

Federation of Law Societies of Canada (FLSC) v Canada: Lawyers exempt from obligation under proceeds of crime law

Introduction

On April 4, 2013, the British Columbia Court of Appeal released its judgment on whether lawyers and law firms are obliged to keep records of clients who may be involved in money laundering and terrorist funding.^[1] The Court considered whether the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act* and related regulation were constitutional.^[2] The Court ruled that the legislation and related regulation (referred to as “the Regime” by the Court) were unconstitutional for violating the lawyers’ and clients’ right to liberty under the *Canadian Charter of Rights and Freedoms (Charter)*.^[3]

The decision reaffirmed that the confidentiality of a solicitor-client relationship and the independence of the legal profession from external influence are fundamental principles of Canada’s legal system.^[4] The Court ruled that these principles are essential to a lawyer’s ability to deliver impartial and efficient legal service. The following Featured Court Ruling provides a summary and analysis of this decision.

Facts

In 1989, the Canadian Government introduced the *Proceeds of Crime and Terrorist Financing Act* to criminalize money laundering and terrorist funding activities.^[5] Along with the relevant regulation enabled by the Act in 2002, the legislation required certain individuals or groups to report suspicious transactions and large cross-border movements of currency to the Federal Government.

In 2008, Parliament amended several sections of the Regime, including section 5 of the *Proceeds of Crime and Terrorist Financing Act* and section 33.3 of the relevant regulation.^[6] Under sections 5(i) and (j) of the Act, “persons and entities engaged in certain businesses, professions or activities described in regulations made under sections 73(1)(a) and (b) of the Act” had the following obligations: record keeping, verifying identity, reporting of suspicious transactions, and registration with the Federal Government’s financial intelligence unit.^[7] This included lawyers and law firms by operation of section 33.3 of the relevant regulation.^[8] The amendment thus expanded the Regime’s scope of application to require lawyers and law firms to collect information of clients potentially involved in money laundering or terrorist funding. These records were to be made available to the Federal Government’s financial intelligence unit.^[9]

In response to the new duties, the Federation of Law Societies of Canada (FLSC), the coordinating body for Canada's 14 provincial and territorial law societies, filed a petition challenging the constitutionality of the amendment.^[10] The FLSC claimed that the Regime's application to lawyers and law firms and the requirement to collect client information for state use failed to respect solicitor-client privilege, which is protected under section 7 of the *Charter*.^[11]

Procedural History

On September 27, 2011, the British Columbia Supreme Court ruled that the portions of the Regime requiring lawyers and law firms to keep information of clients potentially involved in money laundering or terrorist funding were unconstitutional.^[12] The Court ruled that the Regime undermined two key principles of fundamental justice: solicitor-client privilege and the independence of the bar.^[13] The Regime also breached lawyers' and clients' right to liberty under [section 7](#) of the *Charter*. The Court found that the unconstitutional portions of the Regime were not reasonable and permissible limits on the section 7 *Charter* right.^[14]

As a result, the British Columbia Supreme Court ordered the following remedy which relieved lawyers and law firms from obligation under the Regime to keep client records, verify client identify, report suspicious transactions and register with financial intelligence unit:^[15]

- Sections 5(i), 5(j), 62, 63, and 63.1 of the *Act* should not apply to lawyers and law firms.
- Section 11.1 of the regulation should have the words "legal counsel or legal firm" severed.
- Section 64 of the *Act* and sections 33.3, 33.4, 33.5, and 59.4 of the regulation should be struck down in their entirety.

The Attorney General of Canada, representing the Crown, appealed the British Columbia Supreme Court decision to the British Columbia Court of Appeal arguing that the Regime was constitutional.

Issues

1. Does the Regime violate section 7 of the *Charter*?^[16]
 - i) What are the duties of lawyers and law firms under the Regime?
 - ii) Does the Regime violate lawyers' and clients' right to liberty under section 7?^[17]
 - iii) Is the violation made in accordance with the principles of fundamental justice under section 7?^[18]
 - a. Solicitor-client privilege
 - b. Independence of the bar

2. If the Regime violates section 7 of the *Charter*, can the violation be justified?[19]
3. If the violation is not justified, what should be the appropriate effect of the Regime?

Decision

The Court of Appeal dismissed the appeal and upheld the British Columbia Supreme Court decision. The Court found that several portions of the Regime imposed legal duties on lawyers and law firms that breached section 7 of the *Charter*.[\[20\]](#) The breach failed to respect two principles of fundamental justice: solicitor-client privilege and the independence of the bar. The Court found that the unconstitutional provisions were not justifiable under section 1 of the *Charter*.[\[21\]](#) The Court upheld the British Columbia Supreme Court decision to exclude lawyers and law firms from the Regime.

Court's Analysis

1. Does the Regime violate section 7 of the *Charter*?

i) What are the duties of lawyers and law firms under the Regime?

The Court found that the Regime imposed a duty on all lawyers who receive or pay funds on behalf of a client to keep records that can be used by the Government. This duty applied whether or not lawyers were providing legal services. As a result, keeping records for state use became a precondition for giving legal advice. Moreover, the Court found that the use of information was not restricted solely to the purpose of ensuring compliance by the lawyers. Instead, client information made available to the Government could be used for any purpose in accordance with the Regime, such as pursuing a criminal charge against the client.[\[22\]](#)

ii) Does the Regime violate lawyers' and clients' right to liberty under section 7?

Section 7 of the *Charter* guarantees everyone the right to liberty. The right to liberty means that people cannot be physically held against their will without due process. As a general rule, imprisonment of a person violates the right to liberty.[\[23\]](#)

The Court found that the Regime violated both lawyers' and clients' right to liberty guaranteed in section 7 of the *Charter*. Lawyers' right to liberty was violated because their failure to comply with the Regime could result in a fine or imprisonment.[\[24\]](#) Clients' right to liberty was violated because the Regime allowed the Federal Government to access the client's confidential information that is otherwise protected by solicitor-client privilege. As a result, depending on the type of information accessed, criminal charges could be brought against clients and lead to imprisonment.[\[25\]](#)

iii) Is the violation made in accordance with the principles of fundamental justice?

Under section 7 of the *Charter*, the Government's breach of a person's right to liberty may be justified if it is made in accordance with the principles of fundamental justice.[\[26\]](#) To establish that a principle meets the threshold required to be a principle of fundamental justice, the claimant must demonstrate three components:

(1) there is a legal principle;

(2) there is a consensus that the rule or principle is fundamental to the way in which the legal system ought fairly to operate; and

(3) the principle is capable of being identified with sufficient precision so as to yield a manageable standard against which to measure deprivations of life, liberty or security of the person.[\[27\]](#)

a. Solicitor-client privilege

Solicitor-client privilege is a principle of fundamental justice recognized by the courts.[\[28\]](#) It imposes a duty on lawyers to keep the client's information confidential thus ensuring that a client make full and frank disclosure to a lawyer without the fear of that information becoming available to third persons. The only exception to this privilege is when the government can demonstrate that accessing client information through the lawyer is "absolutely necessary".[\[29\]](#) For example, in *Lavallee v Canada (AG)*, the Supreme Court of Canada stated, "even where public safety is at stake, there must be a clear and imminent risk of serious bodily harm or death to an identifiable person or group before solicitor-client privilege can be compromised".[\[30\]](#)

Contrary to the British Columbia Supreme Court's decision, the British Columbia Court of Appeal ruled that the Regime did not intrude on solicitor-client privilege. The Court of Appeal stated that there was sufficient protection for solicitor-client privilege in the Regime. Therefore, the Regime's violation of section 7 could be justified since the violation was made in accordance with solicitor-client privilege (principle of fundamental justice).

b. Independence of the bar

The Court of Appeal directed greater focus to another principle of fundamental justice - the independence of the bar. Independence of the legal profession from external interference, including interference from a public authority, enables lawyers to provide impartial legal services to clients. It is one of the hallmarks of a free and democratic society that satisfies the three components of the principle of fundamental justice.[\[31\]](#) However, the Regime forced lawyers to manage conflicting interests between clients and the Government. Hence, contrary to its finding on solicitor-client privilege, the Court held that the Regime undermined the independence of the bar in a manner that was inconsistent with the principles of fundamental justice.[\[32\]](#)

2. If the Regime violates section 7 of the *Charter*, can the violation be justified?

When a government action or legislation violates a *Charter* right, the court considers whether the violation is justified under section 1 of the *Charter*.[\[33\]](#) Under section 1, the government provides reasons why its legislation or action is justified in violating a *Charter* right and the court examines these reasons. In this case, the Court ruled that the Regime's violation of section 7 of the *Charter* was not justifiable under section 1 of the *Charter*. In other words, the legislation and the regulation were not deemed reasonable

and justifiable in a free and democratic society.[\[34\]](#)

For the section 1 analysis, the courts apply the two-part test which was established in *R v Oakes*.[\[35\]](#)

The first part examines whether the government action violating the *Charter* right has an objective relating to concerns which are pressing and substantial in a free and democratic society. In this case, the Court accepted the Attorney General's argument that some clients may employ lawyers to perform financial transactions based on the belief that solicitor-client privilege would prevent the disclosure of transaction details even if done for an illegal purpose. Therefore, the Court held that the Regime's purpose of combating money laundering and terrorist funding activities addressed a pressing and substantial concern.[\[36\]](#)

The second part examines whether the purpose of the government action or legislation is proportional to the effect of limiting the *Charter* right. The Court found that the Regime's purpose was not proportional to its effect of limiting the section 7 *Charter* right. The Court held that the Regime imposed a duty on lawyers to act as agents of the Federal Government contrary to the interest of their clients. This duty impaired the clients' and lawyers' section 7 right beyond the minimal level permitted under section 1 of the *Charter*. Moreover, the FLSC already had existing anti-money laundering regulations similar to the relevant provisions in the Regime. The Court ruled that the degree of the Regime's violation of the *Charter* right was disproportionate to its objective.[\[37\]](#)

3. If the violation is not justified, what should be the appropriate effect of the Regime?

The Court upheld the British Columbia Supreme Court's decision to exclude lawyers and law firms from the Regime. The Court ordered the amendment of the Regime as follows:

- Sections 5(i), 5(j), 62, 63, and 63.1 of the *Act* would not apply to lawyers and law firms.
- Section 11.1 of the regulation had the words "legal counsel or legal firm" severed.
- Section 64 of the *Act* and sections 33.3, 33.4, 33.5, and 59.4 of the regulation were struck down in their entirety.[\[38\]](#)

As a result, lawyers and law firms were relieved from obligation under the Regime to keep client records, verify client identity, report suspicious transactions and register with the financial intelligence unit.

Significance of the Ruling

The exclusion of lawyers and law firms from the Regime has two positive effects. First, clients can disclose confidential information to their lawyers with the confidence that it will not become available to Government agencies for investigatory purposes. Second, lawyers can provide impartial, comprehensive, and effective legal services because they no longer

face conflicting interests and obligations with respect to their client and the Government.

For the FLSC, protecting solicitor-client privilege and retaining the independence of the bar are fundamental. Therefore, the Court of Appeal's reaffirmation of those two principles of fundamental justice was a major victory for the FLSC. Nevertheless, the decision does not relieve lawyers and law firms from the ongoing obligation to comply with the FLSC's anti-money laundering regulations.

[1] *Federation of Law Societies of Canada v Canada (AG)*, 2013 BCCA 147 <<http://www.canlii.org/en/bc/bcca/doc/2013/2013bcca147/2013bcca147.html>>.

[2] *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*, SC 2000, c 17 <<http://canlii.ca/en/ca/laws/stat/sc-2000-c-17/latest/sc-2000-c-17.html>>; *Proceeds of Crime (Money Laundering) and Terrorist Financing Regulation*, SOR/2002-184 <<http://canlii.ca/en/ca/laws/regu/sor-2002-184/latest/sor-2002-184.html>>; *FLSC*, *supra* note 1.

[3] *Canadian Charter of Rights and Freedoms*, s 7, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11 <<http://laws-lois.justice.gc.ca/eng/const/page-15.html>> (“[e]veryone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice” s 7).

[4] *Reference re Section 94(2) of the Motor Vehicle Act*, [1985] 2 SCR 486 at para 31 <<http://canlii.ca/en/ca/scc/doc/1985/1985canlii81/1985canlii81.html>> (principles of fundamental justice are basic tenets of our legal system which are fundamental to its fair operation).

[5] *Proceeds of Crime Act*, *supra* note 2; *Proceeds of Crime Regulation*, *supra* note 2; *Factsheet: The IMF and the Fight Against Money Laundering and the Financing of Terrorism*, online: International Monetary Fund <<https://www.imf.org/external/np/exr/facts/aml.htm>>; Money laundering is a process where the income generated by criminal activity is put through numerous transactions to become integrated into the legitimate financial system and appear legal. Financing terrorism involves raising and managing funds to support terrorist activities. Both money laundering and terrorist financing are serious threats to the security and stability of a country.

[6] *FLSC*, *supra* note 1 at para 3.

[7] *Proceeds of Crime Act*, *supra* note 2, ss 5(i), 5(j); Financial intelligence unit refers to “Financial Transactions and Reports Analysis Centre of Canada” (“FINTRAC”).

[8] *Proceeds of Crime Regulation*, *supra* note 2, s 33.3.

[9] Other duties imposed on lawyers and law firms include client identification, verification,

record keeping of suspicious financial transactions, establishing an internal program to promote compliance with the federal anti-money laundering regime, and providing information to law enforcement officials who are investigating proceeds from criminal activities.

[10] Federation of Law Societies of Canada is a national body coordinating fourteen provincial and territorial governing bodies of legal professions: Law Society of British Columbia, Law Society of Alberta, Law Society of Saskatchewan, Law Society of Manitoba, Law Society of Upper Canada, Barreau du Quebec, Chambre des notaires du Quebec, Law Society of New Brunswick, Nova Scotia Barristers' Society, Law Society of Prince Edward Island, Law Society of Newfoundland and Labrador, Law Society of Yukon, Law Society of the Northwest Territories, Law Society of Nunavut.

[11] *FAQ about solicitor-client privilege and confidentiality*, online: Canadian Bar Association

<<http://www.cba.org/cba/activities/PDF/Privilege%20FAQ%20Eng%20-%20final.pdf>> (solicitor-client privilege is a rule where an individual's communication with the lawyer cannot be made available to a third party so as to be used against the individual).

[12] *Federation of Law Societies of Canada v Canada (AG)*, 2011 BCSC 1270 <<http://www.canlii.org/en/bc/bcsc/doc/2011/2011bcsc1270/2011bcsc1270.html>>.

[13] *Motor Vehicle Act*, *supra* note 4.

[14] *Charter*, *supra* note 3, s 1 (“[t]he *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society” s 1).

[15] *FLSC*, *supra* note 1 at para 42; *Proceeds of Crime Act*, *supra* note 2, ss 5(i), 5(j), 62, 63, 63.1; *Proceeds of Crime Regulation*, *supra* note 2, ss 11.1, 33.3, 33.4, 33.5, 59.4.

[16] *Charter*, *supra* note 3, s 7.

[17] *Ibid*.

[18] *Ibid*.

[19] *Ibid*, ss 1, 7.

[20] *Ibid*, s 7.

[21] *Ibid*, s 1.

[22] *FLSC*, *supra* note 1.

[23] *Charter*, *supra* note 3; *Motor Vehicle Act*, *supra* note 4.

[24] *Proceeds of Crime Act*, *supra* note 2.

[25] *FLSC*, *supra* note 1 at para 88.

[26] *Motor Vehicle Act*, *supra* note 4.

[27] *R v Malmo-Levine*, 2003 SCC 74
<<http://canlii.ca/en/ca/scc/doc/2003/2003scc74/2003scc74.html>>.

[28] *Solosky v The Queen*, [1980] 1 SCR 821
<<http://canlii.ca/en/ca/scc/doc/1979/1979canlii9/1979canlii9.html>>.

[29] *Lavallee, Rackel & Heintz v Canada (AG)*, 2002 SCC 61
<<http://canlii.ca/en/ca/scc/doc/2002/2002scc61/2002scc61.html>>.

[30] *Ibid* at para 37.

[31] *Malmo-Levine*, *supra* note 27.

[32] *FLSC*, *supra* note 1 at para 113.

[33] *Charter*, *supra* note 3, s 1.

[34] *Ibid*, *supra* note 3, ss 1, 7.

[35] *R v Oakes*, [1986] 1 SCR 103
<<http://www.canlii.org/en/ca/scc/doc/1986/1986canlii46/1986canlii46.html>>.

[36] *FLSC*, *supra* note 1 at para 130.

[37] *Ibid*, *supra* note 1 at para 159.

[38] *Ibid*, *supra* note 1 at paras 42, 161; *Proceeds of Crime Act*, *supra* note 2, ss 5(i), 5(j), 62, 63, 63.1; *Proceeds of Crime Regulation*, *supra* note 2, ss 11.1, 33.3, 33.4, 33.5, 59.4.