Federation of Law Societies of Canada

Fédération des ordres professionnels de juristes du Canada

CONFIDENTIAL

BY FASCIMILE (original by courier)

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Chief, Financial Crimes Section – Domestic
Financial Sector Division
Department of Finance
L'Esplanade Laurier
20th Floor, East Tower
140 O'Connor Street, Ottawa, Ontario K1A 0G5

Re: Regulations Amending Certain Regulations Made Under the Proceeds of Crime (Money Laundering) and Terrorist Financing Act (2007-2)
***Canada Gazette*, Part I, June 30, 2007**

The Federation of Law Societies of Canada (the "Federation") is pleased to provide comments on the proposed regulations under the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act* ("the Act") regarding client identification, record keeping and compliance requirements, pre-published in the *Canada Gazette* on June 30, 2007 (the "draft regulations").

Introductory Comments

The Federation is the coordinating body of the 14 provincial and territorial governing bodies of the legal profession in Canada. Our member law societies are responsible for the regulation of Canada's 95,000 lawyers and 3,500 notaries in Quebec in the public interest. An important role of the Federation is to communicate the views of the governing bodies of the legal profession on national issues.

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 lawyers do not engage in or facilitate such criminal activities. The development and adoption by the Federation of a model "no cash" rule is evidence of its commitment to proactively regulate in this area. Recognized as imposing restrictions and obligations on lawyers that are stricter than the federal cash transaction regulations, the model rule has been implemented by each Canadian law society.

The Federation's position in respect of the draft regulations is consistent with the position it has taken throughout the on-going dialogue with the Department of Finance on this issue: the authority to regulate the legal profession in Canada has been delegated by provincial and territorial law to 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 exercise their jurisdiction over the profession. In this way, the public interest in the administration of justice is protected, and law societies' experience and expertise in regulating the legal profession will be appropriately utilized.

The Federation is currently working with its member law societies to finalize a model rule governing client identification and verification. Once implemented, members of the legal profession will be obligated to fulfill specific client identification and verification requirements.

The model rule is being drafted in keeping with fundamental Canadian constitutional principles. These principles require that legal counsel maintain undivided loyalty to their clients, consistent with the independence of the Bar and the integrity of the administration of justice. There is a strong presumption that all communications between lawyer and client, along with financial information arising from the solicitor and client relationship and the identity of clients, are confidential and subject to solicitor-client privilege and may not be disclosed to, or obtained by, government authorities without a court order.[1] As the Supreme Court of Canada has affirmed, "[i]t is important that lawyers, who are bound by stringent ethical rules, not have their offices turned into archives for the use of the prosecution."[2]

These principles define a clear threshold between constitutional and unconstitutional requirements imposed on lawyers when it comes to the gathering of information from clients: a lawyer may 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.

In the context of anti-money laundering and terrorist financing initiatives, requirements imposed on lawyers, whether by way of law society rules or federal regulations, may assist in promoting the public interest in the success of those initiatives, but must not conflict with the paramount public interest in preserving the fundamental constitutional values on which the Canadian legal system rests.

A review of the draft regulations indicates that there is a measure of overlap between the requirements in the Federation's model rule and the draft regulations. Given that the model rule is intended to set an appropriate and reasonable standard for regulation of the legal profession in this area, the Federation's view is that the draft regulations may inform the content of the model rule, where appropriate and practicable, within the constitutional bounds discussed above.

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[1] *Lavallee, Rackell & Heintz v. Canada (Attorney General),* [2002] 3 S.C.R. 209); *Maranda v. Richer,* [2003] 3 S.C.R. 193; *Foster Wheeler Power Co. v. Sociétéintermunicipale de gestion et d'elimination des d'Échets (SIGED) Inc.,* [2004] 1 S.C.R. 456.

[2] *Maranda v. Richer*, at para. 37.

In this context, and without prejudice to the Federation's position that the provincial and territorial law societies are the authorities with the jurisdiction to regulate in this area, the Federation offers the following comments on the draft regulations. These comments are by no means exhaustive. Consistent with the Federation's organizational structure, comments by the Federation must be the product of consultation with its member law societies. The draft regulations raise issues that require reflection and serious consideration. The timing of the comment period during the peak of the summer makes it difficult to consult as extensively with member law societies as the Federation would wish. In this respect, the Federation looks forward to continuing the dialogue with the Department of Finance following its receipt of these comments.

Comments on the Draft Regulations

The Federation's analysis of the draft regulations is informed by the following guiding principles:

1. The independence of the legal profession is of vital importance to the administration of justice and the operation of the Canadian legal system.
2. Solicitor-client privilege has been recognized by the Supreme Court of Canada as a client's fundamental civil and legal right. Both the principle of privilege and the confidentiality of communications between a client and his or her lawyer are of fundamental importance to the administration of justice.
3. Regulations governing the legal profession must respect all constitutional principles, including the independence of the bar and solicitor-client privilege and confidentiality.
4. Within those bounds, regulations must only go as far as is necessary to achieve the goal of protecting the public, and should not unduly interfere with normal and longstanding business practices of members of the profession.
5. Rules must be clear and practical to ensure that those subject to them know and understand their obligations.

In light of these principles, the Federation has concerns about the scope and reasonableness of a number of provisions in the draft regulations.

As a general observation, the nature and extent of the information required by the draft regulations to be collected and retained goes beyond what is necessary for lawyers to serve their clients. The practical value of some of the information required to be obtained and recorded for the purposes of the retainer is thus called into question. The Federation's view, as stated earlier, is that members of the legal profession may obtain information needed to serve the client, but must not (and must not be obligated to) obtain any information which may only provide potential evidence against the client in a future investigation or prosecution by state authorities.

The draft regulations are in a number of respects unclear, overly broad and impose unreasonable and impractical requirements on legal counsel. The following examples are illustrative of the problems in the draft regulations, but are by no means exhaustive.

One example of the lack of clarity in the draft regulations is found in the requirement in s. 11.1(1) to "take reasonable measures" to obtain the name, address and occupation of all directors and persons who own or control more than 25 per cent of the shares of a corporation or who own or control more than 25 per cent of an entity. Although the

Federation has been advised that guidance will be provided by FINTRAC on what constitutes "reasonable measures", the provision is extremely vague. Such vagueness offends the principle that regulations should be clear to ensure that those governed by them understand the obligations they must meet.

Section 11.1(1) of the draft regulations presents other practical difficulties. The identities of shareholders can be difficult to obtain in some jurisdictions and impossible in the case of private corporations. A similar difficulty arises in relation to the information required to be included in a "receipt of funds record" which legal counsel would be required to create under s. 33.4. Amongst other information that must be obtained and recorded is the account number of any account affected by the transaction. This requirement would present serious practical problems where, for example, the funds were received electronically from a third party, as the number of the account from which the funds were advanced would not typically be included on the record of the transaction provided to legal counsel. Given privacy legislation, a member of the legal profession would likely not be able to obtain the account number in those circumstances. The Federation notes, however, that as the requirement to record the information appears to be mandatory , legal counsel could be placed in the position of failing to comply with the draft regulations in a situation in which compliance is impossible.

The Federation also has concerns about the requirement in the draft regulations for members of the legal profession to implement an "in house" compliance program. This requirement would place the onus of monitoring compliance with the anti-money laundering regulations on individual law firms and sole practitioners. Many law practices already have their own internal practice management procedures to ensure compliance with law society regulations, and guidance by the law societies assists law practices with compliance. It is the Federation's view that a dedicated monitoring function as set out in the draft regulations is a matter for the law societies to prescribe, to the extent necessary, and enforce. Law societies are charged with regulating the legal profession to protect the public interest, and have an infrastructure for this purpose. It is neither appropriate nor practical to require individual members of the legal profession to fulfill this role in the manner set out in the draft regulations.

Apart from the specifics of the draft regulations, a very significant concern for the Federation is that under the draft regulations, the provisions of the Act respecting search and seizure (specifically, sections 62 through 64), would apply to the legal profession. Section 62 of the Act authorizes FINTRAC to conduct broad, warrantless searches of all records in the premises and to "inquire into the business and affairs" of any member of the legal profession. There is no requirement that there be a reasonable belief that an offence has occurred under the Act, only that the person conducting the search have a reasonable belief that there are records on the premises that are relevant to compliance with Part I. The legislation also compels the person in charge of the premises to assist with the search by providing to the person conducting it "all reasonable assistance to enable them to carry out their responsibilities" and to "furnish them with any information with respect to the administration of Part 1 or the regulations." On a plain reading, this provision would require members of the profession not only to facilitate a search of their premises, but also to respond to questions that may be posed during the search.

It is clear that the search and seizure provisions in the Act do not sufficiently safeguard solicitor-client privilege and confidentiality, and do not accord with the 2002 decision in *Lavallee, Rackel & Heintz v. Canada*, in which the Supreme Court emphasized that

solicitor-client privilege is "a principle of fundamental justice and civil right of supreme importance in Canadian law" and set out stringent rules for law office searches. As such, in the respectful submission of the Federation, these provisions are unconstitutional. The Federation notes that in the Department of Finance's Consultation Paper of June 2005, paragraph 6.17, it proposed that amendments be made to sections 62 to 65 of the Act to conform with the principles established by the Supreme Court in *Lavallee.* The Federation questions why these amendments have yet to be made. Until these provisions of the Act are amended in accordance with *Lavallee*, it is the Federation's strongly-held view that any draft regulations which purport to make the existing provisions of the Act applicable to the legal profession are unconstitutional on that basis alone.

Concluding Comments

In the Federation's view, its model rule on client identification and verification standards will accomplish the following goals:

a. the rule will address the activities of members of the legal profession as financial intermediaries, and as a law society rule will form part of the extensive statutorily authorized regulatory regime for legal counsel; and
b. as a law society regulation, rather than federal legislation, the rule will respect the constitutional principles fundamental to the Canadian legal system, protect the right of citizens to independent legal counsel, and ensure that counsel can continue to protect the constitutionally recognized principle of solicitor-client privilege.

In the submission of the Federation, it is neither appropriate nor necessary for the federal government to purport to regulate the legal profession. The exercise by the law societies of their jurisdiction over the legal profession through implementation of the model rule will accomplish the goal of protecting the public interest and may be expected to have the incidental effect of meeting the federal government's objectives concerning client identification and verification.

The existence of an independent Bar governed in the public interest is not one common to all jurisdictions in the world, but in Canada it is a concept of fundamental importance to the administration of justice and the rule of law. The Federation supports efforts to eradicate money laundering and terrorist financing within a framework that acknowledges the value of this principle. Any amendments to the current legislative regime must preserve the rights which have long been recognized as fundamental in Canadian society.

Yours truly,

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President