

Proceeds of Crime (Money Laundering)

BACKGROUND

Introduction of Legislation

- In May 1998, the Solicitor General issued a consultation document regarding the detection, and deterrence of money laundering activity. The National Criminal Justice Section wrote to summarize its general concerns in November 1998.
- In Spring 1999, the National Criminal Justice and Business Law Sections participated in Solicitor General consultations on draft legislation, warning the proposals could damage the confidential relationship between solicitor and client by requiring lawyers to report their clients based on a “suspicion” of money laundering and have a chilling effect on legitimate commercial transactions.
- Bill C-81, *Proceeds of Crime (Money Laundering)* was tabled in May 1999, and died on the Order Paper in September 1999. In December 1999, the Sections wrote to the Ministers of Justice and Finance urging them not to reintroduce Bill C-81. It was nonetheless reintroduced, as Bill C-22. The CBA expressed significant concerns with the Bill to the Standing Committee on Finance in April 2000, and to the Senate Banking Committee in June 2000. Bill C-22 received Royal Assent in June (S.C. 2000, c.19).
- CBA Sections participated in consultations with Finance Canada on regulations in Fall 2000 and Spring 2001. Final regulations, reflecting some CBA recommendations, released in Fall 2001.

Opposition from Legal Profession to Inclusion of Lawyers

- At the 2001 Annual Meeting in Saskatoon, Council passed two related resolutions: to continue to urge the federal government to amend the *Proceeds of Crime Act* to specifically exclude legal counsel, and to condemn legislated incursions into solicitor-client confidentiality.
- Bill S-16, *Proceeds of Crime Act* amendments received Royal Assent in June 2001 (S.C. 2001, c.12). It specifies when documents obtained by the Financial Transactions and Reports Analysis Centre (FINTRAC) will be destroyed, and expands the ability to prevent duplication of documents by claiming solicitor/client privilege. Further amendments in the *Anti-terrorism Act*, changed the name to the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*.
- Federation of Law Societies and Law Society of BC launched a constitutional challenge of the money laundering legislation, in which CBA intervened. In November 2001, the BCSC granted an interlocutory order exempting lawyers from the reporting scheme until the matter was finally determined. In January 2002, the BCCA dismissed a Crown appeal of the interlocutory order.
- Vancouver lawyers Ron Skolrood and Greg DelBigio acted for the CBA on a *pro bono* basis.

- In November 2001 and January 2002, then CBA President Eric Rice, Q.C. wrote to ask the Minister of Justice, to apply the BC order across the country.
- From December 2001 through May 2002, interim orders were issued in Alberta, Nova Scotia, Ontario and Saskatchewan. Challenges were commenced in New Brunswick, Newfoundland and Québec. In May 2002, the Attorney General of Canada and Federation of Law Societies agreed to apply the BC interlocutory order across the country, pending final disposition by the courts.
- In March 2003, the federal government decided to exclude lawyers and Québec notaries from requirements under the money laundering legislation to divulge confidential communications with their clients. At the same time, it said that it would introduce “redesigned” rules for lawyers, promising they would not adversely affect legal counsels’ ability to fulfill their obligations to their clients, and that the “redesign” would be in consultation with the legal profession.
- The BC Supreme Court was scheduled to hear the court challenge in November 2004, but the matter was adjourned indefinitely on consent of all parties.

After First Legal Challenge

- Bill C-53, *Criminal Code* amendments (Proceeds of Crime) creates a reverse onus, requiring certain offenders to show that their property was not proceeds of crime to avoid forfeiture. The National Criminal Justice Section presented its submission to the House Committee on Justice and Legal Affairs in November 2005, warning about the potential ramifications of the proposed changes. The Bill received Royal Assent in November 2005 (S.C. 2005, c. 44)
- The Senate Banking Committee released its review of the *Proceeds of Crime and Terrorist Financing Act* in October 2006. The Committee noted that the omission of lawyers was a problem in preventing money laundering, but recommended that the federal government continue to negotiate with the Federation of Law Societies (FLSC) regarding client identification and reporting requirements, with a view to ensuring all requirements meet *Charter* scrutiny.
- Representatives of the government and the legal profession, including the CBA, continued discussions of how to achieve the objective of combating money laundering, while adequately protecting the solicitor/client relationship. The BC Law Society changed its code of conduct to prohibit lawyers from dealing in cash amounts over \$10,000. The Law Society of Upper Canada now prohibits cash transactions over \$7500, and other law societies have since introduced similar amendments.
- Bill C-25, *Proceeds of Crime and Terrorist Financing Act* amendments, was tabled in October 2006. The bill would enhance client identification, report and record keeping measures for financial institutions and intermediaries, expand disclosures allowed by FINTRAC and allow the Canada Border Service Agency to share information with foreign counterparts.

- Constitutional Law Section Chair Ron Skolrood appeared before House Finance Committee in November 2006, on the only day of hearings scheduled for Bill C-25. CBA supported explicit exemption of lawyers, but cautioned against speed in considering Bill C-25. Expanded information sharing and other provisions may be problematic and merit closer study.
- CBA wrote to the Senate Banking Committee on Bill C-25, repeating the views expressed before the House. Past President Simon Potter appeared on behalf of the CBA in December 2006. Bill C-25 received Royal Assent in December 2006 (S.C. 2006, c.12).
- Canada is an active member of the international Financial Action Task Force (FATF), generating pressure on Canada to show leadership in combating money laundering.
- The government published draft regulations on client identification obligations in June 2007. CBA commented on the impact of those obligations in August 2007, saying the proposed identification and verification provisions were over broad and would be unworkable for practicing lawyers. CBA said the proposed audit process inadequately protected solicitor-client privilege and failed to maintain the independence of the Bar.
- In January 2008, Justice Canada wrote to CBA and other parties to ask for consent to the final regulations by March 2008. CBA was prepared to deny consent, when an agreement was reached to extend the deadline to allow ongoing discussions. Representatives of the legal profession are inflexible on the audit issue, which would permit searches of lawyers' offices under the regulations. The deadline was extended to September 2008.
- By March 2008, all law societies had adopted FLSC's model client identification rule. The model rule was revised by FLSC in December 2008, and implemented by the law societies later that month. Keeping the rule within the purview of self-regulation would avoid searches of law offices by government representatives which CBA and others vigorously opposed.

CURRENT STATUS

- In September 2008, parties representing the profession responded to Justice Canada that they did not consent to the imposition of the regulations on the legal profession. In December 2008, the government wrote to indicate its intent to reopen the litigation given the lack of consent offered. The government's correspondence also contained several inaccuracies.
- In May 2009, the profession responded to address the inaccuracies in the government's December 2008 letter and to stress again that measures taken by the law societies adequately address current problems and international obligations.
- CBA representative Ron Skolrood participated in consultations on the regulations, with a view to ensuring that solicitor-client privilege is protected. Consultations ultimately did not prove fruitful. The CBA intervened when litigation recommenced inspring 2011.
- In September 2011, the BC Supreme Court found that the impugned provisions violate section 7 of the Charter in their application to lawyers. (2011 BCSC 1270). The Court accepted the FLSC argument that lawyers' liberty is put in jeopardy by potential penal consequences of failing to comply with the legislation. The breach of the liberty interest does

not accord with principles of fundamental justice because the legislation interferes to an unacceptable degree with the solicitor-client relationship by compelling lawyers to collect and maintain information about their clients for law enforcement purposes. The infringement of section 7 cannot be saved under section 1 because there are less intrusive means of achieving the anti-money laundering objectives, notably the client identification rules passed by all Canadian law societies. CBA intervention supported FLSC arguments and also argued that, by undermining the unique role of lawyers and intruding into the solicitor-client relationship, the legislation interfered with the proper administration of justice.

- The decision underscores the importance of solicitor-client privilege and confidence in the justice system. It strengthens the role of self-regulation by recognizing that law societies are best situated to regulate the conduct of lawyers because they can do so in the public interest, while at the same time maintaining adequate protections for solicitor-client privilege.
- CBA was represented on a pro bono basis by Ron Skolrood of Lawson Lundell LLP.

NEXT STEPS

- Attorney General is appealing the BCSC decision. CBA Legislation and Law Reform staff will monitor any further developments.