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December 7, 2006

The Honourable Jeremiah S. Grafstein, Q.C.
Chair
Senate Committee on Banking, Trade and Commerce
Room 217, East Block
Ottawa, ON K1A 0A4

Dear Senator Grafstein,

RE: Bill C-25 - *Proceeds of Crime (Money Laundering) and Terrorist Financing Act* amendments

The Canadian Bar Association (CBA) appreciates the opportunity to comment on Bill C-25, amending the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*. The CBA is a national association of more than 37,000 lawyers, notaries, law students and teachers. Our mandate includes seeking improvements in the law and the administration of justice.

As the body representing the independent regulators of the legal profession, the Federation of Law Societies is the primary party in the negotiations on the application of the money laundering regime to lawyers. As the national professional association for lawyers themselves, the mandate of the CBA is to assist the government in crafting a law that is as effective and fair as possible, while protecting the rule of law and the rights of all Canadians.

The independence of the Bar and solicitor-client privilege are fundamental, foundational elements in the institutions, practices and beliefs of any free democracy. The CBA has long stressed that solicitor-client privilege must be protected in any legislation to combat money laundering. This is for the benefit of all Canadians, the integrity of our justice system and for the rule of law.

We have focused our review of Bill C-25 on two general points of interest: the special considerations needed before enlisting the legal profession in the fight against money laundering; and the expansion of information sharing with international authorities. Given the brief time allowed for consideration of this Bill to date, we urge this Committee to take the time needed to allow all stakeholders to present detailed and thoughtful input.

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The CBA fully supports Bill C-25's objective of protecting society against the threat and impact of money laundering. Indeed, the legal profession, through the law societies that regulate it, has voluntarily and proactively adopted regulations to prohibit lawyers from accepting large amounts of cash. This specifically addresses those rare occasions where lawyers might unwittingly be drawn into an illegal scheme. In addition, law societies are now considering ways to address the government's goal of developing a client identification scheme.

For many years, the CBA has contributed to government efforts to combat money laundering through its law reform mandate and by offering educational programs and a national model *Code of Professional Conduct* to assist lawyers in maintaining the highest professional standards. We will continue to lead the profession in these efforts, and continue to lend our expertise to law reform initiatives in the interests of the public and the legal profession.

In addition, the CBA has continuously stressed the necessity of protecting solicitor-client privilege, while also recognizing the importance of other societal interests. The double imperative of protecting fundamental individual rights and freedoms as well as the public interest can best be achieved by full and meaningful consultation in the development and reform of laws, education of all parties involved and the self-regulation of the legal profession.

Clearly, lawyers have shown their willingness to aid the government to fight money laundering. It is critical that the proper approach must remain within the sphere of self-regulation. We commend the government for recognizing the fundamental importance of solicitor-client privilege by explicitly removing legal counsel and legal firms from the reporting requirements in Bill C-25[1]. In our view, the measures put in place by the law societies are more than adequate to include lawyers in the fight against money laundering while upholding the core values of the profession.

The CBA also strongly commends the Committee for recommending, in your recent report, that negotiations between the Federation and the federal government should continue without interference, and for recognizing the proactive efforts of the profession to address concerns about money laundering through self-regulatory mechanisms.[2]

Unfortunately, the text preceding that recommendation suggests that lawyers are a weak link in the fight against money laundering, and either knowingly or innocently participate in money laundering activities schemes. With respect, the CBA strongly disagrees with these comments. The overwhelming majority of lawyers in Canada adhere to the highest legal and ethical standards. Like all citizens, lawyers are bound by the *Criminal Code* and other statutes, and are rightly exposed to criminal prosecution for any violation of the law, including the prohibition against money laundering. Lawyers are also subject to demanding professional codes of conduct and other law society requirements.

The existing investigative tools and sanctions available against any lawyer who violates either the law or professional codes of conduct have been effective. This powerful regulatory regime, coupled with the profession's most recent initiatives to aid in the fight against money laundering (including the ongoing negotiations) are evidence of the profession's responsibility, commitment and ability to protect the public interest.

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1 Clause 9, adding section 10.1 to the Act.

2 The Standing Senate Committee on Banking, Trade and Commerce, *Stemming the Flow of Illicit Money: A Priority for Canada,* Parliamentary Review of the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*, Interim Report, October 2006 at 12 -14.

The legal profession would not attempt to shield lawyers who violate the law. Our purpose is to ensure that the rule of law is preserved, and lawyers are able to fulfill their primary duty to their clients. However, compelling a lawyer to become an agent of the state by providing access to confidential or privileged client information would be antithetical to that duty, and would undermine the fair and proper administration of justice. Our purpose is to preserve what has worked well to protect Canada's freedoms and the administration of justice — all clients' right to speak to their lawyers in the confidence that what they say will go no further.

The Bill also addresses the issue of solicitor-client privilege in clause 35, so that in cases where an authorized person is about to examine or copy a document for which a lawyer claims privilege, that person will not proceed if the lawyer claims privilege. The Supreme Court of Canada's decision in *R.v. Lavallee* [3] and subsequent case law[4] has established that the protection of solicitor-client privilege cannot be dependent upon the assertion of the privilege by a lawyer. Instead, a mechanism must exist to ensure that notice is given to the person to whom the privilege belongs. This ensures that privilege is protected and maintained though the privilege has not been asserted by a lawyer. For this reason, we question whether the clause in Bill C-25 would meet the established constitutional threshold.

Finally, we note that Bill C-25 proposes a significantly expanded regime for information sharing. The use of information collected through statutory compulsion raises many legal and constitutional considerations. The collection, storage and dissemination of personal information would engage privacy interests which are constitutionally protected. The values defining Canadian democracy require that increased government powers to collect data be accompanied by independent and effective mechanisms of oversight and accountability.

This country's recent experience, for example in the case of Maher Arar, has amply demonstrated that simple trust as to the manner in which information is collected and used, including how it is shared with other countries and what happens to that information after being shared, is not always warranted. Bill C-25 must incorporate provisions which will ensure and demonstrate that any additional information sharing powers created by Bill C-25 will be used lawfully, accountably, transparently and in a manner consistent with the public interest and constitutional values. The CBA opposes further information sharing until that degree of effective independent oversight and accountability is assured.

Thank you for the opportunity to share the views of the CBA with your Committee.

Yours truly,

(original signed by J. Parker MacCarthy)

J. Parker MacCarthy, Q.C.

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[3] *R. v. Lavallee, Rackel and Heintz v. Canada (AG); White, Ottenheimer and Baker v. Canada (AG); R. v. Fink*, [2002] 3 SCR 209, 2002 SCC 61.

[4] *R. v. Festing*, [2001] BCJ 2278.