May 16, 2001

Mr. Richard Lalonde, Chief
Financial Crimes Section, Financial Sector Division
Department of Finance, L'Esplanade Laurier
140 O'Connor Street, 20th Floor, East Tower
Ottawa, Ontario
K1A 0G5

Dear Mr. Lalonde,

RE: *Proceeds of Crime (Money Laundering) Regulations*, 2000
***Canada Gazette*, Part 1, February 17, 2001**

The Canadian Bar Association (CBA) appreciates the opportunity we have had to participate in the recent consultation process, and now to make representations on the proposed *Proceeds of Crime (Money Laundering) Regulations*, 2000. We recognize that a number of concerns raised in earlier consultations have now been addressed.

Since the CBA first made representations on proposals for a new *Proceeds of Crime Act*, we have expressed serious concerns about the inclusion of lawyers within the legislative scheme (including the proposed *Regulations*). In our view, including lawyers as parties who must divulge information entrusted to them by their clients constitutes an unwarranted assault upon the solicitor-client relationship and the independence of the legal profession. While some of our suggestions have been incorporated into the current *Regulations*, we reiterate and maintain this fundamental concern on behalf of the legal profession and its clients.

In this submission, we will first elaborate on this fundamental concern with the legislation and its proposed *Regulations*. We will then make suggestions for further improvements.

1. Solicitor-Client Relationship

The CBA acknowledges the clarifications made to sections 31, 32 and 33 as they apply to legal counsel. However, we continue to believe that these sections raise very significant concerns for the legal profession, particularly with regard to client confidentiality and access to justice. Any limitations or clarification in drafting that can be achieved at this point will hopefully assist in the practical application of the *Act* and its *Regulations*.

The integrity of the solicitor-client relationship is essential to a citizen's right to proper

representation by counsel of choice and to that citizen's right to full and fair defence when confronting the weight of the state. It requires the protection of communications that take place between lawyers and their clients. This need has given rise to the now accepted principles of privilege and confidentiality, according to which information received in the context of the solicitor-client relationship must be held in strict confidence. This privilege and this confidentiality are principles which long pre-date our Canadian *Charter of Rights and Freedoms*. They are principles which Canada encourages other societies to adopt as they seek democratic respect of the individual.

In addition, the integrity of the relationship is premised upon the appearance of, and actual independence of legal counsel. Independence is achieved when the loyalty of the lawyer to the interests of the client is undivided. This requires a complete and unfettered ability on the part of the lawyer to act on behalf of the client, without conflict of any sort.

These principles are well established and have not been doubted by the courts. The late Mr. Justice Sopinka articulated the rationale for these principles as follows:

> Nothing is more important to the preservation of this relationship than the confidentiality of information passing between a solicitor and his or her client. The legal profession has distinguished itself from other professions by the sanctity with which these communications are treated. The law, too, perhaps unduly, has protected solicitor and client exchanges while denying the same protection to others. This tradition assumes particular importance when a client bares his or her soul in civil or criminal litigation. Clients do this in the justifiable belief that nothing they say will be used against them and to the advantage of the adversary. Loss of this confidence would deliver a serious blow to the integrity of the profession and to the public's confidence in the administration of justice. [1]

The learned jurist also observed that "(a)n important statement of public policy with respect to the conduct of barrister and solicitor is contained in the professional ethics codes of the governing bodies of the profession."[2] For example, the CBA's *Code of Professional Conduct* states:

> The lawyer must not advise or represent both sides of a dispute and, save after adequate disclosure to and with the consent of the

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1 *MacDonald Estate* v. *Martin,* [1990] 3 S.C.R 1235.

2 *Ibid*.

> client or prospective client concerned, he should not act or continue to act in a matter when there is or there is likely to be a conflicting interest. A conflicting interest is one which would be likely to affect adversely the judgment of the lawyer on behalf of or his loyalty to a client or prospective client or which the lawyer might be prompted to prefer to the interests of a client or prospective client.[3]

This same principle was earlier articulated as follows:

> And what is the duty of the advocate who shoulders the heavy burden of defending the prisoner on this gravest of all charges? It is to devote himself completely to his task whatever he himself may think of the charges, and to lay aside every other duty, so that he may watch constantly in the interests of the accused.…[4]

In our view, the compliance and the mandated transfer of client information to FINTRAC under the proposed *Regulations* would cause a lawyer to be concerned with both the interests of the client and the lawyer's own interests. Independence will be compromised because, as a matter of law, lawyers will be required to provide confidential information to FINTRAC and can be prosecuted for failure to do so.

Section 31 makes counsel subject to the *Act* when engaging in transactions with a third party, though it does exclude certain transactions between a lawyer and client, including funds received as fees or for bail. However, given the mandatory reporting requirement and the substantial punishment provided for violation, we believe the regulation is insufficiently clear;

a) that receipt of funds for fees, disbursements, expenses or bail *cannot* constitute a suspicious transaction. As failure to conform to the proposed *Regulations* carries the possible consequence of criminal prosecution, unless this is clearly stated it will be impossible to ensure that the lawyer will exercise judgment in a manner consistent with undivided loyalty to the client.

b) to whom the term “third party” refers. Lawyers routinely use the expression “third party” to mean a person other than a party to the transaction in question. There would be significant potential for confusion if this term of art is now intended to refer to the client.

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[3] Chapter V, *Impartiality and Conflict of Interest* (Ottawa: Canadian Bar Association, 1987).

[4] Lord Birkett, *Six Great Advocates* (London: Penguin Books, 1961) at 100.

The proposed *Regulations* may well be unconstitutional to the extent that they erode fundamental principles of the solicitor-client relationship. We strongly urge that lawyers be fully exempt from the operation of the *Act* and its proposed *Regulations*.

RECOMMENDATION:
The CBA recommends that lawyers be exempt from the operation of the *Proceeds of Crime Act* and its proposed *Regulations*.

2. Further Suggestions

Although qualified by our fundamental concern about the impact of the *Act* and *Regulations* on the solicitor-client relationship, we are particularly supportive of the proposal that professionals would be included only where their activities are clearly related to financial intermediation. While there is some question as to whether acting in a purchase or sale, without the handling of the funds related to the purchase or sale, should be included, the general scope is workable and conforms with the intention of the *Act*.

The CBA appreciates that the *Regulations* now include qualifications such as the recognition of "reasonable efforts" to provide information to the Centre, where that is suitable. The stated intention to minimize the compliance burden is also applauded, as are many of the regulatory amendments made in furtherance of such concepts.

We look forward to the opportunity to review and comment on expected *Regulations* to address the requirements of cross-border movement of currency and monetary instruments. These *Regulations* will add significant compliance burdens, and will directly affect international commerce, which is so necessary to the Canadian economy. They must ensure not only that the recording and reporting regime is manageable for those required to monitor, obtain and provide information, but also that the speed of commerce is not impeded by unnecessarily complicating the cross-border movement of legitimate funds for valid commercial transactions.

We note the intention to phase in the application of the *Regulations* over a period yet to be determined. This timetable must recognize that for the legal and other affected professions, there will be an unprecedented challenge of educating members about the requirements of the legislation, the *Regulations* and more importantly, the compliance program. Unlike the limited number of financial institutions working in a regulatory environment which has already addressed the issue of money laundering and the recording and handling of funds, these *Regulations* will impose new responsibilities for recording and reporting client information. Further, a significant percentage of members of those professions practise in small partnerships or as sole practitioners. Responsibility for developing a compliance regime could fall very heavily on already over-burdened professionals, especially those without assistance from educated, compliance oriented, staff.

RECOMMENDATION:
The CBA recommends that FINTRAC work directly with the relevant professional bodies in each province and territory to develop a suggested compliance program and reporting outline for those professionals.

RECOMMENDATION:
The CBA recommends that sufficient time be permitted to allow the relevant professions to deal with the necessary training, development of recommended compliance regimes and distribution of information about the money laundering legislation and the duties and responsibilities that it generates to their respective memberships.

Small firms and particularly sole practitioners are generally too strained economically (smaller practices are often truly marginal in their economic returns) to develop their own forms, even if only to enter the reporting forms available in the *Regulations*. An online download, with a well-advertised location for this download, will assist these professionals in meeting their recording and reporting responsibilities.

RECOMMENDATION:
The CBA recommends that, to facilitate implementation of the *Regulations*, access to materials and information such as the regulatory forms must be well-advertised and readily available at no cost.

We trust that it is clear to the regulators and to FINTRAC that reasonable efforts to ascertain whether or not a transaction is being conducted on behalf of a third party should be limited to making the appropriate, written statement enquiry as contemplated by the *Regulations*. We have been assured that particularly the newer participants to the money laundering regime are not themselves intended to become law enforcement agencies, and are not expected to have the expertise or resources to undertake in-depth reviews and investigations or to be trained to identify apparent misstatements. Those to whom the *Act* applies should be permitted to rely upon apparently reliable identification and on written statements as to third party participation, without further investigation. If it is a concern that professionals would hide a suspicion as to third party transactions, then the suspicion that the transaction is related to money laundering and is being undertaken for a third party, as part of the suspicious transactions guidelines, should eliminate this concern.

We assume that other stakeholders listed for the reporting of other financial transactions and record-keeping have advised FINTRAC that the reporting requirements can reasonably be accommodated in accordance with the routine practices of the industry. For the regime to work appropriately, it will need to function in an environment where the stakeholders are being required to effectively continue, with limited expansion, the current knowledge of their clients, and the transaction recording and

record-keeping that they routinely undertake at present.

3. Technical Points

We have identified these further technical issues:

1. Initially, the definition of a large cash transaction record requires that the report include the purpose and details of the transaction. Whether this applies to the financial intermediation portion of the *Regulations*, that is the receipt and disbursement or exchange of funds, or the transaction as a whole, should be clarified. If intended to apply to the transaction as a whole, it will often be virtually impossible for many of those subject to the *Act* to have the required information regarding the purpose and details of the transaction. This would appear to indicate a need for police investigative review beyond that originally contemplated by the *Act*.

2. The definition of senior officer does not include the concept of a partner of a partnership. This should be clarified, given that the majority of professionals are still required to operate in a professional partnership.

3. As indicated previously, the suggestion in subsection 4(1) that reporting be completed electronically should be facilitated by making the original report forms electronically available, so as to permit a download, completion and return of the form.

4. The provisions of section 63 *et seq*. clarifying the basis for identification of individuals and corporations, are both suitable and workable and will help to ensure the responsibilities of the persons to whom the *Act* applies. However, section 65, relating to partnerships, fails to recognize that a partnership agreement, articles of association or similar record is not required to form a partnership. Partnerships formed simply by the determination of individuals to carry on business in partnership can be valid, legal, enforceable partnerships. Accordingly, section 65 should be amended to refer to any record that ascertains the partnership's existence. This can be a simple declaration of the partners that they are carrying on business in a partnership.

5. Paragraph 70(iii) requires citizenship and passport numbers as designated information. However, review of citizenship or passport information is not required, nor should it be required. Having been born in Canada, many Canadians do not have a citizenship number nor a passport. This requirement does not accord with the requirements for determination of the identification of the client, and should be clarified.

6. Schedule 1, the Suspicious Transaction Report, at Part B, 3, again requires purpose and details of the transaction. In many instances, persons dealing with simply the receipt and transfer or exchange of funds, will have no basis for knowing the purpose and details of the transaction. It should be clarified that the requirement is for the purpose and details of the

transaction solely as to the aspect in which those persons were involved.

7. Schedule 1, Part G requires a detailed description of the grounds to suspect. Clarification should also be given as to what is meant by the expression "detailed." This could be outlined in a preamble to the guidelines and must be suitable in the applicable circumstance.

Conclusion

We appreciate this opportunity to offer our contribution to the process of creating an effective, practicable and constitutionally appropriate regime for monitoring proceeds of crime. Thank you for considering the views of the CBA.

Yours truly,

Daphne Dumont, Q.C.