

TWELTH COLLOQUIUM ON THE LEGAL PROFESSION

The Independence of the Bar and if it Matters

***Money Laundering and the
Regulation of the Legal Profession***

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Outline

- Federal legislation affecting lawyers
- The law societies' constitutional challenge
- Law society rules
- New federal regulations?

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Introduction

- The problem: crime pays, often in cash. Criminals are sophisticated money launderers.
- The purpose of law society initiatives and legislation: to “close the gate” on money laundering and terrorist financing.
- The danger: that civil rights are ignored or abrogated in the process.

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Federal legislation

- Background: FATF 40 Recommendations (1990)
- *Proceeds of Crime (money laundering) Act*, S.C. 1991, c. 26
- *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*, S.C. 2000, c. 17, in force November 8, 2000

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Key aspects of the Act

- s. 6 – creation & retention of records
- s. 6.1 – verification of client ID
- s. 7 – suspicious transaction reporting
- s. 8 – no tipping off
- s. 9 – large cash transaction reporting
- s. 11 – no disclosure of privileged communication
- ss. 62-64 – search & seizure

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The legal challenge

- LSBC and FLSC fail to dissuade AG; launched proceedings when the Act came into force
- Interlocutory injunctive relief granted
- Appeal to BCCA denied; stay from SCC denied
- Similar relief in Alberta, Saskatchewan, Ontario & Nova Scotia; applications pending elsewhere

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Principles at stake

- Independence of the bar
- Duty of loyalty
- Solicitor-client confidentiality and privilege
- Duty to avoid conflicting interests

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The *status quo*

- Consent order of C.J. Brenner, May 13, 2005:
 - hearing of the Petition adjourned *sine die*
 - if new Regulations affecting legal counsel are enacted without FLSC, LSBC & CBA consent, hearing may be reset on 6 months' notice
 - National interlocutory injunctions by consent pending final resolution of the challenge
 - Decision from BC challenge is nationally binding

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Cross border cash transactions

- Client must report import / export of \$10,000 cash or instruments in bearer form
- Lawyer must report if physically transporting money for client (or otherwise) – not exempt
- See s. 12 of the Act, and *Cross-border Currency and Monetary Instruments Reporting Regulations* (SOR/2002-412)

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Law Society Initiatives

- The “no cash” rule: LSUC Bylaw 9, Part III:
- When: receiving / paying funds; purchasing / selling property etc; or transferring funds, cannot accept \$7,500 in cash for one matter
- Except for fees, disbursements, expenses or bail
- FLSC Model Rule → similar across Canada

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Rules of Professional Conduct

- Rule 2.02(5): lawyer shall not knowingly assist in or encourage any dishonesty, fraud, crime, or illegal conduct
- Don't be a dupe!
- Duty to inquire, *e.g.* if client seeks to use trust account without service, or promises unrealistic return on investment → too good to be true

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Rules on Client Identification

- FLSC Model Rule / LSUC Bylaw 7.1, Part III
- Client Identification – applies to all client matters
 - basic information about client and contact
- Verification: ensure clients are who they say they are
 - government registry / ID documents, information about directors, controlling shareholders
 - various exceptions

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Enforcement of the Rules

- By the Law Society as always
- Spot audits
- Annual Reports (including cash received)
- and in response to information

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Proposed federal regulations

- Government proposes to add lawyers to client ID and verification regulations
- “to maintain the credibility and soundness of our financial system in addition to sending a signal to the international community that Canada is an active participant in the fight against money laundering and terrorist financing.”

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FLSC Response

- Concern regarding independence of the bar
- Specific concerns, *e.g.* requirement to record any affected account #
 - obtaining info only for state, not client
- Unnecessary given the Rules, and inappropriate given law societies' mandate

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FLSC Response (cont.)

- Sections 62, 64 of the Act (warrantless search and seizure) remain unchanged since *Lavallee*
- Unconstitutional as presently drafted
- 2005 Consultation Paper promised amendments
- Not done yet

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Conclusion

- Law societies and legislators taking action to combat money laundering & terrorist financing
- International pressure on Canada to comply
- Must respect unique constitutional context
- BCSC Order remains in effect

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Thank you!

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