

From the Globe and Mail – COMMENT:

A stain on the law

Lawyers must not be exempt from Ottawa's new anti-money-laundering legislation, says security analyst SAM PORTEOUS -- not if we want it to work

By SAM PORTEOUS

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Last week, the Canadian government succumbed to a ferocious lobbying campaign, and removed lawyers from the list of financial intermediaries required to secretly report "suspicious transactions" (those potentially related to money laundering or terrorist financing) to Canada's new anti-money-laundering agency. So while your stock broker, accountant and banker are now compelled to act as "secret agents," betraying client confidentiality, the legal profession will, for the moment, be spared this indignity.

It wasn't supposed to be this way. In 2001, when the world was awash with a post-9/11 sense of purpose, then-justice minister Anne McLellan dismissed calls by the legal profession to exempt lawyers from the strict new all-encompassing reporting requirements of the Proceeds of Crime (Money Laundering) Act and Terrorist Financing Act. Ms. McLellan argued that leaving lawyers out would create a "gaping loophole" in the legislation. "That would simply be unacceptable in terms of effective public policy," she said.

The legal profession responded by launching a series of successful constitutional challenges to the new legislation, and received ringing endorsements from this country's courts. In province after province, judges acknowledged the importance of curtailing money laundering and terrorist financing but repeatedly found that the new legislation seriously struck at lawyers' independence from government, their loyalty to clients, and the client's privilege against self-incrimination.

Unwilling to continue fighting what appeared to be an expensive (and losing) battle, Ottawa was forced out of the courts and back to the bargaining table. Now negotiators representing the two sides are trying to balance the constitutionally backed concept of solicitor-client privilege with the rapidly emerging national-security need to choke off money laundering and the financing that feeds terrorism and other forms of organized crime.

How have other jurisdictions dealt with this challenge? Those to which Canada might compare itself -- the United Kingdom, Australia and the European Union -- have opted to include lawyers among those intermediaries compelled to report suspicious transactions. Interestingly, the United States, one of the most ardent advocates of tough anti-money-laundering and terrorist-financing laws, has not. Opponents of reporting requirements

should not take much comfort from this, however; even in the United States, the matter is currently under review.

In all these jurisdictions, the rationale for requiring lawyers to report suspicious transactions closely parallels Ms. McLellan's initial argument: Leaving them out creates too large a gap in the legislation's coverage. As we increase the scrutiny exercised on all other gatekeepers to the financial system, this argument is becoming harder and harder to refute.

Increased reporting requirements for banks and other financial institutions in recent years have led money launderers and terrorist financiers to turn to financial intermediaries to better mask their activities. Lawyers whose access to devices such as "client accounts" make them ideal financial intermediaries have frequently been linked to various money-laundering schemes. If their profession, alone among financial intermediaries, is exempted from reporting suspicious transactions, it's not hard to guess where money launderers and terrorist financiers will be taking their business.

Perhaps a compromise between government and lawyers can be reached, wherein we focus on requiring lawyers to report only suspicious transactions potentially linked to the immediate threat of terrorist financing.

Such a compromise would allow lawyers to practise in peace in this grey area of large-scale tax avoidance and financial crime -- traditionally viewed by government with ambivalence -- while, at the same time, contributing their services to the war on terrorism.

But even then, we would need to clearly explain why lawyers, as opposed to tax accountants, bankers or investment advisers, should be treated differently.

Over the next few months, the government, along with all interested parties, will develop a new legislative and regulatory regime that balances lawyers' concerns with the broader public interest. Unless the public is willing to forego all its post-9/11 concerns with security, Canada's legal profession would be well advised to offer an appropriate compromise of its own.

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