February 27, 2012

Leah Anderson  
Director, Financial Sector Division  
Department of Finance  
L’Esplanade Laurier  
20th Floor, East Tower  
140 O’Connor Street  
Ottawa, Ontario, K1A 0G5

Dear Ms. Anderson:

Re: Strengthening Canada’s Anti-Money Laundering and Anti-Terrorist Financing Regime, Consultation Paper - December 2011

The Federation of Law Societies of Canada (the “Federation”) is pleased to provide comments on the above Consultation Paper with respect to certain proposals (the “Proposals”) to strengthen Canada’s anti-money laundering and anti-terrorist financing legislative regime, comprised of the Proceeds of Crime (Money Laundering) and Terrorist Financing Act (the “Act”) and the Proceeds of Crime (Money Laundering) and Terrorist Financing Regulations (the “Regulations”). The Federation consents to posting this submission on the Department of Finance website and permits the Department of Finance to name the Federation as the organization making the submission when posting it on the Department of Finance website.

Introductory Comments

The Federation is the national coordinating body of the 14 law societies in Canada which regulate over 100,000 lawyers and Québec’s 4,000 notaries 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 reiterates its support of Canada’s efforts to combat money laundering and terrorist financing, and affirms its recognition of the importance of the objectives of the Act and the Regulations. It remains the Federation’s position that Canada’s initiatives to fight these crimes, including fulfilling its international commitments as a member of the Financial Action Task Force (“FATF”), must be accomplished within the framework of values and constitutional principles on which Canadian society rests.
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 rule (the “Model Rules”) is evidence of its commitment to proactively regulate in this area. These Model Rules have been implemented by each Canadian law society.

The Federation's position in respect of the Proposals in the Consultation Paper is consistent with the position it has taken in previous submissions regarding the Act and Regulations: 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.

A brief history of the Federation’s actions related to the Act will assist in providing some context for our submission. A constitutional challenge launched by the Federation in 2001 regarding the application of the Act to the legal profession 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. In December 2006, the Government of Canada amended the Act to exempt lawyers from the suspicious and prescribed transactions reporting requirements. 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 and the hearing of the constitutional challenge in 2011. In September 2011, the British Columbia Supreme Court (“BC Supreme Court”) 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. 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 acknowledged in the Consultation Paper, the client identification and verification provisions of the Act and Regulations presently do not apply to lawyers or Quebec notaries.

Some of the Proposals in the Consultation Paper that would lead to new requirements are stated to apply to legal counsel and legal firms. Consistent with the decision of the BC Supreme Court, it is the Federation’s position that the Act and Regulations and any amendments arising from the Proposals discussed in the Consultation Paper cannot apply to legal counsel and legal firms. The Proposals in some cases build on existing requirements addressed by the Federation as described above. In purporting to apply to legal counsel and law firms, the Proposals do not give consideration to the unique role of the legal profession in our justice system and the distinctiveness of the relationship between members of the profession and their clients. New requirements arising from the Proposals if applied to legal counsel would intrude on the solicitor-client relationship and on the independence of counsel. As such, the requirements would be unconstitutional to the extent that they would apply to lawyers and Quebec notaries.
There is a strong presumption that all communications between members of the legal profession and their clients, along with financial information arising from the solicitor-client relationship, are confidential and may not be disclosed to, or obtained by, government authorities without a court order. The Supreme Court of Canada has affirmed that lawyers and Quebec notaries, who are bound by stringent ethical rules, must not have their offices turned into archives for the use of state authorities.

These principles define a clear threshold between constitutional and unconstitutional requirements imposed on members of the legal profession when it comes to the gathering of information from clients: a lawyer or Quebec notary must obtain and keep confidential all information needed to serve the client, but must not obtain any information that serves only to provide potential evidence against the client in a future investigation or prosecution by state authorities.

Comments on the Proposals

Without prejudice to the Federation’s position that requirements that arise from the Consultation Paper’s Proposals cannot apply to lawyers or Quebec notaries, the Federation wishes to comment on certain aspects of the Proposals.

The Federation’s analysis of the Proposals is informed by the following guiding principles:

1. The independence of the legal profession is a foundational principle of and is vital to the operation of the Canadian legal system and to the rule of law in Canada;
2. Solicitor-client privilege is of fundamental importance to the Canadian justice system, and has been recognized by the Supreme Court of Canada as a client’s fundamental civil and legal right;
3. Regulations governing the legal profession should go only as far as necessary to achieve the goal of protecting the public and should not unduly alter the business and professional practices of members of the legal profession; and,
4. Rules must be clear and practical to ensure that those subject to them know and understand their obligations.

Against these principles, the Federation comments as follows on some of the Proposals.

Lawyers and Quebec notaries are regularly retained to assist clients in a wide variety of transactions, including real estate and corporate commercial transactions to which certain proposed compliance requirements would appear to apply. Certain Proposals, such as Proposal 1.2, which proposes a general review of customer identification, due diligence and record-keeping requirements, Proposal 1.9, which relates to the necessary documentation used to prove the existence of a corporation and Proposal 3.4 which mandates reasonable measures to be taken and to be recorded with respect to beneficial ownership requirements would require members of the legal profession to conduct increased due diligence for certain clients or with respect to certain transactions, and keep related records. Similarly, Proposals 5.1 and 5.2, which would lead to requirements for countermeasures in respect of certain foreign entities by Ministerial directive, would likely impose additional requirements on lawyers and Quebec notaries involved in the provision of legal services related to certain designated foreign entities.
The nature and extent of the additional information that these Proposals contemplate to be collected and retained by legal counsel and law firms goes beyond what is necessary for members of the legal profession to serve their clients. The Federation’s view, as stated earlier, is that lawyers and Quebec notaries must obtain information needed to serve their clients, but must not obtain any information which may only provide potential evidence against the client in a future investigation or prosecution by state authorities.

In addition, Proposals 2.6, 2.8 and 6.1 appear to be erroneously identified in the Consultation Paper as relevant to legal counsel and law firms. Proposals 2.6 and 6.1 relate to the obligations of reporting entities that are subject to the large cash and suspicious transactions reporting requirements in the Act. Legal counsel and law firms have been exempted from these requirements by s. 10.1 of the Act. Similarly, Proposal 2.8 solely relates to the reporting obligations of the accounting sector. The Federation therefore assumes that these Proposals would not be applicable to legal counsel and law firms.

Concluding Comments

As part of the regulatory regime under the statutorily authorized mandates of the law societies, the Federation has adopted Model Rules on client identification and verification and cash transactions. Implemented and enforced by law societies these Model Rules have the incidental effect of accomplishing the goals of the Act and the Regulations as they relate to members of the legal profession. Not only do they address the activities of lawyers and Quebec notaries to the extent they may be characterized as financial intermediaries, they do so in a way that is consistent with constitutional principles. Moreover, regulation by the law societies is responsive to developments in the profession and will adapt to address issues in the interests of maintaining appropriate and robust regulation. In this way, the law societies’ stakeholders can be assured that regulation is and will continue to be in the public interest.

In Canada, the existence of an independent Bar governed in the public interest is fundamental to the administration of the rule of law. The Federation supports efforts to eradicate money laundering within a framework that acknowledges the value of this principle. Any Proposals that may lead to amendments to the current legislative regime must preserve the rights which have long been recognized as fundamental in Canadian society.

We welcome the opportunity to discuss these matters further.

Yours truly,

[Signature]

John J. L. Hunter, Q.C.
President