

Fighting Terrorism Financing—Implications for the Legal and Financial Sectors

Vern KRISHNA*

Well, it is difficult to follow those two acts. The good guys, after all, have already spoken.

We have heard the phrase “rule of law in a democratic society” at least a dozen times in the last two hours. I do not know of anyone in this room who is not in favour of the rule of law in a democratic society. If there is, please put up your hand. It is a platitude misstatement and what we are hearing now is how we are going to ensure the rule of law so that we can continue in a democratic society. We embark in this new era on something that will not have its full parameters defined for another 20 years. Most of us in this room will not be here when we even know what the final parameters of these rules are. And those that will still be here will be eating mashed potatoes without salt.

What we are really here to talk about is a balancing of interests that ensures the rule of law and what interests need to be balanced. But before we go too far down the road of absolute conviction in truth of everything that we say, remember Oliver, Wendell Holmes admonition, “Truth is not the wiry Methuselah that it is made out to be. It has a life at best of 25 to 30 years.” We, and governments everywhere, not only here, but also any democratic society at the time that they enact legislation and rules are completely convinced of the need and desire and infallibility of that legislation.

When we entered Japan during the Second World War, we were absolutely convinced it was the right thing to do at that time. It was done in good faith. When MacKenzie King’s advisor was asked how many Jews should we allow into Canada, his answer was, “None is too many.”

* Professor, Faculty of Law (Common Law), University of Ottawa, Treasurer, Law Society of Upper Canada, Toronto, Ontario.

That, too, was given with ultimate conviction in the truth and veracity of the policy by the person who was, at that time, giving the advice. Subsequent events show that we spend half of our time apologizing for our earlier sins in confessionals, or in this particular incidence, hopefully we will have the courts strike down certain aspects of this legislation.

First of all, before I get there, let me speak briefly as to what money laundering is. And here I don't care whether we talk about the money laundering bill itself or terrorism because money laundering, in itself, and movement of funds is the same under both regimes.

Money laundering is a very old-fashioned crime. It continues unabated even as we speak here. As we speak here right now in this city, there are approximately three million dollars being moved in currency from one location to another by the biker gangs who have collected the proceeds from yesterday and last week. Our underground economy accounts for approximately 15 % of GDP (Gross Domestic Product). It is a rough estimate because obviously given the nature of the activity you cannot get an absolute statistic, but reasonably informed sources and estimates say it is around 15 % of GDP.

Now what is money laundering? It is nothing very complicated. It is simply as its name implies taking dirty money and converting it into clean money. The dirty money can arrive from two sources or two types of activities. It can come from an intrinsically illegal activity of criminal activity: drugs and prescribed substances, racketeering, bribery of government officials, kick-backs on government contracts, pay-offs for obtaining licences and permits, income tax evasion, etc., where the underlying activity is illegal. Once you engage in the illegal activity, you have to do something with the money that you get from it. And by its very nature, most illegal activity tends to occur in currency rather than in certified cheques.

It can also emerge as a problem from perfectly legal activities that received money and want to make it illegal. The restaurateur from high cash sales who reports only 70 % of the sales and forgets the other 30 %. What are you going to do with that 30 %? You have to convert that money into something legal, therein lays the problem.

Approximately one third of the people in this room have involuntarily participated in money laundering. The man who comes to your house and says, "I'll fix your roof" and you say, "How much?" He says, "How are you going to pay?" What do you think is going to happen? He says, "Well if you pay cash, we'll do it for five, if you want an invoice it will cost you 8." What is going to happen with the cash if you go with the cash? One of two things: if it's actual currency it will disappear and both the income tax and the GST will not be paid, and if it goes in a cheque he or she, usually a he (at least for roofers), will take it and deposit it against their Visa card on their personal account and the money will disappear.

Of course we tolerate that type of activity simply as a price that we have to pay. The cost of administering a perfect system far outweighs the loss of revenue through slippage at the edges. But what we are really talking about is financing at a much larger scale in racketeering, in drugs, and now it is alleged in terrorist financing. I say it is alleged because, there is no doubt I am sure, that there is money being transferred in terrorist financing, but the allegations are coming fast and furious.

In the RGR Reynolds tobacco case, in which the Government of Canada sued RGR Tobacco in the US under the RICO Statutes and lost, the decision which it lost at the motions stage—I should mention in passing and for which it paid for which it legal fees of 17 million dollars just at the motions stage—was thrown out of court at the second circuit of New York. It then filed a leave to appeal to the US Supreme Court. Suddenly for the first time, in its filing before the US Supreme Court, the Government says RGR Reynolds Tobacco is engaged in terrorist financing. It is an interesting assertion, post September 11; everyone is a victim and a potential target. I hear some people speak of client profiling and I understand the code language of what that means and who is going to be profiled and under what circumstances.

Now, let us turn briefly to some of the issues that we in the legal profession are concerned with and why they are matters of concern to us. First of all, as it has been declared here, the obligation under the act is basically to report and one must report if one has reasonable grounds to suspect that the transaction is related to the commission of a money laundering offence. You must have reasonable grounds.

Now before I get into the difficulties that lawyers face, I must point out one anomaly in the statute, which is really quite interesting. Accountants have been exempted from the requirement to report if the information is derived in the course of their audit. In other words, if you see the evidence in the course of your audit, you are not under requirement to report the transaction. It is only if you physically get involved or have reasonable grounds for believing the client is moving it, that you are required to report the transaction. It is a remarkable exemption for a profession with a remarkable amount of lobbying clout and we see, of course, what that profession is doing.

Mandatory reporting violates two of the most fundamental principles of the legal profession. It is called values and that is, the duty of confidentiality to the client. The duty of confidentiality to the client gives the client comfort and security that when he or she walks into a lawyers' office, he or she is going to obtain advice without danger of being reported, threatened, and incarcerated or anything else. That confidence is at the root of the rule of law because we cannot have a rule of law in which a segment of society is afraid and timid to seek legal advice. It would create a chill that ultimately will prevent people from moving to seek advice from their legal advisers, and ultimately a society that does not allow for free or good or easy legal advice undermines one of the core values of the rule of law.

The legal profession is the only profession that has this fundamental value and is required, under professional ethics and its values of the law society and its code of professional conduct, to maintain that confidentiality or face discipline by the law society. It is for that reason that the various law societies across Canada have challenged the legislation constitutionally and, at the present time, have received interim injunctions in four of the courts: British Columbia, Alberta, Ontario and Nova Scotia. And so while we applaud the platitude, we are committed to the rule of law in a democratic society. We are equally committed to the requirement that the members of society have, namely that they have legal access to legal services to ensure that rule of law.

We recognize that this requires a delicate balance of interests and we are not talking here at the extremes of having absolute immunity versus absolute incarceration or threat. We are talking about a delicate balance in the middle whether the law overreaches and goes too far to put a chill on society through the restraint on legal services. So I ask you to consider whether the balance in respect of that aspect of the law that deals with legal services may have tilted too far, and if it has we would hope that the courts will rectify the problem and sooner rather than later.

Thank you.