OFFICE OF THE PRESIDENT
CABINET DU PRÉSIDENT

August 29, 2007

Lynn Hemmings
Chief, Financial Crimes Section – Domestic
Financial Sector Division
Department of Finance
L'Esplanade Laurier
20th floor, East Tower, 140 O'Connor Street
Ottawa, ON K1A 0G5

Dear Ms. Hemmings,

RE: Proposed Amendments to *Proceeds of Crime (Money Laundering) and Terrorist Financing Act* Regulations - *Canada Gazette*, Part 1, June 30, 2007

The Canadian Bar Association (CBA) appreciates the opportunity to comment upon the Regulations Amending Certain Regulations Made Under the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act* (2007-2) (the Proposed Amendments). The CBA is a national association of over 37,000 lawyers, notaries, law students and law teachers, and our mandate includes improvements in the law and the administration of justice.

The CBA has been involved in the development of the proceeds of crime legislation since it was first considered in Canada, and has frequently commented on legislative and regulatory changes and specifically their application to the legal profession.[1] Throughout our involvement, the CBA has been guided by our commitment to protect and maintain the independence of the Bar and respect for solicitor/client privilege, both of which are at the foundation of the Canadian justice system. We support the government's efforts to combat money laundering, and have continually

[1] See, for example: Letter to Senator Grafstein, Bill C-25, *Proceeds of Crime (money laundering) and Terrorist Financing Act* amendments (Ottawa: CBA, 2006); Letter to Minister of Justice Toews, Proceeds of Crime and the Legal Profession (Ottawa: CBA, 2006); Letter to Richard Lalonde, Proceeds of Crime Regulations 2000 (Ottawa: CBA, 2001); Submission on Bill C-22, *Proceeds of Crime (money laundering) Act* (Ottawa: CBA, 2000); Letter to Senator Kolber, Bill C-22, *Proceeds of Crime (money laundering) Act* (Ottawa: CBA, 2000); Submission on Discussion and Policy Paper on Bill C-89 (Ottawa: CBA, 1991); Submission on Bill C-9, *An Act to Facilitate Combating the Laundering of Proceeds of Crime* (Ottawa: CBA, 1991).

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stressed that those efforts must occur within the context of and with respect for these core constitutional principles. This is for the benefit of all Canadians, and for the integrity of the justice system and the rule of law. These basic principles again guide our comments on the Proposed Amendments.

The legal profession has demonstrated its commitment to combating money laundering and terrorist financing activities through contributions to law reform, efforts to educate and inform members of the profession and through the various initiatives implemented by provincial and territorial law societies. For example, law societies have adopted the model rule on cash transactions developed by the Federation of Law Societies of Canada (FLSC), prohibiting lawyers from accepting large amounts of cash from clients. In light of this proactive step, the government has now exempted lawyers from the cash transaction reporting requirements of the legislation.

More recently, the FLSC developed a second model rule dealing with client identification and verification requirements (model rule on client identification) to again address the government's concerns as reflected in the Proposed Amendments. In a submission to the Senate Banking Committee during its review of the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*, the FLSC stated that:

> The proposed model rule respects the threshold between constitutional and unconstitutional requirements imposed on lawyers when it comes to the gathering of information from clients: a lawyer must obtain and keep all information needed to serve the client, but must not obtain any information which serves only to provide potential evidence against the client in a future investigation or prosecution by state authorities.[2]

The CBA supports the work of the FLSC in this regard. The CBA steadfastly maintains that the proper approach to dealing with concerns about money laundering in the context of the legal profession must be through self-regulation.

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The Proposed Amendments would impose two principal requirements on lawyers and law firms:

(a) lawyers would be required to take certain steps to identify or confirm the existence of their clients and all parties to transactions in which funds are exchanged, except where the funds are paid in respect of professional fees, disbursements, expenses or bail; and

(b) lawyers would be required to maintain records of these transactions and to make them available for inspection by authorized persons under the Act.

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[2] Federation of Law Societies of Canada, Submission to the Senate Committee on Banking, Trade and Commerce on Review of the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act* (S.C. 2000, c. 17) pursuant to section 72 of the Act (Montreal: FLSC, June 2006) at 5.

Client Identification and Verification

The CBA believes that the identification and verification provisions in the Proposed Amendments would be overly broad and unworkable for practicing lawyers. In particular, they would require lawyers to ascertain the identity and verify the existence of all parties to a transaction, apparently even including parties whom they do not represent (s. 59.4). As part of this process, lawyers would be required to obtain the names, addresses and occupations of directors of all corporations involved and of all persons who owned or controlled 25% or more of the shares of the corporation, or the equivalent information for non-corporate entities (s.11.1).

Practically, this requirement would be impossible to meet. Within Canada, such shareholder information is generally not available under the applicable legislation. Lawyers have no means of compelling disclosure from parties whom they do not represent. These difficulties are only exacerbated with respect to foreign corporations. In addition to the practical obstacles to compliance, the resultant increased costs and delays in completing even routine and moderately sized commercial transactions would place Canadian businesses at a tremendous disadvantage compared to international competitors. The economic impact of such onerous measures should be carefully weighed against the relatively minor improvement in security that might be achieved. The CBA believes that the requirement in the model rule on client identification that lawyers take certain steps to identify and verify the existence of their own clients represents a more practical and realistic approach, and one which will not unduly prejudice Canadian businesses.

Further, the model rule on client identification would exempt transactions in which lawyers or law firms receive funds from a financial institution, as the funds would have already been subject to the protective measures required of the financial institution. The Proposed Amendments contain no such exemption and would result in unnecessary duplication of effort.

Records Maintenance and Inspection

The CBA is concerned that inadequate attention to protecting solicitor/client privilege and maintaining the independence of the Bar is provided in the audit process under the Proposed Amendments, which would require lawyers and law firms to maintain records and make them available for inspection upon request.

The Supreme Court of Canada in the *Lavallee* decision[3] and subsequent case law[4] has made it clear that searches of law offices can only be undertaken pursuant to a warrant and are subject to the following principles:

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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.

1. No search warrant can be issued with regard to documents that are known to be protected by solicitor/client privilege;

2. Before searching a law office, the investigative authorities must satisfy the issuing Justice that there exists no other reasonable alternative to the search;

3. When allowing a law office to be searched, the issuing Justice must be rigorously demanding so as to afford maximum protection of solicitor/client confidentiality;

4. Except when the warrant specifically authorizes the immediate examination, copying and seizure of an identified document, all documents in possession of a lawyer must be sealed before being examined or removed from the lawyer's possession;

5. Every effort must be made to contact the lawyer and the client at the time of the execution of the search warrant. Where the lawyer or client cannot be contacted, a representative of the Bar should be allowed to oversee the sealing and seizure of documents;

6. The investigative officer executing the warrant should report to the Justice of the Peace the efforts made to contact all potential privilege holders, who should then be given a reasonable opportunity to assert a claim of privilege and, if that claim is contested, to have the issue judicially decided;

7. If notification of potential privilege holders is not possible, the lawyer who had custody of the documents seized or another lawyer appointed either by the Law Society or by the Court, should examine the documents to determine whether a claim of privilege should be asserted, and should be given a reasonable opportunity to do so;

8. The Attorney General may make submissions on the issue of privilege, but should not be permitted to inspect the documents beforehand. The prosecuting authority can only inspect the documents if and when it is determined by a Judge that the documents are not privileged;

9. Where sealed documents are found not to be privileged, they may be used in the normal course of the investigation; and

10. Where documents are found to be privileged, they are to be returned immediately to the holder of the privilege, or to a person designated by the Court.[5]

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5 *Supra,* note 3 at para. 49.

These principles are not reflected in the Proposed Amendments. The CBA recognizes that not all information required to be collected and maintained pursuant to the Proposed Amendments would satisfy the test for attracting solicitor/client privilege. However, information that is not privileged would still be confidential, and the integrity of the solicitor/client relationship requires that both be safeguarded. At a minimum, any provisions that may require disclosure must also provide a mechanism for determining the issue of privilege and must be consistent with the principles articulated by the Supreme Court of Canada.[6]

In addition, the audit process in the Proposed Amendments is silent on a number of important details. Whether or not audits of lawyers' offices would comply with constitutional standards would depend upon effective and adequate measures to protect materials subject to solicitor/client privilege. For that reason, it is unsatisfactory to simply provide for audits of lawyers' offices without also addressing important questions such as: whether an auditor would have unrestricted access to all contents of a file or all files; who would have access to audit information; and, what would happen to audit information if money laundering was suspected.

Courts have long recognized that an independent Bar is fundamental to the fair and proper administration of justice. Requiring lawyers to collect, store and make available information to the government may well be an unprecedented initiative in Canada. The importance of an independent Bar to the rule of law and to Canada's constitutional democracy is not changed because of the legitimacy of the government objective.

We trust these comments will be helpful. The CBA continues to be pleased to contribute to the government's efforts to combat money laundering, while ensuring that the rule of law is preserved and lawyers are able to fulfill their primary duty to their clients. Thank you again for the opportunity to comment on the Proposed Amendments.

Yours very truly,

(original signed by Bernard Amyot)

Bernard Amyot

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6 Following the *Lavallee* decision, the FLSC also developed a draft Protocol for law office searches. The draft Protocol has not yet been officially endorsed by the government, however.