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WHISTLERBLOWER REGIMES

considering the proposed OSC regime

In the past several years, a proliferation of whistleblower regimes has emerged, particularly in the securities arena. High-profile scandals such as the one involving Bernie Madoff and difficulties proving insider trading cases based upon circumstantial evidence may explain why securities regulators are looking for new hammers in the enforcement toolbox. It is easy to understand why whistleblowing regimes are attractive to such bodies. Information provided by whistleblowers may permit police or regulatory agencies to stop the commission of a serious securities offence in its tracks, or may materially increase the likelihood of a successful prosecution. Although increasingly common, not all whistleblower programs are made the same. As Linda Fuerst explains, the proposed Ontario Securities Commission regime differs from the whistleblower program of the U.S. Securities and Exchange Commission ("SEC") in significant ways and may not go far enough to encourage or protect would-be whistleblowers. The author guides readers through a helpful review of the current SEC regime while highlighting key differences with the program proposed in Ontario. 810

PRINCIPLES OF FUNDAMENTAL JUSTICE

constitutional protection for a client's cause

When in 2001 the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act* and the *Proceeds of Crime (Money Laundering) and Terrorist Financing Regulations* came into force requiring lawyers as well as notaries in Quebec to report suspicious transactions to the Financial Transaction and Reports Analysis Centre of Canada, the Federation of Law Societies served notice that it intended to challenge the regime on the basis that the legislation violated Canada's core constitutional principles. In the time that followed, interlocutory injunctions and exemptions were granted for lawyers, and law societies across the country implemented their own rules for client identification and verification. Now, after nearly 15 years of litigation, the Supreme Court of Canada has recognized a new principle of fundamental justice: a lawyer's commitment to his or her client's cause. Bonnie Jones and Claudia Cappuccitti provide a detailed summary of *Federation of Law Societies of Canada v. Canada (Attorney General)* and review the decision's important consequences for the bar and public at large. The authors applaud the Supreme Court's ruling, declaring it a victory for the profession. 815

WHISTLERBLOWER REGIMES

Big Brother Is Watching: Responding to Regulatory Whistleblower Regimes

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Introduction

In the past several years, a proliferation of whistleblower regimes has emerged, particularly in the securities arena. High-profile scandals such as the one involving Bernie Madoff and difficulties proving insider trading cases based upon circumstantial evidence may explain why securities regulators are looking for new hammers in the enforcement toolbox. It is easy to understand why whistleblowing regimes are attractive to such bodies. Information provided by whistleblowers may permit police or regulatory agencies to stop the commission of a serious securities offence in its tracks, or may materially increase the likelihood of a successful prosecution.

Securities Whistleblower Regimes

Some agencies, such as the Financial Industry Regulatory Authority ("FINRA") in the United States, the Investment Industry Regulatory Organization of Canada ("IIROC"), and the Canadian Mutual Fund Dealers Association ("MFDA") have established whistleblower offices or programs that encourage reporting of systemic wrongdoing, dishonest or unethical behaviour by persons in the investment industry and expedite review of reported information.[1]

Other whistleblower programs, such as the Dodd-Frank Whistleblower Program administered by the United States Securities and Exchange Commission ("SEC") go further by paying financial rewards to eligible whistleblowers. The SEC pays individuals who volunteer "original information" relating to a possible violation of federal securities law that results in successful enforcement action, either in the U.S. federal court or in an administrative action in which the SEC recovers an amount exceeding $1 million. The whistleblower is eligible to receive an award representing 10% to 30% of the recovered amount, at the discretion of the SEC.[2]

Other key aspects of the SEC program include the following:

- Anti-retaliation protection for the whistleblower including SEC enforcement action against firms that retaliate against employees who whistleblow. As well, the *Dodd-Frank Wall Street Reform and Consumer Protection Act* allows individuals who have experienced retaliation to pursue a private cause of action.[3]
- Action to impede an individual from communicating directly with SEC staff about a possible securities law violation is prohibited.[4]
- Information obtained by attorneys and others through legal representation of a client or a communication that was subject to attorney-client privilege is ineligible.[5]
- Information obtained by employees of public accounting firms relating to a federal securities violation by a client through the performance of an engagement for the client is also ineligible.[6]
- Compliance and audit personnel are generally ineligible to receive an award,

[1] March 5, 2009 FINRA News Release: "*FINRA announces creation of 'Office of the Whistleblower*'," https://www.finra.org/newsroom/finra-announces-creation-office-whistleblower; IIROC Notice 09-0157 – Administrative – "*IIROC Announces Creation of Whistleblower Service*;" MFDA News Release: "*MFDA Launches Whistleblower Program.*"

[2] See U.S. Securities and Exchange Commission 2014 Annual Report to Congress on the Dodd-Frank Whistleblower Program; SEC Office of the Whistleblower Frequently Asked Questions, http://www.sec.gov/about/offices/owb/owb-faq.shtml.

[3] Ibid.; 17 C.F.R. §. 240.21F-2.

[4] 17 C.F.R. §. 240.21F-17.

[5] 17 C.F.R. §. 240.21F-4.

[6] Ibid.

although there are exceptions. For example, compliance or audit personnel who have a reasonable basis for believing that disclosure is necessary to prevent conduct that is likely to cause substantial injury to the property or financial interests of the company or its investors may qualify for an award. Additionally, such an individual may be eligible if more than 120 days have passed since the date upon which the information was reported by that individual internally to his or her employer.[7]

- Prior or contemporaneous reporting by the whistleblower to his or her employer is not a prerequisite. However, a whistleblower's voluntary participation in an employer's internal compliance system is a factor considered by the SEC in deciding the size of the award. The making of an internal report is a factor that may increase the size of the award.[8]
- Subject to certain exceptions, including the SEC's obligation to make disclosure to a respondent or defendant in a proceeding, the SEC is prohibited from disclosing information that could reasonably be expected to reveal the identity of the whistleblower. However, if the SEC determines that it is necessary to accomplish the purposes of the *Exchange Act*[9] and to protect investors, it may provide the information to others including the U.S. Department of Justice, an appropriate regulatory authority, a self-regulatory organization, a state attorney general in connection with a criminal investigation, and a foreign securities or law enforcement authority.[10]
- If information is submitted to the SEC anonymously, the whistleblower must have an attorney represent him in connection with the submission. The individual's identity must be disclosed and verified before an award is made.[11]

The SEC considers the program to be a huge success. In fiscal 2014, the SEC received a total of 3,620 tips, representing a 20% increase over the prior year. That included tips from residents in 60 foreign countries, including Canada. The largest award was more than $30 million and was made to a foreign resident, demonstrating the program's international reach.[12]

An interesting cottage industry has sprung up as a result of the requirement that anonymous whistleblowers submit their information to the SEC through an attorney. Various law firms now hold themselves out as experts in navigating the "complicated landscape of whistleblower law,"[13] offering to "advocate for the highest potential monetary award,"[14] presumably for a percentage of any award.

The Ontario Securities Commission ("OSC") has taken note of these developments in the United States and recently proposed its own whistleblower regime as one of a number of initiatives designed to resolve enforcement matters more quickly and effectively.[15] Like the SEC regime, the OSC program would include payment of monetary incentives for information relating to a possible serious violation of securities law, mechanisms to protect the confidentiality of the informant, and anti-retaliation prohibitions allowing for a private right of action by the whistleblower or enforcement proceedings by OSC Staff under section 127 of the *Securities Act*.[16]

There are, however, a number of important differences between the SEC regime and the proposed OSC program. One important distinction is the quantum of the financial reward. The OSC proposes to offer monetary rewards of only up to 15% of the total monetary sanctions or settlement amounts (excluding costs) awarded although not necessarily recovered in a Commission hearing or settlement that exceeds $1 million. The maximum amount of any award would be capped at $1.5 million.[17]

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[7] Ibid.
[8] 17 C.F.R. § 240.21F-6.
[9] 15 U.S.C. § 78a *et seq*.
[10] 17 C.F.R. § 240.21F-7.
[11] 17 C.F.R. § 240.21F-9.
[12] Supra note 2 at 3, 23 and 29.
[13] See Katz, Marshall & Banks LLP website: http://www.kmblegal.com/practice-areas/whistleblower-law/.
[14] See SEC Whistleblower Advocate website at http://www.secwhistleblowerадvocate.com/.
[15] OSC Staff Consultation Paper 15-401: "*Proposed Framework for an OSC Whistleblower Program.*"
[16] R.S.O. 1990, c. S.5.
[17] Supra note 15 at 12.

This is significantly less than what the SEC pays whistleblowers. Query whether the OSC program will offer enough of an incentive to motivate a well-compensated member of senior management of an issuer or financial institution to come forward to report information about a potentially serious breach of securities law to the regulator.

A second distinction relates to the type of proceeding that results from the reported information. The OSC would reward a whistleblower only for information leading to a successful OSC proceeding.[18] However, the whistleblower program currently proposed by the OSC would not provide an incentive to informants to report information that could lead to a criminal conviction for fraud, or for the seldom used insider trading offence in the Criminal Code.[19]

It is unclear why this is the case, particularly given the fanfare surrounding the OSC's participation in the Joint Serious Offences Team ("JSOT"), a partnership between the OSC, OPP Anti-Rackets Unit and RCMP Financial Crime Program designed to target serious frauds and white collar crime through collaborative investigations and prosecution of offences under the Criminal Code in addition to provincial securities legislation.[20]

This contrasts with the SEC regime, which permits awards for amounts collected not only in SEC initiated proceedings, but also in judicial or administrative proceedings brought by the U.S. Attorney General and appropriate regulatory and self-regulatory organizations. The SEC will also pay an award based upon amounts collected in proceedings commenced by a state Attorney General in a criminal case based upon the same original information that the whistleblower voluntarily provided to the SEC and that leads to the SEC obtaining monetary sanctions totaling more than $1 million.[21]

Challenges for Market Participants

These regimes pose new challenges for market participants in Canada and the United States. There are few, if any, protections for market participants in either the SEC whistleblower program or the proposed OSC regime. Neither the SEC's rules nor the OSC's Staff Consultation Paper indicate how the regulator will respond if false information is provided. Such information, the source of which will remain entirely confidential unless proceedings are commenced, could potentially result in a market participant having to expend significant time and resources to respond to a regulatory investigation based upon false information.

The lure of earning a monetary reward for information about potential illegality within an organization may prompt employees to report information to the regulator rather than through internal channels. Additionally, since whistleblower tips are made in confidence and typically anonymously, even when an organization receives an internal report of misconduct from an employee, it will not know whether the employee has already reported the same information to the regulator.

Although both the SEC's rules and the proposed OSC guidelines indicate that employees are encouraged to report suspected illegality internally, neither requires whistleblowers to do so. This may put an organization at a distinct disadvantage. It is clearly in the interests of a corporation to learn about such matters first from an employee rather than hearing about it from the regulator. This preserves the ability of the organization to conduct its own investigation into the misconduct, decide whether to self-report to the regulator prior to or following completion of its internal investigation, and potentially qualify for credit for cooperation.

The failure of an organization to respond appropriately to such internal reports of whistleblowers may result in significant adverse consequences. According to the OSC Staff Consultation Paper:

> If a whistleblower reports misconduct through internal channels, failure by issuers and registrant firms to then promptly and fully report serious breaches of Ontario securities law to staff, or continuation of the inappropriate conduct or failure to correct the problems, may result in no credit for cooperation when the issuer or registrant firm is ultimately brought to account for the misconduct. Further, this would be considered an

[18] Ibid. at 6.
[19] R.S.C. 1985, c. C. 46, section 382.1.
[20] June 14, 2013, thestar.com, "*New Ontario Securities Commission unit will target fraud.*"
[21] SEC Rule 21F, § 240.21F-3.

> aggravating factor in staff's sanctions recommendations in any administrative proceeding. We encourage issuers and registrant firms to review their internal reporting processes to ensure they are robust and effective.[22]

All of this squarely puts the onus on the organization to ensure that it has in place robust internal whistleblower procedures that include the following attributes:

- A system that encourages employees to report potential illegality or other misconduct internally within the organization without appearing to interfere with an employee's ability to report to the regulator.

  The internal system for reporting such activity must be well-publicized and understood by the employees, easily accessible by them, and allow for anonymous reporting. The system must give employees confidence both that their reports will be taken seriously within the organization and that their employment will not be put in jeopardy as a result of making a report. Ideally, the process to be used by the organization to investigate such internal tips should be disclosed to the employees to give whistleblowers confidence that the organization takes the information seriously and will take appropriate steps to investigate it.

  The system must not, however, limit or suggest any restrictions on an employee's ability to report misconduct to a regulator. It is unclear whether offering incentives to employees to report internally within the organization would be viewed with suspicion by a regulator.

- A framework or blueprint for responding to internal reports of wrongdoing on a timely and effective basis.

  Regulators expect that organizations will take internal reports of misconduct or illegality seriously. An internal investigation, either before or after a report to the regulator, must be thorough and timely. Investigations will proceed more expeditiously if a framework for the conduct and oversight of internal investigations has been developed in advance.

  The internal investigatory framework should address matters including when external counsel and forensic investigators should be retained to conduct the investigation, the role of general counsel, and when and to whom internal reports of wrongdoing will be escalated both internally and externally.

- A process of ongoing review of internal policies and systems for dealing with potential whistleblowers to ensure that they are consistent with the evolving expectations of the regulators.

  It is important for organizations to monitor, on an ongoing basis, developments in the applicable whistleblower regimes and to review internal policies and related documentation for consistency with regulatory requirements and expectations.

  Recent U.S. experience is instructive. In early 2015, it was disclosed that the SEC had sent letters to several companies seeking their non-disclosure agreements, employment contracts and other documents as part of an investigation into whether they were inappropriately muzzling or impeding corporate whistleblowers.[23] The head of the SEC's Office of the Whistleblower was reportedly unwilling to provide details about what language in such documents may run afoul of the SEC's rules prohibiting a company from taking action to impede an individual from communicating with Commission Staff about a possible securities law violation.[24] Subsequently, in April 2015, the SEC settled its first case against KBR, Inc. for using overly broad employee confidentiality policies and agreements.[25]

[22] Supra note 15 at 24.

[23] February 26, 2015, *The Wall Street Journal*: "Treatment of Tipsters Is Focus of SEC;" February 25, 2015, *Reuters*: "SEC Probes Companies' Treatment of Whistleblowers: WSJ."

[24] Alston & Baird LLP Labour and Employment/ Securities Litigation Advisory, March 3, 2015: "*Increased Scrutiny of Disclosure and Other Employee Agreements by the SEC Whistleblower Division*."

[25] April 1, 2015, SEC Press Release: "*SEC: Companies Cannot Stifle Whistleblowers in Confidentiality Agreements – Agency Announces First Whistleblower Protection Case Involving Restrictive Language.*"

Canadian employers should be forewarned that in addition to retaliation provisions in existing provincial employment statutes,[26] the Criminal Code[27] makes it a criminal offence punishable by up to 5 years imprisonment for an employer or person in a position of authority to "take a disciplinary measure against, demote, terminate or otherwise adversely affect the employment" of an individual, or threaten to do so, "with the intent to compel the employee to abstain from providing information to a person whose duties include the enforcement of federal or provincial law, respecting an offence that the employee believes has been or is being committed contrary to this or any other federal or provincial Act or regulation by the employer or an officer or employee of the employer or, if the employer is a corporation, by one or more of its directors." Accordingly, in Canada, retaliation may have both regulatory and criminal consequences.

Conclusion

Whistleblower regimes appear to be here to stay. It is important for market participants to implement and update internal programs designed to enhance the likelihood of an internal whistleblower reporting either first or only to the organization rather than the regulator, and to facilitate the thorough and expeditious investigation of all complaints, allowing for the prompt escalation of those that appear to involve breaches of securities legislation to the appropriate regulator.

[26] See, for example, *Employment Standards Act, 2000*, S.O. c. 41, s. 74; *Occupational Health and Safety Act*, R.S.O. 1990, c. O.1, s. 50.
[27] Supra note 19, s. 425.1

PRINCIPLES OF FUNDAMENTAL JUSTICE

Federation of Law Societies of Canada v. Canada (Attorney General): "Commitment to the Client's Cause" Given Constitutional Protection

Bonnie Roberts Jones
Claudia Cappuccitti
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Introduction

This article considers the recent Supreme Court of Canada decision in *Federation of Law Societies of Canada v. Canada (Attorney General)*,[1] which expands the constitutionally recognized principles of fundamental justice to include a lawyer's commitment to his or her client's causes.

Background

Starting in 1989, Canada began enacting legislation aimed at combating money laundering, beginning with an amendment to the Criminal Code.[2] By 2000, Parliament had passed new legislation aimed at money laundering and had created an agency – the Financial Transaction and Reports Analysis Centre of Canada ("FINTRAC") – charged with overseeing compliance with this new regime.

When in 2001 the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*[3] and the *Proceeds of Crime (Money Laundering) and Terrorist Financing Regulations*[4] came into force requiring lawyers as well as notaries in Quebec to report suspicious transactions to FINTRAC, the Federation of Law Societies served notice that it intended to challenge the regime on the basis that the legislation violated Canada's core constitutional principles.[5]

In the time that followed, interlocutory injunctions and exemptions were granted for lawyers, and law societies across the country implemented their own rules for client identification and verification.

The Proceeds of Crime (Money Laundering) and Terrorist Financing Act

The mandate of the Act is to "facilitate combating the laundering of proceeds of crime and combating the financing of terrorist activities."[6] Those subject to the Act and the Regulations, set out at section 5 of the Act, are required to maintain identification and transaction records of clients, report client identification and transaction information where mandated by the Act, and may be subject to warrantless searches by FINTRAC.

The key provisions that were the subject of concern for the Federation of Law Societies fall into two categories: provisions having to do with searches and seizures, and provisions having to do with verifying and recording client information.

Provisions Related to Searches and Seizures

This appeal concerned five provisions in the Act related to searches and seizures:

- section 5(*i*) and (*j*), which bring lawyers within the ambit of the Act;
- section 62, enabling a person authorized by FINTRAC to enter premises (non-dwelling houses) without a warrant in order to examine records, inquire into the business and affairs of a person or entity for the purpose of ensuring compliance, use the computer system on the premises to examine the available data, and reproduce documents;

[1] *Federation of Law Societies of Canada v. Canada (Attorney General)*, 2015 SCC 7.
[2] R.S.O. c. C-46.
[3] S.C. 2000, c. 17 (the "Act").
[4] SOR/2001-317 (the "Regulations").
[5] 2013 BCCA 147.
[6] S.C. 2000, c. 17, Preamble.

- section 63, which serves the same purpose as section 62 but is applicable to searches of dwelling houses and requires a warrant;
- section 63.1, requiring the subject of the inspection to provide records to the authorized person; and
- section 64, which limits the searches in sections 62, 63, and 63.1 to materials not subject to solicitor-client privilege.

Provisions Related to Collecting and Recording Client Information

The Federation also raised concern about the Regulations found at:

- section 11.1, which sets out in detail those persons and entities whose existence must be confirmed, identity verified, and information recorded when a business relationship is entered into that will involve the exchange of funds;
- section 33.3, requiring that lawyers verify the identity of the client on whose behalf the lawyer receives or pays funds (other than monies received for professional fees, disbursements, expenses, or bail);
- section 33.4, requiring lawyers to produce a receipt of funds record for any amounts received over $3,000;
- section 33.5, which eases the rules related to funds received from another lawyers' trust account; and
- section 59.4, which sets out the duties that must be undertaken as part of the section 33.4 requirements, including ascertaining the identity of the person or corporation and confirming his or her or its existence.

Consequences of Non-compliance

The Act provides that those who fail to comply with particular provisions are liable to imprisonment for a term of as much as five years, a fine of up to $500,000, or both.[7]

The Decision

In a 7-0 decision (Cromwell J. writing a majority opinion, with McLachlin C.J.C. and Moldaver J. writing joint reasons in concurrence), the Supreme Court of Canada found a number of provisions in the regime to be at odds with the rights guaranteed under the *Canadian Charter of Rights and Freedoms* ("Charter"), particularly the section 8 right against unauthorized search and seizure, and the section 7 right to liberty, and that these provisions could not be justified under section 1.

In reaching this conclusion, the majority forcefully emphasized the importance of a lawyer's duty to maintain a "client's confidences and act with commitment to serving and protecting their client's legitimate interests," and went so far as to call the offending legislation "repugnant" to lawyers' duties.[8]

Section 8 Analysis

Rather than proceed through an analysis under section 7 of the Charter for those provisions pertaining to FINTRAC-authorized searches (as the application judge[9] and the British Columbia Court of Appeal[10] did), Justice Cromwell considered the application of the section 8 Charter right against unreasonable search and seizure in respect of sections 62, 63, and 63.1 of the Act.

Relying on the precedent set in *Lavallee*,[11] he concluded that the above-named provisions did "constitute a very significant limitation of the right to be free of unreasonable searches and seizures guaranteed by section 8 of the Charter."[12]

Moving to the section 1 analysis, Justice Cromwell stated that while the limitations on one's right to unreasonable search and seizure pursue a pressing and substantial objective, they fail to meet the second limb of the *Oakes*[13] test, which requires that the limitations be proportionate. The limitation, in this case, failed the minimal impairment test.

[7] Section 74 of the Act.

[8] Supra note 1 at paragraph 1.

[9] *Federation of Law Societies of Canada v. Canada (Attorney General)*, 2011 BCSC 1270.

[10] *Federation of Law Societies of Canada v. Canada (Attorney General)*, 2013 BCCA 147.

[11] *R. v. Lavallee, Rackel & Heintz*, 2002 SCC 61, [2002] 3 S.C.R. 209 (S.C.C.).

[12] Supra note 1 at paragraph 57.

[13] *R. v. Oakes* [1986] 1 S.C.R. 103 (S.C.C.).

As a result, section 64, and sections 62, 63, and 63.1, as they relate to lawyers' offices, could not be justified.

As a remedy, the Court followed the example of the application judge and declared that section 64 is of no force or effect and that sections 62, 63.1 and 63.3 should be read down so as to not apply to documents in the possession of legal counsel or held in law office premises, thereby removing FINTRAC's authority to execute a search on a law office to seize client information.

Section 7 Analysis

The majority held that the provisions requiring lawyers to collect information and verify clients' identities was a violation of lawyers' right to liberty and cannot be saved by section 1. It is through its section 7 analysis, as it relates to the provisions on the collecting and verification of client information, that the majority recognized a new dimension of the solicitor-client relationship requiring constitutional protection: the commitment to the client's causes.

The Court demonstrated that the first limb of the section 7 test – whether the provisions limit the right to life, liberty or security of the person – was easily passed because those found in breach of certain provisions of the legislation may face imprisonment. While the British Columbia Supreme Court and Court of Appeal found that the regime limited both the lawyer and the client's right to liberty, the Supreme Court considered only the section 7 Charter rights of lawyers. Justice Cromwell left unanswered the question of whether these provisions could also have the effect of limiting the liberty of the client.

When considering the second limb of the section 7 analysis, the majority, minority, and lower courts all came to the same conclusion: the limitation of section 7 was not in accordance with the principles of fundamental justice, though the four groups took different routes to arrive at the same finding. The British Columbia Supreme Court found that the provisions imposed a duty that "would result in having lawyers' offices turned into archives for the use of the prosecution, and would violate the principles of fundamental justice insofar as it erodes the solicitor-client privilege."[14]

The minority in the Supreme Court agreed that solicitor-client privilege (which has been long-established as an existing principle of fundamental justice) should be the principle relied on when undertaking the section 7 analysis. The British Columbia Court of Appeal, following the test in *Malmo-Levine*,[15] found that the independence of the bar is a principle of fundamental justice and held that, in this case, it was this principle that was violated by the provisions of the regime.

Justice Cromwell, for the majority, noted that the principle of the independence of the bar can be construed in two different ways. Broadly construed, the principle means that lawyers "are free from incursions from any source;" narrowly, it means that lawyers are committed to their clients' causes. It is the second interpretation that Justice Cromwell presented as being most relevant to the case, and the second one, which he said should be recognized as a principle of fundamental justice:

> We should, in my view, recognize as a principle of fundamental justice that the state cannot impose duties on lawyers that undermine their duty of commitment to their clients' causes.[16]

He then applied the *Malmo-Levine* test[17] and concluded that the duty of commitment to a client's causes has the necessary characteristics of a principle of fundamental justice. The minority, on the other hand, argued that the principle of a lawyer's duty of commitment to their clients' causes lacks sufficient precision to be a principle of fundamental justice.

Justice Cromwell concluded his analysis by stating that the scheme cannot be justified under section 1.

As a remedy, the Court declared that sections 33.3, 33.4, 33.5 and 59.4 of the Regulations are of no force and effect, and section 11 should be read down so that it does

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[14] 2011 BCSC 1270, at paragraph 144.
[15] *R. v. Malmo-Levine*, 2003 SCC 74.
[16] Supra note 1 at paragraph 84.
[17] Supra note 15 at paragraph 113.

not apply to documents in the possession of legal counsel or in law office premises. The effect of this remedy is to remove the obligations the Regulations place on lawyers to verify the identity of their clients and to create a receipt-of-funds record. This remedy does not eliminate or modify any duties imposed on lawyers by their law societies, such as the obligation to refuse cash payment from a client in excess of $7,500.[18]

Commentary

What the Decision Does

The overarching result of this decision is to ensure that a lawyer does not have to choose between his or her own section 7 Charter rights and his or her client's cause; that is to say, the state cannot put lawyers in a position of conflict with respect to their clients' causes. How far this commitment may extend is hard to say; however, the majority hints that this decision gives lawyers a fairly wide berth. Quoting Justice Binnie in *R. v. Neil*,[19] the Court says:

> The duty of commitment to the client's cause ensures that divided loyalty does not cause the lawyer to soft peddle his or her [representation] and prevents the solicitor-client relationship from being undermined.[20]

They continue:

> ... this means that (subject to justification) the state cannot impose duties on lawyers that undermine the lawyer's compliance with that duty, either in fact or in the perception of a reasonable person, fully apprised of all of the relevant circumstances and having thought the matter through. The paradigm case of such interference would be state-imposed duties on lawyers that conflict with or otherwise undermine compliance with the lawyer's duty of commitment to serving the client's legitimate interests.[21]

The legislation remains effective against other financial intermediaries, such as accountants, life insurance brokers, securities dealers, and others.

What the Decision Does Not Do

The Court made it clear that this decision does not place lawyers above the law.[22] The Court says:

> It is only when the state's impositions of duties on lawyers undermines, in fact or in the perception of a reasonable person, the lawyer's ability to comply with his or her duty of commitment to the client's cause that there will be a departure from what is required by this principle of fundamental justice.[23]

Justice Cromwell also states that though this decision gives constitutional protection to an independent bar, it does not extend to protect self-regulation of the profession. Citing LeBel J. in *McCullock Finney c. Barreau (Québec)*,[24] he says that self-regulation is merely "the means by which legislatures have chosen in this country to protect the independence of the bar."[25] In the same vein, this decision does not apply to an audit by lawyers' professional governing bodies, as different considerations would need to be taken into account.[26]

Finally, the decision does not preclude Parliament from enacting legislation to create a records-inspecting regime, even one that does not require judicial pre-authorization, as long as the regime is constitutionally compliant.[27] Parliament is also not prevented from imposing obligations, within limits, on lawyers beyond what the legal profession considers essential.[28]

Conclusion

With its decision, the Supreme Court stresses the importance of the independence of the bar and recognizes that the lawyer's duty of commitment to his client's causes is a significant aspect of such independence, deserving of constitutional protection. This decision also reaffirms the special nature of the solicitor-client relationship. Even where the

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[18] For example, see the Law Society of Upper Canada's By-Law 9.
[19] *R. v. Neil*, 2002 SCC 70.
[20] Ibid. at paragraph 103.
[21] Ibid.
[22] Ibid. at paragraph 111.
[23] Ibid.
[24] *McCullock Finney c. Barreau (Québec)*, 2004 SCC 36, at paragraph 1.
[25] Ibid. at paragraph 86.
[26] Ibid. at paragraph 68.
[27] Ibid. at paragraph 56.
[28] Ibid. at paragraph 113.

objective of legislation is as crucial as combating terrorism and laundering funds that were the proceeds of criminal activities, solicitor-client privilege may not be sidestepped to execute searches and seizures, or to monitor data.

After 15 years in the courts, the profession, and indeed the public, has earned their victory. Lawyers may not be used as agents of the state, and law offices may not be used as repositories of evidence for prosecutors. Nor may the interests and liberty of counsel be at odds with the interests of the client. From the public's perspective, a person can feel safe in the knowledge that their lawyer is fully committed to their causes, and that that commitment is constitutionally protected.

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