Federation of Law Societies of Canada

Fédération des ordres professionnels de juristes du Canada

Submission of the Federation of Law Societies of Canada to the Senate Committee on Banking, Trade and Commerce

Review of the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act* (S.C. 2000, c. 17) pursuant to section 72 of the Act.

April 4, 2012

World Exchange Plaza 1810 - 45 O'Connor Street Ottawa Ontario K1P 1A4
Tel: 613.236.7250 Fax: 613.236.7233 www.flsc.ca

Submission of the Federation of Law Societies of Canada 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

April 4, 2012

1. The Federation of Law Societies of Canada ("the Federation") appreciates the opportunity to provide comments to the Committee on the occasion of its review of the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act* ("the Act").

2. The Federation is the coordinating body of the 14 governing bodies of the legal profession in Canada. Our member Law Societies are statutorily charged by legislation in each province and territory of Canada with the responsibility of regulating Canada's more than 100,000 lawyers and 4000 notaries in Quebec in the public interest. An important role of the Federation is to express the views of the governing bodies of the legal profession on national and international issues relating to the administration of justice and the rule of law.

3. The Federation's position remains essentially the same as when it last appeared before this Committee in June 2006. The Federation supports Canada's efforts to fight money laundering and terrorist financing. The Federation recognizes the importance of the objectives of the Act and concurs with its basic purpose. Initiatives to fight these crimes, which include fulfillment of Canada's commitments internationally as a result of its membership in the Financial Action Task Force[1], must be accomplished within the framework of the values and constitutional principles on which Canadian society rests. This includes the rule of law, and within that, the right of individuals to an independent judiciary and independent legal counsel. As the authority to regulate the legal profession in Canada rests with the provincial and territorial law societies, the public interest in addressing money laundering and terrorist financing as it relates to the legal profession is best served by having these regulators address any risks that the legal profession may present.

---

[1] The Financial Action Task Force ("FATF"), founded in 1989, is an inter-governmental body whose purpose is the development and promotion of national and international policies to combat money laundering and terrorist financing.

4. The Federation and its member law societies take seriously the problems of money laundering and terrorist financing. Law societies across Canada have demonstrated their commitment to protecting the public by regulating the legal profession to ensure that legal counsel do not engage in or facilitate such criminal activities. The development and adoption by the Federation of a model No Cash Rule and a model Client Identification, or "Client ID" Rule is evidence of its commitment to proactively regulate in this area. These model rules have been implemented by each Canadian law society.

5. A brief history of the Federation's activities in response to the Act will explain the Federation's perspective on the Act and on the government's current legislative initiatives. As we stated in our submissions to this Committee in June 2006, one of the most serious concerns the Federation has with the Act is that it would require lawyers to violate solicitor-client privilege and confidentiality and threatens the independence of the bar. The entire premise of the Act as it purportedly pertains to lawyers is to prescribe and gain access to information that lawyers and Quebec notaries would only obtain by virtue of being retained to provide legal advice to their clients. Members of the legal profession would be conscripted into fighting crime in the guise of serving clients. Such compulsion would prevent the frank disclosure by clients that is necessary for legal counsel to give proper legal advice, and indeed for the effective operation of our system of justice. To put this slightly differently, the right to confidential, loyal and independent counsel, and the privilege against self-incrimination, would be worthless if the state had routine access to counsel's client files, as proposed by the Act.

6. In 2001, the Federation began a constitutional challenge to the Act, arguing that it required lawyers to act as secret agents of the state, collecting information about clients against their interests and reporting to a government agency. As such, the Federation's position was that the Act threatened fundamental Canadian constitutional principles that require that lawyers maintain undivided loyalty to their clients, consistent with the independence of the Bar and the integrity of the administration of justice. The Federation's constitutional challenge resulted in an interlocutory injunction, which by May 2002, suspended the application of the Act to Canadian lawyers and Quebec notaries, pending a final decision on the merits of the constitutional challenge.

7. In December 2006, after the Federation's last submissions to this Committee, the Government of Canada amended the Act to exempt members of the legal profession from the suspicious and prescribed transactions reporting requirements. However, the government subsequently added provisions to the Regulations that purported to impose client identification and record-keeping requirements on legal counsel and law firms. These amendments to the legislative scheme led to the renewal of the legal proceedings.

8. In 2011, the British Columbia Supreme Court heard the constitutional challenge, and in September 2011, released its decision upholding the Federation's argument that the Act and Regulations violate the *Canadian Charter of Rights and Freedoms*, and are therefore unconstitutional insofar as the legislation, and in particular its client identification and record-keeping requirements, apply to legal counsel and law firms.[2] The BC Supreme Court agreed with the Federation's position that: (i) the Act and Regulations unduly infringe upon the solicitor-client relationship. and (ii) to the extent that one of the purposes of the Act and Regulations is to ensure adequate client identification and record-keeping by professionals, these objectives are already being met with respect to legal counsel by the regulation by law societies of their members. The BC Supreme Court ordered that relevant sections of the Act and Regulations be read down to exempt legal counsel and law firms or struck out entirely. The Government of Canada has appealed this decision. The injunction noted earlier continues to apply pending all appeals and, as a result, the client identification and verification provisions of the Act and Regulations presently do not apply to lawyers or Quebec notaries.

9. As previously reported to this Committee, in 2003, independent of the constitutional challenge the Federation undertook its own initiative to fight money laundering and terrorist financing. The first development in this respect was the Federation's October 2004 model No Cash Rule, pursuant to which each member law society has implemented rules prohibiting legal counsel from receiving cash in amounts over $7,500 and requiring them to keep a cash transactions record as part of their record-keeping requirements. The No Cash Rule is intended to augment longstanding law society rules prohibiting legal counsel from engaging in illegal activities, by preventing lawyers from being unwittingly involved in money laundering and other criminal schemes, while maintaining the longstanding principles underlying the solicitor-client relationship. The Federation's rule sets a higher threshold than that in the regulations for reporting large cash transactions as the amount is lower than the regulation's minimum limit of $10,000. Moreover, the rule prohibits legal counsel from accepting cash whereas the regulation would permit the receipt of cash, but require a report to FINTRAC. It is the position of the Federation that the No Cash Rule is an effective tool to prevent money laundering within the legal profession.

[2] *Federation of Law Societies of Canada v. Canada (Attorney General)*, 2011 BCSC 1270, available online at **http://canlii.ca/t/fn82c**

10. To address the client due diligence issue, the Federation adopted a model rule on client identification and verification known as the "Client ID Rule". The Client ID Rule has been implemented by all Canadian law societies since 2008. Members of the legal profession must identify all clients who retain them to provide legal services, by recording basic information such as the client's name, address and telephone number. In addition, when legal counsel provide legal services in respect of the receipt, payment or transfer of funds, lawyers must verify their clients' identity by reference to independent source documents such as a driver's license, birth certificate, passport or other government-issued identification. The Client ID Rule respects the threshold between constitutional and unconstitutional requirements imposed on members of the legal profession when it comes to the gathering of information from clients: legal counsel 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.

11. Together, the No Cash Rule and the Client ID Rule and verification standards accomplish three goals:

    a. the rules impose on lawyers and Quebec notaries a rigorous standard with respect to cash transactions;
    b. the rules address the activities of lawyers and Quebec notaries as financial intermediaries but form part of the extensive statutorily authorized regulatory regime for members of the legal profession through law societies rather than federal legislation; and
    c. the rules, as law society regulations, respect the constitutional principles upheld by the legal profession for the benefit of the public, protect the right of citizens to independent legal counsel, and ensure that counsel can continue to protect the client's privilege, which is a constitutionally recognized principle.[3]

12. Any actual or perceived gap in the legislative scheme as a result of the exclusion of members of the legal profession from the provisions of the Act has been filled by the Federation's model rules. As implemented by provincial and territorial law societies these rules exist to address the conduct of legal counsel and to prevent them from becoming unwittingly involved in money laundering. Lawyers or Quebec notaries who wittingly participate in criminal activity are subject to criminal charges and sanctions. As the BC Supreme Court has already found:

---

[3] In *Lavallee, Rackel & Heintz v. Canada (Attorney General); White, Ottenheimer & Baker v. Canada (Attorney General); R. v. Fink,* 2002 SCC 61, the Supreme Court of Canada in assessing the constitutionality of search warrant provisions in s. 488.1 of the *Criminal Code* said, "Privilege does not come into being by an assertion of a privilege claim; it exists independently. By the operation of s. 488.1, however, this *constitutionally protected right* can be violated by the mere failure of counsel to act, without instruction from or indeed communication with the client." (at para 39, emphasis added)

> "the law societies have adopted detailed client identification and verification requirements and restrictions on the receipt of cash, in addition to their professional conduct rules. Further, law societies undertake an extensive range of activities to promote and ensure compliance with their rules, including education, annual self-reporting, audits and investigations.
>
> As such, to the extent that one of the purposes of the Regime is to ensure adequate client identification and record-keeping by professionals, those objectives are already being met in respect of the legal profession by virtue of the law societies' regulation of their members." [4]

13. In summary, the Federation supports the goal of fighting money laundering and terrorist financing and ensuring the safety and security of Canadians. The Federation's overarching position remains that the public interest in addressing money laundering and terrorist financing as it relates to the legal profession is best served by having the regulators of the legal profession address the risk that the profession presents.

14. We urge the Committee to ensure that any amendments to the current legislative regime preserve the independence of the bar, and protect solicitor-client privilege and other the rights which have long been recognized as fundamental in Canadian society.

15. We welcome the opportunity to discuss these matters further, and otherwise assist the Committee in its review of the Act.

[4] *Federation of Law Societies of Canada v. Canada* (Attorney General), 2011 BCSC 1270, at paras. 186-187. Available online at: http://canlii.ca/t/fn82c