Proceeds of Crime: Criminal, Regulatory, and Ethical Issues

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Crime and Punishment: New Aspects of Evidence in the Electronic Age

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INTRODUCTION

Money laundering is generally defined as a process used to disguise the source of "dirty" money or assets, derived from criminal activity, by transforming them into "clean" money or assets whose criminal origin is difficult to trace. Money laundering and terrorist financing are significant public policy concerns with international dimensions. Canada is a member of the global Financial Action Task Force (FATF) which develops and promotes policies and legislation to combat these crimes. To address its FATF obligations, Parliament enacted the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*, S.C. 2000, c.17 in 2001. The *Act* imposes obligations on certain businesses and professions that are vulnerable to being exploited by criminals seeking to conduct illicit transactions. The obligations include requirements to conduct client identification and verification, to keep records of financial transactions, and establish internal anti-money laundering and terrorist financing programs. The *Act* also requires that certain transactions be reported to the Financial Transactions Reports Analysis Centre of Canada (FINTRAC) and prohibits the reporter from disclosing the fact of the report to the client. FINTRAC integrates that information into larger databases and makes disclosure to law enforcement where there are reasonable grounds to suspect the information would be useful in investigating or prosecuting a money laundering or terrorist financing offence. During the 2010-11 year, FINTRAC made 777 disclosures to law enforcement agencies.

CANADIAN REGULATORY REQUIREMENTS FOR LAWYERS

Lawyers were made subject to this regime when it was enacted in November 2001 and thus were statutorily required to report suspicious transactions and large cash transactions. However, constitutional challenges to the legislation by Law Societies and the CBA resulted in injunctive relief. Client identification and verification rules for lawyers which were added by regulation in 2008 were also stayed pending a constitutional challenge. In September 2011, Madam Justice Gerow of the British Columbia Supreme Court declared unconstitutional or read down various provisions of the statute, which created obligations for legal counsel and law firms: *Federation of Law Societies of Canada v. Canada (Attorney General*), 2011 BCSC 1270 (currently under appeal).

Justice Gerow held that the money laundering regime in this statute infringed the section 7 *Charter* rights of both counsel and their clients, imperiling solicitor/client privilege. The regime was not saved by section 1 of the *Charter* as it does not minimally impair the solicitor/client privilege. Instead, the minimal impairment regime is that created by Law Societies in the course of regulating lawyers which was found to be an effective and constitutional anti-money laundering and terrorist

financing regime. Thus, Law Society rules regarding client identification and verification and "no cash" rules as well Law Societies' investigation and prosecution of breaches of those rules through annual reports, audits, self reports and complaints, was found to be an effective substitute for the unconstitutional 2001/2008 regime. While this case works its way through appellate challenges, the regulatory regime which affects counsel is that created by the Law Society, not by Parliament.

LAW SOCIETY OF ALBERTA REGULATORY REQUIREMENTS

There are two anti-money laundering regulatory obligations which affect lawyers practicing criminal defence work. The first is the no cash rule; the second is the client identification rule. Lawyers doing transactional practices (receiving funds and paying them out on client instructions from/to third parties) have additional obligations under these rules. Criminal defence lawyers with non-exclusive practices must be aware of these. This paper will not describe those obligations in detail, but they can be determined from the appendices.

No Cash Rules

Rules 119.38 and 119.39 (attached as Appendix "A") impose specific obligations upon lawyers when dealing with cash. In summary, a lawyer cannot receive more than $7500 in cash from a person in respect of any one client matter however the prohibition does not apply where the money is received for professional fees, disbursements, expenses, payment of a fine or bail. Where cash has been received, any refund greater than $1000 must also be made in cash: Rule 119.38(5)(d).

Cash received must be recorded by the law firm in a book of duplicate receipts which records the date the cash is received, the amount, the person from whom it is received, the client for whom it is received and any file number for that client. The receipt must bear the signature of the lawyer or person authorized to receive the cash as well as the signature of the depositor of the cash: Rule 119.39(1).

If cash is returned (if there is a refund of greater than $1000) there must be a record of the date and amount of cash paid out, the client's name and file number and the name and signature of the person to whom the cash is returned: Rule 119.39(2). Not everyone will agree to sign a receipt when they deposit or receive cash back, but the lawyer must make reasonable efforts to get that signature: 119.39(3).