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Independence of the Bar and the Prevention of Money-Laundering

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Cases Considered:

Federation of Law Societies of Canada v Canada (Attorney General) [2013 BCCA 147](#).

Introduction

On April 4, 2013 the British Columbia Court of Appeal issued its decision in *Federation of Law Societies of Canada v Canada (Attorney General)*, [2013 BCCA 147](#) which upheld the earlier decision of a chambers judge that aspects of Canada's money-laundering legislation violate section 7 of the *Charter of Rights and Freedoms* and cannot be saved under section 1.

In her initial judgment ([2011 BCSC 1270](#)) the chambers judge held that aspects of the money-laundering regime undermined the lawyer-client relationship and, in particular, eroded the solicitor-client privilege, which created an unjustified violation of section 7 (para 144). Because the alternative regime implemented by the provincial law societies was an effective alternative that had a more minimal effect on the liberty interests of clients, the money-laundering regime could not be saved under section 1. The law societies' regulation ensured "that proportionate and dissuasive criminal, civil or administrative sanctions be available for non-compliance with anti-money laundering requirements" (para 154).

In its judgment the British Columbia Court of Appeal took a somewhat different approach. It held that the problems with the regime were not that they violated solicitor-client privilege, but rather that they jeopardized the liberty interests of lawyers and clients and were inconsistent with independence of the bar, a principle of fundamental justice.

After summarizing the decision, this blog will consider the Court's use and definition of independence of the bar. I will suggest that while the Court's general explanation of what independence of the bar means is vague and overbroad, its actual application of independence to the facts is both defensible and important. Where a statute interferes with a lawyer's fulfillment of her legal duties in circumstances where the lawyer or client's life, liberty or security of the person is at issue, then that interference is properly found to violate the *Charter*.

The Decision

The federal government's attempt to regulate money laundering and terrorist financing began in 1989, but the provisions primarily at issue in the Court of Appeal decision were introduced in the form of regulations in 2007 and through legislative amendments in 2008 (paras 3 and 21). The Court of Appeal drew several conclusions about how this regime would apply to lawyers. First, it found that the regime did not apply only to lawyers "acting as financial intermediaries" (para 66)

but also to lawyers receiving or paying funds in the course of providing legal advice (para 68). Any lawyer providing legal advice must comply with the record keeping and financial transaction monitoring provisions of the legislation, and also collect and retain client information (para 69). Second, while the legislation and regulations grant some protections and exclusions to information protected by solicitor-client privilege, they also require lawyers to “record client information which is *prima facie* the subject of solicitor-client confidentiality” (para 71). Solicitor-client confidentiality “is a broad descriptive term which includes, but is not limited to, information which is protected by solicitor-client privilege” (para 71). Third, while solicitor-client privilege is protected in some aspects of the regime, it is not wholly protected with respect to others, in particular the legislation’s search and seizure provisions (para 74). To assert a claim of privilege in the event of a search or seizure the lawyer is required “to disclose the client’s last known address” (para 76). Fourth, the use of information obtained through the search and seizure provisions is not restricted to determining whether lawyers are in compliance with their obligations. Once information has been disclosed to a law enforcement agency “there is no restriction on what use may be made of that information” (para 78).

In contrast to this regime, the Federation of Law Societies and its provincial members have adopted an alternative system to prevent the use of lawyer’s accounts for the purposes of money laundering. The Federation’s system has been in fact governing these matters since injunctions were obtained preventing the application of the federal money laundering regime to lawyers, both the provisions at issue in this case (para 24) and also earlier enacted provisions (para 17). The law societies’ regime has two key features. First, it prohibits lawyers from receiving or accepting more than \$7,500 in cash in relation to a single matter except for the purposes of paying legal fees. If a lawyer receives cash payment for legal fees then any refund on those fees in excess of \$1000 must also be paid in cash (para 19). Second, lawyers are required to perform client identification and verification “by recording basic information, such as the client’s name, address, telephone number and occupation (for an individual) or business activities (for a corporation or other entity) (para 22). The law societies ensure compliance with these rules through annual reports and audits (para 23). The Court noted that the governance by the law societies significantly differed from the government’s money laundering regime because information disclosed to the law societies was subject to the “same obligation to the client respecting the disclosure of that information as the lawyer from whom the information was obtained” and is not disclosed to others.

In brief, then, the federal money laundering regime requires lawyers to collect and disclose information that is protected by solicitor-client confidentiality and to provide that information to the state, where law enforcement agencies may use it without any particular restrictions. The law societies’ regime requires lawyers to collect information, and imposes restrictions on their use of cash transactions, but it controls and restricts the use made of that information in the event it is disclosed.

The Court of Appeal held that these aspects of the money-laundering regime rendered it unconstitutional. The legislation places the liberty interests of lawyers at risk because a lawyer who does not comply with her record-keeping and client identification obligations may be liable for a fine or term of imprisonment (para 82). It places the liberty interests of non-corporate clients at risk because it requires the disclosure of confidential information from those clients to law enforcement agencies who may use that information for any purpose, “including pursuing a criminal charge against the client” (para 90). The Court noted here that the regime does protect privileged information, but that “confidential information which is not found to be privileged has no such protection” (para 88).

The risk to lawyer and client liberty is not in accordance with fundamental justice. The Court of Appeal held that both solicitor-client privilege and independence of the bar are principles of fundamental justice. That the privilege is such a principle is well-settled as a matter of law (para 103). Independence of the bar can be recognized as a principle of fundamental justice in accordance with the requirements of *R v Malmo-Levine*, [2003 SCC 74](#), which requires that a principle of fundamental justice be a principle which a consensus recognizes as “fundamental to the way in which the legal system ought fairly to operate” and is “capable of being identified with sufficient precisions so as to yield a manageable standard against which to measure deprivations of life, liberty or security of the person” (para 101).

Independence of the bar satisfies this test because it is a legal principle which “has long been recognized as a fundamental feature of a free and democratic society” (para 107) and is “an integral part of Canadian society as a whole” (para 109). It is “an element of the rule of law which is essential to the constitution of a modern democracy” (para 111). It can also be defined: “independence of the bar consists of lawyers who are free from incursions from any source, including from public authorities” (para 114).

Contrary to the chambers judge, the Court of Appeal decided that the regime did not violate solicitor-client privilege. Generally speaking the provisions of the legislation granted “sufficient protection for solicitor-client privilege” (para 118). The Court held, however, that the legislation did not respect independence of the bar. In particular, the legislation requires that a lawyer choose between satisfying her duty of loyalty to her client or complying with the terms of the legislation (para 122). It “imposes conflicting interests and corresponding obligations on the lawyer, regarding clients’ interests, state interests, and Lawyer’s liberty interests” (para 123). Ultimately, “it attempts to make lawyers the agents of the state against the interests of their clients” (para 154).

The legislation was not saved by section 1. Its objectives are pressing and substantial, and there is a rational connection between the regime and those objectives given that lawyers have been involved in money laundering in the past (para 134). When compared to the rules and requirements imposed by the law societies, however, the regime cannot be considered to create a minimal impairment on the section 7 rights. Further, the approach of the law societies is sufficient to achieve the regime’s objectives, particularly since the law societies’ approach does not prevent the state from prosecuting lawyers who engage in unlawful money laundering: the money-laundering regime “may make the gathering of evidence of such activities easier, but if they are severed or struck down, such conduct on the part of lawyers would not be excused” (para 151). Finally, the Court held that the effect of the legislation was disproportionate to the accomplishment of its objectives.

There was a concurring judgment from Justice Frankel, concurred in by Justice Gerson. Justice Frankel agreed with the result but disagreed with the position of the majority that the regime infringed on the liberty interests of clients. He acknowledged that a client could end up facing legal consequences as a result of the lawyer’s compliance with the regime, but that would also be the case if a “stock broker or financial advisor” did so (para 165). Justice Frankel rejected the idea that simply creating a document that could potentially be used in an investigation or for evidence, engaged an individual’s liberty interests; the connection between the threat to liberty and compliance with the regime was too remote (para 168).

Analysis

In its reasons the Court expresses the idea of independence of the bar in two different ways. In the first articulation, where it sets out the “principle” included in fundamental justice, the court says that independence of the bar requires that lawyers be “free from incursions from any source, including from public authorities” (para 113). In the second articulation, where it applies that principle to the facts of this case, it says that independence of the bar is violated by the money-laundering regime because it requires lawyers to be “agents of the state against the interests of their client.”

The first articulation – that lawyers must be free from any state incursion – is quite typical of judicial invocations of independence of the bar. As I put it in a recent paper, “Rhetoric and Realities: What Independence of the Bar Requires of Lawyer Regulation” [\(2012\) 45 UBC Law Rev 145](#), courts generally do not explain the relationship between independence of the bar and the ethical or legal duties of lawyers. Rather, “[i]ndependence of the bar is simply an abstract principle, like freedom, liberty, democracy, or, relatedly, the rule of law, invoked by the Court on its way to making a determination on some particular matter at issue” (at 152).

The claim that lawyers must be generally free from state interference is not accurate. All Canadian law societies exercise power granted by legislation, and are subject to judicial review in the event that they exceed that legislative authority. Further, lawyers are subject to obligations arising from other statutory schemes, as well as by virtue of judicial decisions. Under the rules of court, for example, lawyers can be required personally to pay costs where they file frivolous and vexatious motions or do not respect the process of the court. Yet we do not view the legislative empowerment of law societies, or the provisions of the rules of court, as requiring some sort of special justification because they involve a public authority determining what lawyers must do under threat of sanction; we would only require that justification if, like the money-laundering regime, the effect that they had was in some way contrary to the role that lawyers play in a free and democratic society. There is, in other words, no necessary problem with state interference with lawyers; there is only a problem where that state interference is of a particular kind.

This understanding of the actual point of independence of the bar is reflected well in the second articulation of independence of the bar, where the Court found that the money-laundering regime violated lawyer independence by making lawyers agents of the state against the interests of their clients. As I explain in the “Rhetoric” paper, the real point of independence of the bar is that state regulation of lawyer conduct ought not to discourage or inhibit lawyer advocacy for clients, and also ought not to discourage or inhibit lawyers from keeping their advocacy within the bounds of legality (at 162-163). The state can (and does) regulate what lawyers do, but that regulation must ensure that lawyers maintain their power and responsibility to facilitate the legal system’s function of achieving peaceful social cooperation in a diverse society.

That the money-laundering regime undermines lawyers’ accomplishment of their role as zealous advocates within the bounds of legality depends, though, on seeing that regime as contrary to the lawyer’s function as an advocate. Lawyers do not always act in accordance with their client’s wishes and, in some circumstances, have an obligation to take actions that may result in negative legal consequences for their client – to be in that sense agents of the state against the interests of their clients. If a client uses a lawyer’s services to accomplish a criminal scheme – to, for example, defraud a lender – the lawyer may be justified in reporting that client to authorities. The communications between the lawyer and client are not privileged because falling within the criminal communications exclusion, and are likely not confidential either (see *Understanding*

Lawyers' Ethics in Canada (Toronto: LexisNexis Canada, 2011) at 112-115). Similarly, a lawyer who receives inculpatory evidence of a crime from a client must disclose that information to the state, even though normally client property is treated as confidential. The lawyer must do so regardless of the negative effect for the client's legal interests and, if she does not, she risks being found guilty of obstruction of justice (see *R v Murray*, [2000] OJ No 2182, 48 OR (3d) 544 (SCJ)). So simply having a lawyer act in a way that furthers state interests at the client's expense does not necessarily demonstrate that the money-laundering regime interferes with the lawyer-client relationship. Making that claim requires something more.

This is where the Court's analysis of solicitor-client confidentiality comes in. The position of the Court appears to be that under the money-laundering regime information will be revealed by the lawyer that is confidential (although not privileged) and that revelation may result in negative legal consequences for the client. By revealing that information, the lawyer is compelled by statute to become an agent in the client's downfall. But, as noted, that is not a unique phenomenon, and is also not one that is inherently problematic. It is only problematic if the lawyer is an agent in the client's downfall *and* if doing so is inconsistent with the lawyer's obligations to the client. Of course normally undermining your client is totally inconsistent with the lawyer's obligations to that client, but as the examples in the previous paragraph show, it isn't always.

So what distinguishes circumstances when a lawyer ought not to undermine her client, from those where doing so is unproblematic? I would guess that there are at least two circumstances that justify a lawyer undermining a client's legal interests: first, where the client has no legal rights against the lawyer that would prevent the lawyer from doing so, or second, where the legal system imposes on the lawyer an overriding obligation to act contrary to the client's interests in particular circumstances. The first instance is demonstrated by the criminal communications example. While a lawyer may or may not have a positive duty to report the financial fraud, the effect of the lawyer being the client's dupe, and the operation of the criminal communications exclusion, means that the client has no legal right to prevent the lawyer from reporting his crime. The lawyer does not owe the client any duty that prevents reporting. Similarly, a lawyer may act for a new client in suing a former client in a matter unrelated to the earlier representation of the former client. Again, while the lawyer has some duties to former clients that outlast the representation, but those duties do not prevent an unrelated representation against that former client. Lawyers' obligations to clients are extensive but they are also legally defined, and outside those obligations lawyers may lawfully act in ways contrary to the interests of those clients (or former clients).

The second instance is demonstrated by the physical evidence rule. While normally a client may ask a lawyer to keep her property confidential, the obligations of criminal law and the law governing lawyers override that obligation where the client's property is evidence of a crime. Absent one of those circumstances – the absence of a legal duty to the client or an overriding legal obligation to act against the client's interests in the particular circumstances – the lawyer must not act contrary to the client's legal interests.

So what about the money-laundering regime? The problem must be not just that the regime involves state regulation of lawyers, and not just that the regime involves lawyers acting contrary to their client's interests. It must be that the state is requiring lawyers to act against their client's interests in a way that is inconsistent with the lawyer's duties to their clients, and is not required by any overriding legal duty applicable in the circumstances.

Extrapolating from the Court's analysis, the problem appears to be that information protected by lawyer-client confidentiality – which is not a criminal communication, e.g. – is required to be disclosed, and that disclosure occurs without any specific analysis of whether the disclosure of this particular information is legally justifiable, as is the case, for example, when a lawyer discloses evidence of a crime. The protected information is just disclosed as a matter of course, and may be passed on to law enforcement agencies.

This more detailed analysis suggests some weaknesses with the majority's reasoning, if not with its result. The reason the money-laundering regime is unconstitutional is because of the particular effect it has on the lawyer-client relationship, not simply because it is a state incursion on a lawyer's work. It requires the lawyer to disclose information he is legally obligated to protect, and it does so without demonstrating that, in the particular circumstances, that disclosure is justified.

The reasons of the minority challenge this analysis. In the minority judgment they characterize the information of the client as no different from information that the client would give to a financial advisor or any other person. If this were the case then the majority's result would be difficult to justify, and it is hard to see why the minority concurs with it. The lawyer faces a fine or imprisonment for not complying with the regime, but unless the information that the lawyer holds is in some way special, then what principle of fundamental justice does that outcome offend? It is only because the lawyer has a duty to protect that information – a special duty arising from the lawyer-client relationship that would not apply to, say, a financial advisor – that the state's threat to the lawyer offends fundamental justice.

This may suggest that my analysis is incorrect, and that by independence of the bar the majority does indeed mean to suggest that any state incursion on lawyers' work requires justification as a potential interference with lawyer independence. If so then I would suggest that the judgment is unfortunate. Lawyers serve a crucial function in the legal system, ensuring that individuals can access the rights and privileges that the law provides. Regulation (state incursions) to ensure that they fulfill that function, that they provide competent advocacy for their clients, that they protect client interests and not their own, and that their representation complies with law, is essential, and should not require special justification, even if it potentially affects a lawyer or client's liberty. Justification is necessary not when the state regulates, but when it regulates in a way that interferes with lawyers' accomplishment of their function in a free and democratic society. In those circumstances, and particularly where life, liberty or security of the person is at issue, then the regulation does indeed violate independence of the bar, and ought not to be permitted. This appears to be the specific determination made by the Court of Appeal, and it is the one that the decision ought to be cited for.

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