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Lawyers' Representation, Lawyers' Regulation and Section 7 of the *Charter*

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Case Commented On: *Attorney General (Canada) v Federation of Law Societies,* 2015 SCC 7

In *Attorney General (Canada) v. Federation of Law Societies,* 2015 SCC 7 the Supreme Court of Canada precluded the application to lawyers of certain provisions of the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*, SC 2000, c 17, and the *Proceeds of Crime (Money Laundering) and Terrorist Financing Regulations*, SOR/2002-184. The Court held that, as applied to lawyers, those provisions violated s. 7 and s. 8 of the *Charter*. The violation of s. 8 arose from the provisions' failure to protect adequately solicitor-client privilege in the context of searches permitted under the legislation. The violation of s. 7 arose because the provisions put lawyers' liberty at risk and were inconsistent with fundamental justice. Specifically, because of the "conclusion that the search aspects of the scheme inadequately protect solicitor-client privilege" (at para 105) and, for a majority of the Court, because the provisions interfered with a newly articulated principle of fundamental justice: that the state may not impose duties on lawyers that undermine a lawyer's commitment to her client's cause. The Court declined to hold that independence of the bar was a principle of fundamental justice.

The conclusion by the majority that fundamental justice prevents improper interference with lawyers' commitment to their clients is welcome. The rule of law requires legal counsel committed to protecting the ability of clients to enjoy the respect for their dignity and autonomy that the law provides (see my articles setting out this position here and here). The Court's view of the legislation as unconstitutional also appears warranted; certainly the legislation's search provisions seem plausibly to permit improper intrusions into privileged documents and information.

There are, however, some analytical deficiencies in the majority judgment. First, the Court never analyzes the question of whether the recording and retention provisions of the legislation – i.e., the provisions at issue other than the search provisions – intrude on solicitor-client privilege. The BC Court of Appeal held that they did not (*Federation of Law Societies v. Canada (Attorney General),* 2013 BCCA 147 at paras 88 and 118); the Chambers' judge held that they did (SCC decision at para 25). In its judgment the Supreme Court simply states that it does "not approach this case on the basis that all the materials that lawyers are required to obtain and retain by the Act are privileged" (at para 42). This suggests that the Court believes that some materials *may* be privileged, but also that it is unwilling to determinatively conclude that they are, or why. This makes its broader analysis of why the recording and retention provisions violate s. 7 uncertain.

Second, assuming that the Court agrees with the BC Court of Appeal (and the quote seems to suggest that it generally does, or at least that it is not disagreeing with that court), that creates some interesting complexities in its s. 8 analysis. Specifically, assuming that the recording and retention provisions do not themselves violate solicitor-client privilege, then it is at least possible to imagine that a carefully tailored search to ensure compliance with those provisions would not do so either. The Court does not consider this possibility. This suggests the Court views the legislation as creating one of two problems (or, conceivably, both): (1) that there is no way to see whether the recording and retention provisions have been complied with without more broadly intruding into the solicitor-client communications, including privileged communications; or (2) that an authority with the sort of broad powers contained in the legislation will inevitably search more widely, and potentially intrude into solicitor-client privilege, even if doing so is not necessary to ensure compliance with the reporting and retention requirements.

Unfortunately, we do not know the precise nature of the Court's concerns with the search provisions; they do not tell us whether the recording and retention provisions properly respect privilege and they do not tell us, if they do respect privilege, how the search provisions designed to enforce them nonetheless violate privilege.

Third, assuming that the Court does not agree with the BC Court of Appeal, and thinks that the recording and retention provisions could violate solicitor-client privilege it would have been helpful for them to have explained why – why some of the materials obtained are privileged even if not "all" of them are (at para 42). The scope of solicitor-client privilege is a matter of argument – how do we define the boundaries of communications for the purpose of giving/receiving legal advice? – and understanding how the reporting and retention provisions breach those boundaries would have been helpful.

Fourth, and most significantly, the Court's explanation of why the provisions of the legislation improperly interfere with the lawyer's commitment to his client's cause is thin and, frankly, unpersuasive. The Court's position is that since the profession has reached a consensus that more minimal disclosure was appropriate than did Parliament, Parliament's view must constitute an improper interference. But at no point did the Court explain how the sort of disclosure Parliament proposed would, in fact, interfere with the lawyer's commitment to her client other than because of the over-breadth of the search provisions. The position 'if it is different than what the profession thinks then it is *prima facie* excessive' seems to grant status to self-regulation of the legal profession that the Court purported to reject.

The rest of this post will summarize the Court's decision before briefly returning to these points.

The Decision

The Act and Regulations considered by the Court have two central attributes. First, they require that financial intermediaries, including lawyers "collect information in order to verify the identity of those on whose behalf they pay or receive money, keep records of the transactions, and establish internal programs to ensure compliance" (at para 2). Second, the legislation permits searches of the material that financial intermediaries "are required to collect, record and retain" (at para 2). The legislation in its disclosure requirements does not require "legal counsel to disclose any communication subject to solicitor-client privilege" (at para 19) and in its search provisions provides some protection of solicitor-client privilege, although only where a lawyer has asserted a privilege claim on the client's behalf (at para 19).

In his reasons for the majority Cromwell J. noted that none of the legislative provisions against lawyers have been enforced pending the Court's decision. Instead, lawyers have been subject to a separate regulatory regime developed by the Federation of Law Societies and adopted across the country (at para 23 - I summarized and compared those in my post on the BCCA decision in this matter, here).

For his s. 8 analysis Cromwell J. began by reviewing the provisions of the legislation. He noted that the provisions do not simply require production of information, but rather permit authorities to embark on a general examination of "records" and an inquiry "into the business and affairs of any person or entity" to ensure compliance with the legislation (at para 32). He noted that law office searches are unreasonable absent "a high level of protection for material subject to solicitor-client privilege" (at para 36). Cromwell J. rejected the Attorney General's position that a different standard applied here because this was an administrative or regulatory matter rather than a criminal one. The expectation of privacy in relation to privilege "is invariably high, regardless of the context" (at para 38) and, as well, there was no reason to distinguish this case from a "search by other law enforcement authorities" (at para 39).

Cromwell J. emphasized the broad scope of the provisions in the legislation, noting that they "give the authorized person licence to troll through vast amounts of information in the possession of lawyers" and that this creates "a very high risk that solicitor-client privilege will be lost" (at para 40). Even though he did not assume that "all" the materials obtained and retained by lawyers under the Act are privileged, the prior jurisprudence on law office searches "aims to prevent the significant risk that some privileged material will be among the records in a lawyer's office examined and seized" (at para 42). Here "there is a significant risk that at least some privileged material will be found among the documents that are the subject of the search powers" (at para 42).

The protection given to privilege by s. 64 of the legislation is insufficient to save it. It only allows privilege claims to be made by legal counsel, it does not provide for notice to the client and it does not provide for "independent legal intervention" when notification of the client is not feasible (at para 50). It also does not allow a judge "to assess the claim of privilege on his or her own motion" (at para 52). Some searches under the legislation "do not require prior judicial authorization" (at para 54) and it only stops review of documents after the lawyer asserts a privilege claim (at para 55). Finally, it requires the lawyer to name the client when asserting privilege and, in some instances, the name of a client may itself be privileged (at para 55).

Cromwell J. found that these deficiencies amounted to a violation of s. 8 that could not be saved under s. 1 because they failed the minimal impairment test (at para 61).

In terms of s. 7 Cromwell J. found that the provisions "engage the liberty interests of lawyers" given that they are "liable to prosecution and impairment" if they fail to comply with them (at para 71). The Court did not consider whether the liberty interests of clients were also engaged, finding that this would not make any analytical difference (at para 72).

Cromwell J. further found that the risk to lawyers' liberty interests was not consistent with fundamental justice given the violations of s. 8 and the fact that solicitor-client privilege is a principle of fundamental justice (at para 73). He also, held, however, that the provisions violate fundamental justice because they are inconsistent with a new principle of fundamental justice, namely, that the state may not improperly interfere with a lawyer's commitment to the client's cause (at para 77).

Cromwell J. declined to consider whether lawyers' freedom "from incursions from any source, including public authorities" – i.e., self-regulation – was a principle of fundamental justice. In a framing similar to that set out in my earlier blog post on this case, he noted that independence of the bar as described in the earlier ruling by the BC Court of Appeal could be understood in that broader sense and also in a more focused way, as reflecting "concern about state interference with the lawyer's commitment to the client's cause" (at para 77). Cromwell J. held that the relevant principle here was the narrower one, and the broader framing did not need to be assessed (at para 80).

That narrower principle, Cromwell J. held, should be given constitutional status, "as a principle of fundamental justice that the state cannot impose duties on lawyers that undermine their duty of commitment to their clients' causes" (at para 84). The duty of commitment to a client's cause has been recognized by the courts (at para 91) and demonstrated to be "sufficiently precise to enable the courts to apply it in widely divergent fact situations" (at para 92). It is not unlimited, and does not allow the lawyer to "assert claims that he or she knows are unfounded or to present evidence that he or she knows to be false or to help the client to commit a crime" (at para 93). It is also broadly recognized in case law and in international documents, and is "essential to maintain public confidence in the administration of justice" (at para 97).

The legislation is inconsistent with this principle of fundamental justice because it imposes standards on lawyers beyond those that the profession itself has recognized as "necessary for effective and ethical representation of clients" (at para 107). While the profession's standards "cannot dictate to Parliament what the public interest requires or set the constitutional parameters for legislation" they "provide evidence of a strong consensus in the profession as to what ethical practice in relation to these issues requires" (at para 108). And the "legislation requires lawyers to gather and retain considerably more information than the profession thinks is needed for ethical and effective client representation" (at para 108). Further, the lawyer gathers that information knowing that the search and seizure provisions do not adequately protect solicitor-client privilege (at para 108), which further undermines the ability of that lawyer to provide committed representation; a "reasonable and informed person" would view this the same way (at para 109).

This does not mean, Cromwell J. stated, that lawyers are "above the law"; constitutional problems only arise where the state has imposed duties that undermine the lawyer's "ability to comply with his or her duty of commitment to the client's cause" (at para 111).

In concurring reasons Chief Justice McLachlin and Moldaver J. agreed with the result based on s. 8 and s. 7's protection of solicitor-client privilege. They were of the view, however, that commitment to a client's cause is insufficiently certain "to constitute a principle of fundamental justice" (at para 119).

Analysis

My main issues with the judgment are largely set out above. In essence, the unwillingness of either the majority or concurring reasons to explain whether the retention and recording provisions violate solicitor-client privilege and, if so, how and why, renders the judgment unclear. It is not clear whether there is an independent s. 7 violation from the reporting and retention provisions and on what basis that violation is made out. It is also not clear whether the issue in s. 8 is a risk of over-zealous searching or inevitable violations of privilege because of the information relevant to whether a lawyer has complied with the recording and retention provisions. We do know that the legislation does not adequately respond if solicitor-client privilege is at risk, but we do not know whether that privilege is at risk because an authority is searching in a lawyer's office, or because of the nature of the documents that the authority would inevitably be looking for to determine compliance with the recording and retention aspects of the legislative scheme. That is not to say that no s. 8 violation occurs here – indeed, on either of these grounds it seems safe to say that it does – but the judgment's scope and meaning is unclear absent some more thorough explanation.

I also want to reiterate how thin and unpersuasive is the Court's analysis of the legislation's breach of the new principle of fundamental justice. The Court tells us (a) the legislation requires more of lawyers than does the Federation of Law Societies' requirements; (b) the Federation's position reflects a professional consensus on what ethical and effective representation requires; (c) that professional consensus is not determinative; but (d) the legislation is unconstitutional because it is inconsistent with that consensus. There is no analysis of why the greater information required by Parliament would interfere with a lawyer's representation, no detailed explanation of what that information is, or how the gathering of it could be problematic. The clearest point made by the Court is with respect to the search and seizure provisions but those provisions can be struck without striking the whole. Yet the Court never explains why that is not – or should not be – an option in order to protect a lawyer's commitment to her client's cause.

As noted earlier, I do welcome the majority's recognition of the centrality of lawyers being committed to their clients' causes; it is a recognition I have argued for. It is unfortunate that in this case it was not coupled with a more rigorous explanation of the meaning of that principle for the articulation of rules governing lawyers' conduct when representing their clients. The Court is right not to have recognized self-regulation as a constitutional principle, and to have focused instead on protection of client representation. But that approach required the Court to itself consider what protection of lawyers' representation of clients' required, not to defer to the judgment of the profession without any independent analysis of why the profession got it right.

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