THE CANADIAN BAR ASSOCIATION
L'ASSOCIATION DU BARREAU CANADIEN

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Submission on Bill C-2 – *Federal Accountability Act*

CANADIAN BAR ASSOCIATION

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PREFACE

The Canadian Bar Association is a national association representing 36,000 jurists, including lawyers, notaries, law teachers and students across Canada. The Association's primary objectives include improvement in the law and in the administration of justice.

This submission was prepared by the National Competition Law Section, the National Criminal Law Section, the National Media and Communications Law Section, the National Administrative Law Section, the National Labour and Employment Law Section, the Constitutional and Human Rights Law Section, and the National Privacy and Access Law Section of the Canadian Bar Association, with assistance from the Legislation and Law Reform Directorate at the National Office. The submission has been reviewed by the Legislation and Law Reform Committee and approved as a public statement of the Canadian Bar Association.

Submission on Bill C-2 – *Federal Accountability Act*

EXECUTIVE SUMMARY

The Canadian Bar Association (CBA) notes many things about the proposed *Federal Accountability Act* that are commendable, in that it seeks to make government more accountable and transparent, and to reduce the risk of inappropriate influence over government decision-making. However, aspects of the *Federal Accountability Act* have the potential risk of hindering the administration of justice and the rule of law, deterring the ability of government to consult legitimately with public interest groups, and thwarting the very goals of accountability and transparency the *Act* was meant to promote.

In that regard, we have highlighted aspects of the Bill we believe require change or further study. The CBA will focus its recommendations on amendments to the *Lobbyists Registration Act,* and *Public Servants Disclosure Protection Act*, and on the new *Conflict of Interest Act* and *Director of Public Prosecutions Act*. It does so as a not-for-profit organization directly affected by the Bill, and also as an organization with specialized expertise on how the Bill may affect the administration of justice and the rule of law.

Lobbying Act – The CBA supports greater transparency in the activities of lobbyists. However, requiring monthly reporting of communications between lobbyists and senior public officers may increase the risk that the Act would force lawyers to violate their ethical duty to maintain solicitor-client privilege. The CBA recommends that the *Lobbying Act* exempt any oral or written communication made to a public office holder on behalf of any person or organization where confidentiality is required by law.

The CBA is also concerned that the *Lobbying Act* will increase the administrative burden on not-for-profit organizations providing information to government in the public interest,

without any evidence that these new obligations will increase lobbyists' compliance with the Act, bring about better lobbyist behaviour, or provide new information of use to the public. Further, it has the potential of chilling the dialogue between public officials and legal experts and community organizations, which are able to provide government with information about how laws are operating "on the ground." The CBA recommends that this portion of the Bill be subject to further study before being enacted.

Restrictions On Employment and Professional Affiliation for Reporting Public Office Holders – The proposed *Conflict of Interest Act* would place significant restrictions upon the employment and professional activities of reporting public office holders during the course of and upon conclusion of their public office. The CBA is concerned that prohibitions against reporting public office holders engaging in the "practice of a profession" will create barriers for former public officers seeking to return to their profession after public life and will act as a substantial disincentive for individuals with specialized skill and knowledge to act in a public office. Further, the prohibition against reporting public officers from "hold[ing] office in a union or professional association" will hinder their full participation in professional associations that could enhance their knowledge of specialized areas. Professional associations will be prohibited from fully accessing skill and knowledge in the possession of public office holders to advance the public interest. The CBA recommends that the Act specifically not prohibit or restrict reporting public officers from being licensed as practicing members of their profession by their regulatory body. It also recommends that the prohibition against holding office in a union or professional association be removed from the Act for further study.

Public Servants Disclosure Protection Act – The CBA supports providing additional protection for whistleblowers who have witnessed wrongdoing in their workplace. However, it recommends that the Act go further and protect not only public officials who make disclosures that are lawfully required, but those who make disclosures that are lawfully permitted. This would codify protection for whistleblowers who are entitled to "go public" with their concerns according to the common law.

Access to Information – Proposed amendments to the *Access to Information Act* would, paradoxically, restrict accountability and transparency in government. Consistent with the government's goal of greater accountability and transparency in government, the CBA proposes a "public interest" override to these exemptions in the *Access to Information Act*, as already implemented in many Canadian jurisdictions. The CBA further recommends that, even if a public interest override is included, the exemptions should be subject to time limitations, and that the government undertake further study of the exemptions with a view to narrowing them to the greatest extent possible.

Director of Public Prosecutions – The CBA welcomes the acknowledgement of the fundamental importance of prosecutorial independence from political considerations. However, the Federal Prosecution Service already has well-established, publicly available and accessible guidelines and procedures designed to ensure prosecutorial independence. On rare occasions where prosecutorial misconduct occurs, oversight and discipline through the law societies enable the correction and future deterrence of improper conduct. If a separate public prosecutions service is created, the CBA recommends that the government further study and take any necessary action to ensure that it does not impede consultation on criminal law policy issues where the practical experience and perspective of the prosecution service would be of particular benefit.

The CBA further recommends an additional improvement on the current system to increase transparency in prosecutorial decision-making. The Attorney General has authority to intervene in particular cases, or to give advice or instruction on particular issues in exceptional circumstances. Official notification of such action is required, but may be postponed in certain circumstances. We suggest that the Attorney General provide immediate notification that such intervention or advice has been given, with reasons why more detailed disclosure cannot be given until the completion of the prosecution in question.

Budgetary and fiscal independence is an important component of a Director of Public Prosecution scheme. A transparent process for budgetary requests and allocations is an important aspect of ensuring both independence and the functional effectiveness of a public

prosecution service. Such a process should provide for the funding of "extraordinary prosecutions" which may exert an otherwise disproportionate impact on the overall fiscal viability of the service.

Last, due to the speed with which Bill C-2 is proceeding through the legislative process, the CBA has not had the opportunity to fully explore the implications of the DPP initiative for the specialized Competition Law Division within Justice Canada. The CBA recommends that the government further study this issue, and that interested groups have a further opportunity to comment on these implications.

Submission on Bill C-2 – *Federal Accountability Act*

I. INTRODUCTION

The Canadian Bar Association (CBA) welcomes the opportunity to comment on Bill C-2, the *Federal Accountability Act.* The Bill introduces several Acts and amends others. The CBA will focus its recommendations on amendments to the *Lobbyists Registration Act* and *Public Servants Disclosure Protection Act*, and on the new *Conflict of Interest Act* and *Director of Public Prosecutions Act*. It does so as an not-for-profit organization directly affected by the Bill, and also as an organization with specialized expertise on how the Bill may affect the administration of justice and the rule of law.

II. AMENDMENTS TO LOBBYISTS REGISTRATION ACT

The CBA is in a unique position with respect to advocacy concerning law reform. Our overarching ideology is that the rule of law must be followed by and applied to all citizens and that the law must work for everyone. Our approach to law reform is to ensure that laws or proposed changes to laws operate in the manner in which they are intended, that there are no unforeseen consequences, and that laws are fair, just and in compliance with the Constitution. The mission of the CBA is:

- To improve the law;
- To improve the administration of justice;
- To improve and promote access to justice;
- To promote equality in the legal profession and the justice system;
- To improve and promote the knowledge, skills, ethical standards and well-being of members of the legal profession;
- To represent the profession nationally and internationally; and
- To promote the interests of the members of the Canadian Bar Association.[1]

[1] Adopted by Council, February 1992, as modified by CBA Resolution 94-05-M.

In addition to formal written submissions, CBA members participate in countless formal and informal consultations. CBA members provide input to government as expert practitioners on areas of the law requiring reform. The government seeks out the views of the CBA precisely because lawyers are in a unique position to see the practical impact of the law.

CBA advocacy reflects the particular expertise of CBA members. For example:

- When reviewing insider-trading regulations, the Business Law Section considered the impact on corporations, as well as any impact on providing independent legal services to those corporations.
- The Charities and Not-for-Profit Law Section commented on government discussion papers leading to the *Canada Not-for-Profit Corporations Act*, focusing on the implications for the voluntary sector.
- The Citizenship and Immigration Law Section promotes fair and reasonable processes and policies for all immigration applicants and refugee claimants.
- The Criminal Justice Section brings the view of both Crown and defence counsel in applying principles of criminal law and sentencing.
- The Competition Law Section promotes a free-market approach to business regulation.

It is against this backdrop that the CBA reviews changes to the *Lobbyists Registration Act* (which would change to the *Lobbying Act* under Bill C-2). Our comments in this regard focus on two related themes: the potential impact of the new *Lobbying Act* on solicitor-client privilege; and the impact on CBA and other not-for-profit organizations advocating in the public interest.

A. Solicitor Client Privilege

Solicitor-client privilege is considered a "civil right of supreme importance and a principle of fundamental justice in Canadian law that serves to protect both the essential interests of clients and ensure the smooth operation of Canada's legal system".[2] The important relationship between lawyer and client "stretches beyond the parties and is integral to the

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[2] *Foster Wheeler Power Co. v. Société intermunicipale de gestion et d'élimination des déchets (SIGED) inc.*, [2004] 1 S.C.R. 456, at para. 34, LeBel J. for the Court; see also *Pritchard v. Ontario (Human Rights Commission)*, [2004] 1 S.C.R. 809, at para. 14, Major J. for the Court ("clients must feel free and protected to be frank and candid with their lawyers with respect to their affairs so that the legal system, as we have recognized it, may properly function").

workings of the legal system itself".[3] The privilege has evolved from "a rule of evidence", to an "important civil and legal right", to "a principle of fundamental justice in Canadian law".[4]

In the criminal context, the privilege is constitutionally protected under both sections 7 and 8 of the *Charter*.[5] However, the privilege is equally important in the civil context, and the same rules apply in that context.[6] The privilege is "central to the administration of justice in an adversarial system",[7] encompassing both criminal and civil justice. Even in circumstances where these *Charter* rights are not specifically applicable, solicitor-client privilege remains an important *Charter* value.[8]

Under the CBA's *Code of Professional Conduct* and similar rules of professional conduct enacted by law societies across Canada, lawyers are required to "hold in strict confidence all information concerning the business and affairs of the client acquired in the course of the professional relationship, and shall not divulge any such information except as expressly or impliedly authorized by the client."[9] The *Code of Professional Conduct* recognizes that this

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3 *R. v. McClure*, [2001] 1 S.C.R. 455, at paras. 2, 31-33, Major J. for the Court; see also *Smith v. Jones*, [1999] 1 S.C.R. 455, at paras. 45-7, Cory J.

4 *Lavallee, Rackel & Heintz v. Canada (Attorney General); White, Ottenheimer & Baker v. Canada (Attorney General)*; *R. v. Fink*, [2002] 3 S.C.R. 209, at para. 49, Arbour J.

5 *R. v. McClur*e, [2001] 1 S.C.R. 445, at para. 41, Cory J. (s. 7); *Lavallee, id*., paras. 24 (s. 7), 35 and 49 (s. 8); *Maranda v. Richer*, [2003] 3 S.C.R. 193, at para. 10, LeBel J. (s. 8).

6 *Maranda, id*, at para. 40, Deschamps J. ("[t]he ultimate purpose of the privilege is to enable every individual to exercise his or her rights in an informed manner. The protection extends to advice given in both criminal and civil cases without distinction"; *National Bank Financial Ltd. v. Potter (2005)*, N.S.R. (2d) 123, at para. 70 (N.S.S.C.), Scanlan J. ("[p]rinciples relating to solicitor-client privilege, established by the Supreme Court of Canada in criminal cases apply with equal force and significance in the civil realm"); *Philip Services Corp. (Receiver of) v. Ontario Securities Commission*, [2005] O.J. No. 4418, at para. 51 (Div. Ct.), Lane J. for the Court ("[w]hile the present cases does not involve a *Charter* challenge, the message from the Supreme Court jurisprudence is clear: restrictions on solicitor-client privilege to attain other important societal objectives are to be closely scrutinized and restricted to what is absolutely necessary for the competing objective so as to achieve the minimal necessary impairment of solicitor-client privilege"); *Nova Growth Corp. v. Kepinski*, [2001] O.J. No. 2522, at para. 6 (Div. Ct.), Flinn J.

7 *Lavallee, supra*, at para. 49.

8 *M.(A.) v. Ryan*, [1997] 1 S.C.R. 157, at paras. 22-23, 30, 48, 53, McLachlin J.; *Hill v. Church of Scientology of Toronto*, [1995] 1 S.C.R. 1130, at paras. 93, 95, Cory J.; R.W.D.S.U., *Local 558 v. Pepsi-Cola Canada Beverages (West) Ltd.*, [2002] 1 S.C.R. 156, at paras. 22, 74, 106, McLachlin C.J. and LeBel J.; *R. v. Crawford*, [1995] 1 S.C.R. 858, at p. 882, Sopinka J; *Airst v. Airst* (1998), 37 O.R. (3d) 654, at p. 659 (Ont. Gen. Div.), Wein J.

9 Chapter IV.

duty is in fact broader than keeping secret communications subject to common law solicitor-client privilege.[10]

The CBA has long been concerned about the impact of the *Lobbyists Registration Act* upon solicitor-client privilege.[11] The CBA has been in favour of transparency in the activities of lobbyists, but not to the extent of overriding solicitor-client privilege. The current requirements of the Act to report lobbying activities might already conflict with solicitor-client privilege by giving third parties information about communications between lawyers and their clients. A lawyer's ethical responsibility even extends to non-disclosure of the fact that a lawyer has been consulted by a client. Requiring a lawyer to publicly disclose representation of a client, in and of itself, may breach a lawyer's ethical responsibilities.[12] Disclosing the subject-matter of the communications between the public office holder and a lawyer may indirectly breach the privilege by giving insight into what client discussions or instructions may have instigated the contact.

This risk is exacerbated by the requirement of monthly returns detailing communications with senior public office holders under proposed section 5(3) of the *Lobbying Act*. The fact that particulars sufficient to identify the subject-matter of the communication or meeting must be provided each month means that third parties, be they business competitors, adverse litigants or government enforcement agencies, can obtain more detailed information as to when a client may have contacted their lawyer and what they might have discussed leading to the contact between the lawyer and the government official. Given the primacy and quasi-constitutional status of solicitor-client privilege and the benefits of facilitating full and frank discussions between lawyers and clients in our justice system, this principle must be paramount over the objectives of the Act in the event of a conflict. Otherwise, the legislation is vulnerable to legal challenge, and at the very least poses a potential conflict between federal law regulating lobbyists and rules of confidentiality of the legal profession sanctioned by provincial or territorial law.

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10 CBA *Code of Professional Conduct*, Chapter IV, Commentary 2.

11 See its 1993 submission to the Holtmann Committee, its 1994 submission to the Subcommittee on Bill C-43, and its 2001 submission to the Standing Committee on Industry, Science and Technology, hereinafter the "1993 Submission," "1994 Submission" and "2001 Submission" respectively.

12 See CBA *Code of Professional Conduct*, Chapter IV, Commentary 4.

The CBA is not arguing for a blanket exemption for lawyers. As it noted in its 2001 submission, "Lawyers who perform lobbying activities ought to comply with all the obligations of lobbyists, save only when the required disclosure would tread upon professional obligations of confidentiality." There must be some recognition of this ethical constraint on lawyers. The CBA proposes that this be accomplished through an addition to section 4(2) of the Act.

RECOMMENDATION:

The Canadian Bar Association recommends that the following paragraph be added to section 4(2) of the *Lobbying Act*:

> **This Act does not apply in respect of any oral or written communication made to a public office holder by an individual on behalf of any person or organization where confidentiality is required by law.**

This would not completely eliminate the potential for provincial/federal conflict, but would lessen it. Any remaining issues would be left for the courts to decide, if necessary.

The CBA would not be adverse to a mechanism by which lawyers would be required to report to the Commissioner, on a confidential basis, that the exemption is being relied on, the date of the communication and the public official lobbied, and for an annual report to Parliament on the number of such reports. This would permit some assessment of whether the exception is being used inappropriately. Under the proposed *Lobbying Act*, the Commissioner could also investigate any reasonable suspicion of breach of the *Lobbyists' Code of Conduct* using the new investigation powers. This would curtail any potential abuse of the exemption.

B. Impact of Monthly Report of Communications with Senior Office-Holders on Informed Government Decision-Making

The public concern that sparked this Bill was not concerned with legal experts and community organizations informing those in government about how laws operate "on the ground," but rather with the buying and selling of privileged lines of communications with

government, in short, influence peddling. Mechanisms already exist in criminal law to deal with such abuses of power.

The monthly reporting requirement will inevitably divert resources of not-for-profit organizations away from serving their constituencies and providing information to government, to complying with bureaucratic red tape. There is no evidence that those who fail to comply with the registration requirements of the *Lobbyists Registration Act* will comply with these and other requirements of the *Lobbying Act*, or that monthly returns, in addition to the bi-annual returns already required under the Act, will result in better lobbyist behaviour, or even that monthly returns will provide information that will serve the public interest and will be read by anyone other than those whose private interests conflict with those of the organization or person involved.

Elected representatives and public servants cannot do their jobs properly if they are deprived of information that would enrich their deliberations. The CBA is concerned that the overall message of the Bill will be interpreted by government officials to mean that contact with registered lobbyists – advocates exclusively for private interests or those who advocate in the public interest – are at best useless and at worst inherently suspicious. *All* communications are subject to more onerous reporting requirements, be it simple information exchanges or "hardball advocacy" on behalf of private interests. The resulting restrictions in exchanges of information will result in less-informed government decision-making.

The CBA recommends that this portion of the Bill be subject to further study, to determine whether the public benefits of more onerous reporting requirements justify the administrative burden to not-for-profit organizations that provide valuable information to government and the potential chill in relations between government and these organizations.

RECOMMENDATION:

The Canadian Bar Association recommends that clause 69 of Bill C-2, requiring monthly returns identifying communications between lobbyists and senior public office holders, be removed from the Bill subject to further study.

III. RESTRICTIONS ON EMPLOYMENT AND PROFESSIONAL AFFILIATION FOR REPORTING PUBLIC OFFICE HOLDERS

The CBA supports measures to prevent public office holders from obtaining personal benefit from their positions. It also recognizes the need to protect the integrity of public offices and maintain public confidence that they are being operated for the public good.

At the same time, the CBA believes that Parliament should consider the need to fill public offices with individuals who have the requisite skills, knowledge and experience to fulfill the duties of their office. In a world of complex policy problems in an equally complex regulatory regime, many offices are best served by experienced professionals, actively engaged in their profession. Even when the duties of the office do not require a professional license, active participation and currency in a chosen profession can and usually will enhance the skill, knowledge and experience of an office holder. Barriers to employment that stem from having held public office will discourage many professionals from accepting public office, greatly reducing the pool of qualified individuals willing to serve in this capacity.

Three provisions of the proposed *Conflict of Interest Act* are of particular concern:

- Sections 15(1)(a) and (d) state that no reporting public office holder shall, except as required in the exercise of his or her official powers, duties and functions engage in the practice of a profession or hold office in a union or professional association. "Profession" and "professional organization" are undefined;
- Sections 15(2) and 15(3) outline circumstances in which a reporting public officer[13] can be a director or officer of a corporation or organization. In essence, a reporting public office holder can hold such positions if the Commissioner is of the opinion that it is not incompatible with his or her public duties as a public office holder. Again, "organization" is undefined; and

[13] Defined in subsection 2(1) to include all Government in Council appointees who are salaried or work full-time.

- Section 35 limits the type of employment and lobbying activities in which former reporting public office holders can engage upon ceasing to be reporting public office holders.

These sections place significant restrictions upon the employment and professional activities of a reporting public office holder during the course of and upon conclusion of their public office and will act as a substantial disincentive for individuals with specialized skill and knowledge to act in a public office.

The prohibition on engaging in employment or practice of a profession as well as the inability to hold office in a professional association means that members of professional associations, including engineers, doctors, lawyers, and accountants, must cease practice while holding public office unless the practice of that profession is required in the exercise of official powers, duties and functions. Depending upon the professional association and jurisdiction, failure to engage in active practice may result in the loss of professional licensing. In the case of lawyers, for example, several law societies have established guidelines for how long and in what circumstances a lawyer can retain non-practicing status and return to practice without fulfilling educational and other licensing requirements. As a result, public office holders may lose substantial employment opportunities within their profession should they hold public office for any length of time.

RECOMMENDATION:

The Canadian Bar Association recommends that section 15 be amended to add:

> **Nothing in this section prohibits or restricts a reporting public office holder from licensure as an active practitioner with any regulatory body governing their profession.**

As neither "office" nor "professional association" is defined, the extent to which reporting public officers are able to participate in professional associations other than licensing regimes is unknown. For example, the CBA consists of national and provincial branches, with subgroups for specialized areas of the law. It would appear that reporting public officer holders could not hold office in the CBA or any of its constituent groups. As a result,

lawyers with particular interests and specialized skill and knowledge would have to choose either to refrain from participating as an officer in the activities of the CBA or refrain from holding public office. Similar problems will occur in other professional associations. Public office holders will be prohibited from full participation in professional associations that could enhance their knowledge of specialized areas. Professional associations will be prohibited from fully accessing skill and knowledge in the possession of public office holders to advance the public interest.

Skilled professionals will be discouraged from holding public office, and professions will separate into those who hold public office but no longer participate in their profession in a meaningful way and those who participate in their profession but do not hold public office. The net result will be a loss of skill and knowledge to public offices and professional associations.

RECOMMENDATION:

The Canadian Bar Association recommends that section 15(d) of Bill C-2, relating to professional associations be removed from the Bill subject to further study.

IV. PUBLIC SERVANTS DISCLOSURE PROTECTION ACT

The CBA supports greater protection for employees who report wrongdoing witnessed in the course of their employment. In the spirit of the amendments in the *Federal Accountability Act*, the CBA recommends an additional amendment to the definition of a "protected disclosure", to better protect lawful disclosure of information by public servants.

A public servant making a "protected disclosure" is protected from "reprisal". The current definition of "protected disclosure" reads as follows:

> "protected disclosure" means a disclosure that is made in good faith and that is made by a public servant
>
> (a) in accordance with this Act;
>
> (b) in the course of a parliamentary proceeding;

> (c) in the course of a procedure established under any other Act of Parliament; or
>
> (d) when lawfully *required* to do so. [emphasis added][14]

This may be interpreted to apply only where a legal **requirement** exists to speak, as opposed to situations where a public servant is legally **permitted** to speak. We recommend that protection be extended to the latter circumstances as well.

The common law "duty of loyalty" to the government permits public servants to speak out on certain occasions, but does not require them to do so. The authority for this right was made clear in *Haydon v. Her Majesty the Queen*, [2001] 2 F.C. 82:

> [82] In Fraser, Dickson, C.J. held that the duty of loyalty does not demand absolute silence from public servants. The Fraser decision instructs us that the common law duty of loyalty encompasses certain exceptions or qualifications:
>
> > And indeed, in some circumstances a public servant may actively and publicly express opposition to the policies of a government. This would be appropriate if, for example, the Government were engaged in illegal acts, or if its policies jeopardized the life, health or safety of the public servant or others, or if the public servant's criticism had no impact on his or her ability to perform effectively the duties of a public servant or on the public perception of that ability. But, having stated these qualifications (and there may be others), it is my view that a public servant must not engage, as the appellant did in the present case, in sustained and highly visible attacks on major Government policies.
>
> [83] In my opinion, these exceptions embrace matters of public concern. They ensure that the duty of loyalty impairs the freedom of expression as little as reasonably possible in order to achieve the objective of an impartial and effective public service. Where a matter is of legitimate public concern requiring a public debate, the duty of loyalty cannot be absolute to the extent of preventing public disclosure by a government official. The common law duty of loyalty does not impose unquestioning silence. As explained in Fraser, the duty of loyalty is qualified: "some speech by public servants concerning public issues is permitted." It is my understanding that these exceptions to the common law rule may be justified wherever the public interest is served. In this regard, the importance of the public interest in disclosure of wrongdoing, referred to as "the defence of whistleblowing", has been recognized in other jurisdictions as an exception to the common law duty of loyalty.

Public servants should be more clearly protected from reprisal when lawfully sharing information with Parliamentarians, the media, or the public generally.

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[14] Section 2.

We anticipate that the certainty offered by the defined disclosure process in the *Public Servants Disclosure Protection Act* would be attractive to most public servants seeking protection from reprisal when bringing information to public attention. Nevertheless, it must be clear that all legally permissible whistleblowing is protected, regardless of the mechanism chosen by the public servant to bring important information to public attention.

RECOMMENDATION:

The Canadian Bar Association recommends that the definition of "protected disclosure" in section 2 of the *Public Servants Disclosure Protection Act* be amended to add:

> **"protected disclosure" means a disclosure that is made in good faith and that is made by a public servant…**
>
> **(d) when lawfully *permitted or* required to do so. [emphasis added]**

V. ACCESS TO INFORMATION

The *Federal Accountability Act* proposes a series of amendments to the *Access to Information Act* that, paradoxically, restrict accountability and transparency in government. Consistent with the government's goal of greater accountability and transparency in government, the CBA proposes a "public interest" override in the *Access to Information Act*, as has already been implemented in many Canadian jurisdictions.

The *Federal Accountability Act* would add ten new exemptions to the *Access to Information Act*:

- Section 89 gives the Commissioner of Lobbying a mandatory, class exemption (with no time limit) for "any record … that contains information that was obtained or created by the Commissioner or on the Commissioner's behalf in the course of an investigation conducted by or under the authority of the Commissioner;

- Section 146 gives the Auditor General, the Commissioner of Official Languages, the Information Commissioner and the Privacy Commissioner a mandatory, class exemption for "any record … that contains information that was obtained or created by them or on their behalf in the course of an investigation, examination or audit conducted by them or under their authority";

- Section 147 gives the Chief Electoral Officer a mandatory, class exemption for "any record … that contains information that was obtained or created by or on behalf of a person who conducts an examination or review under the *Canada Elections Act*";

- Section 149 gives Canada Post Corporation, Export Development Canada, the Public Sector Pension Investment Board and VIA Rail Canada a discretionary, class exemption (with no time limit) for "a record … that contains trade secrets or financial, commercial, scientific or technical information that belongs to, and has consistently been treated as confidential by [these institutions]". There is a qualification in that the exemptions do not apply to their general administration, nor does it authorize Canada Post Corporation to refuse to disclose information relating to any activity fully funded out of funds appropriated by Parliament;

- Section 150 gives the National Arts Centre Corporation a mandatory, class exemption for "a record … if the disclosure would reveal the terms of a contract for the services of a performing artist or the identity of a donor who has made a donation in confidence and if the Corporation has consistently treated the information as confidential";

- Section 150 also gives the Public Sector Pension Investment Board a mandatory, class exemption for "a record … that contains advice or information relating to investment that the Board has obtained in confidence from a third party if the Board has consistently treated the advice or information as confidential".

- Section 152 gives all institutions a discretionary, class exemption (for 15 years) for "any record that contains a draft report of an internal audit of a government institution or any related audit working paper..." though if a final audit report is not produced within two years of the initiation of the internal audit, the most recent draft report may be made accessible;

- Section 179 gives the Export Development Corporation (via amendments to the *Export Development Act* and to Schedule II of the *Access to Information Act*) a mandatory, class exemption for information "in relation to its customers" except with the "written consent of the person to whom the information relates";

- Section 222 gives all institutions subject to the *Access to Information Act* a mandatory, class exemption for "any record … that contains information created for the purpose of making a disclosure under the *Public Servants Disclosure Protection Act* or in the course of an investigation into a disclosure under that Act";

- The Public Sector Integrity Commissioner is also given a mandatory, class exemption for "any record --- that contains information obtained or created by him or her or on his or her behalf in the course of an investigation into a

> disclosure made under the *Public Servants Disclosure Protection Act* or an investigation commenced under section 33 of that Act; or received by a conciliator in the course of attempting to reach a settlement of a complaint filed under subsection 19.1(1) of that Act.

Our comments focus on three concerns, relating to scope, time and public interest.

In terms of **scope**, the language of these exemptions is overbroad. Those relating to Crown corporations could arguably defeat the purpose of including these institutions under the *Access to Information Act*.

While the underlying concerns about providing access are understandable, the choice of language pertaining to an "investigation, examination or audit" in a number of instances does not seem justifiable, especially in light of the lack of time limits on the exemption. One can understand the need to protect sources in an investigation to encourage full disclosure of information, but it will be in the public interest to obtain information as to how an audit or investigation was conducted, aspects unrelated to the impetus behind such exemptions.

In terms of **time**, many of the proposed exemptions have no time limits. Subject to applicable legislation, these exemptions would effectively, and seemingly permanently, bar access to information for which it will eventually be useful to permit public access. Given the broad scope of the exemptions, the government should consider time limits to mitigate the negative effect of the exemptions and provide a greater degree of transparency. It would be helpful if the government could explain the rationale for these exemptions and consider either narrowing the scope of the exemptions or eliminating them altogether.

In terms of **public interest**, several provincial access to information statutes provide a "public interest" basis for disclosure (also referred to as a public interest override). Despite the application of an exemption from access, heads of institutions in Alberta, British Columbia, Saskatchewan, Manitoba, Ontario and Prince Edward Island may disclose information that is, for any other reason, clearly in the public interest to do so. If the government proposes to maintain these exemptions, it should consider adding a public

interest exception to give institutions a degree of flexibility with respect to the information in its possession.

In short, the proposed legislation lacks sufficient definition in the areas of scope and time limits that paradoxically will restrict accountability and transparency in government. The addition of a broad "public interest" override to the *Access to Information Act* would also assist in ensuring that the legislation does not operate contrary to these goals.

RECOMMENDATIONS:

The Canadian Bar Association recommends that:

(a) the *Federal Accountability Act* be amended to include a "public interest override" to exemptions in the *Access to Information Act*, that would permit the named institutions to disclose information subject to the exemption if it is in the public interest to do so;

(b) even if a public interest override is included, the exemptions to the *Access to Information Act* in the *Federal Accountability Act* be subject to time limitations; and

(c) the government examine the scope of the exemptions with a view to narrowing them to the extent possible, in light of the objectives of government accountability and transparency.

VI. DIRECTOR OF PUBLIC PROSECUTIONS

A. Existing Measures to Ensure Prosecutorial Independence

Part 3 of the *Federal Accountability Act* would create an office of the Director of Public Prosecutions (DPP) and enact a *Director of Public Prosecutions Act*. Underlying this initiative is a statement in the Federal Accountability Action Plan that it is "… important for transparency and for the integrity of the federal justice system that prosecutions under federal law operate independently of the Attorney General of Canada and of the political process".[15]

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15 Online: Government of Canada <http://www.faa-lfi.gc.ca/docs/ap-pa/ap-pa14_e.asp>.

The CBA welcomes the acknowledgement of the fundamental importance of prosecutorial independence from political considerations. This constitutional convention has long been recognized in Canada and other Commonwealth countries. For example, the *Royal Commission Report on Civil Rights* stated:

> [The Attorney General] must be answerable to the Legislature and it is better that he be answerable as a Minister of the Crown. Notwithstanding that this is so, he must of necessity occupy a different position politically from all other Ministers of the Crown. As the Queen's Attorney he occupies an office with judicial attributes and in that office he is responsible to the Queen and not responsible to the Government. He must decide when to prosecute and when to discontinue a prosecution. In making such decisions he is not under the jurisdiction of the Cabinet nor should such decisions be influenced by political considerations. They are decisions made as a Queen's Attorney, not as a member of the government of the day.[16]

Similarly, Senator Jacques Flynn, Attorney General of Canada, observed as follows in 1979:

> … the Attorney General does not act on directions from his colleagues, other members of Parliament, or anyone else in discharging his duties in the enforcement of the law.[17]

Jurisdictions in Canada have employed several methods to ensure that this convention is respected and followed assiduously. The prosecution services operating in certain provinces, such as Nova Scotia[18] and Quebec,[19] utilize a public prosecution model. British Columbia has created a statutory framework ensuring independence of the prosecution function.[20] Other prosecution services, including the Federal Prosecution Service (FPS) of Justice Canada, have well-established, publicly available guidelines and procedures designed to ensure prosecutorial independence.

While, in theory, the Attorney General may direct individual prosecution decisions, such direction is extremely rare.[21] Daily prosecution decisions in federal matters are made by FPS

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16 The Hon. J.C. McRuer, *Royal Commission Inquiry Into Civil Rights*, Report No. 1 (Toronto: Queen's Printer, 1968), Volume 2 at 933-934.

17 *The Federal Prosecution Service Deskbook* (the "Deskbook"), online: Department of Justice <http://canada.justice.gc.ca/en/dept/pub/fps/fpd/> at Chapter 4 (footnote 6).

18 *Public Prosecutions Act*, R.S.N.S. 1990, c. 21.

19 An *Act Respecting the Director of Criminal and Penal Prosecutions*, R.S.Q., c. D-9.1.1.

20 *Crown Counsel Act*, R.S.B.C. 1996, c. 87.

21 B.A. MacFarlane, "Sunlight and Disinfectants: Prosecutorial Accountability and Independence Through Public Transparency" (2001) 45 Criminal Law Quarterly 272 at 293-294.

lawyers who discharge their duties competently, independently, and to the highest ethical standards. On rare occasions where prosecutorial misconduct occurs, oversight and discipline through the law societies enable the correction and future deterrence of improper conduct.[22] On significant and high profile cases where the public may perceive a lack of independence, prosecution services have entered into informal arrangements to have an independent person review key prosecution decisions.[23]

While the CBA recognizes that the DPP model has been recommended by the Law Reform Commission of Canada and has been adopted by two provincial jurisdictions, we note that it is not the only means of securing prosecutorial independence.

B. Additional Issues

Policy determinations of the federal government with respect to substantive criminal law are often made after extensive consultation with prosecutors from provincial prosecution services and the FPS. These consultations often provide a critical practical perspective on policy issues. Particular care should be taken to ensure that the creation of a separate prosecution service does not impede such consultation. Consideration might be given to the approach in section 19 of the Quebec legislation[24] that permits advisory opinions on issues relating to the administration of the Acts within the Director's jurisdiction.

RECOMMENDATION:

The Canadian Bar Association recommends that the government further study the creation of a separate public prosecutions service and take any necessary action to ensure it does not impede consultation on criminal law policy issues where the practical experience and perspective of the prosecution service would be of particular benefit.

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22 See, for example, *Krieger v. Law Society of Alberta*, [2002] 3 S.C.R. 372.

23 See, for example, "Outside counsel appointed to review Phoenix decision" (28 March 1995), online: Executive Council, Province of Saskatchewan <http://www.gov.sk.ca/newsrel/releases/1995/03/28-135.html>.

24 *Supra* note 19.

Under the proposed Act, the Attorney General would have authority to intervene in particular cases, or to give advice or instruction on particular issues in exceptional circumstances. Official notification of such action may need to be postponed in certain circumstances. To further increase transparency in prosecutorial decision-making, we suggest that the Attorney General give immediate notification that such intervention or advice has been given, and provide reasons why more detailed disclosure cannot be given until completion of the prosecution.

RECOMMENDATION:

The Canadian Bar Association recommends that section 11 of the *Director of Public Prosecutions Act* be amended to limit any delay of official notification of either intervention or specific direction by the Attorney General only to exceptional circumstances. In such circumstances prompt official notification of the existence of intervention or direction should be required, together with reasons why detailed notice of the nature of the action taken cannot be provided until the conclusion of the prosecution.

Finally, we note that budgetary and fiscal independence is an important component of a DPP scheme. A transparent process for budgetary requests and allocations is an important aspect of ensuring both independence and functional effectiveness of a public prosecution service. Such a process should also contemplate funding of "extraordinary prosecutions" that may exert a disproportionate impact on the overall fiscal viability of the service.[25]

RECOMMENDATION:

The Canadian Bar Association recommends that the process of budgetary requests and allocations be transparent, and legislative provision should be made for the allocation of additional resources for extraordinary prosecutions.

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[25] See, for example, *Nova Scotia's Public Prosecutions Act, supra* note 4 at section 6B.

Due to the speed with which Bill C-2 is proceeding through the legislative process, the CBA has not had the opportunity to fully explore the implications of the DPP initiative for the specialized Competition Law Division (CLD) within Justice Canada. The CLD provides legal advisory services in relation to civil and criminal matters under the *Competition Act*, and also conducts prosecutions under that legislation, exercising its own Attorney General function. The CBA would like to obtain a better understanding of what will happen to the CLD if a DPP is created, so that it may assess the issues of prosecutorial independence and efficiency of process associated with any changes to the current model, in further detail.

RECOMMENDATION:

The Canadian Bar Association recommends that the implications of the DPP initiative for the Competition Law Division be the subject of further study, and that interested groups be given a further opportunity to comment on these implications.

VII. CONCLUSION

The CBA has noted many things about the proposed *Federal Accountability Act* that are commendable, in that it seeks to make government more accountable and transparent, and reduce the risk of inappropriate influence over government decision-making. However, aspects of the *Federal Accountability Act* have the potential risk of hindering the administration of justice and the rule of law, deterring the ability of government to consult legitimately with public interest groups, including the CBA, and thwarting the very goals of accountability and transparency that the *Act* was meant to promote. In that regard, we have highlighted aspects of the Act that we believe require change or further study. The CBA hopes that its comments have been helpful in making recommendations that would enhance the operation of the *Act* for the benefit of the Canadian public.

VIII. SUMMARY OF RECOMMENDATIONS

The Canadian Bar Association recommends:

1. **that the following paragraph be added to section 4(2) of the *Lobbying Act*:**

   > **This Act does not apply in respect of any oral or written communication made to a public office holder by an individual on behalf of any person or organization where confidentiality is required by law.**

2. **that clause 69 of Bill C-2, requiring monthly returns identifying communications between lobbyists and senior public office holders, be removed from the Bill subject to further study.**

3. **that section 15 be amended to add:**

   > **Nothing in this section prohibits or restricts a reporting public office holder from licensure as an active practitioner with any regulatory body governing their profession.**

4. **that section 15(d) of Bill C-2, relating to professional associations be removed from the Bill subject to further study.**

5. **that the definition of "protected disclosure" in section 2 of the *Public Servants Disclosure Protection Act* be amended to add:**

   > **"protected disclosure" means a disclosure that is made in good faith and that is made by a public servant…**
   >
   > **(d) when lawfully *permitted or* required to do so. [emphasis added].**

6. **that the *Federal Accountability Act* be amended to include a "public interest override" to exemptions in the *Access to Information Act*, that would permit the named institutions to disclose information subject to the exemption if it is in the public interest to do so.**

7. **that, even if a public interest override is included, the exemptions to the *Access to Information Act* in the *Federal Accountability Act* be subject to time limitations.**

8. that the government examine the scope of the exemptions with a view to narrowing them to the extent possible, in light of the objectives of government accountability and transparency.

9. that the government further study the creation of a separate public prosecutions service and take any necessary action to ensure it does not impede consultation on criminal law policy issues where the practical experience and perspective of the prosecution service would be of particular benefit.

10. that section 11 of the *Director of Public Prosecutions Act* be amended to limit any delay of official notification of either intervention or specific direction by the Attorney General only to exceptional circumstances. In such circumstances prompt official notification of the existence of intervention or direction should be required, together with reasons why detailed notice of the nature of the action taken cannot be provided until the conclusion of the prosecution.

11. that the process of budgetary requests and allocations be transparent, and legislative provision should be made for the allocation of additional resources for extraordinary prosecutions.

12. that the implications of the DPP initiative for the Competition Law Division be the subject of further study, and that interested groups be given a further opportunity to comment on these implications.