THE CANADIAN BAR ASSOCIATION
L'ASSOCIATION DU BARREAU CANADIEN

Office of the President
Cabinet de la présidente

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

Leah Anderson
Director, Financial Sector Division
Department of Finance
L'Esplanade Laurier
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140 O'Connor Street
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Dear Ms. Anderson:

Re: ***Proceeds of Crime (Money Laundering) and Terrorist Financing Act (PCMLTFA)***

The Canadian Bar Association (CBA) appreciates the opportunity to comment on the consultation paper, *Strengthening Canada's Anti-Money Laundering and Anti-Terrorist Financing Regime* (the Consultation Paper). The CBA is a national association of over 37,000 lawyers, law students, notaries 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 proceeds of crime legislation since it was first considered in Canada, and has frequently commented on proposed legislative and regulatory changes, in particular as those changes impact the legal profession. As the national professional association for lawyers, the CBA strives to assist the federal government in crafting laws that are as effective and fair as possible, while protecting the rule of law and the rights of all Canadians. We support the federal government's efforts to combat money laundering, but stress that those efforts must occur in the context of protecting fundamental individual rights and freedoms of all Canadians and must comply with Canadian constitutional requirements.

The Consultation Paper states that Canada's regime is among the top of Financial Action Task Force (FATF) members in terms of compliance with the FATF standards. In spite of this, it proposes expanding the present legislation with broad and vague proposals said to be aimed at enhancing public safety in Canada and around the world and safeguarding the integrity of Canada's financial system. As the CBA has previously cautioned, effective anti-terrorism and money laundering legislation must be precise, as imprecision only "opens the door to subjective interpretation and arbitrary application of the law, which can too readily lead to abuses, discrimination and persecution rather than protection of national security interests."[1]

[1] Submission on the Three Year Review of the *Anti-Terrorism Act* (Ottawa: CBA, 2005) at 9.

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The CBA's detailed comments follow the key headings in the Consultation Paper. While provisions in the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act* (PCMLTFA) concerning the legal profession are in force, they are currently inoperative as a result of court rulings and related injunctions.[2] The Consultation Paper correctly indicates that the ruling is currently under appeal. Since 1998, 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. 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 currently apply to the legal profession.

1. Strengthening Customer Due Diligence Standards

Customer due diligence (CDD) standards are a key element of Canada's anti-money laundering and anti-terrorist financing (AML/ATF) regime. The CBA recognizes that some proposals in the Consultation Paper would relax obligations previously placed on reporting entities (i.e., proposals 1.2 and 1.8). We are encouraged to see the federal government responding to stakeholder concerns by making at least some of the reporting requirements less, rather than more, onerous.

However, other proposals would require reporting entities to monitor more closely and report on their clients' affairs, under the threat of greater penalty if found to be non-compliant. Most lawyers and Quebec notaries are not generally involved in the day to day affairs of their clients[3], and do not have access to much of the information required for this monitoring and reporting, in particular to the extent those requirements deal with persons other than our clients. In addition, law societies across Canada have already introduced strict requirements on client due diligence and cash transactions, and those bodies monitor and audit to ensure compliance by the profession.

If lawyers and Quebec notaries were ever included in the regime, the proposals in this section would have a serious negative impact on the solicitor-client relationship. To the extent that lawyers are required to monitor and collect information about their clients for state purposes unrelated to the lawyer's retainer, the duty of loyalty owed by lawyers to their clients is undermined, and the independence of the Bar significantly weakened.

Proposal 1.5

The Consultation Paper proposes amending the definition of "politically exposed foreign person" to include close associates of that person. Proposal 1.5 is too vague to permit a detailed response, and the CBA believes that further consideration should be given to this proposal. Reporting entities require clear instructions to determine if a client is, or is not a politically exposed foreign person. The term "close associate" is also subjective, and could expose reporting entities to unwitting violations of the PCMLTFA. We encourage the government either to define the term more precisely or consider adopting a definition from another area of Canadian law, with more precise meaning either in statute or as a result of a history of case law.

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2 See, *Law Society of B.C. v. A.G. Canada,* 2001 BCSC 1593 and *Federation of Law Societies v. A.G. Canada*, 2011 BCSC 1270. In the most recent litigation, the BC Supreme Court again 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 about the extent to which the proposed amendments would again interfere with the solicitor-client relationship.

3 This observation does not hold true, however, for lawyers acting as in-house counsel. The proposals would raise distinct concerns in that regard.

Proposal 1.9

The Consultation Paper proposes amending the PCMLTFA to specify that any document used as proof of the existence of a corporation must be no more than one year old. In the interests of greater certainty, we recommend that provision be made for delivery of a certificate of corporate status or functionally equivalent document issued by a competent authority under whose laws the corporation exists within one year of the subject transaction. These documents are routinely used by solicitors in Canada in granting opinions on corporate subsistence.

2. Closing the Gaps

Enhancements to the current regime must be examined recognizing that they address an unquantifiable threat, both domestically and internationally. To date, there is no empirical evidence on the extent of terrorist financing in Canada.

This position is supported by the final report of the Commission of Inquiry into the Investigation of the Bombing of Air India Flight 182, *Air India Flight 182: A Canadian Tragedy*. Commissioner Justice Major indicated that no witness felt it possible to estimate the dollar value of terrorist financing activity, whether in Canada or globally, and at least one RCMP witness suggested that the amounts reported by FINTRAC to be connected to terrorist financing "seemed high in light of the RCMP's own observations." As such, Commissioner Major observed that anti-terrorist financing measures "must seek to contain an activity of unknown value."

Given this uncertainty, we urge caution regarding the breadth of application of these proposals.

Proposal 2.6

Proposal 2.6 would require a reporting entity to report relevant cash transactions from an agent – information not currently caught under the *Act* and Regulations. This would significantly expand the scope of what must be reported. While the legal profession is not currently impacted by the proposals, any expansion would be a serious concern should that situation change in future.

3. Improving Compliance, Monitoring and Enforcement

Proposal 3.3

On the issue of compliance of reporting entities, proposal 3.3 would add an enforcement mechanism for non-compliant entities. At present, a fine can be issued for non-compliance. This proposal would allow continuing fines for continuing non-compliance on the same issue. We believe that making the punishment for non-compliance harsher, while simultaneously making the burden on reporting entities more onerous, is a step in the wrong direction. We urge the federal government to reconsider this proposal.

Again, most lawyers and Quebec notaries are not intimately involved in the day to day activities of their clients, and so would not generally have the information sought under the report. To the extent that we do have the information, disclosing it would often result in an adverse impact on the solicitor-client relationship. We note that lawyers acting as in-house counsel are often intimately aware of the day-to-day activities of their clients. Should these rules ever apply to those lawyers, it would have a fundamental impact on their role.

Proposal 3.4

The Consultation Paper proposes to require reporting entities to keep track of all reasonable measures they take under the *Act* and Regulations. This too would impose a significant new burden on reporting entities. Not only would they be expected to monitor client activities, but they would also be required to keep track of that monitoring, in certain circumstances. In addition, the term "reasonable" in this context might be inadequately precise.

Law society requirements provide a high standard of diligence and disclosure, and compliance with these requirements is monitored and audited by law societies across Canada.

4. Strengthening Information Sharing in the Regime

Canadian democracy rests in part on effective law and regulatory enforcement and its related intelligence gathering. However, as the CBA has cautioned, "intelligence gathering is potentially more insidious to individual rights and freedoms than other types of policing, and more difficult to hold accountable."[4] In that regard, we must consider the foreseeable and unforeseeable consequences of strengthening information sharing with a view to ensuring the rights of Canadians are respected and protected.

Proposal 4.1

The federal government is considering an expansion of the current list of designated information that FINTRAC may be required to disclose to law enforcement and intelligence agencies to include:

- an individual's gender and occupation;
- the grounds for suspicion developed by international partner Financial Intelligence Units;
- information contained in the narrative section of cross-border seizure reports;
- a description of the actions taken by reporting entities when making a suspicious transaction report; and
- information setting out the "reasonable grounds to suspect" that FINTRAC has determined would enable it to make a disclosure.

The CBA remains concerned that information gathered and analyzed by FINTRAC will not necessarily be tested for accuracy or reliability before it is employed by law enforcement and regulatory agencies, particularly the Canada Revenue Agency (CRA). Although there is a recognized efficiency in avoiding duplicated analysis of information obtained under the PCMLTFA (a recommendation of Commissioner Major in the Air India Report), there remains a benefit to each intelligence, law and regulatory enforcement agency exposing the information to its own specialized lens. Failure to test information for accuracy or reliability may result in compounding errors, resulting in a serious negative impact on individuals and entities in Canada.

The CBA believes that strong controls on the sharing of information are necessary to ensure it remains subject to the protections guaranteed under Canadian privacy legislation and the *Charter of Rights and Freedoms.*

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[4] *Supra*, note 1 at v.

Proposal 4.4

The Consultation Paper proposes to review and clarify the conditions under which FINTRAC discloses to the CRA information related to registered charities to facilitate its ability to provide proactive disclosures.

The CRA Charities Directorate is tasked with ensuring compliance with the *Income Tax Act* by registered charities and determining whether entities qualify for registration. The *Anti-Terrorism Act*, which included amendments to the PCMLTFA, exposes charities in Canada to a new layer of scrutiny, with issues of terrorist financing incorporated into the CRA's auditing of the organizations. Prior to 2001, there were no specific terrorist financing offences in Canadian law and incidents were dealt with under existing criminal law. With the 2001 reforms, charities are susceptible to criminal charges for facilitating terrorist activities or supporting terrorist groups; deregistration for suspected involvement in terrorist activities, with the charity losing its charitable status and its directors exposed to personal liability; and surveillance of its financial activities, potentially leading to allegations of terrorist financing.

In our view, the deregistration process for registered charities lacks procedural safeguards and infringes principles of natural justice and due process, as:

- no knowledge or intent is required;[5]
- the law is retroactive;[6]
- normal rules for admissibility of evidence do not apply;[7]
- the burden of proof is shifted to the charity to prove its innocence, even where it may not know the full case against it;[8] and
- due diligence is not a defence.[9]

Further, failure by CRA to provide comprehensive made-in-Canada guidelines for complying with anti-terrorism legislation has resulted in compliance being a moving target for Canadian charities. CBA members report anecdotally an uneven enforcement against charities, with smaller, ethnically identified charities carrying out programs in conflict zones facing deregistration on the basis of questionable allegations of terrorist financing at a far greater rate than the larger established charities carrying out the same or similar programs in the same conflict zones.

In light of these problems, the CBA is concerned with proposals to enhance disclosure of information related to registered charities, whether by FINTRAC or CBSA. We are particularly concerned about sharing that information with administrative departments who regulate the charities, and are in a position to affect their status and very existence. The Consultation Paper quotes the Air India Report, which suggested that FINTRAC's lack of authority to disclose more than designated information, including its own analysis, negatively impacts the quality and timely use of the disclosure. However, Commissioner Major referred to disclosures to law enforcement agencies in that regard, not regulatory agencies. Timeliness of disclosure to CRA and duplicated analysis of information cannot reasonably be

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5 See, *Charities Registration (Security Information) Act*, para. 4. Although not explicitly stated, there is no requirement for knowledge or intent to be demonstrated.

6 *Ibid.,* paras. 4(a) and (b).

7 *Ibid.,* paras. 6(e), (f), (g).

8 *Ibid.*, para. 6(h).

9 *Ibid*. The *Act* does not provide defences.

cited as issues relating to CRA's role in detecting and deterring money laundering and terrorist financing, when its ultimate tool against threats is merely deregistration or failure to register an organization as a charity.

The CBA encourages the federal government to review the disclosure provisions in the PCMLTFA as they relate to registered charities with stakeholders, to address deficiencies in the existing collection and use of information against registered charities, and to ensure adherence with principles of procedural fairness, natural justice and due process.

5. Countermeasures

We have no comments on these proposals.

6. Other Proposals

The legislation currently requires reporting entities to report suspicious transactions. The *Act* states that a suspicious transaction is any financial transaction that occurs or is attempted in the course of a reporting entity's activities that gives rise to a suspicion of money laundering or terrorist financing.

Proposal 6.1

Proposal 6.1 would expand the definition of a suspicious transaction to any financial transaction that occurs or is attempted, *including an activity undertaken for the purpose of a financial transaction*, in the course of a reporting entity's activities, that gives rise to a suspicion of money laundering or terrorist financing.

The effect would be to require even more information from reporting entities about their clients. Again, while the legislation does not now apply to lawyers and Quebec notaries, the more information a lawyer could be required to obtain from a client and then report to the federal government, the greater the damage to the solicitor-client relationship. Subjecting lawyers and Quebec notaries to the suspicious transaction reporting requirements in future would raise significant constitutional concerns of the type already addressed by the BC Supreme Court in the original stay application regarding the regime's application to the legal profession.[10] It would essentially require lawyers to spy on their clients for state purposes. Further, the definition of what constitutes a "suspicious transaction" as proposed is so vague that reporting entities would be placed in the untenable position of facing jeopardy for failing to comply with an ill-defined standard. This would offend principles of fundamental justice under section 7 of the *Charter*.

We appreciate the opportunity to comment on the proposals, and encourage serious consideration of the comments provided. The CBA continues to contribute to the federal government's efforts to combat money laundering and terrorist financing, while also ensuring that the rule of law and the rights of Canadians are preserved.

Yours truly,

Trinda L. Ernst, Q.C.

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[10] *Supra*, note 2.