The Law Society of British Columbia

Memo

To: Executive Committee
From: Michael Lucas
Date: May 13, 2019
Subject: Summary of Relevant Portions of "Turning the Tide - An Independent Review of Money Laundering in B.C. Real Estate, Luxury Vehicle Sales & Horse Racing" (German Report, Part 2)

Introduction

Peter German was retained by the Attorney General to review and report on money laundering in British Columbia. His first report, released in June 2018, focused on money-laundering activities in connection with casinos and gaming. His second report, released last week, addresses money-laundering in the real estate, luxury car and horse racing sectors.

Dr. German's report examines the role of professionals in these sectors, and in so doing discusses at some length the legal profession in relation to real estate. In the course of his Report he makes a number of "proposals" about how to deal with the problems that money-laundering creates, some of which address lawyers and the Law Society.

This summary looks at specific matters relating to the legal profession in the Report.

Comments on Lawyers

The Report contains a lengthy section on lawyers in Chapters 2 – 4.

The report notes that lawyers are at high risk of being targeted by money launderers, not only because they are exempted from financial reporting but by the very nature of the risks inherent in dealing with real estate transactions, the formation of corporations and trusts, and most of all because they can hold funds in a trust account. Lawyers acting in real estate transactions are therefore particularly vulnerable to being used as conduits for "dirty money." For this reason, the Report notes that they should be required to enquire into the source of funds when closing funds are wired into their trust accounts from foreign destinations. The Report also notes that, because of solicitor-client privilege, lawyers are "through no fault of their own" the 'black hole'

of real estate and of money movement generally. Law enforcement is often unable to know what enters and leaves a lawyer's trust account, resulting in the many investigations being stymied.

Overall, however, the Report has some positive things to say about Law Society activities. In particular the Report notes that "to its credit, the Law Society of B.C. is at the forefront of Canadian law societies as they attempt to replace the absence of reporting with self-regulation by lawyers."

The Report reviews in some considerable detail the Supreme Court of Canada's decision in the Federation money-laundering case, as well as efforts by law societies through the Federation to create rules to address money-laundering concerns, and details the Law Society rules to this end. It also reviews the general professional and ethical obligations of lawyers, including the decision in *Law Society of BC v. Gurney*. The Report also reviews in detail the Law Society's investigative authority and audit powers in a generally positive way, and reviews efforts through the Federation to update the Model Rules to address money-laundering concerns.

Some concerns

Unfortunately, there are at least two glaring errors in the Report which are capable of creating public misunderstandings about the Law Society's and lawyers' roles and efforts in combatting money-laundering.

The first is a conflation of the role of Quebec notaires with BC notaries public. The Report comments at page 123:

> In British Columbia, notaries are a well-established profession, much as they are in the Province of Quebec. Those in Quebec joined with the law societies in the *Federation* case and are exempted from financial reporting, while those in B.C. did not. The B.C. Notaries Society supports financial reporting.

BC notaries public are not the same as Quebec notaires. Quebec notaires are lawyers, while BC notaries public are not. The law has not extended solicitor-client privilege to BC notaries public. Dr. German's language makes it sound like BC notaries public made a conscious decision not to participate in the Federation case, when in fact there was no legal basis for them to be included. Without understanding the error, one might ask "if BC notaries public support financial reporting, why doesn't the Law Society?" In truth, it is not a question of notaries supporting reporting, it is that the law requires them to, and there was no constitutional issue for the notaries to challenge that requirement.

The second is how Dr. German has characterized solicitor-client privilege. At page 124 in the Report it is stated:

> The solicitor-client privilege which lawyers enjoy, and jealously guard, sets the profession apart in the eyes of the law from all others.

Solicitor-client privilege is not a privilege that "lawyers enjoy." It is a right that the public benefits from. In law, it is a principle of fundamental justice and a civil right of supreme importance in Canadian law, and is a positive feature of law enforcement, not an impediment to it (*Lavallee, Rackel & Heintz v. Canada (Attorney General)* [2002] 3. S.C.R.209). The way it is presented in the Report makes it appear that it is a right that lawyers benefit from, not the public, and that it is a right jealously guarded by lawyers for their own purposes, rather than a professional obligation that a lawyer has an ethical responsibility to defend. Stated as it is in the Report invites those reading it to believe that lawyers challenged the government's legislation on money-laundering for their own benefit, not to defend a constitutional principle and the rule of law.

Both these errors should be corrected.

Solicitor-client Privilege

Despite having mis-described who benefits from solicitor-client privilege, the Report contains a very useful review of the application of privilege, with a reminder that not everything that takes place in lawyer's trust account is always privileged, and reviews a number of cases where information from a lawyer's trust account was ordered to be released. Its conclusion is worth keeping in mind because it is sometime overlooked: there is no blanket privilege that shields all records in a lawyer's trust account from disclosure, and case law recognizes that information relating to financial transactions in trust accounts will in general not be privileged.

However, the Report does *not* note that if any privilege exists, it is the client's privilege, not the lawyer's. Therefore, while information about financial transactions in a trust account may *generally* not be privileged, such information can, depending on the circumstances, be privileged. A lawyer cannot safely provide information over which a client has claimed privilege in all but the most obvious of cases, as the client has a right to defend the claim of privilege.

The Report also reminds readers that any communications made by a client for the purpose of facilitating or assisting the commission of a crime are exempted from privilege. It comments:

> Accordingly, were a client to seek advice from a lawyer on how to launder money, that communication would not be protected by solicitor-client privilege, and the lawyer would be obligated by LSBC Rule 3-109 to withdraw from representation of the client. In these circumstances, there would not appear to be any legal impediment based on either privilege or duty of loyalty that would prevent a lawyer from reporting the transaction.

This conclusion addresses the underlying issues relating to Recommendation 14 in the "Maloney Report" although, unlike the Maloney Report recommendation, the German Report's conclusion suggests there is no impediment on reporting this "suspicious transaction" like any other reporting entity. The Maloney Report recommends reporting to the law societies, which is a safer option on the chance that the lawyer was wrong about the nature of the communication. The Supreme Court of Canada has said that privilege must be protected as absolutely as possible, and the possibility that privilege could be lost in error has resulted in legislation been struck down on at least two occasions.

Proposals

As stated above, the German Report makes a number of "proposals" about how to deal with the problems created by money-laundering activities. The proposals are not, strictly speaking, recommendations and they are scattered throughout the narrative. Outlined below are some of the proposals relating to lawyers.

1. In several places, it is noted that the cash rule governing the acceptance by lawyers of no more than $7,500 is limited in its effect. It does not prevent persons from giving tens, or hundreds of thousands of dollars in cash to a lawyer for bail money, or in settlement of fees and expenses, and the report explains how this can give rise to risks of money-laundering. Therefore, the report seems to propose that the "no-cash" rule be tightened up to include cash received for bail, fees and expenses.

   This has been discussed as a possibility, although it is not currently one of the items proposed by the Federation's Working Group.

2. The Report notes that, in the Federation money-laundering case, the Supreme Court of Canada invited Parliament to revisit the *PCMLTFA* and attempt to deal with the issue of non-reporting by lawyers to FinTRAC. There is a section of the Report that outlines reporting regimes in other Commonwealth countries with common legal traditions and invites the conclusion that if they can be worked out there, they can be worked out in Canada. While the Report downplays (or ignores) the different constitutional parameters between these countries, it is true the Supreme Court left it open that if a constitutionally compliant way of including lawyers in the regime could be identified, it could be legislated.

   Consequently, the proposal that efforts be made to identify a constitutionally compliant method of including lawyers in the regime will likely require renewed discussions with the federal government. There are some recommendations in the Maloney Report that could form the basis for these discussions. The German Report notes that options include reporting financial transactions to FinTRAC, reporting those transactions to a separate body, possibly administered by the law societies, such as the Federation of Law Societies,

or creating some other blind that allows for the transmission of financial data without transgressing solicitor-client privilege.

3. The German Report seems to propose that reporting be done to the Law Societies:

> Self-regulation by provincial law societies is the sole due diligence mechanism by which lawyers seek to prevent money laundering. Regulation of lawyers through the LSBC presents at least one significant advantage over enforcement and regulation by FinTRAC and law enforcement, which is that investigators and auditors working for LSBC have unhindered access to all records and files of a lawyer, including documents that would otherwise be protected by solicitor-client privilege. Why can they not act as the blind described above?

This would be consistent with Recommendation 14 of the Maloney Report.

4. The German Report specifically identifies the possibility of following an American example where lawyers are required to file reports on any transaction in which they receive more than $10,000 in cash. These reports contain the name and address of the person from whom the cash was received, the amount of cash, and the date and nature of the transaction. It is difficult to understand how this basic information, none of which comes from the client, other than name and address, could violate solicitor-client privilege.

   This proposal can be kept in mind, although it seems to contravene the general principles outlined in the Federation money-laundering case. Sometimes the transaction *will* be privileged, even if it usually isn't. Moreover, if it is the client providing the cash, the name and address of the client may also sometimes be privileged.

   The proposal also seems to operate on the presumption that lawyers would become able to accept cash. The current "no-cash" rule seems like a better way of addressing money-laundering concerns, perhaps enhanced so that the current rule could be extended to including fees, expenses and bail.

5. The Report notes that "it is anomalous that in B.C., lawyers can act as realtors and yet not report to FinTRAC." It is true that lawyers are permitted to act as realtors in BC. I do not know enough about these activities to know if, when acting as a realtor, a lawyer is not bound to act in all ways similar to a relator, such as requiring to be a reporting entity. Arguably, when wearing a realtor hat, perhaps there is no good reason that a lawyer should, for other purposes, claim that he or she is acting as a lawyer. Further study of this anomaly is warranted, although it is not likely than many lawyers actually do act as realtors.

6. The Report notes that it is important that lawyers be aware of sanctions legislation and "politically exposed person" requirements and incorporate both in their due diligence and client verification. This is likely worth further consideration.

7. The Report proposes that FinTRAC should be able to provide copies of suspicious transaction reports to the Law Society for use with audits and investigations, as part of a working group with law enforcement, similar to the gaming sector. This proposal has similarities to Recommendation 16 in the Maloney Report.

8. The Report proposes that Law Society auditors and investigators should be required to obtain anti money-laundering training, possibly including a form of certification. It would be hard to argue against this proposal.