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Via Email: fin.OBBO.fin@canada.ca

The Advisory Committee to the Open Banking Review/
Financial Institutions Division
The Financial Sector Policy Branch
Department of Finance Canada,
90 Elgin Street
Ottawa, ON K1A 0G5

Dear Advisory Committee Members:

Re: A Review into the Merits of Open Banking – Law Society of Ontario Submission

I am writing on behalf of the Law Society of Ontario ("Law Society") to provide written comments on the January 2019 consultation document entitled "A Review into the Merits of Open Banking."

The Law Society has had a longstanding interest in any government initiatives affecting the financial services used by Ontario lawyers and paralegals during the course of their practices. Our licensees are subject to comprehensive professional conduct obligations in relation to the handling of client monies, and the maintenance of trust accounts, particularly in the area of real estate law.

The Law Society has been an active participant in consultations held by the Competition Bureau of Canada and Payments Canada, and has made substantive submissions regarding electronic funds transfers and the modernization of the payments clearing and settlement system in Canada. We are pleased to participate in the present consultation and look forward to our continued engagement as the initiative unfolds and more details become known.

The following submission articulates the Law Society's interest in open banking in Canada and asks that the Law Society be kept apprised of any developments and future consultations. As

you will see from our submission, we are unable to articulate definitive positions in the absence of additional information and a clear understanding of how open banking would function in practice. We understand that it is early days and that the specifics of any new system would be determined following the completion of the review—assuming that the federal government decides to move forward with implementing an open banking system. Accordingly, our comments are preliminary and seek to identify areas of concern to the Law Society, provide thoughts for consideration, and request additional information.

In summary, the Law Society's positions at this time are that:

a) no financial transaction data should be disclosed to financial technology firms ("FinTechs") in an open banking system without the consent of all the parties to the transaction;
b) a discussion should be had with the Law Society about the possibility of excluding licensees' mixed trust accounts from open banking; and
c) FinTechs should be required to advise consumers that by opting into open banking, they may be agreeing to share data capable of disclosing the existence and nature of a relationship otherwise protected by duties of confidentiality.

Further, the Law Society proposes that a future payments initiation system should provide for secure, affordable, real-time transfers of funds that are final and irrevocable.

These submissions are more fully articulated below.

1. The Law Society's Role as Professional Regulator

Created by provincial legislation, the Law Society governs more than 53,000 lawyers and 9,000 paralegals in the public interest. The Law Society is mandated to ensure that the people of Ontario are served by lawyers and paralegals who meet high standards of learning, competence, and professional conduct (lawyers and paralegals are referred to collectively as "licensees").

The Law Society's by-laws, *Rules of Professional Conduct* for lawyers, and *Paralegal Rules of Conduct*—all based on the *Law Society Act*—set out the professional and ethical obligations of lawyers and paralegals in Ontario. Paramount among these obligations is a licensee's duty of confidentiality, owed to every client without exception. Licensees are required to hold in strict confidence all information concerning the business and affairs of a client acquired in the course of the professional relationship and shall not divulge any such information except in very limited circumstances.[1] Generally, the duty of confidentiality extends to the existence of the lawyer-client relationship, and particularly to the fact that the lawyer has been retained or consulted by a person about a particular matter, unless the nature of the matter requires such

[1] Section 3.3 of the *Rules of Professional Conduct*, and Rule 3.03 of the *Paralegal Rules of Conduct*.

disclosure.[2]

In addition, the Law Society's by-laws and rules set out a comprehensive regime for how lawyers and paralegals ought to deal with financial transactions and records related to client monies. For instance, the Law Society:

- requires that client monies received by licensees (including in the context of real estate transactions) be deposited into a trust account held in the name of the licensee or the licensee's firm at a regulated deposit-taking institution[3]
- regulates when and how a licensee is permitted or required to deposit and withdraw money from a trust account, including by electronic transfer[4]
    - e.g., a licensee is prohibited from withdrawing from a trust account, with respect to a client, more money than is held on behalf of that client in that trust account at that time.[5] To avoid overdrawing the account and being in breach of trust, licensees would be well advised to verify that any funds transferred electronically into their trust account are final and irrevocable before withdrawing from the account in reliance of those funds[6]
- has established rules designed to help lawyers guard against "becoming the tool or dupe of an unscrupulous client or persons associated with such a client," or "unwittingly becoming involved with a client or any other person who is engaged in criminal activity such as mortgage fraud or money laundering"[7]

New financial systems and services may have an impact on the Law Society's regime, and particularly on whether and how lawyers and paralegals discharge their professional conduct obligations with respect to financial transactions. This is a matter of significance for two reasons: first, clients' rights could be compromised if the Law Society's rules are not followed; and second, a lawyer or paralegal who violates or attempts to violate these rules may be found guilty of professional misconduct and disciplined by the Law Society Tribunal.[8]

Against this backdrop, we will proceed to set out the Law Society's preliminary comments regarding data sharing and payments initiation, for the Advisory Committee's consideration.

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[2] Commentary [5] to Rule 3.3-1 of the *Rules of Professional Conduct*.
[3] Section 7 of By-Law 9 (Financial Transactions and Records), online: https://lawsocietyontario.azureedge.net/media/lso/media/legacy/pdf/b/by-law-9-financial-transactions-records-april-27-2017.pdf [By-Law 9].
[4] See By-Law 9.
[5] Subsection 9(3) of By-Law 9.
[6] Shawn Erker, "Can you trust what's in your trust account? A brief overview of Canada's electronic payment systems" (November 19, 2018), online: https://avoidaclaim.com/2018/can-you-trust-whats-in-your-trust-account-a-brief-overview-of-canadas-electronic-payment-systems/
[7] Commentary [1] and [2] to Rule 3.2-7 of the *Rules of Professional Conduct*.
[8] See *Rules of Professional Conduct*, Rule 1.1-1; and *Paralegal Rules of Conduct*, Subrule 9.01(13).

2. The Law Society's Submission on Data Sharing

The consultation paper characterizes open banking as a new, secure way for Canadian individual and business consumers to share their financial transaction data beyond their current financial institution (to FinTechs and financial service providers), through secure online channels. The paper states that an open banking framework would allow consumers to benefit from a broader range of tailored financial products and services, such as holistic budgeting tools capable of analyzing all of a consumer's financial transactions across multiple accounts at multiple financial institutions. It also argues that open banking would increase competition in the financial sector and foster innovative, consumer-centric financial services.[9]

We understand data sharing to be the core aspect of open banking.[10] From the Law Society's perspective, data sharing in an open banking system may raise, at minimum, the questions and concerns set out below:

(a) Can financial transaction data be disclosed without the consent of all the parties to the transaction?

The consultation paper is silent on whether or not financial transaction data would be available to FinTechs in an open banking system without the consent of all the parties to the transaction.

Every financial transaction has at least two sides and some parties (including licensees) may not participate in open banking. If a client makes an electronic payment to a licensee (for a retainer, for example), and the client has opted into open banking but not the licensee, how much information would be made available to the FinTech about the transaction? Would the identity of the payee (i.e., the licensee) be disclosed as well, or would the payee need to opt into open banking before the payee's identity can be disclosed? In other words, how does a consumer's consent apply to the counterparty to a financial transaction and to any information embedded in the payment?

In discussing the right to privacy in an open banking system, McKinsey & Company has expressed the following concerns on this point:

> There exists a silent counterparty to every financial transaction conducted by that holder; does a right to privacy exist for the corresponding payor/payee? If so, the consent process becomes infinitely more complex—particularly when parties to the transaction bank with different institutions and there is no central repository of permissions granted.[11]

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[9] Department of Finance Canada, "Consultation Document: A Review into the Merits of Open Banking" (January 2019), online: https://www.fin.gc.ca/activty/consult/2019/ob-bo/pdf/obbo-report-rapport-eng.pdf [Consultation Paper].
[10] *Ibid*. at 5.
[11] Laura Brodsky & Liz Oakes, "Data sharing and open banking" McKinsey & Company (September 2017), online: https://www.mckinsey.com/industries/financial-services/our-insights/data-sharing-and-open-banking [McKinsey].

Our questions speak to some of the ways in which the confidential nature of clients' relationships with their lawyers or paralegals could be undermined. Access to consumers' financial transaction data may provide far-reaching and comprehensive insights into their lives—particularly as Payments Canada moves to upgrade all of its payments systems to the data-rich ISO 20022 messaging standard.

The ISO 20022 standard will allow payors to add more detailed payment remittance information that will travel with the funds to provide some context and indicate the purpose of the payment or other identifying information.[12] In that type of environment, "[t]he greater availability of data gives financial institutions (FIs) and FinTech firms alike insight into customers' behaviors, habits and preferences, allowing them to develop more effective tools, products and features."[13] Greater access to data will likely increase the risk of third parties obtaining confidential information about licensee-client matters.

If a client has consented to open banking for their accounts, a FinTech's ability to identify patterns in the client's data-rich transactions with the lawyer or paralegal may provide the FinTech with a window into the client's personal and legal affairs that may not otherwise be available, and which would be otherwise protected by confidentiality duties.

The Law Society submits that no financial transaction data should be disclosed to FinTechs in an open banking system without the consent of all the parties to the transaction. It also submits that sufficient clarity and transparency should exist regarding the scope and limits of consent and disclosure in an open banking system.

(b) Should mixed trust accounts be excluded from disclosure in an open banking system?

The Law Society is interested in discussing whether the special or sensitive nature of certain accounts or transactions would call for their blanket exclusion from disclosure in an open banking system. With respect to some accounts, does the public interest in protecting confidentiality outweigh any potential benefits to FinTechs' private interest in developing and selling financial tools and applications?

Mixed trust accounts are a case in point. A mixed trust account is a trust account held in the name of a licensee or a licensee's firm at a regulated deposit-taking institution. It is used by the licensee to hold client monies, retainers on account of fees for services not yet rendered or closing funds in a real estate transaction. As its name suggests, a mixed trust account contains monies that belong to many clients and that are held in trust for those clients for a variety of reasons and purposes. The monies in a mixed trust account are not the licensee's.

[12] Payments Canada Modernization, "ISO 20022," online: https://modernization.payments.ca/the-plan/iso-20022/
[13] PYMNTS, "How PSD2 And Open Banking Impact Security" (October 29, 2018), online: https://www.pymnts.com/news/security-and-risk/2018/gdpr-psd2-open-banking-data-regulation/

Arguably our licensees should be barred from opting into open banking with respect to their mixed trust accounts as doing so would constitute a breach of their duty of confidentiality. Further, we question whether disclosure of the transactions in a licensee's mixed trust account would be of any value to FinTechs, and ultimately to consumers, in light of the stated purposes of open banking.

According to the consultation paper, open banking is meant to allow FinTechs "to develop products and services that are more tailored to consumer and small business needs and preferences,"[14] such as current account comparison services, personal finance management, and easily accessible credit services.[15] It is hard to see how disclosure of multiple clients' financial transaction data from a mixed trust account could translate into financial products relevant to the licensee or the licensee's firm, as the monies do not belong to the firm or the licensee, and the trust account is primarily a regulatory vehicle to protect client monies.

The Law Society would welcome an opportunity to discuss the possibility of excluding licensees' mixed trust accounts from open banking, given the factors discussed above.

(c) Should informed consent include reference to the potential implications of disclosure to the confidentiality of a professional relationship?

The Law Society is concerned about the potential implications that disclosure of financial transaction data may have for the confidentiality of the existence of a client's relationship with a lawyer or paralegal. As noted above, the duty of confidentiality extends to the very existence of the licensee-client relationship unless the nature of the matter requires such disclosure.

The consultation paper speaks to the notion of informed consent, and states that "it would be critical that consumers are well informed and, that their consent is meaningfully and properly obtained."[16] While it is a client's prerogative to waive confidentiality, the Law Society notes that in the absence of enough information, a consumer of financial services may, by opting into open banking, inadvertently disclose financial transaction data connecting him or her to a lawyer, a mental health professional, or another professional with whom the consumer has a sensitive or confidential client relationship.

In discussing the inherent risks of data sharing in the European Union's open banking system, McKinsey & Company notes that "customer transparency and control must remain at the center of product design decisions."[17] It adds that "different data categories warrant different levels of security," with informed consent requiring "understanding the implications of sharing before approving—no small feat when the reflexive clicking of "I Agree" on an unread set of

[14] Consultation Paper, *supra* note 9 at 7.
[15] Sasidharan Chandran (Tata Consultancy Services), "Open banking: implications and risks" Financier Worldwide Magazine (July 2017), online: https://www.financierworldwide.com/open-banking-implications-and-risks/#.XFsaBVxKiUk
[16] Consultation Paper, *supra* note 9 at 13.
[17] McKinsey, *supra* note 11.

terms and conditions is standard."[18] McKinsey also notes that:

> Perhaps the most complex of these is educating end users on data permission and privacy. PSD2[19] explicitly empowers account holders with the authority to share data, removing the financial institution's role as gatekeeper. Further complicating matters, real-world evidence suggests consumers may not attach the same value and sensitivity to certain data elements that banks and their regulators do…
>
> Further questions persist regarding the duty to redact "sensitive data" in certain circumstances as well as third-party providers' obligations to delete/destroy data after a period…[20]

The Law Society submits that any informed consent requirements must include a requirement to advise consumers that: By opting into open banking, the consumer may be agreeing to share data capable of disclosing the existence and nature of a relationship otherwise protected by duties of confidentiality, including those held by lawyers and paralegals.

3. The Law Society's Submission on Payments Initiation

The consultation paper defines payments initiation as a system where "third party financial service providers can make payments on behalf of consumers and small business directly from their bank account, within their framework."[21] Known in other jurisdictions as Payment Initiation Service Providers ("PISPs"), these third-party providers offer an alternative to the use of a card or online banking.[22]

The Law Society understands payments initiation as an ancillary (and therefore optional) aspect of open banking, adopted in some jurisdictions where open banking is now a reality (e.g., United Kingdom, European Union, and Japan) but not in others (e.g., Australia).[23]

Given that the consultation paper does not provide sufficient detail about the features and mechanics of a payments initiation system in Canada, the Law Society needs more information before it can be in a position to provide meaningful comment on this aspect of the paper. As a result, the Law Society is posing a number of questions whose answers may help us determine whether PISPs could ever be used in the financial transactions in which lawyers and paralegals are typically involved:

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[18] *Id*.
[19] PSD2 is the acronym for the European Union's revised (or second) Payment Services Directive.
[20] McKinsey, *supra* note 11.
[21] Consultation Paper, *supra* note 9 at 5.
[22] Ben Rose, "Managing the risk and reward of PSD2," Fintech Weekly Magazine, online: https://www.fintechweekly.com/magazine/articles/managing-the-risk-and-reward-of-psd2
[23] Consultation Paper, *supra* note 9 at 5, 16-19.

(a) Is payments initiation meant to be a means to automate future payments?

The Law Society is interested in learning whether a PISP is envisioned to be a means to: (1) automate and make future payments (very much like the pre-authorized payment arrangements used to pay for utility bills), (2) make unique one-off payments, or (3) both.

(b) Is payments initiation meant to be used for high-value payments?

We also are interested in learning what exactly is envisioned with respect to the features and operation of a potential payments initiation system, as the consultation paper's description is quite limited and high-level. The consultation paper discusses the connection between the present consultation and Payments Canada's modernization project as follows:

> …In Canada, Payments Canada is currently working towards the modernization of the infrastructure for retail and large value payments systems. Should the Government proceed with open banking, appropriate staging and alignment with payments modernization would be undertaken. Stakeholder views are welcomed on whether payments initiation should ultimately form part of an open banking framework.[24]

Canada's payments clearing and settlement system is currently comprised of two payments systems, namely the paper-based Automated Clearing Settlement System ("ACSS") and the electronic-wire-based Large Value Transfer System ("LVTS"). As the Law Society noted in its 2011 submission to the Task Force for the Payments System Review, and again in its 2016 submission to the Competition Bureau of Canada, these systems have serious limitations that must be addressed:

> The practical reality is that there is now no certain means by which funds can be moved on a timely basis as between different parties… Whether one is attempting to verify the authenticity of certified cheques or bank drafts or attempting the use the [Large Value Transfer System] it appears that there are real barriers to effective transfer of closing funds for transactions and therefore a real impediment to completing transactions on a timely basis…[25]

While these barriers are not unique to lawyers and their clients as they are widely experienced across types of businesses and transactions, they are particularly significant in the context of real estate transactions, given their large volume and value. For example, Canadians who are buying and selling homes are affected by the reality that funds need to be available for use within very short timeframes to complete sales and purchases. As noted in our 2016 submission to the Competition Bureau, "[t]his is particularly so when the transaction is part of a chain of

[24] *Ibid*. at 5-6.

[25] Law Society of Upper Canada, "Response to Technology-led Innovation and Emerging Services in the Canadian Financial Services Sector. Competition Bureau of Canada Market Study Notice (Spring 2016)" (June 30, 2016) at 7-8, paras. 5.2 and 5.3 [2016 Submission to Competition Bureau]. See **Appendix A** to this letter.

transactions of buying and selling, all closing on the same day."[26] However, when funds moved through the paper-based ACSS "are not available for closing on a timely basis, closings are delayed and this creates additional risk that there will be a breakdown in the transactions, with consequences to the parties that can be dire."[27] Furthermore the LVTS—which lawyers have been encouraged to use whenever possible as the transactions completed through it are irrevocable—also presents challenges and limitations as "[b]ank rules, access, training, cost and competition… make LVTS inconsistently available on inconsistent terms."[28]

The Law Society expects that the current gaps in the payments clearing and settlement system will be filled by Payments Canada's modernization project, which will replace the ACSS and the LVTS with the following three systems: (1) Lynx (the new high-value payments system), (2) the Real-Time Rail or RTR (the new low-value payments system), and (3) the Automated Funds Transfer system or AFT (which will enhance the existing ACCS).[29]

Against this backdrop, questions remain about the relationship between a potential payments initiation system and Payments Canada's work. Would a payments initiation system rely on any of the three payments systems making up Payments Canada's modernization project? Or would a payments initiation system be a new, fourth standalone system to be developed in the future, in coordination with Payments Canada, alongside the three systems being developed?

Either way, the Law Society will have substantive comments to provide on the specifics of any payments initiation system, as it remains actively engaged with Payments Canada and with the Department of Finance. The Law Society's members, like those of its counterparts across Canada, use and rely on Canada's payments clearing and settlement system daily, both on their own account and, more significantly, on account of their clients, particularly with respect to economically significant residential real estate transactions.

The Law Society stated in its 2017 submission to Payments Canada that our licensees and their clients—particularly in the area of real estate law—require access to "a payment stream suitable for higher value transactions that have specific requirements, including security, accessibility, affordability, timeliness and finality of payment."[30] Given their obligations regarding trust accounts, our licensees are currently faced with very practical challenges to their ability to verify, in real time, whether funds transferred electronically into their trust accounts are final and irrevocable before withdrawing from the accounts in reliance of those funds.

Accordingly, the Law Society submits that a future payments initiation system should have, at minimum, the same features being contemplated by Payments Canada for its modernization

[26] *Ibid*. at 8, para. 5.4.
[27] *Id*.
[28] *Id*.
[29] Payments Canada Modernization, "The Plan," online: https://modernization.payments.ca/the-plan/
[30] Letter from Robert G.W. Lapper to The Honourable William F. Morneau, Mr. Stephen S. Poloz, and Mr. Gerry Gaetz (January 20, 2017) [2017 Submission to Payments Canada]. See **Appendix B** to this letter.

project. In particular, a payments initiation system should provide for secure, affordable, real-time transfers of funds that are final and irrevocable. We refer you to our previous submissions on electronic funds transfers, attached to this letter as **Appendices A and B**.

We ask that the Law Society be included in any consultations and meetings on open banking and related initiatives going forward. We also look forward to receiving further information about our questions and concerns as it becomes available.

The Law Society provides its full consent to being identified as having made a submission, and to the disclosure of this submission and its attachments in their entirety.

Thank you very much for your time and consideration. I am available to discuss this matter further at your convenience.

Sincerely,

Diana Miles
Chief Executive Officer

Enclosures: Appendix A – Law Society's 2016 Submission to Competition Bureau of Canada
Appendix B – Law Society's 2017 Submission to Payments Canada

cc The Honourable Bill Morneau, Minister of Finance, Finance Canada, Bill.Morneau@parl.gc.ca
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