

## Commercial Real Estate Law

February 2009

### February 20th - New Reporting Rules for Real Estate Developers

The Canadian real estate sector has been identified as vulnerable to money laundering and terrorist financing. Amendments to the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*, which come into effect February 20, 2009, address this vulnerability by requiring real estate developers to comply with regulations similar to those followed by real estate brokers and others. These amendments are designed to bring Canada's legislation in line with international initiatives, and failure to comply may result in substantial fines or imprisonment.

#### Who is affected by amendments to the Act?

The legislation defines a real estate developer as any person or entity who, in a given year after 2007 has sold to the public:

- a) five or more new houses or condominium units,
- b) one or more new commercial or industrial building, or
- c) one or more new multi-unit residential buildings each of which contains five or more residential units, or two or more new multi-unit residential buildings that together contain five or more residential units.

#### What is the nature of these amendments?

Under the amendments, parties subject to the legislation are required to maintain certain records, to identify their customers, to report large or suspicious transactions to the Financial Transactions and Reports Analysis Centre of Canada (FINTRAC) and to develop and implement compliance programs.

#### 1. Record-Keeping Obligations

Under these legislative amendments, developers are obliged to maintain specific records (subject to some exceptions). Your record-keeping systems must allow for FINTRAC access in a timely fashion when it is requested. The following records must be maintained for a prescribed period:

- a) **Large cash transaction records** for cash transactions exceeding \$10,000.

- b) **Receipt of funds records** for any amount, whether or not in cash.
- c) **Client information records** for every sale of a house, condominium unit, commercial or industrial building, or multi-unit residential building.
- d) **Suspicious transaction report records.**

These obligations require developers to record specific information, including the following:

- The amount and currency of funds received.
- The account type and number, and name of account holder.
- The name, address, date of birth, and nature of principal business or occupation of the individual from whom the funds were received. Be specific about occupation. For example, "self employed" or "consultant" are not sufficient descriptions of one's occupation. If the funds received were from a corporation, you must record the name, address, and nature of principal business of the entity and keep a copy of the official corporate records such as a certificate of incumbency or the articles of incorporation showing the power to bind the corporation regarding the transaction.
- The date of transaction.
- The purpose and details of the transaction.
- If cash was received, the method of delivery (e.g., by mail, in person).

## 2. Client Identification Obligations

As a developer, it is your obligation to verify the identity of any individual involved in the transaction by referring to a government-issued document that has a unique identifier. Corporate identity should be verified by referring to the corporation's certificate of corporate status, annual provincial securities filings, or other record such as the corporation's published annual report. You must also confirm the names of the corporation's directors.

The regulations do allow developers to rely on an agent to verify identification provided that there is a written agreement or arrangement between the parties.

## 3. Reporting Obligations

You must complete and submit a report to FINTRAC under the following circumstances:

a) **Large cash transactions**, which include:

- Receipt of \$10,000 or more in cash.
- Receipt of two or more payments from or on behalf of the same individual or entity within 24 hours totalling \$10,000 or more.

b) **Suspicious transactions** (including attempted suspicious transactions). Developers must report where there are "reasonable grounds" to suspect that a transaction or an attempted transaction is related to the commission or attempted commission of a money laundering offence or a terrorist activity financing offence. FINTRAC has identified a number of specific indicators in the real estate industry that may point to a suspicious transaction. These include<sup>1</sup>:

- Client arrives at a real estate closing with a significant amount of cash.
- Client purchases property in someone else's name such as an associate or a relative (other than a spouse).

- Client does not want to put his or her name on any document that would connect him or her with the property or uses different names on Offers to Purchase, closing documents and deposit receipts.
- Client inadequately explains a last-minute substitution of the purchasing party's name.
- Client negotiates a purchase for the market value or above the asked price, but requests that a lower value be recorded on documents, paying the difference "under the table."
- Client pays initial deposit with a cheque from a third party other than a spouse or a parent.
- Client pays substantial down payment in cash and balance is financed by an unusual source (for example, a third party or private lender) or an offshore bank.
- Client purchases personal use property through his or her company when this type of transaction is inconsistent with the ordinary business practice of the client.
- Client purchases multiple properties in a short time period, and seems to have few concerns about the location, condition, and anticipated repair costs, etc., of each property.
- Client insists on providing signature on documents by fax only.
- Client over-justifies or over-explains the purchase.
- Client's home or business telephone number has been disconnected or there is no such number.
- Client uses a post office box or General Delivery address where other options are available.
- Client wants to build a luxury house in a non-prime location.
- Client exhibits unusual concerns regarding the firm's compliance with government reporting requirements

and the firm's anti-money laundering policies.

- Client exhibits a lack of concern regarding risks, commissions, or other transaction costs.
- Client persists in representing his financial situation in a way that is unrealistic or that could not be supported by documents.
- Transactions are carried out on behalf of minors, incapacitated persons or other persons who, although not included in these categories, appear to lack the economic capacity to make such purchases.
- A transaction involves legal entities when there does not seem to be any relationship between the transaction and the activity carried out by the buying company, or when the company has no business activity.
- Parties show a strong interest in completing the transaction quickly without good cause.
- Parties are foreign or non-resident for tax purposes and their only purpose is a capital investment.
- Transactions involve payments in cash or in negotiable instruments which do not state the true payer (for example, bank drafts), where the accumulated amount is considered to be significant in relation to the total amount of the transaction.
- Party asks for the payment to be divided into smaller parts with a short interval between them.
- Payment is made in cash, bank notes, bearer cheques or other anonymous instruments.
- Transactions are not completed in seeming disregard of a contract clause penalizing the buyer with loss of the deposit if the sale does not go ahead.
- The sale of a building plot is quickly followed by the recording of the declaration of a completely finished new building at the location at an interval

less than the minimum time needed to complete the construction.

- Transaction is completely anonymous: transaction is conducted by lawyer, and all deposit cheques are drawn on lawyer's trust account.
- c) **Terrorist Property.** You must report where you know that there is property in your possession or control that is owned or controlled by or on behalf of a terrorist or a terrorist group.

#### 4. Implementing a Compliance Regime

Developers must implement a compliance regime. A compliance regime can be tailored to fit your individual needs and should reflect the nature and size of your business and your risk of exposure to money laundering or terrorist financing. All compliance regimes are expected to include:

- a) The appointment of a compliance officer.
- b) The development and application of written and regularly updated compliance policies and procedures.
- c) The assessment and documentation of risks related to money laundering and terrorist financing, including an analysis of potential threats and vulnerabilities to which your business is exposed and implementation of controls to limit the potential risks you have identified.
- d) Implementation of an ongoing compliance training program for employees and agents.
- e) Ongoing reviews to test the effectiveness of the various elements of compliance programs.

#### What are the consequences of non-compliance?

Reporting entities that do not comply with the Act and its regulations are subject to penalties. Criminal penalties

may include fines of up to \$2 million and/or five years imprisonment. As of December 30, 2008, FINTRAC has legislative authority to issue administrative monetary penalties ranging from \$1000 to \$500,000 to non-compliant reporting entities.

It is important that you fully understand your obligations under this new legislation. Pallett Valo LLP's Commercial Real Estate Law Group can also offer guidance to developers who require assistance in navigating their way through the new rules.

<sup>1</sup> See FINTRAC's description of industry specific indicators of suspicious transactions, section 8.9 Real Estate : <http://www.fintrac.gc.ca/publications/guide/Guide2/2-eng.asp#889>

## Pallett Valo LLP Commercial Real Estate Group

The Commercial Real Estate Group has experience in all areas of Real Estate Law, from the most complex joint ventures and land development projects to routine commercial purchase, sale and mortgage transactions.

We assist our clients as they structure and negotiate their projects, and we strive to creatively and effectively overcome any obstacles which arise during the course of a transaction. Our lawyers work hard to resolve all problems or disputes, and work closely with engineers, architects and other consultants to ensure our clients' success. We pride ourselves on thinking "outside the legal box" and adopt a practical, business approach to best serve and protect our clients.

### Areas of Practice Include:

- Commercial and Residential Land Development
- Leasing
- Condominium Development
- Mortgage Financing
- Commercial Transactions
- Rezoning and Minor Variance Applications
- Joint Ventures
- Construction Contracts
- Builder Sales
- Severance

## Contact Members of the Commercial Real Estate Group at Pallett Valo LLP

**Pamela Green** [pgreen@pallettvalo.com](mailto:pgreen@pallettvalo.com)  
Direct Dial: 905.273.3022 Ext 265

**Ray Mikkola** [rmikkola@pallettvalo.com](mailto:rmikkola@pallettvalo.com)  
Direct Dial: 905.273.3022 Ext 276

**Adelit Maidenberg** [amaidenberg@pallettvalo.com](mailto:amaidenberg@pallettvalo.com)  
Direct Dial: 905.273.3022 Ext 250

This article provides information of a general nature only and should not be relied upon as professional advice in any particular context. For more information about these legislative amendments, contact a member of our **Commercial Real Estate Group** at **905.273.3300**.

If you would like additional copies of the bulletin, or know of anyone who would be interested in joining our mailing list, please contact our Marketing Coordinator at [marketing@pallettvalo.com](mailto:marketing@pallettvalo.com).