THE CANADIAN BAR ASSOCIATION
L'ASSOCIATION DU BARREAU CANADIEN

Office of the President
Cabinet de la présidente

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Via email: wayne.easter@parl.gc.ca

The Honourable Wayne Easter, P.C., M.P.
Chair, Finance Committee
Sixth Floor, 131 Queen Street
House of Commons
Ottawa ON K1A 0A6

Dear Mr. Easter:

Re: Statutory Review of the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*

The Canadian Bar Association (CBA) appreciates the opportunity to contribute to the Finance Committee's statutory review of the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act* (PCMLTFA). The CBA is a national association of over 36,000 lawyers, law students, notaries and law teachers, and our mandate includes improvements in the law and the administration of justice.

The CBA supports the federal government's efforts to combat money laundering and terrorist financing. We stress that those efforts must occur in the context of protecting the fundamental individual rights and freedoms of all Canadians, and in compliance with Canadian constitutional requirements.

The CBA has been involved in the development of proceeds of crime legislation since it was first considered in Canada. We have frequently commented on proposed legislative and regulatory changes, in particular as those changes impact the legal profession. It is a principle of fundamental justice that the state cannot impose duties on lawyers that undermine their duty of commitment to their clients' causes. As such, the lawyer/client relationship is unlike any other professional relationship — the lawyer's duty of commitment to the client's cause is essential to maintaining confidence in the integrity of the administration of justice.

Importance of protecting solicitor-client privilege in fight against money laundering

The key points from our past submissions remain equally relevant today:

- Canada's courts have long recognized that an independent Bar is fundamental to the rule of law and the fair and proper administration of justice. The importance of an independent Bar and respect for solicitor-client privilege are at the foundation of

Canada's justice system. This is not changed because of the legitimacy of the government objective.

- Any law or regulation that requires lawyers to monitor and collect information about their clients for state purposes undermines the duty of loyalty owed by lawyers to their clients and significantly weakens the independence of the Bar. Compelling a lawyer to become an agent of the state by providing access to confidential or privileged client information is antithetical to this duty to clients, and would undermine the fair and proper administration of justice. The CBA wants to preserve what has worked well to protect Canada's freedoms and the administration of justice — the right of all people to speak to their lawyers in the confidence that what they say will go no further. This is essential for access to justice, so people can seek professional advice for a legal issue without fear of repercussions. Sound legal advice depends on the lawyer being fully informed by the client. Protecting full and frank communication between lawyers and their clients promotes the public interest in the observance of law and respect for the administration of justice.

- Lawyers have demonstrated their willingness to aid the government to fight money laundering and terrorist financing, but it is critical that the approach remain within the sphere of self-regulation. Law societies across Canada have introduced strict requirements on client due diligence and cash transactions. Compliance with these requirements is monitored and audited by law societies across Canada.

  The Federation of Law Societies has undertaken a rigorous review of its Model Rules relating to money laundering and is in the process of developing amendments to the Model Rules to clarify and strengthen those requirements in light of the 2016 Financial Action Task Force (FATF) *Mutual Evaluation Report Canada*.[1] The CBA is involved in this process. The FLSC consultation document (October 2017) states that, "Ensuring effective anti-money laundering and terrorist financing rules and regulations for the legal profession remains a strategic priority of the Federation." After careful review of the 2016 FATF report, the FLSC "was led to the conclusion that amendments are required to ensure that the Model Rules remain as robust and effective as possible".

- For several years, both Finance Canada and FATF have contended that lawyers are a weak link in the fight against money laundering, and either knowingly or unwittingly participate in money laundering activities. This claim was recently reiterated in the 2016 FATF report, and in Finance Canada's current consultation document (February 2018).[2] However, 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 errant lawyers are rightly exposed to criminal prosecution for a violation of the law, including the prohibition against money laundering. Unlike other citizens, lawyers are also subject to demanding professional ethical obligations set out in codes of conduct and other law society rules that continue to evolve in the public interest.

- Canadian democracy rests in part on effective law and regulatory enforcement and its related intelligence gathering. However, "intelligence gathering is potentially more insidious to individual rights and freedoms than other types of policing, and more difficult to hold accountable."[3] Strong controls on state information gathering 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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1 Mutual Evaluation Report Canada online (http://bit.ly/2FGxKAd)

2 *Reviewing Canada's Anti-Money Laundering and Terrorist Finance Regime* (Ottawa: Finance Canada, 2018).

3 Submission on the Three Year Review of the *Anti-Terrorism Act* (Ottawa: CBA, 2005) at 14.

Canada (Attorney General) vs Federation of Law Societies of Canada[4]

After years of unsuccessful negotiations with government about the appropriate role of the legal profession in combatting money laundering in Canada, the CBA intervened in extended litigation initiated by the Federation of Law Societies of Canada, beginning in 2001. In 2015 the Supreme Court of Canada confirmed that the PCMLTFA regime should not apply to the legal profession. Central extracts from the decision include:

- "Lawyers must keep their clients' confidences and act with commitment to serving and protecting their clients' legitimate interests. Both of these duties are essential to the due administration of justice. However, some provisions of Canada's anti-money laundering and anti-terrorist financing legislation are repugnant to these duties. They require lawyers, on pain of imprisonment, to obtain and retain information that is not necessary for ethical legal representation and provide inadequate protection for the client's confidences subject to solicitor-client privilege." (Para. 1)

- "[T]he search powers, as applied to lawyers, along with the inadequate protection of solicitor-client privilege provided by s. 64, constitute a very significant limitation of the right to be free of unreasonable searches and seizures guaranteed by s. 8 of the Charter."(Para. 57) "[S.] 64 is of no force or effect and ss. 62, 63 and 63.1 should be read down so that they do not apply to documents in the possession of legal counsel or in law office premises." (Para. 67)

- "The scheme requires lawyers to make and retain records that the profession does not think are necessary for effective and ethical representation of clients. The Federation's Model Rule on Client Identification and Verification Requirements (online), which has been adopted by all law societies in Canada, contains a number of verification and record keeping provisions similar to the requirements of the Act and Regulations. However, the Model Rule is narrower in scope." (Para. 107)
- "[T]he legislation requires lawyers to gather and retain considerably more information than the profession thinks is needed for ethical and effective client representation. This, coupled with the inadequate protection of solicitor-client privilege, undermines the lawyer's ability to comply with his or her duty of commitment to the client's cause. The lawyer is required to create and preserve records which are not required for ethical and effective representation." (Para.108)
- "I conclude that the scheme taken as a whole limits the liberty of lawyers in a manner that is not in accordance with the principle of fundamental justice relating to the lawyer's duty of committed representation… I emphasize, however, that this holding does not place lawyers above the law. It is only when the state's imposition of duties on lawyers undermines, in fact or in the perception of a reasonable person, the lawyer's ability to comply with his or her duty of commitment to the client's cause that there will be a departure from what is required by this principle of fundamental justice." (Paras. 110-111)

We appreciate the opportunity to offer our views for your review of the PCMLTFA. To comply with the SCC decision in *Canada (Attorney General) vs Federation of Law Societies of Canada*, the Act should be revised to remove offending sections and clarify which sections do not apply to members

4 [2015] 1 SCR 401.

of the legal profession. That would give clarity to readers unfamiliar with the SCC decision and avoid mistaken application of this legislation going forward.[5]

The CBA will continue to contribute to government 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,

Kerry L. Simmons, Q.C./c.r.
President,
Canadian Bar Association

5 This happened in *R. v. Vader*, (2016) ABQB 309, where sections of the *Criminal Code* declared unconstitutional and not subsequently removed from the Code were applied in error.