

# SUPREME COURT OF CANADA UPHOLDS SOLICITOR-CLIENT PRIVILEGE SETTling A 15 YEAR DISPUTE

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On February 13, 2015 the Supreme Court of Canada ("**SCC**") released a ruling in *Canada (Attorney General) v. Federation of Law Societies of Canada* ending a 15 year battle between Canadian lawyers and the federal government with respect to the ability of the Financial Transactions and Reports Analysis Centre of Canada ("**FINTRAC**") to, among other things, search and seize files from lawyers' offices without a warrant and hand out penalties to lawyers for non-compliance such as a fine of up to \$500,000 or 5 years in jail, or both.

FINTRAC is a Canadian administrative financial intelligence unit that operates independently from law enforcement agencies. It is mandated to facilitate the detection, prevention and deterrence of money laundering and terrorist financing by collecting and analyzing information, and disclosing that information, under certain conditions, to law enforcement agencies. FINTRAC derives its authority from the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act* which came into force in 2000 (the "Act") and the 2001 *Proceeds of Crime (Money Laundering) and Terrorist Financing Suspicious Transaction Reporting Regulations* (the "**Regulations**", and together with the Act, the "**Legislation**").

In 2008, the Legislation was amended to require that certain persons, including lawyers and notaries in the province of Québec, take on obligations including collecting information of clients potentially involved in money laundering or terrorist funding and providing such information to FINTRAC.

In response, the Federation of Law Societies of Canada launched a constitutional challenge against the Legislation on behalf of the 14 self-governing bodies that oversee lawyers in Canada arguing that its provisions threaten solicitor-client privilege. In 2010, the Federation and the Attorney General of Canada agreed to a consent order exempting legal counsel and law firms from the amendments pending determination of the proceedings.

On September 27, 2011, the British Columbia Supreme Court ruled that the portions of the Legislation that applied to lawyers, law firms and Québec notaries were unconstitutional and granted an order severing and striking down the impugned provisions.

On appeal by the Attorney General, the British Columbia Court of Appeal upheld the trial judge's decision. In

reviewing the Legislation, the court found that confidential client information obtained by FINTRAC may be disclosed to law enforcement for the purpose of ensuring lawyer compliance with the Legislation and may then be used by the law enforcement agency for any purpose, including pursuing a criminal charge against the client. The court held that this regime engages the liberty interests of both clients and lawyers in a manner which does not accord with the principles of fundamental justice pursuant to section 7 of the *Charter of Rights and Freedoms* and cannot be saved by section 1 of the Charter.

At the SCC level, the analysis focused on the section 8 Charter right to be free of unreasonable searches and seizures. The SCC held that the search provisions in the Legislation do not provide the constitutionally required protection for solicitor-client privilege and that such infringement cannot be saved by section 1 of the Charter, namely because there are other, less drastic means of pursuing the objectives of combating money laundering and terrorist financing.

In addition, the SCC identified a lawyer's duty of committed representation as a new principle of fundamental justice which was also infringed by the Legislation.

To remedy these infringements, the SCC declared section 64 of the Act of no force or effect and read down sections 62, 63 and 63.1 so that they do not apply to documents in the possession of legal counsel or in law office premises. Similarly, sections 33.3, 33.4, 33.5, and 59.4 of the Regulations were declared of no force and effect and section 11.1 read down so that it does not apply to documents in the possession of legal counsel or in law office premises.

This decision represents a long-awaited victory for lawyers who can continue to represent their clients without fear of being used as an agent of the state. Clients can rest easy knowing that solicitor-client privilege and a lawyer's duty of committed representation is protected by our highest court. However, the legislation will continue to apply to financial institutions, accountants and real estate firms.

by Darcy Ammerman and Pat Forgione

### **A Cautionary Note**

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

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