licensee may have a much deeper relationship with that same individual. The licensee may see the type of car they drive, where they currently live, the clothes they wear, who they associate with, and how they spend their day. Furthermore, licensees may get into much deeper conversations with these individuals and learn a lot more about them through other cues.

There are three key methods that criminals employ to launder their money through real estate transactions, as shown in Figure 5.3.

FIGURE 5.3: Money Laundering Methods in Real Estate



By using the three methods identified above, the following are some examples of money laundering schemes that criminals have used to launder their money through real estate:

1. **Mortgages:**
   a. **Mortgage Payments with Dirty Money:** Criminals may obtain a mortgage loan from a private lender, and while the down payment may be made with legitimate funds, the mortgage payments are made with dirty money. Even if the lender is regulated, the mortgage payments are subject to less scrutiny than bank deposits, because they are in smaller amounts and do not qualify as deposits.
   b. **Quickly Discharging Mortgages:** A related technique is to repeat the mortgage repayment process multiple times with a series of quickly discharged mortgages. In this method, the criminal is granted a mortgage loan, quickly pays it off with dirty money, and then applies for, and receives, another mortgage loan. This process allows the criminal to launder more money.
   c. **Loan Back Schemes:** A criminal can lend themselves money from their own illicit funds to finance a real estate purchase. They would use companies or nominees as the lender to create the appearance that this money is coming from someone else, in order to make it look like a legitimate mortgage transaction.
   d. **Acting as Unregulated Lenders:** Criminals can launder money by operating as unregulated lenders. The loan repayments would be clean money, particularly if the borrower was not involved in the criminal's illegal activities.
2. **Rental and Leasing:** There are a number of ways by which money can be laundered through a rental property. Properties owned by criminals can be rented to individuals, and the rental amounts claimed to be received can be inflated. The legitimate rental income can then be mixed with the criminal's dirty money. Another method is for criminals to purchase property (through a third party) and then pay rent using dirty money. Alternatively, criminals can provide dirty money to co-operating tenants, who make their rent payments with the dirty money and repay the criminal with clean money.
3. **Construction and Renovation:** Criminals can use dirty money to buy supplies and pay labourers and tradespeople for construction or renovation work. The result of this activity is an increase in the value of their properties, so when they sell them, it appears that they have earned legitimate income through a capital gain.

4. **Criminal Operations:** Criminals often purchase real estate because they need it in order to conduct their criminal operations and generate illicit profits (e.g., facilities to produce or grow drugs, provide prostitution services, etc.)
5. **Valuation:** Criminals may overpay for real estate, allowing them to wash larger sums of money. In other cases, they may underpay for real estate on paper to a seller, paying the balance of the true purchase price in cash with their dirty money. Sellers may be motivated to agree to such a transaction because this will enable them to evade some of the capital gains tax on the sale.
6. **Unfinanced Transactions:** Purchasing real estate without financing (i.e., without a mortgage loan) is rarely done with physical cash, but rather by wire, bank draft, or cheque. These transactions draw less attention because a lender, who typically collects a lot of information as part of their underwriting process, is not involved.
7. **Aborted Purchases:** Sometimes, the seller is an unsuspecting person, and other times, the seller is aware of the intent of the criminal buyer, who provides a deposit (paid with dirty money) to their lawyer or real estate agent. The deposit is placed in a lawyer or agent's trust account. The buyer then claims that the transaction will not be closing (e.g., subject clauses could not be fulfilled, the parties agreed to terminate the contract) and asks for their deposit back. The return of their money from a lawyer's or agent's trust account helps the criminal create distance with the dirty money used to pay for the initial deposit.

Real estate licensees have an opportunity, and a duty, to help shut the door to money launderers and keep criminal activities out of their communities.

Combatting Money Laundering

The History of the Anti-Money Laundering Regime

FATF was created in 1989 at the G7 Summit and now has membership of most of the major financial centres of the world. FATF was initially tasked with examining money laundering techniques and trends, reviewing current international and national measures, and setting out measures to combat money laundering. In 1990, FATF issued a report containing Forty Recommendations which were intended to provide a comprehensive plan of action to fight money laundering. FATF's mandate was expanded after the terrorist attacks in New York on September 11, 2001 to include developing standards to fight against terrorist financing. FATF's standards were implemented in Canada in 2000 through the enactment of the *Proceeds of Crime (Money Laundering) Act*, which was expanded upon and renamed the PCMLTFA after the September 11 terrorist attacks.

The PCMLTFA

The PCMLTFA has four objectives:

1. To implement specific measures to detect and deter money laundering and the financing of terrorist activities, and to facilitate the investigation and prosecution of money laundering and terrorist activity financing offences
2. To respond to the threat posed by organized crime by providing law enforcement officials with the information they need to deprive criminals of the proceeds of their criminal activities while protecting individual privacy
3. To assist in fulfilling Canada's international commitments to participate in efforts to combat transnational crime
4. To enhance Canada's capacity to take targeted measures to protect its financial systems and mitigate the risk of it being used for money laundering

To fulfill its first objective, the PCMLTFA places a variety of obligations on those who may be able to identify money laundering activities. Those who have such obligations are known as "reporting entities". Real estate brokers and sales representatives (collectively known as licensees in British Columbia), when acting as agents for the purchase and sale of real estate, are reporting entities under the PCMLTFA. Other reporting entities include real estate developers, accountants, notaries public, casinos, dealers of precious metals and stones, financial entities, and securities dealers.

The Financial Transactions and Reports Analysis Centre of Canada

The PCMLTFA also establishes the Financial Transactions and Reports Analysis Centre of Canada (FINTRAC), one of several government bodies involved in Canada's regime to combat money laundering. It is an independent government agency which operates at arm's length from law enforcement. FINTRAC collects, analyzes, and discloses information to law enforcement and national security agencies to combat money laundering and terrorist financing. FINTRAC's key tasks include:

- requiring certain individuals and entities to submit various reports to FINTRAC;
- using these reports to assess and analyze financial transactions to uncover relationships and networks that will assist in criminal investigations and prosecution of offences related to money laundering/terrorist financing and threats to the security of Canada;
- ensuring compliance of reporting entities with the PCMLTFA; and
- promoting public awareness and understanding of money laundering and terrorist financing threats.

KEY COMPLIANCE OBLIGATIONS UNDER THE PCMLTFA

The PCMLTFA applies to real estate brokers, sales representatives, and real estate developers. Licensees fall with the definition of a real estate broker or sales representative when they act as an agent for the purchase and sale of any type of real estate. When they do so, they are deemed to be a "reporting entity" under the PCMLTFA, and will be subject to a number of obligations. However, a licensee's property management activities (e.g., leases or rental management) are NOT subject to the obligations under the PCMLTFA. The obligations on developers are outside the scope of this course.

As a Licensee...

Despite the fact that clients sign agency contracts with the brokerage, compliance with the PCMLTFA is not just a "brokerage issue" to be handled by the managing broker. All licensees who act as agents in the purchase and sale of real estate are reporting entities and are subject to the requirements under the PCMLTFA. While only managing brokers must establish a compliance program, all the licensees within the brokerage must fulfill their obligations in a manner that is consistent with it. To this end, all licensees within a brokerage are expected to work together to ensure that the key obligations under the PCMLTFA are fulfilled. Whenever you are in doubt as to your obligations under the PCMLTFA, do not hesitate to speak with your managing broker or the brokerage's compliance officer.

RECBC/FINTRAC Memorandum of Understanding

On April 9, 2019, RECBC (a former regulatory body under the *Real Estate Services Act*, whose duties are now performed by BCFSA) announced that, for the first time in Canada, a provincial real estate regulator has partnered with FINTRAC to fight money laundering. RECBC signed a memorandum of understanding (MOU) with FINTRAC to cooperate and share information to facilitate anti-money laundering enforcement activities in British Columbia's real estate sector. This made RECBC, now BCFSA, a more active participant in initiatives to identify and deter money laundering and terrorist financing. The MOU will also increase opportunities for BCFSA and FINTRAC to work together to monitor trends and emerging risks, and develop education and information to support BC's real estate industry to do its part in fighting money laundering.

BCFSA may consider non-compliance with the PCMLTFA to be conduct unbecoming a licensee and subject to disciplinary action. For example, in April 2019, a license was found to have committed conduct unbecoming a licensee when, while she was acting as a buyer's agent, she allowed the buyer to transfer money directly into her personal bank account in Canada using a name other than the buyer's name. The licensee knowingly avoided the application of the rules and requirements of FINTRAC in this transaction. This breach, among others in respect to this transaction, led to a variety of orders including a disciplinary penalty of $7,500, a licence suspension for 270 days, and a requirement to complete an ethics course.

Licensees have four key obligations under the PCMLTFA.

1. Compliance Program

The overarching document for PCMLTFA compliance, at the brokerage level, is the compliance program. Managing brokers must establish a compliance program for their brokerage, which provides the structure that ensures that the obligations under the PCMLTFA are fulfilled.

Most of the obligations under the PCMLTFA lie with the brokerage, rather than individual licensees. However, while the majority of PCMLTFA obligations rest with brokerages, non-managing broker licensees are the representatives of the brokerage and are relied upon to carry out certain PCMLTFA obligations. As such, non-managing broker licensees play an important role in ensuring the brokerage's compliance program is followed. To do this, they need to be aware of the details of the compliance program. A compliance program is only effective if the brokerage's individual licensees apply and implement it in their daily business activities.

A compliance program must include the following five elements:

1. **Compliance Officer:** A compliance officer must be appointed, who is responsible for the implementation and oversight of the brokerage's compliance program. They must have the necessary authority and knowledge to carry out the requirements of the program, meaning that they must have knowledge of the business, knowledge of the money laundering and terrorist financing risks in the sector, and knowledge of the brokerage's legal obligations under the PCMLTFA.
2. **Policies and Procedures:** The brokerage must develop written policies and procedures that are applied to all the activities of and persons within the brokerage. The policies must be kept up-to-date. These policies and procedures must be approved by a senior officer of the brokerage. In most cases, this will be the managing broker.
3. **Risk Assessment:** A risk assessment is an analysis of the potential risks that could expose a business to money laundering. It must be documented and include mitigation measures and strategies. In completing a risk assessment, one must consider the brokerage's relationship with its clients; the products, services, and channels offered by the brokerage; the geographic location where the brokerage operates; new technologies and their impacts; and other relevant factors affecting the brokerage.
4. **Training Program:** Brokerages must develop, implement, and maintain a written training program for PCMLTFA compliance for employees, agents, and others authorized to act on behalf of the brokerage.
5. **Review of Compliance Program:** A compliance program must be reviewed every two years to ensure that, despite any changes in the operating environment and conditions, the program continues to be effective. Specific follow-ups based on a review must be actioned by a senior officer of the brokerage.

Setting up a compliance program under the PCMLTFA must be a deliberate and well thought-out task. Ultimately, while there are some strict requirements for a compliance program, there is also a lot of flexibility to design a program that meets the individual circumstances of the brokerage.

2. Know Your Client

The Know Your Client obligations, or "KYC" obligations, under the PCMLTFA relate to identifying clients. If the client is an individual, this means that a licensee must identify them. If the client is an entity (e.g., corporation, trust, partnership, fund, unincorporated association/organization), this means that the licensee must confirm the entity's existence. For the balance of the discussion of obligations under the PCMLTFA, we will simply refer to the process of identifying individuals or confirming the existence of entities as "identification".

KYC obligations can also extend to non-clients, if they are not represented by another licensee in a particular real estate transaction. In these cases, each licensee involved in the transaction must take reasonable measures to identify the unrepresented individual or entity. For example, if a licensee is acting for a seller and an unrepresented buyer wishes to make an offer on the property, the licensee needs to identify the client seller and needs to take reasonable measures to identify the unrepresented buyer.

Complying with KYC obligations relating to identifying clients is not only required under the PCMLTFA, but it can also help a licensee in other ways, such as in identifying and preventing title transfer fraud (discussed in Chapter 4: "The Subdivision of Land and Title Registration in British Columbia").

There are four main triggers for the KYC obligation to identify a party in a real estate transaction (discussed shortly). A record of the identification (i.e., an information record) must also be kept. What information must be contained in the record depends upon the type of party:

- **For Individuals:** Name, address, date of birth, and nature of their principal business or occupation.
- **For Non-Corporate Entities**: Name, address, and nature of principal business for both the entity and the individual conducting the transaction on behalf of the entity.
- **For Corporate Entities**: A copy of the provisions in the official corporate records relating to the power to bind the corporation with respect to the transaction (e.g., certificate of incumbency, articles of incorporation, bylaws that set out the officers who are authorized to sign on the corporation's behalf).

There are various exceptions for each (beyond the scope of this course), such as when the entity involved is a financial entity (e.g., bank) or a public body. Furthermore, licensees are not required to re-identify an individual or entity if they have already done so during a past transaction in accordance with their PCMLTFA obligations, have kept the required records, and have no doubts about the information used for that purpose.

Trigger #1: Receipt of Funds

Licensees who receive funds from a person in any form (e.g., cash, bank draft, cheque) must identify the individual or entity. An exception exists when funds are received from a financial entity (e.g., a bank), or a public body. If a licensee receives funds directly from another party in the transaction, and that party is represented by another licensee, that other licensee has to identify that party (i.e., each licensee identifies their own client only).

Trigger #2: Purchase or Sale Transaction

Licensees must identify the individual or entity when a purchase and sale of real estate occurs. Licensees must identify their own clients and any unrepresented parties. Further, if their client or unrepresented party is acting on behalf of a third party, that third party must also be identified.

Trigger #3: Large Cash Transaction

A large cash transaction is defined as a transaction in which a licensee receives $10,000 or more in cash in a single transaction, or multiple payments of cash that add up to $10,000 or more in a 24-hour period (if the transactions were conducted by or on behalf of the same individual or entity, or if the amounts were for the same beneficiary).

FINTRAC has also indicated that reporting entities have KYC obligations if they receive the equivalent of $10,000 or more in virtual currency, either all at once or over a 24-hour period. However, licensees are unlikely to deal with virtual currency in their usual practice. For example, the Real Estate Council (which was responsible for the regulation of licensees prior to its integration with BCFSA in 2021) stated that virtual currencies cannot be held in trust accounts by brokerages. Additionally, brokerages may have policies prohibiting the receipt of virtual currency by its licensees.

Trigger #4: Suspicious Transactions

A suspicious transaction occurs when the licensee has reasonable grounds to suspect that the financial transaction is related to the commission or attempted commission of a money laundering or terrorist financing offence. Suspicious transactions will be explored in greater detail later in this chapter.

How to Identify an Individual

There are three main methods that licensees can use to identify an individual:

1. **Government-Issued Photo Identification Method:** Licensees must review a piece of government-issued photo identification that is "authentic, valid and current", and compare it to the person providing it to ensure that they match. The PCMLTFA now allows for this to be done virtually, if sophisticated software that is able to assess a particular identification document's authenticity (through an analysis of its security features) is used. As such, reviewing identification through video conferencing and reviewing photocopied identification is **not** permitted.

2. **Credit File Method:** Licensees must refer to the individual's credit file, which must be located in Canada and have been in existence for at least three years. The name, address, and date of birth on the credit file must match the information that the individual provided to the licensee.
3. **Dual Process Method:** Licensees must do two of the following:
   a. Refer to information from a reliable source (e.g., banks, government agencies, utility companies) that includes the individual's name and address
   b. Refer to information from a reliable source that includes the individual's name and date of birth
   c. Refer to information that includes the individual's name and confirm that they hold a deposit account, a prepaid payment product account, or a credit card or loan account with a financial entity

   The name, address, date of birth, or confirmation of account must match what the individual provided to the licensee.

How to Confirm the Existence of a Corporate Entity

Entities include corporations, trust, partnerships, funds, and unincorporated associations and organizations. To confirm the existence of a corporation, licensees can refer to a paper record, or an electronic record that was obtained from a source that is accessible to the public, such as its certificate of incorporation; a certificate of active corporate status; a record that has to be filed annually under provincial securities legislation; or any other record that confirms the corporation's existence, such as the corporation's published annual report signed by an audit firm, or a letter or notice of assessment for the corporation from a municipal, provincial, territorial, or federal government. Licensees must also verify the corporation's name, address, and the names of its directors.

To confirm the existence of an entity other than a corporation, licensees can refer to a paper record, or an electronic record that was obtained from a source that is accessible to the public, such as a partnership agreement; the articles of association; or any other record that confirms its existence as a legal entity (e.g., trust agreement).

FINTRAC has stated that licensees may also use another method, called the "reliance method", to identify individuals and entities. The reliance method allows different reporting entities to share information with one another and may allow one reporting entity to rely upon another reporting entity's identification measures, rather than independently verifying the same individual or entity twice. Licensees considering the "reliance method" must consult with their compliance officer or managing broker about the availability of this procedure at their particular brokerage.

Third Party Determination

In certain cases, when performing one's KYC duties, a licensee must also take reasonable measures to determine if a client is acting on behalf of someone else (i.e., a third party). A third party is defined by FINTRAC to be a person or entity who instructs another person or entity to conduct an activity or financial transaction on their behalf. Recall that money launderers try to create separation between a transaction and themselves by using nominees (e.g., corporations, trusts, associates, friends, and family members) to act as the party in the transaction. Third party determination is required in purchase and sales transactions and large cash transactions.

Reasonable measures could involve asking the person if they are acting on someone else's behalf, or reviewing the information that the licensee may have already collected. For example, if a client who claims to have a low-paying job is purchasing a high-value property with little or no financing, this may raise a suspicion that the client is acting on behalf of another person. The licensee must document the steps they take, to show that their determination measures were reasonable.

Beneficial Ownership Requirements

As discussed earlier, money launderers sometimes attempt to conceal their identities by using one or more intermediary corporations or other entities to complete a financial transaction. For this reason, identifying the beneficial owners of any entities who may be parties to a real estate transaction is of crucial importance in the fight against money laundering.

FINTRAC states that a *beneficial owner* is any individual who directly or indirectly owns or controls 25% or more of a corporation or other entity. It is important to note that this definition is focused on "individuals", as opposed to other corporations or entities. This is because money launderers may use one or more "layers" of corporations or other entities in order to distance themselves from a money laundering transaction. An example of corporate layering is provided below, together with the type of beneficial ownership information that must be collected in that particular scenario. In short, licensees must take steps to fully trace the ownership of any entity involved in a real estate transaction through to the individuals that ultimately own the entity.

beneficial owner (PCMLTFA)
for the purposes of the PCMLTFA any individual who directly or indirectly owns or controls 25% or more of a corporation or other entity

Licensees have two obligations with respect to beneficial ownership information. These obligations are triggered any time a licensee is required to verify the identity of an entity.

1. **The first obligation is to obtain beneficial ownership information.** The specific information that must be obtained depends upon the type of entity. For corporations, licensees must obtain the names of all directors of the corporation and the names and addresses of all persons who directly or indirectly own or control 25% or more of the shares of the corporation. FINTRAC indicates that beneficial ownership information could be obtained in various ways, including verbally from an authorized representative of the entity, or in writing (e.g., by having the entity's authorized representative fill out a form that includes questions about beneficial ownership).
2. **The second obligation is to take reasonable measures to confirm that the beneficial ownership information they have obtained is accurate.** FINTRAC has provided various examples of how licensees may discharge this obligation. Perhaps the simplest method is to ask the authorized representative to sign a document confirming the accuracy of the information. More investigative methods may involve searching the Land Owner Transparency Registry (discussed later) or the BC Company Registry, or reviewing the official documents of the entity, to independently confirm the accuracy of the information. The degree of investigation that will be considered reasonable will depend upon the risk assessment of the entity, with high risk entities meriting more scrutiny than low risk entities. Risk assessments are discussed further later. Licensees must keep a record of the measures taken to confirm the accuracy of the information they obtain.

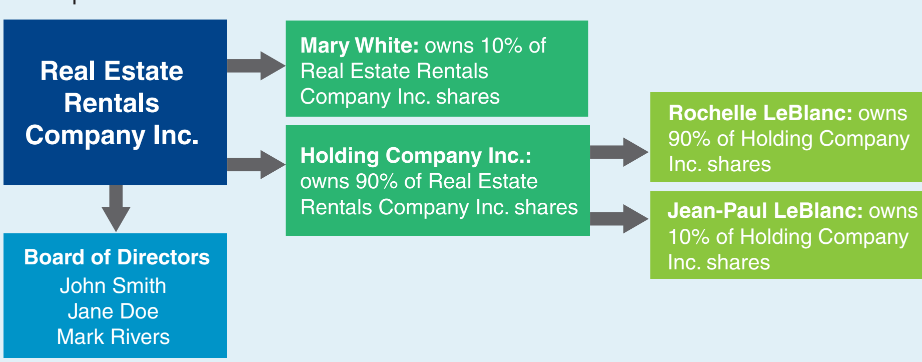
There may be circumstances in which a licensee is unable to obtain beneficial ownership information from an entity, or is unable to confirm its accuracy. In such cases, the licensee is expected to take reasonable measures to verify the identity of the entity's chief executive officer, or the person who performs a similar function, and apply their brokerage's special measures relating to high risk clients, which should be contained in the brokerage's written compliance program documents.

Where a licensee has (after taking reasonable measures) confirmed that there are no individuals who directly or indirectly own 25% of an entity, the licensee must keep a record of the measures they took and the information they obtained in order to reach that conclusion. Note that confirming that there are no beneficial owners is different than being unable to confirm who the beneficial owners are.

Beneficial ownership information must be retained for five years after the last business transaction is conducted.

Example

The following illustrates the type of beneficial ownership information that FINTRAC expects licensees to record, when dealing with a client that is a corporation.



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In this example, you must record:

1. The names of all directors of Real Estate Rentals Company Inc.:
    - John Smith;
    - Jane Doe; and
    - Mark Rivers.
2. The names and addresses of all of the persons who directly or indirectly own or control 25% or more of the shares of Real Estate Rentals Company Inc.:
    - The name and address of Rochelle LeBlanc, who owns 90% of Holding Company Inc. Since Holding Company Inc. owns 90% of Real Estate Rentals Company Inc.'s shares, and Rochelle owns 90% of Holding Company Inc.'s shares, Rochelle indirectly owns and controls more than 25% of the shares of Real Estate Rentals Company Inc. (Rochelle's indirect interest is equal to 90% x 90% = 81%).
3. The information establishing the ownership, control and structure of Real Estate Rentals Company Inc., including:
    - the ownership of Real Estate Rentals Company Inc. being shared between Mary White (10%) and Holding Company Inc. (90%);
    - the ownership of Holding Company Inc. being shared between Rochelle LeBlanc (90%), and Jean-Paul LeBlanc (10%);
    - the control of Real Estate Rentals Company Inc. significantly being held by Holding Company Inc. and specifically Rochelle LeBlanc (who indirectly owns and controls more than 25% of Real Estate Rentals Company Inc.'s shares);
    - the structure of Real Estate Rentals Company Inc., including that it is a privately held corporation; and
    - other structure details about Real Estate Rentals Company Inc. including the positions held by each director and any organization chart.
4. The reasonable measures you took to confirm the accuracy of the information:
    - the steps you took as reasonable measures to confirm the accuracy of this information; and
    - any official documents obtained to support the measures you took.

For further guidance and examples like this one created by FINTRAC, visit: *www.fintrac-canafe.gc.ca/guidance-directives/client-clientele/bor-eng*

In some circumstances, such as where clients have complex ownership structures involving several different individuals, corporations, or trusts, brokerages may choose to obtain the assistance of specialized third parties to obtain and confirm beneficial ownership information. For instance, there may be law firms, anti-money laundering services providers, or corporate due diligence service provides who are familiar with corporate ownership structures and anti-money laundering obligations.

Land Owner Transparency Act ("LOTA")

LOTA came into effect in British Columbia in November 2020, other than the sections dealing with information being available for searches. Those sections came into effect on April 30, 2021. LOTA was created by the British Columbia government as part of its broader efforts to combat tax evasion, fraud, and money laundering in this province. As discussed earlier, anonymity is an important objective for money-launderers, who sometimes use corporations, trusts and nominees to hide their beneficial interests and rights in real property. In one 2004 study analyzing RCMP case files, the authors concluded that of all the money-laundering cases involving real estate, 61.4% involved nominee owners. LOTA was enacted in an attempt to end the "hidden ownership" of real estate in British Columbia. LOTA was preceded by several reports about the prevalence of money laundering in the province, and the launch of a public inquiry into the issue. LOTA is an important and far-reaching piece of legislation that owners of real estate and licensees need to understand.

LOTA requires that a transparency declaration be filed when applying to register certain interests in land at the land title office. These interests are fee simple estates, life estates, rights to occupy under a lease exceeding 10 years, and certain rights under an agreement for sale. The transparency declaration states whether or not the person receiving the interest is a "reporting body", which includes "relevant corporations", "trustees of relevant trusts", and "partners of relevant partnerships", each of which is defined in LOTA. For example, "relevant corporations" include all corporations except for certain corporations that are expressly excluded such as publicly traded corporations, strata corporations, and savings institutions. Also, nominee owners would be considered "trustees of relevant trusts", and therefore, reporting bodies under LOTA.

continued next page

If the interest will be registered in the name of a reporting body, then the reporting body must also file a transparency report at the same time as the transparency declaration. Failure to submit a transparency declaration or transparency report (as appropriate) will result in the registrar of the land title office refusing to accept an application to register the interest.

The transparency report must include certain information, including information about any "interest holder" of the reporting body. Under LOTA, the legal definition of "interest holder" includes individuals who may not have direct ownership of land but are considered to have an indirect interest in it. Interest holders include:

1. For land registered in the name of a trustee of a relevant trust, individuals who have a beneficial interest in the land as well as individuals who have the power to revoke the relevant trust and receive the interest in land.
2. For land registered in the name of a relevant corporation, individuals who (a) own 10 per cent or more of the issued shares, or 10 per cent or more of shares that carry the voting rights of the relevant corporation; or (b) have rights or abilities to elect, appoint or remove the majority of the directors of the relevant corporation.
3. For land that is the property of a relevant partnership and is registered in the name of a partner of the relevant partnership, individuals who are the partners in the relevant partnership.

Transparency reports require various types of information to be provided by reporting bodies, such as:

- "Primary identification information" about the reporting body, such as:
  - in the case of an individual, the person's full name, citizenship, and certain information about their principal residence (city and province if within Canada, or city and country if outside Canada); and
  - in the case of a corporation, the name, address and jurisdiction of the corporation;
- "Primary identification information" plus certain other information about each "interest holder", such as:
  - birthdate;
  - social insurance number; and
  - description of how the individual is an interest holder (e.g., owns 10% of voting shares);
- Parcel Identifier (PID) of the land to which the transparency report relates; and
- The name and contact information of the person certifying the report.

Licensees will not be responsible for creating and filing transparency declarations and transparency reports. These documents should be prepared and submitted by lawyers or notaries public on behalf of their client. Licensees should direct client questions about LOTA disclosure to these professionals.

LOTA creates a record keeping system, known as the Land Owner Transparency Registry ("LOTR"). LOTA records are completely separate from *Land Title Act* records. According to section 5 of LOTA, any documents or records made under LOTA are not considered documents or records for the purposes of the *Land Title Act*. Although LOTA records are stored in a searchable database commonly referred to as a "registry" (i.e., LOTR), LOTA itself does not refer to a "registry" and there are important distinctions between LOTR and the *Land Title Act* registry. Unlike the registry under the *Land Title Act,* LOTR does not confirm title or ownership of interests and estates. Further, the correctness of LOTA records has not been conformed by anyone other than the transferee.

Some of the information collected under LOTA is searchable by the public. "Public" includes real estate licensees. Some information (e.g., birth dates and social insurance numbers) is available only to certain individuals and authorities (such as law enforcement and taxation authorities). A member of the public may search LOTR in one of two ways: by PID or by name. LOTR searches by PID will disclose information about certain reporting bodies, interest holders, or settlors (i.e., persons who create and contribute property to a trust) that are related to the PID searched. LOTR searches by name will disclose PIDs for which the name searched is recorded as a reporting body, an interest holder, or a settlor. However, a person may apply to omit their name or other information from the publicly searchable information for reasons of personal security. LOTA also requires that "primary identification information" be omitted from the publicly accessible information for individuals who are under 19 years of age or individuals who have been determined to be incapable of managing their own financial affairs. The information searchable by the public will not be made available for search until at least 90 days after the applicable transparency report is accepted for filing. For these and other reasons, licensees need to understand that the information received under a LOTR search may be incomplete or incorrect.

A LOTR search is not a substitute for a land title office search. LOTR is not meant to be a resource for land title matters. In fact, the *Land Title Act* has been modified in an important way as a result of LOTA. In the Chapter of your Course Manual dealing with land registration, the principle of "abolition of notice" is discussed. As set out in that section, "Under section 29 [of the *Land Title Act*], a purchaser dealing with the registered owner only needs to be concerned with those estates and

continued next page

interest contained on the title." Section 29 has been amended so that a purchaser dealing with a registered owner is not affected by a transparency declaration or transparency report filed under LOTA, whether or not they knew of the declaration, report, or information.

LOTR is one of the tools that licensees can use to assist them in fulfilling their anti-money laundering obligations. For example, a LOTR search using a client's name could reveal a different picture of the client than they represented to the licensee, and it might raise suspicions worthy of investigation. For further guidance as to the use of LOTR in the fight against money laundering, see the guidance contained in BCFSA's Knowledge Base.

In the event that a client raises an issue that may engage LOTA obligations, the licensee should recommend their client to seek independent legal advice as soon as possible.

Politically Exposed Persons and Heads of International Organizations

Given the threat foreign and domestic political corruption poses, the PCMLTFA and its regulations require licensees to take reasonable measures to determine whether the person with whom they are in a business relationship is a politically exposed persons (PEP), a head of an international organization (HIO), or a family member or close associate of a PEP or HIO, at the outset of a business relationship and at certain other points during the business relationship. Business relationships are discussed in greater detail later in this chapter.

In addition, if licensees receive an amount of cash (or virtual currency) equal to $100,000 or more from a person, the licensee must take reasonable measures to determine whether the person from whom the cash or virtual currency was received is a PEP, an HIO, or a family member or close associate of a PEP or HIO.

In the event that a licensee determines that they are dealing with a PEP, HIO, or a family member or close associate of a PEP or HIO, additional record keeping obligations will apply. Licensees should consult their brokerage's compliance program where PEPs or HIOs are present or suspected.

Business Relationships and Ongoing Monitoring

A licensee is considered to be in a business relationship with an individual or entity the first time that they are required to verify their identity.

There are two key requirements placed upon licensees when they are in a business relationship with a person:

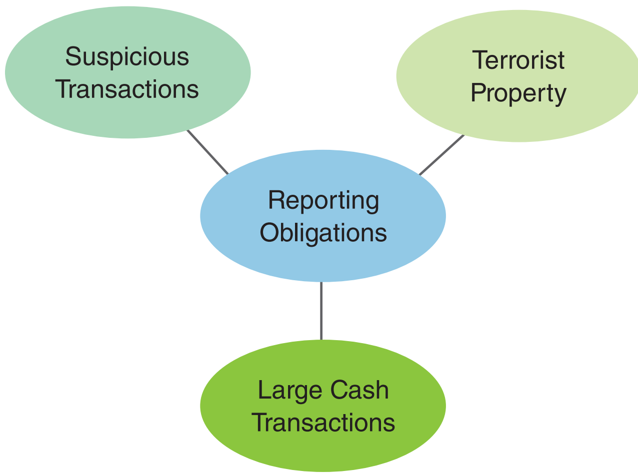
1. **Keep a record of the intended nature of the business relationship.** This requirement is fairly simple. For example, it could be as simple as: "The purpose of this relationship is to act as an agent for someone looking to identify residential properties for investment."
2. **Perform ongoing monitoring based on risk assessments.** At the outset of the business relationship, one of the first duties of brokerages and licensees is to assess the risk of the client participating in money laundering or terrorist financing activities. This risk assessment should follow the procedure contained in a brokerage's written compliance program, and may be based upon various factors, such as the geographic location of the client, the country where funds originated, the client's identity, and the client's business activities. Upon completion of the risk assessment, the client may be categorized into a certain risk profile, with some clients being higher risk than others. The purpose of ongoing monitoring is to detect any suspicious transactions; to keep client information up-to-date; to reassess the client's risk profile; and to determine whether transactions are consistent with what is known about the client. High-risk clients' information must be updated more often. Ongoing monitoring is also about reassessing the client's risk profile, which may change if the type of transactions the client engages in changes, or the licensee learns new information about prior transactions. A business relationship will end five years after the last transaction that required the licensee to verify the identity of the client. Each brokerage will have policies for how ongoing monitoring should be done. For certain types of clients, ongoing monitoring may be as simple as annual or other periodic follow-up with the client by email to ensure accuracy of client information. Ongoing monitoring may also involve periodic searches of LOTR to assess whether the client has acquired any other property interests in BC.

3. Reporting

The third key obligation upon licensees under the PCMLTFA relates to reporting. Licensees are required to provide certain reports to FINTRAC. These reports are essential to FINTRAC's ability to develop financial intelligence, a key component of the anti-money laundering regime. The quality of a licensee's reporting will be part of FINTRAC's examination of their brokerage.

There are three key reporting requirements upon licensees, as shown in Figure 5.4.

FIGURE 5.4: Three Reporting Obligations Upon Licensees



Terrorist Property

A Terrorist Property Report must be filed without delay by a licensee when they know or have reason to believe that property in their possession or under their control is either owned by a terrorist or a terrorist group, or controlled by or on behalf of a terrorist or terrorist group. A report must also be sent to the RCMP and the Canadian Security Intelligence Service (CSIS).

Large Cash Transactions

A large cash transaction was defined earlier as a transaction in which a licensee receives $10,000 or more in cash in a single transaction, or multiple payments of cash that add up to $10,000 or more in a 24-hour period (if the transactions were conducted by or on behalf of the same individual or entity, or for the same beneficiary). Earlier, you read that large cash transactions trigger KYC obligations (i.e., the licensee must identify the individual or confirm the existence of the entity).

In addition to the KYC obligations, licensees must file a Large Cash Transaction Report within 15 days of the transaction. In reality, most brokerages either do not accept cash at all, or do not accept cash over certain amounts. This may eliminate the obligation to file Large Cash Transaction Reports.

Licensees have similar reporting obligations for large virtual currency transactions, but as discussed, the likelihood of licensees dealing with virtual currency in BC at the present time is relatively low.

Suspicious Transactions

The reporting of suspicious transactions is a key obligation upon licensees, and the industry has been criticized for not reporting suspicious transactions as often as it should. The real estate sector is highly vulnerable to money laundering, and there are numerous methods and schemes used by criminals to launder money through real estate. As stated earlier in this chapter, it has been estimated that money laundering in the British Columbia real estate market has increased real estate prices by 5%. Despite these realities, only 62 Suspicious Transaction Reports were filed by real estate licensees from 2014 to 2018. There is a possibility that licensees do not fully understand their obligations in this area under the PCMLTFA, or licensees are consciously avoiding their obligations under the PCMLTFA.

Licensees are on the front line for detecting and deterring money laundering. FINTRAC uses reports from reporting entities to assess and analyze financial transactions in order to uncover money laundering and terrorist financing, among other things. Suspicious Transaction Reports ("STRs") are the most valuable types of reports to identify money laundering, so they must be detailed and of high quality.

The basic obligation for licensees is simple: An STR must be filed as soon as practicable by a licensee when they determine that there are reasonable grounds to suspect that a transaction or attempted transaction is related to the commission or attempted commission of a money laundering or terrorist financing offence. Unlike large cash transaction reports, there is no monetary threshold for reporting on a suspicious transaction.

Reasonable Grounds to Suspect

While the obligation to file an STR is simple, applying the test for when to file is not always easy. The threshold for submitting an STR to FINTRAC is reaching "reasonable grounds to suspect". This threshold applies to both completed and attempted transactions, in the course of a licensee's activities in the purchase and sale of real estate. Therefore, so long as the activities relate to a licensee's activities, they can report on any aspect of a transaction, even for those which they are not directly involved.

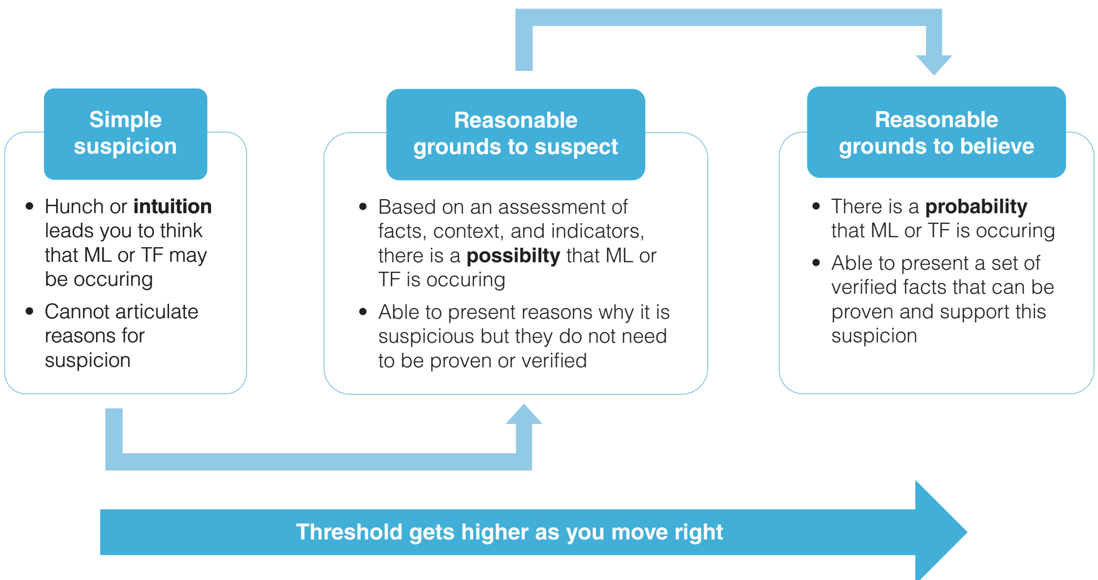
Reasonable grounds to suspect occurs when there is a possibility of a ML/TF offence. Under this threshold, a licensee does not have to prove the facts that led to their suspicion. The suspicion simply needs to be reasonable (i.e., it cannot be biased or prejudiced). A licensee's reasons for the suspicion must be explainable in such a way that another individual with similar knowledge, experience, and training would, based on the same information, likely reach the same conclusion.

Reasonable grounds to suspect is:

- a step above simple suspicion (i.e., a "hunch" without much more); and
- a step below reasonable grounds to believe (i.e., probability supported by verified facts).

A simple way to think about the different standards is that simple suspicion is a "hunch" or intuition (but not much more), reasonable grounds to suspect is about a possibility (with valid reasons), and reasonable grounds to believe is about a probability (supported by verified facts). As you can see from Figure 5.5, the threshold gets higher as you move from simple suspicion, to reasonable grounds to suspect, to reasonable grounds to believe.

FIGURE 5.5: Different Standards of Suspicion



Source: *www.fintrac-canafe.gc.ca/guidance-directives/transaction-operation/Guide2/2-eng*

It is possible that a licensee has one piece of information that is so compelling that it leads them to start an assessment or submit an STR. However, a suspicious transaction often involves many elements that, on their own, seem insignificant, but together may raise suspicion that the transaction is related to the commission or attempted commission of a money laundering or terrorist financing offence. In most cases, the determination that there are reasonable grounds to suspect is based on a mix of facts, context, and money laundering/terrorist financing ("ML/TF") indicators. When viewed together, the indicators will either inform or negate one's suspicion of money laundering or terrorist financing.

As a Licensee...

Remember that, while you may not feel the need to report a suspicious transaction without actual evidence of criminal activity, you are required to do so by law. Filing an STR is not equivalent to a declaration that you think money laundering or terrorist financing is occurring. Rather, the filing of an STR is simply an indication to FINTRAC that there are enough factors present in a transaction that money laundering or terrorist financing is a possibility, and FINTRAC, armed with a wider variety of intelligence, may be able to uncover money laundering or terrorist financing activities. You are in the best position to know what are usual transactions for your business and therefore, what is suspicious.

Facts

A fact is an actual event, action, occurrence, or element that exists or is known to have happened or existed. It cannot be an opinion. For example, the facts surrounding a financial transaction could include the date, time, location, amount, or type of transaction, or could include account details or the party's financial history.

Context

A financial transaction may not appear suspicious in and of itself. However, when examined in the appropriate context, suspicion may be raised. Understanding the context of a financial transaction involves something that may be observed or acquired through:

- knowledge of the typical financial activities found within the real estate business and industry;
- a general awareness of the events occurring in the real estate market;
- regular "know your client" activities; and
- the background and/or behaviour of a client.

When completing an STR, context is important in order to clarify a set of circumstances or to provide an explanation of a situation or financial transaction so that it can be understood and assessed by FINTRAC.

ML/TF Indicators

ML/TF indicators are potential red flags that could initiate suspicion or indicate that something may be unusual without reasonable explanation. Red flags typically stem from one or more factual characteristics, behaviours, patterns, and other contextual factors that identify irregularities related to financial transactions.

ML/TF indicators often present inconsistencies with what is expected or considered normal, and are based on what the licensee knows about their client. This reinforces the key obligation on licensees to know their client.

FIGURE 5.6: Money Laundering/Terrorist Financing Indicators

ML/TF Indicators	
General	• The use of corporate entities, trusts, and nominees • Cash purchases (no financing or lender involvement) • The use of unregulated lenders (i.e., lenders other than banks or monoline lenders that are not subject to federal banking regulations) • Ownership by foreign persons
Client Behaviour	• Client arrives at a real estate closing with a significant amount of cash • Client over-justifies or over-explains the purchase • Client exhibits unusual concerns regarding the brokerage's compliance with government reporting requirements and the brokerage's anti-money laundering or anti-terrorist financing policies • Client exhibits a lack of concern regarding risks, commissions, or other transaction costs • Client is known to have paid large remodeling or home improvements invoices with cash
Atypical Transactions	• Client sells or buys property significantly below or above market value • Client purchases property without inspecting it • Frequent change of ownership of same property, particularly between related or acquainted parties • Property is re-sold shortly after purchase at a significantly different purchase price, without corresponding changes in market values in the same area • Client buys back a property that they recently sold • Client negotiates a purchase for market value or above the asking price, but requests that a lower value be recorded on documents, paying the difference "under the table" • Client purchases multiple properties in a short time period, and seems to have few concerns about the location, condition, and anticipated repair costs of each property • Client wants to build a luxury house in a non-prime location • Payment is made in cash, bank notes, bearer cheques, or other anonymous instruments • Parties show strong interest in completing the transaction quickly, without there being a good cause

continued next page

FIGURE 5.6: Money Laundering/Terrorist Financing Indicators, *continued*

ML/TF Indicators	
Person/Entity Financial Profile	• Client persists in representing the financial situation in a way that is unrealistic or that cannot be supported by documents • Transactions being carried out on behalf of minors, incapacitated persons, or other persons who appear to lack the economic capacity to make such purchase
Use of Other Parties	• Client does not want to put their name on any document that would connect them with the property, or uses different names on contracts, closing documents, and deposit returns • Client inadequately explains a last-minute substitution of the purchasing party's name • Client purchases property in someone else's name such as an associate or a relative (other than a spouse) • Client pays initial deposit with a cheque from a third party (other than a spouse or a parent) • Client pays a substantial down payment in cash and the balance is financed by an unusual source (e.g., a third party or private lender) or offshore bank • A transaction involving legal entities, when there does not seem to be any relationship between the transaction and the activity carried out by the buying entity, or when the entity has no business activity • A transaction is completely anonymous (e.g., the transaction is conducted by a lawyer and all deposit cheques are drawn on the lawyer's trust account)

Asking Questions

In certain situations, while there may be indicators of a suspicious transaction, a licensee may still have some doubt. The best way to gather further information about a transaction in order to determine whether it is appropriate to file an STR is to ask questions. Sometimes, a simple question or two is all one needs to ask:

Example #1: A client you have worked with on several property transactions has always provided their deposit in the form of a cheque drawn on a Canadian bank. However, for this purchase, the funds for the deposit are provided by a wire transfer from a bank in Europe.	**Possible Question to Ask:** "I see that you have used an international wire transfer for your deposit – have you started a new business? Will this be purchased on behalf of a third party?"
Example #2: A new client approaches you to buy a condo unit. They have advised you that they are an international exchange student.	**Possible Question to Ask:** "How will you be securing the down payment for your new condo?"
Example #3: A client comes to you to finalize a contract for a purchase price that is well below the property's market value.	**Possible Question to Ask**: "How did you get the seller to agree to such a low price?!"

The answers given to initial questions may uncover additional issues and inconsistencies that warrant further questioning. This information gathering process is valuable to licensees because it:

- assists in fulfilling your obligation to report suspicious transactions;
- conveys to your clients that you are a critically thinking professional, rather than a simple "order taker"; and
- discourages clients who may be engaged in money laundering activities from working with you, as they may fear being identified as suspicious.

When to Submit an STR

STRs must be submitted as soon as practicable after having reasonable grounds to suspect that a transaction is related to the commission or attempted commission of a ML/TF offence.

As a Licensee...

You cannot disclose that you are filing or have filed an STR with the intent to prejudice (or harm) a criminal investigation. Despite this provision, nothing prevents you from having a discussion with your brokerage's compliance officer and/or managing brokerage about what you have seen or learned about a transaction, and whether it might be appropriate to file an STR. Managing brokers and compliance officers will likely have seen many more transactions in their career than you; therefore, they should be used as resource whenever in doubt.

How to Submit an STR

Except in very rare circumstances, licensees must submit STRs to FINTRAC electronically through one of two encrypted submission methods. A brokerage compliance program will set out how this should be done by the brokerage's licensees.

Components of an STR

The STR has eight parts and must include at least one transaction. Parts A to F require a variety of information, such as details of the transaction, the accounts involved, and the individual involved. Part G is the key part of the STR – it requires the licensee to describe why they have suspicions about a specific transaction or transactions. This section should be as detailed as possible. The detailed explanation may include indicators observed during the transaction; information about the person who requested the transaction, including known aliases or associates; information as to why this is suspicious behaviour given the type of business or industry; and if more than one transaction is included in the report, information about how the transactions are connected. Part H, the final section of the STR, asks for information on what the reporting entity did in response to the suspicious transaction, such as providing information directly to law enforcement.

Licensees who have questions about completing an STR should speak to their brokerage's compliance officer.

4. Record Keeping

The final key obligation on licensees under the PCMLTFA is to keep certain records. Records must be kept in a manner such that they can be provided to FINTRAC within 30 days of a request. These records are also needed in case a law enforcement entity issues a warrant or production order for them to support an investigation of money laundering. Since the information relates to the brokerage's clients, once created, the records should ultimately be kept by the brokerage.

A separate record, solely for PCMLTFA compliance, is not required, as long as the information is in other records of the brokerage that are readily available and can be produced to FINTRAC during an examination. There are six record keeping obligations that licensees, on behalf of their brokerage, must observe, some of which have already been touched upon in this chapter.

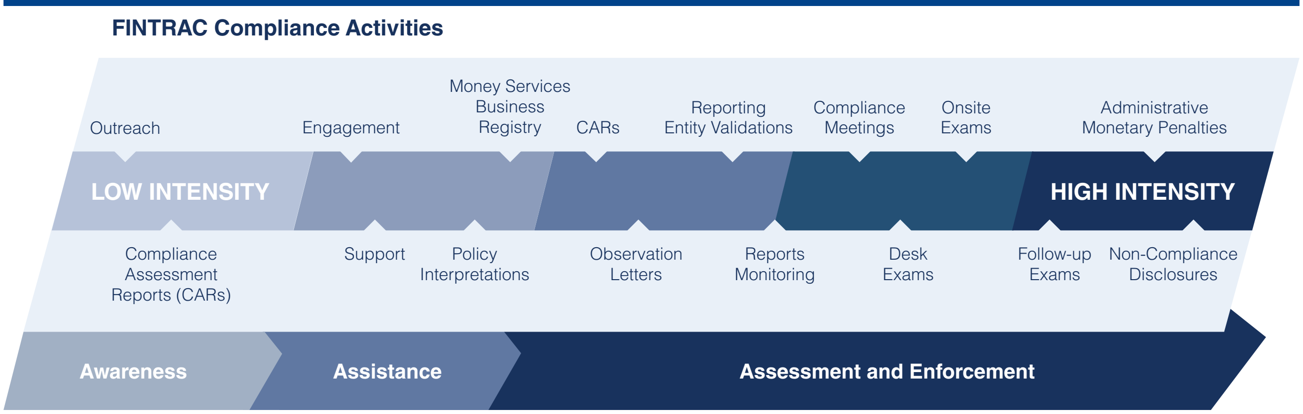
1. **Suspicious Transaction and other FINTRAC Reports:** Must be kept for at least five years from the date it was submitted to FINTRAC.
2. **Large Cash Transaction Records:** Must include specifically enumerated information about the transaction and must be kept for at least five years from the date of creation.
3. **Client Information Records (to fulfil KYC Obligations):** Must be kept for five years from the date of completion of the last business transaction. These include beneficial ownership information records when dealing with entities and PEP or HIO records where dealing with those persons, their family members, or their close associates.
4. **Receipt of Funds Record:** A record must be kept for at least five years when a licensee receives any type of funds, with the record including information such as name, address, date of birth, principal business or occupation, amount and currency of funds, date the funds were received, date of the transaction, and account information. If the client is a corporation, a licensee also needs to keep a copy of the provisions in the official corporate records relating to the power to bind the corporation with respect to the transaction.

5. **Unrepresented Party Record:** Licensees must take reasonable measures to identify unrepresented parties in a real estate transaction. Such records must be kept for at least five years.
6. **Reasonable Measures Record:** Where a licensee has attempted to identify an unrepresented party using reasonable efforts but is unsuccessful, licensees must record the measures taken, the date they were taken, and the reason why the measures were unsuccessful.

Compliance with the PCMLTFA

FINTRAC uses a number of different tools to ensure compliance with the PCMLTFA. Generally, FINTRAC will not pursue a more serious compliance action if the same objective can be fulfilled by utilizing less serious compliance actions.

FIGURE 5.7: FINTRAC Compliance Activities



Source: *www.fintrac-canafe.gc.ca/pen/2-eng*

As you can see in Figure 5.7, at the lower intensity side of the spectrum of compliance activities, FINTRAC provides published guidance and policy interpretations, as well as training and information during the assessment and examination processes. FINTRAC focuses its efforts on promoting awareness, providing assistance, and conducting compliance assessments. However, non-compliance can result in administrative monetary penalties ("AMPs"), and/or criminal proceedings.

AMPs are designed to provide a measured and proportionate response to particular instances of non-compliance. The purpose of the AMP program is to encourage future compliance with the PCMLTFA and to promote a change in behaviour from the reporting entity. AMPs are not issued automatically in response to non-compliance, as typically other compliance actions are taken to change behaviour (e.g., observation letters, reports monitoring, compliance meetings, and onsite exams) before an AMP is considered. For individuals, AMPs may range from $1 to $100,000 per violation, depending on the severity of the violation. FINTRAC must make public all AMPs imposed, including the names or entities that committed the conduct warranting an AMP. Much of FINTRAC's updated published guidance show a heightened readiness to impose AMPs against those who violate the policies and objectives behind the PCMLTFA.

FINTRAC may disclose cases of non-compliance to law enforcement when there is extensive non-compliance or little expectation of immediate or future compliance. Maximum criminal penalties include up to $2 million and/or 5 years of imprisonment.

As a Licensee...

Because of your unique position in being able to identify real estate transactions in which money laundering or terrorist financing may be occurring, you play an important role in combating such activities. By maintaining alertness to indicators of potential money laundering, analyzing situations for risk, and using professional judgment to guide you in ethical decision-making when you suspect money laundering, you can play an important role in making our real estate markets and our province safer.

PROTECTING AGAINST IMPACTS OF CLIMATE CHANGE[3]

The risks from natural disasters are expected to rise with the increasing frequency and severity of natural disasters resulting from climate change. British Columbia has significant exposure to natural disasters, including flooding, heat waves, wildfires, wind, winter storms, and earthquakes. Therefore, there are significant potential impacts of climate change on the real estate industry in British Columbia, such as the following:

- Property values could decrease or increase depending on exposure to natural disasters.
- The number of properties considered high(er) risk may increase due to changing climate conditions.
- Ongoing development in disaster-prone areas is expected to put more properties in harm's way, which could further increase the number of clients exposed to natural disasters (i.e., more properties in high-risk areas).
- Construction and reconstruction costs will likely increase over time.
- Insurance and reinsurance costs could increase (abruptly) to correspond with the increasing frequency, intensity, and severity of natural disasters.
- Insurers could restrict homeowners' insurance coverage in high-risk areas.
- Lenders could restrict or place conditions on mortgages for higher risk properties.

Example

A buyer may be unable to obtain an insurance policy if they are purchasing a property close to an active wildfire. The inability to obtain insurance could impact the ability of the buyer to obtain financing for their purchase, as lenders may refuse to advance mortgage funds without satisfactory homeowner's insurance in place. This could put the buyer in a difficult position where they may not be able to close on their purchase and they risk losing the property, and their deposit, and being sued for damages in excess of the deposit.

Licensees will have to adapt to the increasing risk and potential impacts of climate change in order to protect their clients, themselves, and their businesses. The real estate industry as a whole is exploring how exposure to natural disasters and climate-related risks should factor into the listing and sale process for real estate.

Licensees can protect their clients (and thereby protect themselves from liability) by being knowledgeable and providing information about the impacts of climate change on the products, such as properties and mortgage loans, with which their clients are interacting. For example, trading services licensees should:

- review charges on title to the properties they interact with and conduct proper due diligence. Many titles in British Columbia have section 219 covenants registered on them that describe the potential for flooding or geotechnical events. These covenants need to be reviewed in detail and considered. Section 219 covenants were discussed in Chapter 4;
- become familiar with the communities they work in, including location, proximity to natural features, geography, and exposure to natural disasters, by staying on top of current events and obtaining relevant documents from municipalities;
- advise their clients to consult with other relevant professionals, such as mortgage brokers, lawyers, engineers, and insurance providers, so that their clients can have a full understanding of, and protection against, the impacts of climate change on their specific transactions;
- draft clauses in contracts of purchase and sale that make the contracts conditional upon further due diligence by a professional, such as a lawyer (for reviewing title) or an engineer (for evaluating risks of natural disasters). These clauses, known as conditions precedent or subject to clauses, will be discussed in greater detail in Chapter 11: "Contracts for Real Estate Transactions";

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[3] Much of the content in this section has been adapted from the following sources: BC Financial Services Authority. 2023. *Natural Catastrophes and Climate-Related Risks: Managing Uncertainty and Building Resilience in the B.C. Financial Services Sector* [Discussion Paper]. Vancouver: BC Financial Services Authority; Niegemann, M. (Director Risk Surveillance & Analytics (BCFSA)). 2023. "Climate Risk Impact on Real Estate" [PowerPoint Slides]. Retrieved from the British Columbia Real Estate Association's Community of Practice on May 24, 2023; and Niro, L. 2023. "Wildfires and Climate Change – The New Normal?". Legally Speaking. 561. *www.bcrea.bc.ca/legally-speaking/wildfires-and-climate-change-the-new-normal-561*

- advise their seller clients to maintain their existing insurance coverage until after completion is confirmed in case the transaction collapses; and
- become familiar with property features that may reduce the effects of climate change (e.g., fire smart yards and building materials).

Licensees can protect themselves and their businesses by being knowledgeable about the impacts of climate change, by ensuring that they have the ability to deliver services through natural disasters, and by protecting against physical damage to their own property caused by natural disasters. For example, obtaining and maintaining appropriate insurance, such as business interruption insurance, insurance against losses from damage to buildings, and insurance against natural perils, may ensure the ability to deliver operations and protect against physical damage.