CANADIAN BAR ASSOCIATION
ASSOCIATION DU BARREAU CANADIEN

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Via email: fipublicconsultations-consultationspubliqueei@ps-sp.gc.ca

Office of the National Counter Foreign Interference Coordinator
National Security Branch
Department of Public Safety
340 Laurier Avenue West
Ottawa, ON K1A 0P9

Dear Department of Public Safety and Emergency Preparedness:

Re: Foreign Influence Transparency and Accountability Regulations

We are writing on behalf of the Ethics and Professional Responsibility Committee and the Business Law Section of the Canadian Bar Association (the CBA Sections) in response to *the Foreign Influence Transparency and Accountability Act* (FITAA) which establishes a new framework to enhance transparency regarding foreign influence activities, including the creation of a public registry for such activities. This consultation concerns the proposed regulations for implementing the FITAA.

The CBA is a national association of over 40,000 lawyers, law students, notaries and academics, and our mandate includes seeking improvement in the law and the administration of justice. The CBA Committee promotes ethical standards for Canadian lawyers by creating practice tools, resources on confidentiality/privilege, and providing guidance on professional conduct issues. The Business Law Section's mandate covers the law governing corporate entities and includes securities regulation, commercial law and consumer law.

The CBA Sections are concerned that the registry regime outlined in these proposed regulations may obligate legal professionals to disclose information related to their representation of certain foreign clients, raising significant issues regarding solicitor-client privilege, confidentiality and the lawyer's duty of commitment to the client's cause. In our view, the regulations should contain a defined mechanism for parties to object to, or prevent, the public disclosure of information based on solicitor-client privilege.

Introduction

The proposed FITAA and its accompanying regulations establish a robust framework for disclosing foreign influence activities in Canada. The Act's central mechanism is a public registry of such activities which seeks to enhance transparency and accountability. However, we submit that several provisions, particularly those related to the scope of information required and the duration of its retention, have significant implications for solicitor-client privilege and the broader lawyer-client relationship.

Breadth of required disclosure

The information that must be recorded in the registry under the "description of the arrangement" is extremely broad, see section 5(1)(a) of the proposed regulations:

a) a description of the arrangement, including

i. its start and end dates,

ii. any compensation or other benefit that has been or is to be provided to the person by the foreign principal in relation to the arrangement,

iii. the political or governmental process to which the arrangement relates,

iv. the types of influence activities that the person has undertaken to carry out under the arrangement,

v. in the case of influence activities described in paragraphs (b) and (c) of the definition arrangement in section 2 of the Act, the target of those influence activities, for example, public office holders, groups of Canadians or persons in Canada or private or not-for-profit organizations in Canada,

vi. the details set out in subsections (2) to (4), as the case may be, in respect of the influence activities that the person has undertaken to carry out under the arrangement, and

vii. the foreign principal's stated objective under the arrangement.

[the underlined represents the greatest potential for infringing upon what is typically considered the protected lawyer-client relationship]

The obligation to record a "description of the arrangement" in the public registry is exceptionally broad. The enumerated elements which range from basic temporal details (start and end dates) to more substantive information such as compensation, associated political or governmental processes, targeted activities, and even the foreign principal's stated objective extends well beyond typical disclosure requirements.

Of particular concern is the inclusion of details that could reveal the nature and purpose of legal advice or advocacy strategies undertaken on behalf of a client. If a legal professional is deemed to be acting under an "arrangement" within the meaning of the Act, disclosures under subparagraphs (iv) through (vii) could inadvertently expose communications or strategic considerations that are ordinarily protected by solicitor-client privilege. This presents a significant risk of infringing upon a lawyer's professional obligation to maintain client confidentiality, a cornerstone of both the justice system and the rule of law.

Public registry and privilege concerns

The decision to make a portion of the registry public heightens these concerns. Canadian courts have consistently recognized that while the mere existence of a lawyer–client relationship is not ordinarily privileged, it becomes privileged where its disclosure would permit reasonable inferences about the nature of legal advice sought, the client's legal position, or litigation or regulatory strategy. Many lawyers are engaged to provide legal representation in business transactions involving regulatory approvals, enforcement risk or sensitive governmental processes. The public disclosure of the fact and purpose of the retainer can itself reveal protected legal advice.

For example, a foreign economic entity engaging a Canadian law firm to advise on an acquisition could be required to register that engagement and publicly disclose the representation. Such disclosure could effectively signal the existence and timing of a major acquisition well before any legal announcement or security filing, potentially affecting market behaviour or negotiations.

Similarly, a foreign entity retaining counsel to advise on potential regulatory enforcement or anticipated litigation could be required to register the engagement, revealing both the fact and the subject of the advice, even before proceedings have begun. That disclosure could prejudge legal positions, tip off potential adversaries, or draw premature attention from regulators or the media.

The regulations should therefore expressly recognize and accommodate such scenarios by permitting the withholding or redaction of relationship information where disclosure would, in substance, undermine solicitor-client privilege. There should be a defined mechanism for parties to object to, or prevent, the public disclosure of information based on solicitor-client privilege. This stands in sharp contrast to statutes such as the *Income Tax Act*,[1] which expressly preserve privilege and provide a front-end process for its assertion and adjudication before disclosure. At present, the only recourse would be after-the-fact judicial review, an approach the Supreme Court of Canada has repeatedly found inadequate where privilege is engaged

To preserve public trust in both the administration of justice and the transparency objective of the Act, the regulations should expressly carve out exemptions for information that falls within the scope of solicitor-client privilege or the lawyer's duty of confidentiality. A defined process for asserting privilege or seeking redactions prior to disclosure should include prior notice to the client, a statutory right to make submissions, assert privilege or object to disclosure; and a mechanism for the lawyer to suspend disclosure pending client instructions or adjudication.

Retention and ongoing intrusion

Another area of concern is the requirement that registry information be retained for 20 years following the conclusion of an arrangement. Such an extensive retention period significantly prolongs the potential for intrusion into sensitive or confidential matters. Even after any regulated activity has ceased, the enduring availability of detailed records, especially those accessible to the public, creates an ongoing risk of reputational or professional prejudice to both clients and their counsel. Consideration should be given to either limiting the retention period or establishing mechanisms for early removal or anonymization in cases where privilege, confidentiality, or privacy concerns persist.

Investigatory and enforcement provisions

The proposed regulations appear to provide limited guidance on how investigative, or enforcement powers would be exercised, particularly in circumstances where privileged materials or confidential client documents might be implicated. Any judicial authorization permitting searches, seizures or production orders should explicitly require consideration of solicitor-client privilege and provide for procedural safeguards, including the potential appointment of independent counsel to review and protect privileged information. Such safeguards align with established jurisprudence governing privilege in investigative contexts.

In addition, the CBA Sections offer an analogy to proceedings under section 38 of the *Canada Evidence Act*,[2] which provide a structured process for handling sensitive national security information. In those cases, courts conduct in camera reviews with the participation of special counsel in *ex parte* proceedings to assist the court in determining whether, and to what extent, protected national

1 R.S.C » 1985, c.1 (5th Supp)
2 R.S C. 1985, c. C-5.

security information can be disclosed or used in criminal trials. A similar mechanism could be contemplated to allow an independent, court-supervised review to determine what sensitive or privileged information must be disclosed to meet the objectives of the FITAA, while minimizing the risk of compromising solicitor-client privilege. This approach could offer a balanced model for addressing the threat of foreign interference without undermining core constitutional and professional protections.

Interaction with the duty of loyalty and representation

An additional layer of complexity arises from the lawyer's duty of loyalty to the client. The FITAA regime could, in practice, place lawyers in conflicting positions: the statutory duty to register and disclose may intersect with professional obligations not to act in ways that could compromise the client's cause or reveal confidential information. Law societies and bar associations are likely best positioned to explore these implications and propose professional guidance to help legal practitioners navigate compliance without breaching their ethical duties.

Recommendation

We would like to highlight that the United States, the United Kingdom and Australia, have all incorporated exemptions or carve-outs for legal professional services in their foreign influence registration regimes to preserve solicitor-client privilege.

In contrast, the proposed FITAA regulations contain no such exemption for legal services, placing Canada as an outlier among peer jurisdictions. We therefore recommend that the regulations include an explicit exemption for legal professional services that:

- Exempts all legal advice, litigation representation, regulatory advocacy and communications with government officials undertaken as part of traditional legal services from registration requirements; and
- Ensures compliance with Canada's constitutional protections for solicitor-client privilege and preserves lawyers' ability to fulfill their professional duties of confidentiality and loyalty to clients.

Conclusion

In summary, we support efforts expressed by the FITAA framework to advance important transparency and accountability objectives, in a manner consistent with the constitutional and professional imperatives of maintaining solicitor-client privilege and the integrity of the lawyer-client relationship. Tailored regulatory exemptions, procedural safeguards, and ongoing consultation with legal profession stakeholders would help ensure that the transparency goals of the Act do not come at the expense of these foundational legal principles. Moreover, if left unaddressed, there is a risk that Canada's approach will deter foreign investors from seeking timely Canadian legal advice and from engaging openly with Canadian regulators, thereby undermining Canada's competitiveness as a predictable

Yours truly,

(original letter signed by Julie Terrien for Jonathan Griffith and Ron Kugan)

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