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April 27, 2015

Via Email

Standing Committee on Finance | Comité permanent des finances
Committees and Legislative Services Directorate | Direction des comités et services législatifs
House of Commons | Chambre des communes
131 Queen Street, 6th Floor |131, rue Queen, 6e étage
Ottawa, Ontario K1A 0A6

Re: Standing Committee's study of the cost, economic impact, frequency and best practices to address the issue of terrorist financing

I write pursuant to your invitation to me to appear before the House of Commons Standing Committee on Finance (Canada) on April 30, 2015 to comment on the study the Standing Committee is conducting on the issue of terrorist financing. I have been invited to provide a brief summarizing the matters on which I might be of assistance to the Standing Committee. This is that brief.

I am proceeding on the assumption that I have been invited to appear before the Standing Committee because of my involvement as counsel for the Federation of Law Societies of Canada in the recently concluded litigation concerning the application of the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act* to lawyers in relation to their clients' transactions. As such, I am not able to assist the Standing Committee on the issues of cost, economic impact or frequency, but my comments may be of assistance on the subject of best practices.

I should reiterate as I did when I accepted the invitation that in appearing before the Standing Committee I do not speak for or represent the Federation of Law Societies of Canada or any other organization. I hope nevertheless that my review of the recent litigation and the constitutional principles that have been clarified through that litigation will assist the Standing Committee in developing any recommendations concerning potential legislation on this subject.

The Issue

The issue that arises when government legislation is designed to detect and deter financial criminal activity such as money laundering or terrorist financing is the extent to which lawyers may be enlisted to assist in the endeavour by being required either to report directly or prepare reports of their clients' activities. The concern is that any such requirements undermine lawyers' obligations in the administration of justice.

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PRACTICE CONDUCTED THROUGH A PERSONAL LAW CORPORATION

The Constitutional Litigation – Phase 1

This issue arose squarely in the lengthy litigation that took place over the past fifteen years between the legal profession[1] and the government of Canada concerning provisions of the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act* ("the Act")

The litigation had two distinct stages, the first one, from 2001 to 2003 dealing with the provisions requiring lawyers to submit suspicious transaction reports about their clients' activities and the second one, from 2008 to 2015, dealing with the provisions that required lawyers to prepare reports of *all* financial transactions of their clients beyond a modest threshold. A brief chronology of events may be helpful for the Committee:

- 1991 – *Proceeds of Crime (Money Laundering) Act* provided for record keeping and client identification obligations with respect to large transactions for financial institutions

- 2000 – Financial Transactions and Reports Analysis Centre of Canada (FINTRAC) established as Canada's financial intelligence unit to address money laundering criminal activity

- 2001 – Mandate of FINTRAC expanded to include terrorist financing and scope of obligations expanded to specifically include lawyers when providing legal services to clients. Lawyers were required to submit suspicious transaction reports to FINTRAC concerning their clients' activities.

- 2001 – On the day the application of this legislation against lawyers and their clients came into force, the Federation of Law Societies of Canada and the Law Society of British Columbia instituted legal proceedings challenging the constitutional validity of the legislation as it applied to lawyers when providing legal advice to clients. The British Columbia Supreme Court issued an interim injunction to prevent the legislation from applying to lawyers when providing legal services to clients as did the Alberta Queen's Bench in parallel litigation.

- 2002 – The British Columbia injunction was upheld in the British Columbia Court of Appeal and similar injunctions were issued in Ontario, Saskatchewan and Nova Scotia. Agreement was then reached that the British Columbia litigation would serve as test litigation for this issue.

[1] I will use the terms "legal profession" and "law societies" somewhat interchangeably in this brief. Law Societies are the regulatory entities organized by the profession in each province and territory and authorized through provincial and territorial legislation to regulate the legal profession in the public interest. When I use the term "law societies" I include the Barreau du Québec and the Chambre des Notaires du Québec, who perform these functions in Québec for avocats and notaires. The Federation of Law Societies of Canada is the national umbrella organization established by the law societies to provide a national voice for the legal regulators of Canada.

- 2003 – Parliament amended the Act and removed the requirement that lawyers file suspicious transaction reports in relation to their clients' activities.

- 2004 – The Federation of Law Societies developed a Model Rule limiting the amount of cash lawyers could receive from their clients for transactions to $7500 ("the No Cash Rule"). The No Cash Rule was subsequently adopted by all Canadian law societies.

From 2003 to 2008, the provisions of the Act did not apply to lawyers in relation to their clients' activities. Of course lawyers were not immune from the legislation. Like all Canadians, their activities in their own right were subject to the Act. But they were no longer required to make reports of their clients' activities as part of the effort to combat money laundering and terrorist financing activities.

That changed in 2008, when Regulations were enacted requiring lawyers to prepare and maintain reports of *all* financial transactions of their clients beyond a modest threshold as well as obtaining information concerning the identity of all parties to the transaction. FINTRAC was given authority to attend at law offices to review the reports without a warrant, although some provision was made for the protection of information falling within solicitor-client privilege. If lawyers failed to comply with the record-keeping and client identification requirements, they were subject to fines or imprisonment.

The Federation responded by developing another Model Rule, this time relating to client identification and verification ("the Client ID Rule"). The Client ID Rule dealt with those elements of the new Regulations which law societies regarded as important for the provision of legal services, but did not require lawyers to prepare reports of their clients' transactions. This Model Rule also was adopted by all the law societies. The Government did not however accept that these rules were sufficient for their purposes and the litigation resumed.

The Constitutional Litigation – Phase 2

The Federation challenged the new regulations on the ground that they violated both section 7 and section 8 of the Charter of Rights and Freedoms. This time the Government did not withdraw the challenged provisions and the litigation went to trial on the merits.

The basis for the challenge was twofold. The Federation claimed that by requiring lawyers on pain of imprisonment to prepare reports of their clients' activities and obtain information not required to provide legal services, the legislation turned lawyers into "state agents" acting against the interests of their own clients, and that this requirement was contrary to principles of fundamental justice.

Three principles of fundamental justice were proposed – the protection of solicitor-client privilege, the independence of the bar and the lawyer's duty of loyalty to the client. The essential argument was that lawyers perform an important role in the administration of justice

which requires that they not be placed in a position of conflict of interest between their clients' interests and the interests of the state.

Additionally, the Federation claimed that the search and seizure provisions in the Act did not provide adequate protection for privileged documents and information.

The Federation was supported in this litigation by the Law Society of British Columbia, the Barreau du Québec, the Chambre des Notaires du Québec and the Canadian Bar Association. In the Supreme Court of Canada, the Canadian Civil Liberties Association, the Advocates Society and the Criminal Lawyers' Association (Ontario) also intervened to support the Federation's position.

The litigation took the following course through the courts of British Columbia and ultimately the Supreme Court of Canada:

- 2011 – Gerow J. of the Supreme Court of British Columbia struck the legislation down (or read it down) as it applied to lawyers, holding that it interfered to an impermissible degree with information that was protected by the solicitor-client privilege.

- 2013 – The British Columbia Court of Appeal dismissed the Government's appeal, but resolved the case on a somewhat different ground. The Court of Appeal held that the legislative regime interfered with the independence of the bar, which was said to be a principle of fundamental justice in Canada's constitutional structure.

- 2015 – The Supreme Court of Canada dismissed the Government's appeal and confirmed that the legislation as it applied to lawyers must be struck down (and in some cases, read down to exclude lawyers).

The Relevant Constitutional Principle

The Supreme Court expressed the applicable constitutional principles somewhat differently than had the British Columbia courts. The principle of fundamental justice expressed by the Supreme Court is that the Government must not undermine the lawyer's commitment to the client's cause. The essence of the decision can be found in the first paragraph of the majority judgment:

> 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. I agree with the British Columbia courts that these provisions are therefore unconstitutional.

Best Practices for Anti-Terrorist Financing Legislation

There are two aspects of this history that may be of use to the Standing Committee to the extent that the Committee may conclude that amendments are required to be made to the Act to further address the issue of terrorist financing. First, it is a principle of fundamental justice that the state cannot impose duties on lawyers that interfere with their duty of commitment to advancing their clients' legitimate interests. Thus any change in the legislative regime should respect this constitutional protection for Canadians.

Second, the legal profession through its self-regulation process has demonstrated that it can respond through appropriate regulation to concerns the Government may have about the risk that lawyers may inadvertently be used by their clients to facilitate financial crimes. The "No Cash" Rule and the "Client ID Rule" addressed a legitimate concern of the Government, but did so within the constitutional and regulatory structure that is uniquely Canadian.

The legal profession recognizes there may be pressures from outside Canada to adopt a "one size fits all" solution to combat international financial criminal activity, but it is of course important that any legislative solution be tailored to respect Canada's unique and highly successful constitutional traditions.

I hope this review will be of some assistance to the Standing Committee in its deliberations.

Yours truly,

John J.L. Hunter

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