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 House of Commons Standing Committee on Finance

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

March 20, 2018

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Introduction

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 with the responsibility for regulating more than 120,000 lawyers, 3,800 notaries in Quebec and Ontario's nearly 9,000 licensed paralegals 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 and its member law societies support Canada's efforts to fight money laundering and terrorist financing. We recognize the importance of the objectives of the Act and concur 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 ("FATF"), must respect 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.

4. In 2015 the Supreme Court of Canada recognized that the provisions in the legislation requiring legal counsel to collect and retain information not required for client representation, expansive powers to search law offices, and inadequate protection for solicitor-client privilege violated provisions of the Canadian Charter of Rights and Freedoms and undermined the ability of lawyers and Quebec notaries to comply with their duty of commitment to the client's cause, a principle of fundamental justice.[1]

5. 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.

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[1] Canada (Attorney General) v. Federation of Law Societies of Canada, [2015] 1 SCR 401, 2015 SCC 7 (CanLII).

Anti-money laundering and anti-terrorist financing initiatives

6. The Federation and the law societies of Canada have demonstrated their commitment to protecting the public by regulating the legal profession to mitigate the risk of legal counsel engaging in or facilitating money laundering or the financing of terrorism. The development by the Federation of model rules limiting the ability of legal counsel to accept cash (the "No Cash Rule") and imposing extensive client verification obligations (the "Client ID Rule") and their adoption and enforcement by the law societies is evidence of our commitment to proactively regulate in this area. Combined with extensive rules of professional conduct and financial accounting rules, the No Cash Rule and the Client ID Rule provide effective regulation of the risks of members of the legal profession becoming involved in money laundering or the financing of terrorism.

7. The No Cash Rule, adopted in 2004 prohibits legal counsel from receiving cash in amounts over $7,500 and requires them to keep a record of cash transactions as part of their accounting record-keeping. The rule is intended to augment longstanding law society rules aimed at preventing lawyers from being unwittingly involved in money laundering and other criminal schemes, while maintaining the core principles underlying the solicitor-client relationship. The threshold in the Federation's rule is stricter than that in the regulations for reporting large cash transactions ($10,000). By prohibiting legal counsel from accepting cash the rule addresses the risks associated with the handling and placement of cash and so provides an effective alternative to the reporting requirements that apply to other reporting entities under the federal anti-money laundering scheme.

8. To ensure that legal counsel engage in appropriate client due diligence, the Federation adopted a model rule on client identification and verification, the Client ID Rule. The rule has been in force in all Canadian jurisdictions 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, they 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.

9. Together, the No Cash and Client ID rules accomplish three goals:

   a. the rules impose on lawyers and Quebec notaries a rigorous standard with respect to cash transactions and limit the ability of legal counsel to accept cash from clients;

   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.

10. It has been suggested in a number of forums, including a recently published Department of Finance consultation paper[2] that the exclusion of members of the legal profession from the federal anti-money laundering and anti-terrorism financing regime is "a major deficiency"[3] We note that in its 2016 Mutual Evaluation Report on Canada the FATF also was dismissive of law society regulation to combat money laundering and the financing of terrorist activities suggesting that as a result of the Federation's successful challenge to the constitutionality of the federal anti-money laundering and terrorist financing scheme "there is … no incentive for the profession to apply AML/CFT measures and participate in the detection of potential ML/TF activities." These suggestions ignore the serious regulatory initiatives of Canada's law societies in this area and the ongoing monitoring of members of the legal profession that law societies engage in including both periodic and risk-based audits.

11. Law societies take their mandate to regulate the legal profession in the public interest seriously. The rules and regulations implemented by provincial and territorial law societies based on the Federation's model rules exist to address the conduct of legal counsel and to prevent them from unwitting involvement in money laundering or the financing of terrorism. As noted earlier, legal counsel are also required to abide by comprehensive rules of professional conduct that include provisions prohibiting them from knowingly assisting in or encouraging any unlawful conduct. Measures to ensure that legal counsel maintain appropriate practice management systems and comply with law society regulations include annual reporting obligations, practice reviews and financial audits. Law societies also have extensive investigatory and disciplinary powers that include the ability to impose penalties up to and including disbarment when members fail to abide by law society rules and regulations. Lawyers and Quebec notaries are, of course, also bound by the criminal law and those who wittingly participate in criminal activity are subject to criminal charges and sanctions. In the submission of the Federation, 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 these regulatory initiatives.

12. However the Federation also recognizes that it is important to ensure that the regulations in this area are as robust and effective as possible, and to that end the Federation recently undertook a comprehensive review of its model rules. Last fall a Federation special working group launched a consultation on draft amendments to the rules that clarify some of the provisions and add additional obligations including a requirement for legal counsel to obtain and verify the identity of the beneficiaries of trusts and the beneficial owners of organizations as well as requirements for ongoing monitoring of the professional relationship and the activities of clients. Also proposed is a new model rule (modeled on a rule that several law societies have implemented) that would tie the use of trust accounts to the provision of legal services thus ensuring that lawyer trust accounts cannot be used for purely financial transactions. The consultation ended on March 15, 2018. The working group is now considering the feedback it received and will also be reviewing the Department of Finance white paper referred to earlier. It is expected that final amendments to the rules will be approved by the Federation and implemented by the law societies later this year.

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2 Reviewing Canada's Anti-Money Laundering and Terrorist Financing Regime, page 21

3 Anti-money laundering and counter-terrorist financing measures in Canada – 2016, FATF page 95

13. The Federation's working group also has undertaken a review of law society compliance and enforcement activities and is now preparing guidance on best practices to assist law societies in ensuring that their activities in these areas are as effective as possible. The working group will also be preparing comprehensive guidance and educational materials for the legal profession to assist members in understanding the money laundering and terrorism financing risks they may encounter in their professional activities and their associated legal, regulatory and ethical obligations.

Beneficial ownership

14. As noted above, proposed amendments to the Federation's model rules would add a requirement for legal counsel to obtain and verify information on the beneficial owners of organizations and the beneficiaries of trusts. The proposed amendments reflect the Federation's recognition of the value of capturing this information. It is important to note, however, that compliance with such a rule, which would mirror requirements in federal regulations, will be greatly hampered by the lack of publicly available information on beneficial owners. In the absence of publicly accessible registries of beneficial owners, it simply may not be possible to impose an absolute requirement to verify beneficial ownership information.

15. Canada has been criticized by the FATF and others for the lack of transparency on beneficial owners that exists in this country. In its recent consultation paper, the Department of Finance indicates that access to accurate beneficial ownership information "is vital to combatting illicit financial flows including money laundering, terrorist financing and tax evasion."[4] The consultation paper also acknowledges the lack of transparency on beneficial ownership, noting in particular the lack of any central registry.

16. The Federation notes that governments in many countries have recognized the threats posed by a lack of transparency on the beneficial owners of organizations and the beneficiaries of trusts. According to a 2016 report produced by Transparency International Canada[5] the G20, of which Canada is a member, has adopted principles on the transparency of beneficial ownership information and several member states (the UK, France, Australia and South Africa) have committed to setting up public registries of beneficial owners. The European Union has also adopted a requirement for its member countries to *collect and publish* beneficial ownership information. A July 2017 report published by the United States Library of Congress indicates that most countries surveyed have amended their legislation on beneficial ownership in response to either the G20 principles or the recommendations of the FATF. The report notes that Canada is one of only 2 G7 countries not to have taken legislative action.[6]

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[4] *Reviewing Canada's Anti-Money Laundering and Terrorist Financing Regime, page 18.*

[5] *No Reason to Hide; Unmasking Anonymous Owners of Canadian Companies and Trusts, Transparency International Canada,* ***http://www.transparencycanada.ca/wp-content/uploads/2017/05/TICBeneficialOwnershipReport-Interactive.pdf.***

[6] *Disclosure of Beneficial Ownership in Selected Countries, July 2017, Library of Congress,* ***https://www.loc.gov/law/help/beneficial-ownership/disclosure-beneficial-ownership.pdf.***

17. In the submission of the Federation, in light of the identified risk that a lack of transparency creates, it is essential that beneficial ownership information is not only provided to government authorities but is also publicly available. We note that the government indicated in its recent budget that it plans to introduce legislative amendments to enhance the availability of beneficial ownership information at the federal level. The Federation recognizes that responsibility for this issue is shared by the federal, provincial and territorial governments, but this jurisdictional complexity ought not to stand in the way of legislative reform. Indeed we note that in its recent budget the government of British Columbia announced plans to track beneficial ownership information of property, organizations and trusts. The Federation supports these plans and urges the federal government to move forward promptly with legislative initiatives that include the creation of a publicly accessible registry of beneficial owners and to continue to work with the provincial and territorial governments toward similar amendments to the legislation in their respective jurisdictions.

Conclusion

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