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Hunter sees victory for clients as SCC enshrines independence

Ruling strikes down lawyers' role in anti-money-laundering regime

CRISTIN SCHMITZ
OTTAWA

The Supreme Court has quashed the latest bid to enlist lawyers in Ottawa's anti-money-laundering regime, ending a 14-year legal battle waged by law societies in the name of defending solicitor-client privilege and the independence of the bar.

On Feb. 13 in *Canada A.G. v. Federation of Law Societies of Canada*, [2015] S.C.J. No. 7, seven judges ruled unanimously that 2008 federal regulations requiring financial intermediaries to verify clients' identities and record and retain their information for scrutiny by the Financial Transactions and Reports Analysis Centre of Canada (FINTRAC), as well as statutory provisions from 2000 authorizing the federal agency to search offices and computers and seize information during compliance audits, are unconstitutional as they apply to Canadian lawyers and law firms, including Quebec notaries.

The ruling "confirms the importance of a lawyer's undivided loyalty to his or her client," and for the first time elevates that duty of "committed client representation" to a s. 7 *Charter*-protected principle of fundamental justice, said John Hunter of Vancouver's Hunter Litigation Chambers, counsel for the FLSC, umbrella group for Canada's 14 law societies that launched the test case in 2001. The regime attracted the opposition and intervention of other legal groups including Le Barreau du Québec, La Chambre des notaires du Québec, the Criminal Lawyers' Association, the Advocates' Society and the Canadian Civil Liberties Association.

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John Hunter of Hunter Litigation Chambers, seen above at his Vancouver offices, represented the Federation of Law Societies of Canada in a Supreme Court case that underscored the independence of the bar. Hunter termed it a win for clients more than lawyers. ALISTAIR EAGLE FOR THE LAWYERS WEEKLY

Cop tactics slammed in lawyer arrest

CRISTIN SCHMITZ

The courthouse arrest of a Toronto defence counsel after marijuana was found in the clothes she delivered to security officials for a client's court date has sparked pushback from lawyers.

Laura Liscio, 32, is "innocent" — not just "not guilty" — of the charges of possession of marijuana for the purposes of trafficking, simple possession of marijuana, obstruction of justice and breach of trust Peel Regional Police laid Feb. 12, said her counsel Stephen Bernstein of Toronto's Bernstein Newman.

"She's devastated by being charged with these allegations," Bernstein told *The Lawyers Weekly*. "These are all classic, trumped-up charges."

Bernstein described his client as an "ethical young lawyer who has been very falsely accused here."

Liscio was arrested in the Brampton, Ont., courthouse while defending her client in an Ontario Superior Court trial. She was handcuffed, led through the public corridors in front of witnesses, and put into a police car. In a statement, Peel police denied they handcuffed her while she was in "court attire." Bernstein said Liscio's clothing clearly marked her as a lawyer.

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"The important thing is it is not so much a win for lawyers, as it is for clients," said Hunter. "The clients are entitled to lawyers' undivided loyalty and commitment to the client's cause, and…if government duties put a lawyer in a position of conflict with respect to that duty, then that creates a significant problem for the administration of justice. So the client's ability to have faith that their lawyer is working just for them has been confirmed."

The Supreme Court has now "constitutionalized" under the *Charter* two core elements of the legal profession — solicitor-client privilege and "committed representation" to clients, said Craig Ferris of Vancouver's Lawson Lundell, counsel for the intervener Canadian Bar Association.

"I can see those being real building blocks for other cases," he said. "I think those are going to be some core principles that will have long-lasting implications under the *Charter*."

In the wake of the constitutional parameters outlined in *FLSC*, the federal government has little "meaningful ground" to legislate money-laundering controls in respect of lawyers, Ferris said. A more productive route might be "to see if they can convince the law societies to make their anti-money laundering rules a bit more comprehensive."

The Supreme Court held that the constitutionally deficient legislation requires lawyers to gather and retain considerably more information than the profession thinks necessary for ethical and effective client representation. Coupled with the regime's inadequate protections for solicitor-client privilege, this undermines what a majority of the judges held to be a lawyer's constitutionally protected duty of commitment to their client's cause.

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>
> **Craig Ferris**
> Lawson Lundell

There are "less drastic means" of pursuing the valid objectives of fighting money-laundering and terrorist financing, Justice Thomas Cromwell held, largely affirming B.C. lower-court decisions exempting lawyers from the regime.

The Supreme Court did, however, suggest constitutional compliance is possible with "significant" modifications by government, such as better safeguarding solicitor-client privilege and creating "meaningful derivative use immunity of the required records for the purposes of prosecuting clients."

"Under this specific regime, I think that's the end of the road, [or] I hope it is," Hunter noted. "But I'm sure the federation would welcome discussions with the government, as would individual law societies, if there are things that lawyers can do that will be helpful, that don't put them into a conflict with their clients."

Hunter stressed law societies have implemented their own anti-money-laundering rules over the past 15 years, including requiring lawyers to keep appropriate records and barring them from putting large amounts of client cash into their trust accounts.

"I think the regulators have stepped up," Hunter said. "This has never been about whether it's a good idea to fight money-laundering. This is just about whether lawyers can be enlisted in contravention of their duties to their clients."

Much of the impetus to treat lawyers the same as other financial intermediaries has come from the Financial Action Task Force, of which Canada is a member, which sets global standards for combating money-laundering and the financing of terrorism.

In *FLSC* Justice Cromwell held, on behalf of five of the seven judges, that the court should recognize a new principle of fundamental justice "that the state cannot impose duties on lawyers that undermine their duty of commitment to their clients' causes."

"Clients — and the broader public — must justifiably feel confident that lawyers are committed to serving their clients' legitimate interests free of other obligations that might interfere with that duty. Otherwise the lawyer's ability to do so may be compromised and the trust and confidence necessary for the solicitor-client relationship may be undermined. This duty of commitment to the client's cause is an enduring principle that is essential to the integrity of the administration of justice."

The court held that, subject to providing adequate justification under s. 1 of the *Charter*, "the state cannot impose obligations on lawyers that undermine their compliance with the duty, either in fact or in the perception of a reasonable person.

All seven of the Supreme Court's judges agreed that ss. 62, 63, 63.1 of the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act* are "a very significant limitation" of the s. 8 *Charter* right to be free from unreasonable searches and seizures and, along with s. 64, which gives "inadequate protection" to solicitor-client privilege, are an unjustified violation of s. 8. The government failed to demonstrate that it minimally impaired the right, the court held.

"There are less drastic means of pursuing the same identified objectives," Justice Cromwell held, in striking down s. 64, and reading down ss. 62, 63 and 63.1 to exclude their application to records held by lawyers and law firms.

He suggested "less drastic means" would include the sorts of protections for solicitor-client privilege the court said should govern law-office searches in *Lavallee, Rackel & Heintz v. Canada (A.G.)* [2002] S.C.J. No. 61.

All seven judges went on to hold that the measures also violate s. 7 of the *Charter*. The liberty interests of lawyers are infringed because they can be imprisoned if they do not comply with the act and its regulations, the judges agreed.

However, Chief Justice Beverley McLachlin and Justice Michael Moldaver argued that the principle of fundamental justice that is breached is the recognized constitutional norm that lawyers must preserve their clients' confidences — i.e. solicitor-client privilege.

"The lawyer's commitment to the client's interest will vary with the nature of the retainer between the lawyer and client, as well as with other circumstances," they said, adding that it does not provide "a workable constitutional standard."

Justice Cromwell, writing also for Justices Louis LeBel, Rosalie Abella, Andromache Karakatsanis and Richard Wagner, held that the notion that "the state cannot impose duties on lawyers that undermine their duty of commitment to their clients' causes" is a recognized "normative legal principle and basic tenet of the legal system" that is sufficiently precise to provide a workable standard.