

*Federation of Law Societies
of Canada*



*Fédération des ordres professionnels
de juristes du Canada*

Anti-Money Laundering Regulation - What Can be Learned From the Canadian Experience

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What is the Federation?

Canada is Federal Democracy

Lawyers are Regulated by Provincial and Territorial
Bodies

Federation is National Coordinating Body



Federation's Position:

- Publically supports fight against Money Laundering
- Promotes self - regulation to reach this goal
- Government Initiatives to fight Money Laundering based on International Commitments must respect Constitutional Principles



Suspicious Transaction Reporting

- 2001: Canada passed PCMLTF Act
- Done in spite of Federation's Concerns that the scheme included Lawyers
- Required Lawyers to report clients and pass along confidential information and to do it in private



Litigation

- November, 2001 Litigation commenced challenging constitutionality of legislation
- Argued legislation threatened Independence of the Bar and Solicitor-Client Privilege
- SCC had affirmed lawyers' offices should not be used as archives for the State



Litigation

- Courts issued interim injunction prohibiting application of legislation to lawyers
- Also enjoined application of any new regulation without consent
- Subsequently legislation amended to remove lawyers



Regulator's Obligations

- Canada's Law Societies recognized the public interest required action to protect against Lawyers being involved in Money Laundering
- Worked together to develop rules to protect the public



Model Rule

- Federation developed Model “No Cash” Rule
- Prohibited Lawyers from accepting cash in excess of \$7500
- Rule adopted by all Governing Bodies demonstrating commitment to governing in the Public Interest



Know Your Client Regulation

- 2008: Federal Government enacted provisions making Federal regulations applicable to lawyers
- Federation argued these should not apply to lawyers
- Government argued that FATF required legislation or regulation
- Federation argued that in fact Regulation by Profession more effective



Know Your Client Regulation

- Federation created Second Model Rule
- Adopted by all governing bodies
- Codifies steps prudent / ethical lawyer should take
- Copies of both rules available on Website



Federation KYC Rule

- Rule applies to all Clients
- More stringent than Government regulation
- Identity Verification rules apply whenever lawyer assists or advises with Financial transaction
- Must use Reasonable Efforts to verify identity



Federation KYC Rule

- Governing Bodies enforce own regulations
- Governing Bodies discipline violations



What Can Be Learned

- Voluntary Acceptance of Obligation to Regulate by Profession
- Both “No Cash” and KYC rules
- Demonstrates voluntary acceptance of Self - Regulatory obligations
- Responsible Self-Regulation reinforces the Principle of Independence of the Bar



What Can Be Learned

- Also: Advocating the Principle reinforces the Principle
- SCC: “An independent bar composed of lawyers who are free of influence by public authorities is an important component of the fundamental legal framework of Canadian Society.”
- Litigation re-commenced against Federal Government regarding their KYC regulations



FLSC v. Government of Canada

- Federal Legislation required lawyers to:
 - identify clients, with verification when lawyer receives \$3,000 or more in a transaction;
 - create and obtain records about the client and transaction, to be retained for at least five years; and
 - produce to gov't enforcement agency, any document or information without warrant along with client names and contact information.



FLSC v. Government of Canada

- Section 7 of the *Charter of Rights and Freedoms* provides that “everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.”



FLSC v. Government of Canada

- The Court found this right was violated:
 - Liberty of clients jeopardized because lawyers required to collect information for state's use.
 - Unacceptably interferes with solicitor-client relationship, ie: lawyer's duty of loyalty.
 - Also interferes with solicitor client privilege which SCC calls a "principle of fundamental justice and civil right of supreme importance in Canadian law".



FLSC v. Government of Canada

- Government argued the law was a necessary infringement of rights as was needed to fight money laundering. However, Court found:
 - Was not a proportionate response;
 - Was not needed for international commitments, which in any event could not override constitutional guarantees.
 - And Law Societies already provide **“an effective and constitutional anti-money laundering and terrorist financing regime”**



FLSC v. Government of Canada

- Not a victory for Lawyers.
- A victory for Clients who can still rely on objective lawyers who are independently regulated.



FLSC v. Government of Canada

- Bottom Line:
- Pro-Active and effective self-regulation by Canadian Law Societies helped to defend the principle of self-regulation.



References:

- Case Citation: ***Federation of Law Societies of Canada v. Canada (Attorney General)***, 2011 BCSC 1270
- Federation Model Rules can be found on Federation Website:
- www.flsc.ca