

December 10, 1999

The Hon. Anne McLellan, P.C., M.P.
Minister of Justice and Attorney General
of Canada
284 Wellington Street
Ottawa, ON K1A 0H8

The Hon. Paul Martin, P.C., M.P.
Minister of Finance
140 O'Connor
Ottawa, ON K1A 0G5

Dear Minister,

We are writing in regard to anticipated legislation pertaining to suspicious transactions, similar to that tabled in the last Parliamentary session as Bill C-81. Since the Canadian Bar Association was first consulted about legislative options to address suspicious transactions and money laundering, we have expressed serious concerns about the manner in which such legislation would operate. We would like to reiterate our earlier concerns and urge you to consider them carefully prior to reintroducing proposed legislation. We urge you not to reintroduce legislation containing the same shortcomings as those of Bill C-81.

Generally speaking, we are concerned that the legislation as previously tabled would require lawyers to act in a manner inconsistent with both their professional and lawful duty of preserving solicitor-client confidentiality. Further, we believe that the legislation considered to date would be overly broad. As a consequence, it is likely to interfere with legitimate commercial transactions and thereby unnecessarily add time and cost to those transactions.

The CBA agrees that 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 these objectives and commitments. However, to do this, the law must 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-81 was structured in a manner that we believe would give rise to both of these pitfalls.

Impact on Legitimate Financial Transactions

The reporting requirements in Part 2 of Bill C-81 would potentially capture and disrupt many legitimate commercial transactions. Further, the confidentiality that necessarily surrounds some commercial transactions may be compromised by the statutory duty to answer "any questions that the officer asks...". Canadians compete for business in international markets. In order to succeed within these markets, Canada must create an environment which will attract commercial interests. As it was drafted, the Bill could only serve to undermine our ability to compete.

Requirements for the keeping and retaining of records must be manageable, and consistent with the usual requirements for maintaining records. Reporting requirements must likewise be as simple as possible, and the threshold for reporting reasonable. A ten thousand dollar limit is very low in many sectors, including law, accounting and financial institutions, and the record keeping involved could readily become unwieldy. A system for advance filing to expedite the border crossing itself would somewhat alleviate these concerns. Guidance must be provided as to what constitutes reasonable grounds to suspect that a transaction is related to the commission of a money laundering offence. The forfeiture clauses contained in Bill C-81 were draconian, allowing for legitimate currency or money instruments to be seized based on a clerical error or ignorance of the requirements of Canada. To summarize, we are concerned that the relatively low dollar amount and the provisions for forfeiture, coupled with a lack of training and the level of review at the border, may cause unwarranted delay and difficulty for entirely legitimate commercial transactions.

Solicitor-Client Relationship

Perhaps of even greater concern to the Canadian Bar Association is that the requirements of the Bill would fundamentally alter the very foundation of the solicitor-client relationship. This relationship is premised upon the protection of both privilege and confidentiality. Clients must be able to seek the assistance of a lawyer knowing that the information that they pass to the lawyer 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.

The importance of privilege and confidentiality has long been recognized in law and it is central to the rules of professional conduct governing lawyers. The mandatory reporting of suspicious financial transactions creates a legal obligation which would be inconsistent with the solicitor-client relationship. Section 7 of Bill C-81 would have required lawyers to report “every financial transaction” where there were “reasonable grounds to suspect that the transaction is related to the commission of a money laundering offence.” Section 462.31(1) of the *Criminal Code* already prohibits lawyers from becoming engaged in laundering proceeds of crime. The proposal in Bill C-81 would go much 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.

While section 11 of Bill C-81 exempted privileged information from disclosure, the Bill was silent with respect to confidential information. 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’ financial dealings with clients be specifically excluded from the ambit of any future proposed legislation to do with suspicious transactions.

We urge you to take the concerns we have expressed into account when drafting an appropriate legislative response to suspicious transactions and money laundering. Thank you for considering the views of the Canadian Bar Association.

Yours truly,

Eugene Meehan
National President

cc. Greg DelBigio, Member, National Criminal Justice Section
Isabel Schurman, Chair, National Criminal Justice Section
Alison Manzer, Co-Chair, Financial Institutions Committee, Business Law Section
Blair Keefe, Co-Chair, Financial Institutions Committee, Business Law Section