Submission on Bill C-22

Proceeds of Crime (Money Laundering) Act

CANADIAN BAR ASSOCIATION

May 2002

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PREFACE

The Canadian Bar Association is a national association representing over 36,000 jurists, including lawyers, notaries, law teachers and students across Canada. The Association's primary objectives include improvement in the law and in the administration of justice.

This submission was prepared by the Canadian Bar Association, with assistance from the Legislation and Law Reform Directorate at the National Office. The submission has been reviewed by the Legislation and Law Reform Committee and approved by the Executive Officers as a public statement of the Canadian Bar Association.

Submission on Bill C-22
Proceeds of Crime (Money Laundering) Act

I. INTRODUCTION

The Canadian Bar Association (CBA) has consulted with government officials on the optimal approach to dealing with the issue of money laundering over the past several years.[1] We are grateful for this opportunity to reiterate our views to the Finance Committee of the House of Commons in its consideration of Bill C-22.

Bill C-22, *Proceeds of Crime Act (Money Laundering)* attempts to suppress international crime and money laundering, in keeping with commitments by Canada in the international crime control context. The Bill would establish the Financial Transactions and Reports Analysis Centre of Canada (the Centre), to receive and deal with information reported to it as required by the Bill, and to share information in certain situations with police and other investigative agencies both in Canada and abroad.

The CBA does not support the passage of Bill C-22 for several reasons. The Bill's broad scope has profound cost and efficiency implications for Canadian financial transactions and business operations. We have concerns about the constitutionality of Bill C-22 in its application to the legal profession and the rights of Canadians to independent legal advice. We are concerned that the legislation would require lawyers

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1 Two previous letters sent by the CBA to Ministers of Justice and Finance, and the Solicitor General, respectively, are attached to this submission.

to act in a manner inconsistent with both their professional and their legal duty to preserve solicitor-client confidentiality.

When members of the legal profession are called to the Bar, we take an oath to honour and uphold the law. We are subsequently governed by *Codes of Conduct* in our respective provinces or territories, which also require us to respect and obey the law, while simultaneously holding our duties to our clients in the highest regard. Existing statutory provisions in our *Criminal Code* already prohibit and punish money laundering activities. Given these realities, this Bill is redundant and unnecessary in its attempts to protect or prohibit lawyers from money laundering, and would erode central tenets of the solicitor/client relationship.

The mandatory reporting of information which may be confidential is a drastic measure and a gross intrusion into a previously protected sphere. In our view, the objectives of the Bill in terms of meeting international obligations to combat money laundering could be effectively addressed without legislatively restructuring the relationship of trust between lawyers and clients. We recommend that lawyers be specifically excluded from the ambit of any legislation concerning suspicious transactions.

RECOMMENDATION:

1. **The Canadian Bar Association recommends that lawyers be specifically excluded from the ambit of any legislation pertaining to suspicious transactions.**

The principal objective of detecting and deterring money laundering is meritorious and we acknowledge the international commitments Canada has made in this regard. Any new law must effectively address those objectives and commitments. However, the law must also be properly tailored to ensure that it does not create unwarranted obligations

or interfere with existing rights in a manner beyond that demonstrably necessary. Bill C-22 is structured in a manner that we believe would give rise to both of these pitfalls.

This Bill should offer an absolutely critical improvement to existing law to justify its passage, given its imposition of major cost and burden on citizens, businesses and professions. The large and intrusive state apparatus being proposed and the cost to taxpayers for the establishment of the Financial Transactions and Reports Analysis Centre to address a problem that we believe reflects a relatively minor portion of business activity in Canada lead us to conclude that the possible salutary results of Bill C-22 are outweighed by its predictable deleterious effects. The comments and recommendations offered in the remainder of this submission suggest improvements to Bill C-22, recognizing that it may be passed regardless of our opposition.

II. CONSTITUTIONAL CONCERNS

Bill C-22 imposes significantly intrusive regulation upon businesses, financial institutions and professionals, including the legal profession, to the extent that we believe it may be *ultra vires* of Parliament. We recognize that the Federal Government may rely on the Criminal Law power for constitutional jurisdiction for Bill C-22. However, we believe the Bill could be interpreted as intruding upon the legislative jurisdiction of the provinces as to "property and civil rights" and "administration of justice within the province" under section 92 of the *Constitution Act, 1867*. We also note that provisions in the Bill would mandate record-keeping by lawyers and other professionals, but then authorize what we see as unreasonable search and seizure, offending clients' rights under section 8 of the *Charter*. Further, the Bill erodes the basic right of citizens not to provide private information to the state and the right to independent and confidential legal representation under the Canadian *Bill of Rights* and under sections 7 and 11(d) of the *Charter*.

In our view, important aspects of this Bill unnecessarily undermine the constitutionally vital principle of lawyer-client privilege. The social cost of conscripting the legal profession into the role of state investigators against their own clients is profound.

Alternatives are needed to address the objects of the Bill without causing the serious collateral damage as currently proposed. The Bill contemplates a massive and intrusive form of record-keeping and reporting for all relevant lawful financial and commercial operations in Canada in pursuit of what we believe are relatively infrequent occasions of money laundering. More specifically, when the Bill's requirements are contrasted to the actual incidence of money laundering within the legal profession, we believe the breadth of the Bill to be truly excessive.

III. MANDATORY RECORD-KEEPING

Section 6 of the Bill creates a legal duty to keep records, punishable under section 74 of the Bill. We are concerned that regulations could be promulgated without further resort to Parliament so as to impose this obligation on lawyers about their clients and to impose further obligations related to employees of such lawyers.

A. Impact on Lawyers and the Solicitor-Client Relationship

The requirements of Bill C-22 would fundamentally alter the foundation of the solicitor-client relationship, which is premised upon the protection of both privilege and confidentiality. The importance of privilege and confidentiality has long been recognized in law and it is central to the rules of professional conduct governing lawyers. Clients must be able to seek the assistance of a lawyer knowing that the information they communicate will remain with the lawyer and go no further. Uncertainty in the integrity of the privilege or confidentiality will create uncertainty in and undermine the solicitor-client relationship.

Keeping and retaining client records are parts of the standard operating practice of lawyers in Canada under their professional obligations. Particular requirements for record-keeping are subject to the governance of the law society in each province or territory. Application to lawyers of a *further* requirement of keeping records in accordance with the regulations under section 73(1) of Bill C-22 could be costly and impinge upon professional standards and practice.

Under section 6, the record-keeping prescribed by regulation beyond that required of the applicable law society would be driven by the objectives of the Centre, not by sensitivity to the constitutional imperative of confidentiality between solicitor and client. Under section 62, records thus maintained are further subject to arbitrary compliance examination without warrant by an "authorized person", namely, any person authorized by the Director of the Centre. Under section 62(2), there is a duty to give such person "reasonable assistance" in going through the files, corresponding to a similar duty under section 19 for Part 2. Section 63 contemplates a warrant only if the lawyer is working out of his or her home.

Section 64 of the Bill specifies how a lawyer subject to a search under sections 62 and 63 may make a claim of privilege. Section 64 is comparable to section 488.1 of the *Criminal Code*, which has been found to be inadequate protection for the privilege of a client.[2] Instead of presuming privilege and requiring the searching official to ask a Court for review, the onus is on the lawyer to claim the privilege, failing which it is lost. A lawyer or client must also seek court protection for documents after seizure although the documents are presumably subject to lawyer-client privilege.

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[2] See, *Lavallee, Rackel and Heintz, and Polo* v. *Canada (A.G.) and the Law Society of Alberta*, unreported, February 17, 2000, dismissing appeal [except in some technical respects] from (1998) 126 C.C.C. (3d) 129 (Alta.Q.B.). See also, *R.v. Claus* (1999), 139 C.C.C. (3d) 47 (Ont. S.C.).

In our view, this improperly shifts both the legal and practical burden respecting such confidential and privileged documents. The Bill requires lawyers to create records about their clients' affairs solely for state purposes, and then makes those documents subject to state inspection without warrant. Whereas section 64(10) purports to provide after the fact "notice" to the client about the random audit of the client's records, the real effect is to exacerbate the impact of using the lawyer against the client by requiring the lawyer to provide the last known address of the client to authorities.

Such legislation is not valid as part of a regulatory system beneficial to its participants, as discussed in *Fitzpatrick*.[3] This Bill does not deal with an industry or enterprise constitutionally subject to federal regulation for the overall benefit of that industry or enterprises. It is not a situation where persons agree to subject themselves to regulation by engaging in that activity. This Bill purports to impose regulations of record-keeping and disclosure to serve an anticipated criminal investigative purpose. Accordingly, we believe that such legislation would be unconstitutionally conscriptive[4] and would affront the more general constitutional right of citizens to be left alone by the state.[5]

There is some confidentiality in place once the Centre receives records under section 36(1), but sections 36(2) and (3) then allow officials to disclose information without notice, based on their reasonable suspicion that the information would be helpful or relevant. Section 55(3) mandates the Centre to share certain information where relevant to investigation or prosecution of a money laundering offence. The result of those sections is that the record keeper effectively becomes an informant to the Centre

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3 *R.v. Fitzpatrick*, [1995] 4 S.C.R. 154.

4 *R.v. White*, [1999] 2 S.C.R. 417.

5 See *R.v. Mack,* [1988] 2 S.C.R. 903. See also, *R.v. Kakesch* (1991), 61 C.C.C. (3d) 207, and in particular, the remarks of Sopinka, J. at 227.

for the police or other officials, possibly including those of a foreign state. Where the record keeper is a lawyer, this clearly conflicts with solicitor-client privilege.

The chilling effect on the legal profession and legitimate business practice would be profound. Lawyers would be professionally obligated to inform clients or prospective clients that information provided, even in a completely innocent context, could be subject to random review and inspection by the state. Clients should also be warned that further information could be extracted from the lawyer beyond the specific records required under section 6.

In our view, no lawyer-client records required to be maintained under section 6 of this Bill should be accessible by the Centre or any other state agent without warrant. Any form provided for the reporting requirement under section 6 of the Bill should be stipulated in the Bill, and not simply subject to amendment or enhancement at the discretion of the state through regulation. No random or arbitrary access to such information should be authorized.

RECOMMENDATION:

2. **The Canadian Bar Association recommends that lawyer-client records required to be maintained under section 6 of this Bill should be accessible by the Centre or any other state agent only by warrant.**

RECOMMENDATION:

3. **The Canadian Bar Association recommends that any form provided for the reporting requirement under section 6 should**

be stipulated in the Bill, and not subject to amendment or enhancement at the discretion of the state through regulation.

Before state examination of documents seized under such warrant, there should be an automatic requirement of judicial review with notice to the lawyer and the client. Tracking money transfers is not so urgent or pressing an objective as to ignore lawyer-client privilege to the extent proposed by Bill C-22.

RECOMMENDATION:

4. **The Canadian Bar Association recommends that before state examination of documents seized under warrant, there should be an automatic requirement of judicial review with notice to the lawyer and the client.**

B. Impact on Business

Requirements for the creation and retention of records must be manageable, and consistent with the usual requirements for the maintenance of similar records. A threshold of ten thousand dollars is very low in many sectors, including law, accounting, and financial institutions and the record-keeping requirement could get unwieldy if not simple and straightforward.

Any requirement to verify information by certificate from another person should not also require verification of the certificate. The form of the records should accord with the normal requirements for accounting and record-keeping for usual commercial purposes (GAAP, regulatory, tax) to minimize duplication. The extent of the due diligence requirement pertaining to the source of funds must be reasonable and recognize the difficulty of identifying a source in some methods of funds transfer, such as an electronic

wire transfer. While the Department of Finance's Consultation Paper[6] (Consultation Paper) recommendations about obtaining and retaining client information under section 73 may be suitable for banks or similar institutions, they do not seem suitable for many other included entities where there is a shorter term account relationship.

IV. MANDATORY REPORTING

The mandatory reporting requirements in sections 7 and 9 of Bill C-22 are of serious concern to the CBA. Before elaborating on those concerns, we must first caution that whatever reporting is ultimately required, the forms and requirements for reporting must be reasonable. They must be simple, easy to complete and contain a limited number of questions. The threshold for reporting must also be reasonable. Again, a ten thousand dollar limit is very low in many sectors, including law, accounting and financial institutions. There are significant reporting requirements already, so that adding an additional burden on financial institutions and the professional community could potentially be unworkable.

RECOMMENDATION:

5. The Canadian Bar Association recommends that the forms and requirements for reporting under Bill C-22 be simple, easy to complete and brief.

Section 7 requires lawyers to report "every financial transaction" where there are "reasonable grounds to suspect that the transaction is related to the commission of a money laundering offence." No guidance is given for interpreting what are reasonable grounds for suspicion. Under the definition of a "money laundering offence" contained

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6 Proceeds of Crime (Money Laundering) Regulations (Ottawa: December, 1999).

in the Bill, the test for "reasonable suspicion" is also fairly broad, in spite of its focus on specifically prohibited activities.

Not only should the forms be prescribed, but there should be more guidance as to what might constitute reasonable grounds. The Bill would otherwise contravene principles requiring certainty in law in regards to when to report and what is prohibited, while imposing serious sanctions for failing to report. Without further guidance, intermediaries, including lawyers, will become arbitrators of the symptoms of money laundering. That is not a responsibility government can fairly impose through legislation.

RECOMMENDATION:

6. **The Canadian Bar Association recommends that there should be further guidance provided with respect to those circumstances that might be considered reasonable grounds to suspect that a transaction is related to the commission of a money laundering offence according to Bill C-22.**

There is no question that lawyers who reasonably suspect that their clients are committing crimes should not assist them in perpetrating such crimes, directly or indirectly, and should not provide a safe haven for illegal funds or other proceeds of crimes. However, the lawyer-client relationship would be rendered untenable by the test of "reasonable suspicion" connected to the further language "is related to"under section 7, particularly for lawyers practicing criminal law. Lawyers with certain criminal defence practices might routinely have some "reasonable suspicion" about their clients. For example, the mere fact that a client is charged with a money laundering offence or with drug trafficking could constitute a reasonable suspicion for a criminal defence lawyer. Should Bill C-22 be read to require those lawyers to either not be involved in

financial transactions with clients – including taking deposits for fees or posting bail – or simply not represent such persons?

Section 9 casts a very wide a net by mandating that every person or entity make report of "every prescribed financial transaction" occurring in the course of their business activities. The exact meaning of "prescribed financial transactions" is not completely settled, although the Consultation Paper refers to certain cash transactions. Lawyers with legitimate clients who prefer to deal in cash will have to comply by reporting them to the Centre or keeping such records in a prescribed form. Since the form is unlike any other type of records presently kept, this is likely to involve a considerable amount of time and effort.

According to the Consultation Paper, the intended approach is to use "simple objective standards to define classes of transactions that must be reported to the Centre". The approach is by no means simple, in our view. Some lawyers may be involved in complex business practices with clients on a routine basis, and compliance with this provision may complicate and duplicate existing responsibilities. Is the client to be billed for the extra time involved in complying with the requirements of this Bill, or are lawyers and other professionals not to be remunerated for the considerable time involved in complying with those requirements? From a business perspective, the outline of transactions to which the Bill would apply is in keeping with the US model and clearly identifiable except in the case of multi-branch operations. How will an institution know, practically and on a timely basis, that two or more transactions occurred resulting in an aggregate amount exceeding the limits? This would seem to be a virtual impossibility.

These provisions may be primarily aimed at the financial transactions contemplated by the Bill, but the proposed regulations could also include many comparatively ordinary

commercial transactions, including those involving the legal profession. While lawyers rarely deal in *cash* transactions above ten thousand dollars, transactions involving cheques, money orders, wire transfers, bank drafts and the like over that amount are within the ordinary practice of many lawyers. Section 462.31(1) of the *Criminal Code* already prohibits lawyers from becoming engaged in laundering proceeds of crime. This proposal goes further to place a positive obligation on lawyers to report their clients in any situation where a retainer was paid, or perhaps even offered, in a manner which may give rise to a "reasonable suspicion."

Further, section 8 would place lawyers in an untenable position by prohibiting a lawyer from informing a client that the lawyer has reported a transaction to the Centre, leaving the client with the false impression that the relationship was subject to the usual and expected confidentiality. As a result, the lawyer would immediately have a conflict of interest with the client, forcing termination of the lawyer-client relationship. The client would normally expect an explanation for the termination, yet that would be an offence under this Bill. This problem is not relieved because the prohibition in section 8 requires an "intent to prejudice a criminal investigation", actual or anticipated. Potential prejudice to an investigation could arise solely from the client's deducing the reason for a lawyer's termination of their relationship.

V. PRE-FILING OPTION

Bill C-22 is intended to provide a workable reporting system for direct cross border movement of funds, but no specific proposals are suggested. Every effort should be made to ensure that the movement of funds for legitimate commercial purposes is not impeded, affecting the timeliness or completion of required payments.

When a person reaches the border on a legitimate business transaction, some sort of pre-approval could be available to ensure uninterrupted passage. A pre-filing option should be allowed when it is known that on certain dates funds will be moving across a border (by certified cheque, draft, cash or wire) because of matters including regularly scheduled payments or obligations for the closing of a commercial transaction, and should be fast and simple. The authorization could be shown at the border or held at both ends of the wire transfer to ensure the funds move when intended.

No procedure currently included in the Bill or in the outline of the regulations permits such a pre-filing. Without it or something similar, wire transfer and physical transfer of funds to close transactions, complete payments, or otherwise could be fraught with complications. A pre-filing system, with an authorization that can be expeditiously obtained, would permit monies to flow in the ordinary course of commerce. This removes the onus from professionals and financial institutions, where we believe it should not rest in the first place, facilitates commerce and eliminates unnecessary difficulties on a required day of transfer.

We are also concerned that the exercise of discretion by border officials unfamiliar with complex business matters could delay or prevent entry, again with serious ramifications for legitimate commercial enterprise. Under section 12(4)(b), a stated purpose for the request of the officer should be included for clarity. Further, the confidentiality that necessarily surrounds some commercial transactions may be compromised by the statutory duty to answer "any questions that the officer asks..." under section 12(4)(a). Canadians compete for business in international markets. In order to succeed within these markets, Canada must create an environment which will attract commercial interests. The uncertainty, the relatively low dollar amount, and the lack of training and general level of review at the border is likely to cause unwarranted problems for legitimate commercial transactions.

RECOMMENDATION:

7. The Canadian Bar Association recommends that Bill C-22 permit a pre-filing system, so that when people reach an international border on a legitimate business transaction, they can have completed paperwork sufficient to ensure an expedited crossing.

RECOMMENDATION:

8. The Canadian Bar Association recommends that section 12(4)(b) be clarified to require a stated purpose for the request of an officer.

VI. LIMITATION SECTIONS

While section 10 of the Bill is a general immunity provision, it does not go far enough. In addition, we believe that is unlikely to be effective for civil or professional disciplinary proceedings. Some counterpart recognition in the *Criminal Code* should also be included. In our view, there should be a good faith exception applicable to all offences prescribed in relation to criminal or civil proceedings. Moreover, the immunity should extend not merely to the making of reports, but to the taking of any steps by a person or entity in compliance with any requirement under the Bill.

RECOMMENDATION:

9. The Canadian Bar Association recommends that there should be a good faith exception applicable to all offences prescribed within the Bill in relation to either criminal or civil

proceedings, and that parallel recognition of such an exception should be added to the *Criminal Code*.

Section 11 does not satisfy our concerns about the Bill's impact on the solicitor-client relationship. While it exempts privileged information from disclosure, the Bill is silent with respect to the broader category of confidential information. It does not provide a full exemption in relation to the reporting requirements under either section 7 or section 9. It does not seem to have any effect on the record-keeping duty under section 6. Further, how will section 8 and section 11 in combination address the lawyer's duty to disclose to the client? The general duty of a lawyer to disclose information to the client is overlooked except to state that a report is not to be disclosed. How will the scheme work in light of the rules imposed by professional *Codes of Conduct*? How will a lawyer's obligations to maintain client confidentiality and privilege under those *Codes* accommodate the conflicting requirements of this Bill?

The CBA is concerned that the omnibus statement of respect for privilege under section 11 will provide little protection if the lawyer errs on the side of compliance and it is later determined there has been a breach of privilege, or conversely, errs on the side of privilege and it is later determined there should have been compliance. Privilege is not easy to determine and at a minimum, there must be more guidance and protection provided where legislation is overtly interfering with a fundamental tenant of the lawyer/client relationship.

A further difficulty in the relationship of the reporting requirement under section 7 with section 11 is that protection may not be offered given that the triggering factor for reporting has to do with <u>suspicion</u> of criminal activity. At common law, such suspicion could influence an after the fact evaluation of the nature of the communications between

lawyer and client to defeat the lawyer-client privilege claim.[7] If so, the exemption from reporting lawyer-client communications might then not extend to suspected communications. Under those circumstances, a lawyer would be in a difficult position in determining whether or not the requirement under section 7 applied to communications connected to a particular transaction. This ambiguity is not answerable by section 11. The ability of the lawyer to refer the question to a Court would be essential under such circumstances.

RECOMMENDATION:

10. The Canadian Bar Association recommends that Bill C-22 allow a lawyer to refer a question of whether or not the requirement under section 7 applies to communications connected to a particular transaction to a Court, if the lawyer believes there is some ambiguity in making that determination.

VII. THE CENTRE AND ITS OPERATIONS

Any limits proposed by sections 54 to 61 for the workings of the Centre do not address our concerns about prejudicial access to the substance of communications and transactions governed by lawyer-client privilege. Further, the mandatory reporting responsibilities contained in those sections will again create significant work and unrecoverable costs for many, including banking and financial institutions, private businesses, lawyers and their clients. We anticipate that a major bureaucracy would be necessary to handle these responsibilities and respectfully suggest that the share of this activity actually connected to money laundering will be small.

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7 *R.v. Campbell and Shirose* (1999), 133 C.C.C. (3d) 257 (S.C.C.).

Section 55(4) allows the Centre to disclose information to foreign states or international organizations on a "reasonable grounds to suspect" standard, coupled with the additional requirement that it be relevant to investigating or prosecuting a money laundering offence. Section 55(6) allows any person to disclose information if the disclosure "is necessary for the purpose of exercising powers or performing duties and functions." In our view, the permissible level of unreviewable disclosure is unconstitutionally vague in both sections, as they set no standards for legal analysis and no limit on the sweep of discretion. The Centre may also disclose this information to a foreign state or foreign agency if relevant to an investigation or prosecution of a substantially similar offence to money laundering if there is an arrangement or agreement in place, under sections 55(4) and 55(5).

The real sanction for misuse of information appears in section 74 of the Bill, making it an offence to contravene sections including section 57. Whether or not this would be effective against Canadian police officers or other officials who misuse the information, the efficacy against foreign officials must be seriously questioned unless some extra-territoriality feature is built into the *Act* or there is a mirror act in that foreign jurisdiction to catch this activity.

VIII. CURRENCY AND MONETARY DEALINGS UNDER PART 2

As with section 9, lawyers may feel obliged to begin dealings with any client predisposed to deal in cash with a discussion about the requirements of section 12. This would inform the client as to under exactly what circumstances the report or recording might need to be shared with the Centre, so that the client is then able to make an informed decision as to how to proceed.

The Bill inadequately describes the process in the event of an intention to retain currency or monetary instruments under section 14. The pre-approval system we have recommended, where a person bringing money for a legitimate commercial purposes can provide a pre-approved form to avoid delay at the border, would partially address this concern. Section 14 also seems to lack appropriate mechanics for the release of funds, if it is eventually shown that they were being imported for legitimate purposes.

Courts have dealt with the requisites of customs searches and the diminished expectation of privacy for border crossing.[8] While a search within a "reasonable time" under section 15 might mean a brief check of suitcases at a border point, it is unclear what it will imply if border officials wish to examine a substantial body of private business records or a computer database to determine their relevance to an ongoing investigation. The search authority under this Bill includes a search of persons, conveyances and so forth for gathering *evidence*, even from innocent persons. The risk of abuse of this search power and its effect on the privacy of transactions across boundaries is easily foreseeable.

Section 17 authorizes the conscription of a person to open their own mail on demand. While search warrants have traditionally been unavailable for mail before delivery, requiring a person to open their own mail or to conscript a possessor of mail to open mail addressed to someone else offers the same sort of risk of supplementary conscription noted by the Alberta Court of Appeal in *Rackel*.[9] A person required by law to open their own mail may also be likely to make statements which, whether inculpatory or not, could provide knowledge or evidence to investigating officials that would not otherwise be available by legal right or under court authorization. In addition, the sixty day time period for notification to Canada Post under section 21(3) is

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8 See *R.v. Simmons*, [1988] 2 S.C.R. 495 or *R.v. Monney*, [1999] 1 S.C.R. 652.

9 *Supra*, at note 1.

far too long. We question whether the party entitled to the mail should not also be notified.

Under section 18, we are concerned that an officer could, in effect, subject a searched party to pay a fine in order to regain possession of their previously seized business documents. This process of summary fining differs from the voluntary payment of tickets under provincial law or under the *Contraventions Act*. The penalty under Bill C-22 would be imposed at the discretion of an officer without any sort of hearing comparable to that available in the administrative law context, let alone a hearing as contemplated under the criminal law – to which this Bill is aimed.

In reality, sections 14 to 21 of the Bill provide for warrantless search and seizure at border points, in baggage, in mail and in conveyances, including vehicles, vessels and aircraft. In our view, the test of "suspects on reasonable grounds" used throughout the Bill falls short of the requisites of section 8 of the *Charter*.

The basis for appeal and return of forfeited money seems unwieldy and time consuming, under the forfeiture clauses in section 18, section 23 and section 25. Under section 25, the cause for a forfeiture is a simple failure to report under section 12(1). There should be some allowance for a person who is able to demonstrate that no aspect of money laundering was involved in the transaction in question. An appeal to the Minister is based only on a non-contravention of section 12(1). An appeal should also be available to prove that there was no aspect of money laundering to the import or the export of funds. The legislation is intended to prevent money laundering and encourage reporting, not expropriate money where people are unaware or make a clerical error in failing to report.

RECOMMENDATION:

11. The Canadian Bar Association recommends that the process for appeal and return of forfeited goods and currency be streamlined, and the forfeiture and appeal provisions of the Bill allow for situations where it is demonstrated that no aspect of money laundering was involved.

IX. APPROPRIATE POLICE FORCE

Throughout the latter parts of this statute, including section 55(3)(a) and section 65, there are references to an "appropriate police force" and/or "appropriate law enforcement agencies". What is an appropriate police force or law enforcement agency? A Canadian police force or agency? If not, how will we address the fact that some foreign jurisdictions have insufficient protections for individuals in relation to policing activities? If this reference applies to foreign jurisdictions, there can and should be some limitation to parties who are signatory to a reasonable international standard for the maintenance of confidentiality and respect for human rights.

RECOMMENDATION:

12. The Canadian Bar Association recommends that if the references to "appropriate police force" and/or "appropriate law enforcement agencies" apply to foreign as well as domestic authorities, there be some limitation to parties who are signatory to a reasonable international standard for the maintenance of confidentiality and respect for human rights.

X. CONCLUSION

The CBA believes that the substantial constitutional issues raised by the Bill cannot be addressed through cosmetic changes. Clear exclusions respecting lawyer-client activities not clearly implicated in money laundering are required.

Lawyers are not financial institutions, but work to enable financial and business transactions to take place in a lawful manner. The serious interference with the legal rights of Canadians to choose and rely upon legal counsel is simply unwarranted based on a possibility that it may be more difficult for some criminals to conceal their efforts to channel profits into legitimate financial sectors. The extent of the problem being addressed, the speculative potential benefit for Canadian public policy, the massive and intrusive means proposed and the impact on legal rights lead us to advise against the passage of Bill C-22.

XI. SUMMARY OF RECOMMENDATIONS

The Canadian Bar Association recommends:

1. that lawyers be specifically excluded from the ambit of any legislation pertaining to suspicious transactions.

2. that lawyer-client records required to be maintained under section 6 of this Bill should be accessible by the Centre or any other state agent only by warrant.

3. that any form provided for the reporting requirement under section 6 should be stipulated in the Bill, and not subject to amendment or enhancement at the discretion of the state through regulation.

4. that before state examination of documents seized under warrant, there should be an automatic requirement of judicial review with notice to the lawyer and the client.

5. that the forms and requirements for reporting under Bill C-22 be simple, easy to complete and brief.

6. that there should be further guidance provided with respect to those circumstances that might be considered reasonable grounds to suspect that a transaction is related to the commission of a money laundering offence according to Bill C-22.

7. that Bill C-22 permit a pre-filing system, so that when people reach an international border on a legitimate business transaction, they can have completed paperwork sufficient to ensure an expedited crossing.

8. that section 12(4)(b) be clarified to require a stated purpose for the request of an officer.

9. that there should be a good faith exception applicable to all offences prescribed within the Bill in relation to either criminal or civil proceedings, and that parallel recognition of such an exception should be added to the *Criminal Code*.

10. that Bill C-22 allow a lawyer to refer a question of whether or not the requirement under section 7 applies to communications connected to a particular transaction to a Court, if the lawyer believes there is some ambiguity in making that determination.

11. that the process for appeal and return of forfeited goods and currency be streamlined, and the forfeiture and appeal provisions of the Bill allow for situations where it is demonstrated that no aspect of money laundering was involved.

12. that if the references to "appropriate police force" and/or "appropriate law enforcement agencies" apply to foreign as well as domestic authorities, there be some limitation to parties who are signatory to a reasonable international standard for the maintenance of confidentiality and respect for human rights.