Federation of Law Societies of Canada

Fédération des ordres professionnels de juristes du Canada

Submission to the Standing Senate Committee on Banking, Trade and Commerce in Respect of Bill C-4 (a second Act to implement certain provisions of the budget tabled in Parliament on March 21, 2013 and other measures)

Federation of Law Societies of Canada

Ottawa, November 26, 2013

I. INTRODUCTION

1. The Federation of Law Societies of Canada (the "Federation") is the national coordinating body of the 14 provincial and territorial governing bodies of the legal profession in Canada. Our member law societies are charged with the responsibility of regulating Canada's 100,000 lawyers and 4,000 Quebec notaries in the public interest. The Federation is a leading voice on a wide range of issues of national and international importance involving justice and regulatory matters critical to the protection of the public. The Federation appreciates the opportunity to contribute to this Committee's review of Divisions 2, 3, 9, and 13 of Part 3 of Bill C-4, (A second Act to implement certain provisions of the budget tabled in Parliament on March 21, 2013 and other measures ("Bill C-4" or "the Bill").

2. The Federation's submission is limited to the proposal contained in Division 13 of Bill C-4 to amend Section 11 of the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act* (the "Act") to expand protection for communications covered by solicitor-client privilege (section 279 of Bill C-4).

3. The Federation supports Canada's efforts to fight money laundering and terrorist financing. The Federation recognizes the importance of the objectives of the Act and concurs with its basic purpose. Initiatives to fight these crimes, which include fulfillment of Canada's commitments internationally as a result of its membership in the Financial Action Task Force[1], must be accomplished within the framework of the values and constitutional principles on which Canadian society rests. This includes the rule of law, and within that, the right of individuals to an independent judiciary and independent legal counsel. As the authority to regulate the legal profession in Canada rests with the provincial and territorial law societies, the public interest in addressing money laundering and terrorist financing as it relates to the legal profession is best served by having these regulators address any risks that the legal profession may present.

[1] The Financial Action Task Force ("FATF"), founded in 1989, is an inter-governmental body whose purpose is the development and promotion of national and international policies to combat money laundering and terrorist financing.

4. The Federation and its member law societies take seriously the problems of money laundering and terrorist financing. Law societies across Canada have demonstrated their commitment to protecting the public by regulating the legal profession to ensure that legal counsel do not engage in or facilitate such criminal activities. The development and adoption by the Federation of a model No Cash Rule and a model Client Identification, or "Client ID" Rule is evidence of its commitment to proactively regulate in this area. These model rules have been implemented by each Canadian law society.

II. SUBMISSION HIGHLIGHTS

5. The Federation has long been concerned that if applied to members of the legal profession the Act would require lawyers to violate solicitor-client privilege and confidentiality and would threaten the independence of the bar. The entire premise of the Act as it purportedly pertains to lawyers is to prescribe and gain access to information that lawyers and Quebec notaries would only obtain by virtue of being retained to provide legal advice to their clients. Members of the legal profession would be conscripted into fighting crime in the guise of serving clients. Such compulsion would prevent the frank disclosure by clients that is necessary for legal counsel to give proper legal advice, and indeed for the effective operation of our system of justice. The right to confidential, loyal and independent counsel, and the privilege against self-incrimination, would be worthless if lawyers were required to collect and retain information on their clients for the purpose of assisting the state.

6. We applaud the recognition of the importance of protecting solicitor-client privilege that is evidenced by the proposed amendment. Even with this amendment, however, the legislation remains fundamentally flawed as it pertains to members of the legal profession.

III. BACKGROUND

7. In 2001, the Federation began a constitutional challenge to the Act, arguing that it required lawyers to act as secret agents of the state, collecting information about clients against their interests and reporting to a government agency. As such, the Federation's position was that the Act threatened fundamental

Canadian constitutional principles that require that lawyers maintain undivided loyalty to their clients, consistent with the independence of the Bar and the integrity of the administration of justice. The Federation's constitutional challenge resulted in an interlocutory injunction, which by May 2002, suspended the application of the Act to Canadian lawyers and Quebec notaries, pending a final decision on the merits of the constitutional challenge.

8. In December 2006, after the Federation's last submissions to this Committee, the Government of Canada amended the Act to exempt members of the legal profession from the suspicious and prescribed transactions reporting requirements. However, the government subsequently added provisions to the Regulations that purported to impose client identification and record-keeping requirements on legal counsel and law firms. These amendments to the legislative scheme led to the renewal of the legal proceedings.

9. In 2011, the British Columbia Supreme Court heard the constitutional challenge, and in September 2011, released its decision upholding the Federation's argument that the Act and Regulations violate the *Canadian Charter of Rights and Freedoms*, and are therefore unconstitutional insofar as the legislation, and in particular its client identification and record-keeping requirements, apply to legal counsel and law firms.[2] The BC Supreme Court agreed with the Federation's position that: (i) the Act and Regulations unduly infringe upon the solicitor-client relationship, and (ii) to the extent that one of the purposes of the Act and Regulations is to ensure adequate client identification and record-keeping by professionals, these objectives are already being met with respect to legal counsel by the regulation by law societies of their members. The BC Supreme Court ordered that relevant sections of the Act and Regulations be read down to exempt legal counsel and law firms or struck out entirely. The Government of Canada appealed this decision and in April 2013 the British Columbia Court of Appeal upheld the decision of the lower court. The federal government was granted leave to appeal the decision of the BC Court of Appeal and the matter is expected to be heard in 2014.

[2] *Federation of Law Societies of Canada v. Canada (Attorney General),* 2011 BCSC 1270, available online at: http://canlii.ca/t/fn82c

10. The injunction noted earlier continues to apply pending all appeals and, as a result, the client identification and verification provisions of the Act and Regulations presently do not apply to lawyers or Quebec notaries.

11. In 2003, independent of the constitutional challenge the Federation undertook its own initiative to fight money laundering and terrorist financing. The first development in this respect was the Federation's October 2004 model No Cash Rule, pursuant to which each member law society has implemented rules prohibiting legal counsel from receiving cash in amounts over $7,500 and requiring them to keep a cash transactions record as part of their record-keeping requirements. The No Cash Rule is intended to augment longstanding law society rules prohibiting legal counsel from engaging in illegal activities, by preventing lawyers from being unwittingly involved in money laundering and other criminal schemes, while maintaining the longstanding principles underlying the solicitor-client relationship. By setting the cash prohibition threshold at $7,500, the Federation's rule is more stringent than the federal regulations, which require the reporting of $10,000 or more in cash. Moreover, the rule prohibits legal counsel from accepting cash whereas the regulation would permit the receipt of cash, but require a report to FINTRAC. It is the position of the Federation that the No Cash Rule is an effective tool to prevent money laundering within the legal profession.

12. To address the client due diligence issue, the Federation adopted a model rule on client identification and verification known as the "Client ID Rule". The Client ID Rule has been implemented by all Canadian law societies since 2008. Members of the legal profession must identify all clients who retain them to provide legal services, by recording basic information such as the client's name, address and telephone number. In addition, when legal counsel provide legal services in respect of the receipt, payment or transfer of funds, lawyers must verify their clients' identity by reference to independent source documents such as a driver's license, birth certificate, passport or other government-issued identification. The Client ID Rule respects the threshold between constitutional and unconstitutional requirements imposed on members of the legal profession when it comes to the gathering of information from clients: legal counsel must obtain and keep all information needed to serve the client, but must not obtain

any information which serves only to provide potential evidence against the client in a future investigation or prosecution by state authorities.

13. Together, the No Cash Rule and the Client ID Rule and verification standards accomplish three goals:

(a) the rules impose on lawyers and Quebec notaries a rigorous standard with respect to cash transactions;
(b) the rules address the activities of lawyers and Quebec notaries as financial intermediaries but form part of the extensive statutorily authorized regulatory regime for members of the legal profession through law societies rather than federal legislation; and
(c) the rules, as law society regulations, respect the constitutional principles upheld by the legal profession for the benefit of the public, protect the right of citizens to independent legal counsel, and ensure that counsel can continue to protect the client's privilege, which is a constitutionally recognized principle.[3]

14. Any actual or perceived gap in the legislative scheme as a result of the exclusion of members of the legal profession from the provisions of the Act has been filled by the Federation's model rules. As implemented by provincial and territorial law societies these rules exist to address the conduct of legal counsel and to prevent them from becoming unwittingly involved in money laundering. Lawyers or Quebec notaries who wittingly participate in criminal activity are subject to criminal charges and sanctions. As the BC Supreme Court found:

> "[T]he law societies have adopted detailed client identification and verification requirements and restrictions on the receipt of cash, in addition to their professional conduct rules. Further, law societies undertake an extensive range of activities to promote and ensure compliance with their rules, including education, annual self-reporting, audits and investigations.
>
> As such, to the extent that one of the purposes of the Regime is to ensure adequate client identification and record-keeping by professionals, those objectives are already being met in respect of

[3] In *Lavallee, Rackel & Heintz v. Canada (Attorney General); White, Ottenheimer & Baker v. Canada (Attorney General); R. v. Fink*, 2002 SCC 61, the Supreme Court of Canada in assessing the constitutionality of search warrant provisions in s. 488.1 of the *Criminal Code* said, "Privilege does not come into being by an assertion of a privilege claim; it exists independently. By the operation of s. 488.1, however, this *constitutionally protected right* can be violated by the mere failure of counsel to act, without instruction from or indeed communication with the client." (at para 39, emphasis added)

> the legal profession by virtue of the law societies' regulation of their members."[4]

IV. SUBMISSIONS ON PROPOSED AMENDMENTS

15. Division 13 of Bill C-4 contains two proposed amendments to the Act. The first would extend protection for solicitor-client privileged communications. Currently Section 11of the Act provides that "Nothing in [Part 1] requires a legal counsel to disclose any communication that is subject to solicitor-client privilege." The proposed amendment would replace the reference to Part 1 with the words "this Act" resulting in broader protection of solicitor-client privilege.

16. The second proposed amendment would limit the use of any information disclosed under section 65(1) of the Act by specifying that it may be used only as evidence of a contravention of Part 1.

17. While the proposed amendments would provide greater protections for information protected by solicitor-client privilege, they do not address other fundamental problems with the application of the legislation and its accompanying regulations to lawyers and Quebec notaries.

18. As the BC Court of Appeal noted in its judgment, extension of the legislation to legal counsel engages three components of the solicitor-client relationship: "solicitor-client privilege, the independence of the Bar, and the duty of undivided loyalty from a lawyer to a client."[5]

19. Nothing in the amendments addresses the damage done to the independence of the Bar or the duty of loyalty that lawyers owe to their clients. The conflicting obligations and interests imposed on lawyers by the legislation would remain: they would still be obliged to collect information from and about their clients on behalf of the state and would still face penalties for non-compliance.

20. As noted above, the law societies have enacted rules and regulations that meet the client identification and record-keeping goals of the legislation. Both the BC

---

[4] *Federation of Law Societies of Canada v. Canada (Attorney General),* 2011 BCSC 1270, at paras. 186-187. Available online at: http://canlii.ca/t/fn82c

[5] *Federation of Law Societies of Canada v. Canada (Attorney General),* 2013 BCCA 147 at para 102. Available online at http://canlii.ca/t/fwvfk

Supreme Court and the BC Court of Appeal recognized this. At paragraphs 141 and 142 the Court of Appeal held:

> [141] The chambers judge found that Canada did not establish that the means chosen are proportionate to the objective of the legislation. She found that the objectives of ensuring adequate client identification and record-keeping by professionals were already being met in respect of the legal profession by virtue of the law societies' regulation of their members, and concluded at para. 192 of her reasons that:
>
> > ... where a law society is exercising its role by regulating its members to protect the public's interests, replacement of that role with a federal statute that permits the intrusion on solicitor-client privilege is contrary to the public interest.
>
> [142] In the result, I agree with the chambers judge that the regulation of lawyers by the law societies minimally impairs the rights of clients and lawyers while providing an effective and constitutional anti-money laundering and terrorist financing regime.[6]

21. In the view of the Federation Parliament should respect the courts' unanimous conclusion that the legislation is unconstitutional in its application to legal counsel and should not seek to extend the provisions of the Act to members of the legal profession.

V. CONCLUSION

22. While the proposed amendments to the Act address some of the concerns of the Federation and its member law societies, serious problems with the legislation remain. The incursion into the independence of the Bar and the duty of loyalty are neither necessary nor justifiable. As the goals of the Act and its regulations are being met by the law societies in a way that is "effective and constitutional" it continues to be inappropriate to impose the client-identification and record keeping obligations contained in the Act on legal counsel.

23. We thank the Committee for inviting the Federation to assist with its review of Bill C-4.

[6] Supra, note 5.