

June 12, 2000

The Honourable Leo Kolber
Chair
Standing Committee on Banking, Trade and Commerce
The Senate
Ottawa ON K1A 0A4

Dear Senator Kolber,

RE: Bill C-22, *Proceeds of Crime (Money Laundering)*

Further to the Canadian Bar Association's (CBA) appearance before the Senate Banking Committee on June 8, 2000, I am writing now to convey the additional information requested at the hearing.

We were asked:

- how United Kingdom and United States legislation deals with the application of the reporting of suspicious transactions to lawyers; and
- to propose alternative drafting to sections of the bill dealing with the legal profession.

Please note that these are the best responses we can provide, given the limited time and resources at our disposal. Finance Canada and Justice Canada officials can doubtless obtain more complete information for the Committee.

Comparative Legislation

The UK has had legislation placing specific requirements on solicitors regarding money laundering since 1993-1994. Lawyers are not expected to have suspicions about clients without cause or to actually detect money laundering, but to be aware of the legislation, alert to unusual circumstances and to make further enquiries, if appropriate. A solicitor unsatisfied by the response to such enquiries must decide whether a report should be made. It is an offence to provide assistance to a money launderer to obtain, conceal, retain or invest funds if the person assisting knows or suspects, or in the case of terrorism, should have known or

suspected, that those funds are the proceeds of “serious criminal conduct”. The legislation contains important exceptions to lawyers’ duty of confidentiality to the client and the duty to disclose relevant information to the client. The applicable statutes provide immunity for breach of a solicitor’s professional and contractual duty of confidence. Legal professional privilege within the solicitor/client relationship is also protected under the *Criminal Justice Act* (1993) and the common law, but it does not apply, nor does the duty of confidentiality, if a client is using a solicitor for a criminal purpose. The Law Society provides guidance to the profession on issues of money laundering through bulletins, questions and answer guides and various advisory bodies.

Information about the UK was shared with us by the Investment Business Executive, Professional Ethics Division, at the UK Law Society. They expressed the view that the current regime does not undermine the solicitor/client relationship because there are still significant protections in place. However, without those protections, anyone either under investigation or even concerned that they might be under investigation would be unable to obtain legal advice, and a lawyer similarly would be unable to carry out their appropriate professional role.

Through our counterparts at the American Bar Association, we understand that there is currently no legislation specifically requiring lawyers to report “suspicious” transactions of their clients. Such a requirement is placed on financial institutions, however. We understand that a “Gatekeepers Group” of representatives from the US Department of Justice, Treasury Board and Securities and Exchange Commission has been created to look at the issue in relation to the legal profession. The Gatekeepers Group is considering various options, including professional education and additions to codes of professional conduct, as well as possible legislative options. The view expressed by our contacts was that legislative proposals requiring lawyers to breach professional obligations to their clients would be extremely unlikely to succeed in the US, given the respect afforded the solicitor/client relationship.

We must also caution that our submissions to the Senate Committee are inextricably linked to our interpretation of how Bill C-22 would operate within Canadian law, especially our *Charter of Rights and Freedoms*. When considering decisions made by other countries, even those to which we are closely allied, the distinct Canadian constitutional framework must be remembered.

Legislative wording

We suggest that sections 11 and 64(2) read as follows to realize our recommendations in respect of the legal profession:

Section 11. Protection of Privilege and Confidentiality

The reporting requirements of s.7 specifically do not require any member of the legal profession to disclose or report any information, which includes but is not restricted to any communication or transaction, which has been received or conducted while acting in a professional capacity and which is either privileged or confidential.

This is not intended to restrict any other legal or professional obligation to disclose or report any information which might otherwise exist.

A member of the legal profession may apply, on an ex parte and in camera basis, to a judge of a superior court, for a determination as to whether any obligation to report information might exist.

In hearing an application under (3), a judge may receive the information or inspect any document for purpose of the application.

S.64 (2) Search of Law Offices

The documents, records or other information contained within a law office may not be viewed, inspected, copied or seized for any reason whatsoever except under the authorization of a warrant to search issued by a judge of the superior court.

Where a warrant to search a law office has been authorized under this Act, the documents, records or other information which are the subject of the warrant shall be presumed to be privileged and confidential, and they shall be immediately sealed without inspection.

Where information has been sealed, it shall not be inspected until the issues of privilege and confidentiality have been finally determined.

A lawyer whose records have been seized may apply to the court to inspect those records.

A lawyer whose records have been seized shall, within 30 days of the date of the seizure, take all reasonable steps to notify the clients whose records have been seized of the fact of the seizure.

Where it is not practicable to make notification within 30 days, an application may be made to the court to extend the time period within which notice must be given.

Where it has not been possible to notify a client of the seizure, a judge who is determining the issue of privilege and confidentiality under this part may provide direction for further steps to be taken for providing notice to the client.

A hearing to determine the issue of privilege and, or confidentiality shall take place within 60 days of the date of the seizure or so soon thereafter as is possible for the hearing to take place.

A client whose records have been seized shall have the right to be present, either individually or through counsel, and to make submissions upon the issues to be determined.

Where it is necessary to determine the issue of privilege and, or confidentiality, the judge may inspect the document or hear the information in question.

In determining the issue of privilege and, or confidentiality, and whether the information may be viewed by the authorities responsible for the seizure, the judge shall consider:

- *the interests of justice, including the importance of preserving privilege and confidentiality and the integrity of the solicitor-client relationship;*
- *the need to protect any privacy interests that an individual whose records have been seized might have in the records;*
- *the extent to which the information or record in question is relevant to the investigation being conducted;*
- *any other factor that the judge considers relevant;*

Where the judge orders that a record be disclosed, the judge shall give reasons for that decision;

Where a judge orders that a record be disclosed, the judge may impose conditions and require undertakings to restrict the manner in which the records may be used;

Where a judge finds that a record shall not be disclosed, the record shall be returned forthwith;

An appeal lies from an order for the disclosure of information which has been made under this part to the Court of Appeal.

While more time would have allowed us to prepare a more complete and definitive response, I trust this information will be helpful.

Yours truly,

Greg DelBigio
Member, National Criminal Justice System