THE SUPREME COURT FINDS THAT CERTAIN SEARCH AND PRODUCTION PROVISIONS OF ANTI-MONEY LAUNDERING AND ANTI-TERRORIST LEGISLATION ARE INAPPLICABLE TO LEGAL COUNSEL

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On February 13, 2015, the Supreme Court of Canada reiterated that in Canada, the legal professional privilege must remain nearly absolute, and recognized as a principle of fundamental justice that the government cannot impose duties on lawyers that undermine their duty of commitment to their client.[1]

The Supreme Court struck down certain search and production provisions of anti-money laundering and anti-terrorist financing legislation[2] to the extent that they apply to lawyers on the basis that they violate ss. 7 and 8 of the Canadian *Charter of human right and freedoms*.[3] The sections of the Act and Regulations were declared unconstitutional on the basis that they violate both the protection against unreasonable searches and seizures and the right to liberty in accordance with the principles of fundamental justice.

Canada's anti-money laundering and anti-terrorist legislation requires financial intermediaries, including lawyers, to collect, record, retain and verify certain information regarding, *inter alia*, the identity of their clients, funds received from them and corporate and trust ownership, control and structure. The legislative provisions, whose constitutionality was challenged by the Federation of Law Societies of Canada, permit the Financial Transactions and Reports Analysis Centre of Canada ("**FINTRAC**") to perform warrantless searches of premises other than a dwelling-house to examine records required under the Act and use any computer and system for that purpose. The same powers are granted to FINTRAC for searches of dwelling-houses, however, a warrant has to be obtained beforehand. FINTRAC can also serve a notice to a person subject to an inspection to require the provision of information relevant to the administration of the Act.

While the provisions of the Act do provide some protection of the solicitor-client privilege by granting a reasonable time to make a solicitor-client privilege claim before examination or copying of the material, the Supreme Court found that such protection fell short of the high-level protection required for material subject to solicitor-client privilege. In light of this conclusion, the Supreme Court concluded that the search powers

under the impugned provisions of the Act "constitute a very significant limitation of the right to be free of unreasonable searches and seizures."[4]

Interestingly, the Supreme Court observed that information subject to solicitor-client privilege should not be more vulnerable in the course of a search and seizure by FINTRAC than they would be for a search and seizure conducted by any other enforcement authority. In a competition law context, this would mean that searches and seizures performed by the Competition Bureau are subject to the same high-level protection of the solicitor-client privilege.

As the Supreme Court reiterated, the existence of a violation of the right of liberty, life or security under s. 7 of the Charter contemplates a two-pronged test. First, there must be a limitation of the liberty, life or security interest of the person and second, this limitation must be contrary to a principle of fundamental justice. For the first part of the analysis, since the regime imposes penal sanctions for failure to comply with the Act, the Supreme Court held that it undisputedly limited the lawyers' liberty interest under s. 7 of the Charter.

The core of the Supreme Court's analysis rested on the second part, that is whether the limitation of the liberty interest was contrary to a principle of fundamental justice. The Federation of Law Societies of Canada argued that the provisions violated the right to liberty in a way contrary to the fundamental principle of the "independence of the bar". The respondent and the interveners maintained that the legislative provisions violated this principle by allowing the government to directly interfere in the way in which the lawyer delivers legal services and by requiring the lawyer to become "an archive for the use of the prosecution",[5] thus undermining the lawyer-client trust at the foundation of the solicitor-client relationship.

The Supreme Court understood that there are two versions of that principle, namely a broad one according to which lawyers "are free from incursions from any source, including from public authorities" and a narrow one, which relates to the interference of the government with the lawyers' commitment to their clients' cause. The Supreme Court elected to apply the latter in this case. Contrary to what the Attorney General argued, the Supreme Court found that this principle was sufficiently precise "to provide a workable standard in that it can be applied in a manner that provides guidance as to the appropriate result"[6] and that there was "overwhelming evidence of a strong and widespread consensus"[7] concerning its existence.

The Supreme Court concluded that in effect, the information collection and record-holding scheme of the legislation deprived lawyers of their right to liberty in a way that is not in accordance with this principle, by requiring lawyers to hold more records than their profession believe is necessary for the effective and ethical representation of their clients, the whole in the knowledge that such records are not sufficiently protected against searches and seizures.

In the words of the Supreme Court, "[c]lients would thus reasonably perceive that lawyers were, at least in part,

acting on behalf of the state in collecting and retaining this information in circumstances in which privileged information might well be disclosed to the state without the client's consent."8 The Supreme Court agreed with the lower courts that the violations are not demonstrably justified in a free and democratic society under s. 1 of the Charter.

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1 Canada (Attorney General) v. Federation of Law Societies of Canada, 2015 SCC 7.

2 Namely, ss. 62, 63 and 63.1 of the Proceeds of Crime (Money Laundering) and Terrorist Financing Act (S.C. 2000, c. 17) (the "Act"), to the extent that they apply to law firms and legal counsel, and s. 64 thereof. Sections 33.3, 33.4 and 59.4 of the Proceeds of Crime (Money Laundering) and Terrorist Financing Regulations (SOR/2002-184) (the "Regulations"), as well as s. 11.1, to the extent that it applies to law firms and legal counsel, were also declared to infringe the Charter.

3 The Constitution Act, 1982, Schedule B to the Canada Act 1982 (UK), 1982, c 11 (the "Charter").

4 Paragraph 57 of the decision.

5 Paragraph 75 of the decision.

6 Paragraph 92 of the decision.

7 Paragraph 102 of the decision.

8 Paragraph 109 of the decision.

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.