Federation of Law Societies of Canada | Fédération des ordres professionnels de juristes du Canada

Submission of the
Federation of Law Societies of Canada
to Finance Canada

Consultation on Strengthening Canada's Anti-Money Laundering and Anti-Terrorist Financing Regime

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World Exchange Plaza | 1810 - 45 O'Connor | Ottawa | Ontario | Canada | K1P 1A4 | 613.236.7272 | www.flsc.ca

Introduction

1. The Federation of Law Societies of Canada ("the Federation") appreciates the opportunity to provide comments to Finance Canada on its June 6, 2023 consultation paper in support of the 2023 Parliamentary Review of the Proceeds of Crime (Money Laundering) and Terrorist Financing Act ("the *PCMLTFA*"). The Federation consents to public disclosure of the comments in this submission.

2. The Federation is the national association of the 14 governing bodies of the legal profession in Canada. Its member law societies are statutorily charged by legislation in each province and territory with the responsibility for regulating more than 136,000 lawyers, 4,200 notaries in Quebec and Ontario's 10,600 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. The Federation recognizes the importance of the objectives of the *PCMLTFA* and concurs with its 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 *PCMLTFA* 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 may arise in the practice of law.

6. The Federation and the law societies of Canada have long demonstrated their commitment to protecting the public by regulating the legal profession to mitigate the risk of 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 "Cash Transactions Model Rule"), imposing extensive client identification and verification obligations (the "Client Identification and Verification Model Rule"), and limiting the use of trust accounts (the Model Trust Accounting Rule),

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

(collectively “the Model Rules”), and their adoption and enforcement by the law societies, is evidence of the commitment to proactively regulate in this area. Legal professionals are also bound by robust trust accounting rules, and by professional conduct duties that include a prohibition on engaging in any activity that they know or ought to know is in furtherance of any crime. These rules and duties, combined with the law societies’ extensive audit, investigation and enforcement powers provide effective regulation of the risks of members of the legal profession becoming involved in money laundering or the financing of terrorism.

7. Together, the Model Rules:

    a. impose on lawyers, Quebec notaries, and Ontario paralegals a rigorous standard with respect to cash transactions and limit the ability of legal counsel to accept cash;

    b. address the activities of lawyers, Quebec notaries, and Ontario paralegals as financial intermediaries by imposing extensive due diligence and client identification and verification obligations and limiting the use of trust accounts; and

    c. 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.

8. The Federation and its member law societies affirm their commitment to addressing money laundering and terrorist financing risks associated with the provision of legal services by regulated legal professionals in Canada. Comments are offered below on a number of subjects discussed in the consultation paper.

The legal profession and the importance of a collaborative approach

9. Part I, Chapter 3 of the consultation paper refers to the collaborative approach the government and the Federation have taken since 2019 with respect to the legal profession in the AML/ATF regime.

10. When the creation of the Federation – Government of Canada Joint Working Group (“the Joint Working Group”) was announced in June 2019, Finance Canada provided the following in a press statement, in the context of a meeting of Canada's federal, provincial, and territorial Ministers of Finance and ministers responsible for anti-money laundering and beneficial ownership transparency to advance a national response to combat money laundering and terrorist financing in Canada.

    > …[W]e welcome the creation of a new working group with the Federation of Law Societies of Canada to address the inherent risks of money laundering and other illicit activity that may arise in the practice of law. The working group will hold its first meeting later this month.
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    > We are resolved to work collaboratively and to each do our part, using the appropriate tools at our disposal to detect, stop and prosecute financial

criminals in our jurisdictions. This will ensure Canada collectively remains effective in the global fight against money laundering and terrorist financing.

11. The Federation greatly appreciates the efforts of Finance Canada to work collaboratively with the regulators of the legal profession through the Joint Working Group, and the government's commitment to continue working with the Federation this way.

12. The Joint Working Group provides valuable opportunities to share information about evolving risks, typologies, legislative and other developments. It also provides a forum for the legal regulators to demonstrate their commitment to robust and effective regulation to mitigate money laundering risks and provides opportunities to explore ways in which the law societies' regulations might be strengthened.

13. The Chapter 3 discussion questions ask how governments at all levels can better collaborate and prioritize AML/ATF issues as they relate to the legal profession. In the Federation's view, the Joint Working Group demonstrates a meaningful and productive example. The focus on information sharing is of particular importance, and the mutual exchange of information from FINTRAC, the RCMP, the CRA and law societies has proven valuable and instructive. As noted in Part II Chapter 6, information sharing is most effective when it is ongoing and supports understanding of the changing risk environment, effective decision-making with respect to due diligence and monitoring and the exploration of progressive measures to assist in addressing and mitigating risks of money laundering and terrorist financing activities.

14. As the consultation paper notes, however, Canada continues to face criticism, both domestically and internationally, over the exclusion of members of the legal profession from the federal AML/ATF regime. These criticisms fail to recognize Canada's unique constitution and also indicate a failure to appreciate both the commitment of the law societies to regulate to address the money laundering and terrorism financing risks associated with the practice of law and their capacity to do so effectively. The law societies are statutorily mandated to regulate the legal profession in the public interest. The legal regulators have demonstrated that this includes regulation to address money laundering and terrorist financing risks in the professions and a commitment to effective regulation through implementation of the Model Rules, with both proactive and enforcement measures to ensure compliance.

15. The Commission of Inquiry into Money Laundering in British Columbia (Cullen Commission) carefully examined the regulatory regime established by the Law Society of British Columbia (LSBC) based on the Federation's Model Rules. This is the only comprehensive independent review of the regulation of money laundering risks in the legal profession in Canada that has been undertaken. In the Commission's final report, Commissioner Cullen considered the criticisms levelled by the FATF and others and challenged the assumption that "because lawyers are not subject to the *PCMLTFA* regime, they are not regulated for anti-money laundering purposes."[2] Referring to the comprehensive AML rules implemented by LSBC, coupled with the regulator's extensive

[2] Commission of Inquiry into Money Laundering in British Columbia Final Report, 1159

investigatory and disciplinary powers, Commissioner Cullen rejected the suggestion "that lawyers are not subject to anti-money laundering regulation and have no incentive to comply."[3]

16. Commissioner Cullen stated that "[t]he analysis and critiques in the Financial Task Force's 2016 mutual evaluation seem to employ a standard that adheres rigidly to the model of reporting to a country's financial intelligence unit…" While recognizing the value of such requirements generally, Commissioner Cullen found that reporting requirements are not the only effective approach to money laundering regulation, concluding that "the existence of a robust regulatory model seems to be a more important and effective aspect of anti-money laundering regulation in the legal sector."[4]

17. Commissioner Cullen also said that "…some of the critiques that have been levelled at the Canadian anti–money laundering regime with respect to lawyers…have failed to fully appreciate the extent of [the law society investigative] powers and the degree to which the Law Society engages in anti–money laundering regulation and oversight."[5] While the conclusions and comments in the Cullen Commission's Final Report were specific to the LSBC, law societies across the country have similar powers and are equally engaged in regulatory compliance and enforcement activities.

18. The Federation recognizes that it is important not only to have a comprehensive regulatory regime to address money laundering and terrorist financing risks faced by the legal profession, but also to be able to demonstrate the effectiveness of the regime. To this end, the Federation is committed to review and, as required, amendment of the Model Rules to ensure that they are as robust and effective as possible. The Federation also understands that education of the profession on the risks of money laundering and their regulatory obligations is as important as the rules themselves. To that end, the Federation Standing Committee on Anti-Money Laundering and Terrorist Financing has developed several educational tools including a comprehensive guide to the Model Rules and a series of risk advisories. To supplement these tools, the Federation has developed a comprehensive online educational program – to be released in summer 2023 - consisting of five modules addressing money laundering risks and typologies and detailed information on the rules and the compliance steps required.

19. The Federation is also developing specific standards to better track breaches of the anti-money laundering rules and resulting sanctions that will be added to the National Discipline Standards[6] that all law societies have adopted. These standards will allow the Federation to collect and share data on the regulators' compliance and enforcement activities.

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[3] Ibid.
[4] Ibid.
[5] Commission of Inquiry into Money Laundering in British Columbia Final Report (Cullen Commission), 1113
[6] Information on the Federation's National Discipline Standards is available here.

20. The seriousness with which law societies treat breaches of their AML rules is demonstrated in discipline cases dealing with established breaches of these rules. The penalties for serious breaches of the rules can include significant suspensions of practice, or revocation of the legal professional's license. Significant outcomes have resulted even where there is no finding of money laundering or other illegal conduct.

    The following are some recent cases:

    - *Law Society of Ontario v. Davis*, 2022 ONLSTH 109 (CanLII) hearing phase; Law Society of Ontario v. Davis, 2023 ONLSTH 13 (CanLII) penalty phase – money laundering – licensed revoked
    - *Law Society of Ontario v. Nesker*, 2022 ONLSTH 152 (CanLII) - misuse of trust account – license surrendered
    - *Law Society of Upper Canada v. Stanko Jose Grmovsek*, 2011 ONLSHP 137 (CanLII) – fraud and money laundering (criminal convictions) – license revoked
    - *Law Society of British Columbia v. Huculak* , 2022 LSBC 26 (facts and determination); 2023 LSBC 05 (disciplinary action) – breach of AML rules including duty to make inquiries in suspicious circumstances – disbarment
    - *Law Society of British Columbia v. Gurney* , 2017 LSBC 15 (facts and determination); 2017 LSBC 32 (disciplinary action)– misuse of trust account and failure to make inquiries in suspicious circumstances – 6 month suspension and disgorgement of the "fee" paid as a result of his professional misconduct of $25,845
    - *Law Society of British Columbia v. De Lange,* Admission of misconduct- failure to make inquiries in suspicious circumstances- resignation and no re-admission for 15 years
    - *Law Society of British Columbia v. Yanke,* Consent Agreement- misuse of trust account and failure to make inquiries in suspicious circumstances- 9 month suspension and undertaking not to handle trust funds or operate a trust account

Electronic devices, search warrants and solicitor – client privilege

21. In Part II, Chapter 4 of the consultation paper, views are sought on the *Criminal Code* power to search and the issue of solicitor-client privilege. Specifically, a question is raised about options to facilitate searches of electronic devices or other materials/documents that may include information protected by solicitor-client privilege.

22. In considering these questions it is essential to recognize the critical role solicitor client privilege plays in the proper functioning of the justice system. The privilege has been recognized by the Supreme Court of Canada as a principle of fundamental justice that must be as near absolute as possible if it is to remain relevant. As the Court stated in Lavallee, solicitor client privilege must also be understood as "a positive feature of law enforcement, not an impediment to it" as it protects both the privacy interests of the client and "the interests of a fair, just and efficient law enforcement process."

23. The guidelines set out in *Lavallee* are intended to ensure that the privilege it is not inadvertently breached and that the privilege holder – the client – is advised that privilege is at issue. Articulated over two decades ago they have the advantage of being well-known today.

24. A referee process such as that articulated in *Lavallee* has been used in many instances where materials over which a claim of privilege may exist are sought by investigative agencies. For example, in an application to the British Columbia Superior Court for direction on the appropriate persons or process for identifying, isolating, and storing the privileged electronic materials required in order to resume a search, [7] the Court said:

> [63] Independent referees have utility in searches of law offices with multiple clients. In those searches, there is a potential for many different claims of solicitor-client privilege. All clients must be notified so they can assert their respective, potential claims. The independent referee may help to facilitate this process and if clients cannot be notified or contacted, asserts privilege on their behalf: see e.g. *Lavallee* at para. 49 at "7.". The respondents and their counsel have demonstrated that they are capable of identifying solicitor-client privileged materials. Indeed, they have done so over a large number of the documents already, as shown in the list attached by the applicant at its "Appendix B". The respondents have asserted privilege on their own behalf in the past and are presumably capable of doing so, together with their counsel, moving forward. They do not require the assistance of an independent referee.
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> [64] Independent referees are also valuable to "look over the shoulder" of an operationally-separate forensics department of the investigating state institution. In these situations, the independent referee ensures the identification and isolation is proceeding lawfully to protect solicitor-client privilege and affirms the same to satisfy the court: see e.g. *Saramac* at paras. 52, 82-83. As will be explained below, this arrangement is not required in the present case.
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> [65] The parties largely agree that the respondents and respondents' counsel are best suited to review a copy of the materials on the seized electronic storage devices and identify which of those are privileged, later giving that copy to the CFA team. The parties largely agreed that no independent referee is required.

25. It may be helpful to consider discussing the development of a protocol to address how the referee is appointed, what role the referee plays, how notification of the possible privilege holders is done, how documents that are clearly not privileged might be identified early on, and how to make arguments over documents that may be privileged can be made. Such procedures can then be discussed by investigating bodies and their counsel, perhaps in consultation with law society officials, and once settled, be included

[7] Solicitor-Client Privilege of Things Seized (Re), 2019 BCSC 91 (CanLII), <https://canlii.ca/t/j1pml>, retrieved on 2023-06-15

in the terms of the warrant. An example of such a protocol can be found in British Columbia.[8] It was developed over a decade ago, and would likely benefit from review.

26. The Federation and its member law societies recognize the importance of a referee process that is timely, effective and efficient and respects the Lavallee principles required to protect solicitor client privilege and would be pleased to work with the Department of Justice to address these issues.

Beneficial Ownership

27. The Federation supports the government's commitment to address transparency of beneficial ownership and its work to advance a pan-Canadian approach to beneficial ownership transparency.

28. For several years, the Federation has called for a public registry as a necessary feature of the AML/ATF regime, and made the following comments in its May 2018 response to the consultation paper on review of the regime:

> In our submission, in light of the identified risk that a lack of transparency creates, it is essential that beneficial ownership information be available in publicly accessible registries. Simply requiring corporations to provide the information to a government agency would be insufficient. 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 the effectiveness of such a rule, which would mirror requirements in federal regulations, will be undermined 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.
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> 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.

[8] https://www.lawsociety.bc.ca/Website/media/Shared/docs/lawyers/search-warrants.pdf

29. Faced with the absence of publicly accessible registries, the Federation's Client Identification and Verification Model Rule was amended in 2018 to require that legal professionals make reasonable efforts to obtain beneficial ownership information for organizational clients.

30. Chapter 3 discussion questions ask how governments at all levels can better collaborate and prioritize AML/ATF issues as they relate to beneficial ownership. In the Federation's view, the legislative initiatives through Bill C-32 and Bill C-42 are significant steps in the right direction. The plans to engage in consultations with provincial and territorial governments on partnerships and real property registries also support the efforts to increase transparency.

31. We anticipate that these developments will re-invigorate consideration by the Federation and the law societies of more rigorous requirements for obtaining beneficial ownership information as part of client identification and verification rules.

Politically Exposed Persons (PEPs) and Heads of International Organizations (HIOs)

32. The consultation paper poses a series of questions in Part II, Chapter 6 on creating and maintaining a database of PEPs and HIOs. As legal professionals from time to time provide legal services to these individuals, the due diligence requirements for identity verification make current and accessible information about these individuals important for compliance.

33. The Federation has recognized the risks associated with these individuals. Forthcoming guidance for the legal profession explains how legal professionals may need to obtain certain information - including source of wealth and additional verification information as required, and if necessary, take enhanced measures to ascertain the purpose of transactions - to satisfy the due diligence standards and ensure that the higher risk associated with PEPs and HIOs is addressed.

34. The Federation believes there is value in the government creating and maintaining a database of PEPs and HIOs as a trusted source of information in Canada. The legal profession is not a reporting entity under the government's AML/ATF regime, but as legal professionals may need access to such information to comply with their due diligent requirements under law societies' rules, this would be beneficial.

35. As the database would exist to support compliance with AML/ATF requirements, the cost of creating and maintaining the database and providing access to it should be borne by the government. For those who require the information, it is anticipated that this would be a welcome development that does not increase costs associated with fulfilling compliance measures.

36. With respect to privacy, it is expected that the nature of the information proposed to be captured for the database would determine whether privacy issues are present and if so, whether including such information in the database complies with the requirements of relevant privacy policy or legislation. This analysis may involve balancing any privacy

concerns with the purpose and value associated with the information in the database, and determining how the issues are to be managed in respect of competing interests.

Private-to-Private Information Sharing

37. The Federation believes that industry collaboration and information sharing across sectors who must meet AML requirements can be a powerful tool in promoting understanding of money laundering risks and typologies and methods to address them. It also can be a fertile ground for innovative thinking about how measures to detect and prevent money laundering can be improved or adopted in either formal or informal ways across industries. The Federation and its member law societies are open to pursuing additional opportunities for such collaboration. An example may be enhancing collaboration in the real estate sector which typically involves a range of providers and professionals, including members of the legal professions.

38. The government may wish to consider utilizing and possibly recasting the purpose of existing structures such as the Advisory Committee on Money Laundering and Terrorist Financing (ACMLTF) and its *ad hoc* working groups as vehicles to leverage the knowledge of those who have AML due diligence responsibilities within a particular industry. The Federation would encourage the government to extend access to such groups to representatives of the legal regulators as way of ensuring greater information exchange between professionals involved in key sectors of the economy such as the real estate sector.

Conclusion

39. As noted above, the Federation and its member law societies value the collaborative approach the government has embraced through the Joint Working Group and believe this approach is highly effective in addressing money laundering risks associated with legal practice. The Federation looks forward to continuing to work closely with the federal government in this forum. The Federation thanks Finance Canada for taking the opportunity presented by this consultation to share information about the collaborative model and to voice its support for this approach.

40. The Federation would welcome the opportunity to discuss the matters it has addressed in this submission and to otherwise assist Finance Canada and the parliamentary review of the *PCMLTFA*.