

Litigation - Canada

Record-keeping and disclosure requirements offend principle of fundamental justice

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Introduction

In *Canada (Attorney General) v Federation of Law Societies of Canada* [2015 SCC 7] the Supreme Court of Canada considered whether certain sections of the Proceeds of Crime (Money Laundering) and Terrorist Financing Act [SC 2000 c 17] and the Proceeds of Crime (Money Laundering) and Terrorist Financing Regulations [SOR/2002-184] offended Sections 7 and 8 of the Canadian Charter of Rights and Freedoms. The provisions at issue imposed record-keeping and disclosure requirements on lawyers, among other professionals, and imposed penal sanctions for non-compliance. The provisions further gave the crown broad search powers, including the right to conduct warrantless searches of businesses and premises, and to examine and make copies of documents found pursuant to searches.

Case history

This case did not arise from any specific facts; the Federation of Law Societies of Canada challenged the regime solely on its constitutionality. The challenge first appeared before the British Columbia Supreme Court. Recognising solicitor client privilege as a principle of fundamental justice, the application judge held that the regime offended Section 7 of the charter. As remedy, the application judge read down the general search and seizure provisions as not applicable to the legal profession and struck down the provisions that specifically applied to lawyers and aspects of the legal practice.

The British Columbia Court of Appeal overturned the application judge's reasons, but upheld the result. Despite finding that the regime had adequate protections for solicitor client privilege, the court recognised "independence of the Bar" as a new category under the principle of fundamental justice. By effectively making lawyers "agents of the state", the regime offended this principle and could not be upheld.

The Supreme Court of Canada departed from the lower courts by considering the issue as interfering not only with Section 7, but also with Section 8 of the charter.

Section 8 analysis

The court's Section 8 analysis focused primarily on the regime's overarching criminal law objective and its interference with solicitor client privilege. Despite affirming that searches with merely regulatory objectives attract less protection, the court rejected the attorney general's characterisation of the regime as regulatory. Its objective was to gather evidence to support criminal prosecutions and it imposed penal sanctions for non-compliance, which characterised it as having a criminal law objective.

The court's analysis placed even greater emphasis on the importance of solicitor client privilege, affirming that it must remain as close to absolute as possible if it is to retain relevance. The regime fell woefully short in protecting privilege:

- Allowing Financial Transactions and Reports Analysis Centre of Canada officers to review and copy documents held by the lawyer created a "very high risk" that privilege would be lost.
- Lawyers had to claim privilege over specific documents at the time of the search.
- Judges had no discretionary authority to uphold a claim of privilege, absent a lawyer's specific application.
- There was no mandatory requirement that the state inform privilege holders of the possible loss of privilege.
- Only searches of lawyer home-offices required judicial pre-authorisation.

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Ultimately, the court held that the search and seizure powers under the regime violated the protection of Section 8 and were not saved by Section 1. As remedy, the court read down the regime's application as excluding lawyers.

The court's decision to read down the regime, rather than strike it out, is significant in understanding the decision's broader application. The characterisation of the regime's objective as criminal rather than administrative persists regardless of the person who is subject to the search. However, despite permitting warrantless searches with penal consequences for non-compliance, the regime alone does not offend Section 8 *per se*. It is instead the risk to solicitor client privilege that raises the objection, and specifically the high degree of deference that this category of privilege attracts.

While the court was not asked to rule on the broader constitutionality of the regime, its remedy implies that searches involving a weaker claim to confidentiality may not be offside Section 8.

Section 7 analysis

The enduring legacy of this case will likely be its enshrinement of the "solicitor's commitment to the client's cause" as a principle of fundamental justice. This finding was also the sole point of disagreement between the majority (Justices LeBel, Abella, Cromwell, Karkatsanis and Wagner) and the minority (Chief Justice McLachlin and Justice Moldaver).

The minority held that the commitment lacked sufficient precision to qualify as a principle of fundamental justice. Further, it held that solicitor client privilege, already recognised as a principle of fundamental justice, adequately supported the conclusion that the regime offended Section 7; accordingly, there was no reason to define a new category. The majority held that the solicitor's commitment is adequately precise and that, having already considered solicitor client privilege in its Section 8 analysis, it was unnecessary to apply this principle in its Section 7 analysis.

An in-depth analysis of the commitment and its broader application to future judgments is beyond the scope of this update. Suffice to say that it prohibits the state from imposing duties on a solicitor which, in fact or perception, undermine the solicitor's ability to fully commit to the client's cause.

Applied to the regime, the majority found that the requirement to create and maintain records of client information, knowing that there were inadequate systems to protect privilege, directly conflicted with the solicitor's commitment. Further, from the perspective of a reasonably informed client familiar with the federation's Model Rules on Client Identification and Verification Requirements, the regime went beyond what the profession deems sufficient to fulfil the solicitor's ethical obligation and would be perceived to conflict with the solicitor's commitment. Given that non-compliance would mean that a solicitor risked incarceration, the regime deprived liberty contrary to principles of fundamental justice.

Accordingly, the majority struck down Sections 33.3, 33.4, 33.5 and 59.4 of the regulations (which explicitly apply to law firms), and read down Section 11.1 of the regulations as not applicable to documents in possession of legal counsel.

The different grounds on which the majority and minority framed their Section 7 analysis create different consequences for how the regime may be amended to conform with the charter, if conformity is even possible. For the minority, Parliament could rectify the regime merely by introducing adequate protections for solicitor client privilege. Such protections were equally essential for the majority's analysis, but would not necessarily go far enough. Further, by grounding its analysis on a new principle of fundamental justice, the majority did not provide a clear path to remedy the regime's defects.

The majority speculated that, along with adequately protecting privilege, Parliament could satisfy the solicitor's commitment by creating derivative use immunity, ensuring that the required records are not used to prosecute clients. However, given its acknowledged criminal law objective, it is ambiguous whether the regime could retain its purpose in the context of derivative use immunity. Accordingly, the regime's application to lawyers may not be salvageable.

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