



December 16, 2011

Via email: fcs-scf@fin.gc.ca

Leah Anderson
Director, Financial Sector Division
Department of Finance
140 O'Connor Street
Ottawa, ON K1A 0G5

Dear Ms. Anderson:

RE: Proposed Amendments to the *Proceeds of Crime (Money Laundering) and Terrorist Financing Regulations* on Ascertaining Identity

The Canadian Bar Association (CBA) appreciates the opportunity to comment on proposed amendments to the *Proceeds of Crime (Money Laundering) and Terrorist Financing Regulations* on Ascertaining Identity (the Proposed Amendments), published by Finance Canada on November 7, 2011. 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. We have frequently commented on legislative and regulatory changes, and specifically on their application to the legal profession.¹ Throughout our involvement, the CBA has been guided by a 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 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 various initiatives implemented by provincial and territorial law societies. For

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).

example, law societies adopted the model rule on cash transactions developed by the Federation of Law Societies of Canada (FLSC), prohibiting lawyers and Quebec notaries from accepting large amounts of cash from clients. In light of this proactive step, the government exempted lawyers and Quebec notaries from the cash transaction reporting requirements of the legislation.

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. However, the government did not accept that model rule as sufficient, and included the legal profession in regulations on the subject. This decision led to reopening earlier litigation from 2002, which had resulted in the courts declaring the reporting requirements of the *Act* to be unconstitutional. The CBA has steadfastly maintained that the proper approach to dealing with concerns about money laundering in the context of the legal profession must be through self-regulation.

In the most recent litigation, as with previous judicial decisions, the BC Supreme Court again² held that the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act* and *Regulations* do not apply to lawyers, Quebec notaries and law firms. In the unlikely event that this situation changes as a result of Canada's appeal of that decision, the CBA would express serious objections to the extent to which the Proposed Amendments would again interfere with the solicitor-client relationship. Given the CBA's extensive commentary on this issue over many years, we offer our comments on the current proposals in spite of the fact that they do not apply to the legal profession.

The Proposed Amendments are extremely broad in scope, and extensive in their approach. They would require professionals and other entities subject to the legislation to function as government watchdogs over the business activities of their clients.

While the legislation now requires reporting entities to carry out certain reporting and due diligence activities in respect of prescribed transactions, under Proposal 1.1, those obligations would be extended to encompass the totality of the reporting entity's "business relationship" with its customers. This will, in effect, require reporting entities to engage in continuous monitoring of their clients and their clients' activities. This is both impractical and highly intrusive.

Currently, reporting entities are required to undertake client due diligence (CDD) measures (i.e. client identification and verification measures) for certain prescribed transactions. The proposed amendments (Proposal 2.1) would extend that obligation to all transactions, whether prescribed or not, if the transaction gives rise to a suspicion of money laundering or terrorist financing. The obligations will be further extended to any attempted suspicious transactions, whether or not the transaction is completed (Proposal 2.2). Again, if ever applied to lawyers and Quebec notaries, these proposed provisions would compel those professionals to spy on their clients, which would run contrary to the essence of the solicitor-client relationship. For this reason, any attempt to apply the proposed provisions to lawyers and Quebec notaries would be unconstitutional and would be vigorously opposed by the CBA.

Under Proposal 3.1, it would be mandatory for reporting entities to obtain information about the beneficial ownership of customers that are corporations, entities or trusts. In many instances, this information will not be available and cannot be compelled. Proposals 3.2 and 3.3 would require a reporting entity to engage in ongoing monitoring of all aspects of its business relationship with its customers. This is impractical and highly intrusive for reporting entities. If applied to lawyers and Quebec notaries, it would again intrude on the solicitor-client relationship, and thus render the provision unconstitutional.

² *Federation of Law Societies of Canada vs. AG Canada*, 2011 BCSC 1270.

We question how professionals and businesses are expected to comply with these onerous obligations. In particular, the requirement for ongoing monitoring of the business relationship will be very difficult, particularly if the client is a foreign entity. It does not appear that consideration has been given to how these provisions would work (or not work) in reality. While the Proposed Amendments suggest they would offer “help” to business people in complying with their obligations to the government, simply enacting regulations demanding onerous or unworkable efforts by non-governmental actors to achieve government objectives is not equivalent to providing help in meeting those demands. As a matter of both law and sound public policy, the government should not oblige citizens to act as substitute law enforcement officials, subject to penalties for non-compliance.

In closing, we note that courts have long recognized that an independent Bar is fundamental to the fair and proper administration of justice. 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 our 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 and Quebec notaries are able to fulfill their primary duty to their clients.

Yours truly,

(original signed by Trinda L. Ernst)

Trinda L. Ernst, Q.C.