American lawyers can be heartened by a recent decision of the Supreme Court of Canada that protects the integrity of the attorney-client privilege and the confidential lawyer-client relationship in connection with Canada’s federal anti-money laundering, anti-terror law.

The court’s Feb. 13 landmark decision in *Attorney General of Canada v. Federation of Law Societies of Canada* acknowledges the critical importance of the attorney-client privilege—known in Canada as the solicitor-client privilege—and strikes down portions of Canada’s Proceeds of Crime (money laundering) and Terrorist Financing Act and regulations that would intrude on the privilege.

The opinion reinforces the principles that lawyers are not agents of the state and that the government may not search lawyers’ records without a warrant. The decision also affords constitutional protection to the privilege and to a lawyer’s broader “commitment to the client’s cause,” meaning that the government cannot impose obligations on lawyers that undermine either principle.

Although the opinion is from the Canadian Supreme Court, it also has resonance for the United States. The attorney-client privilege is a bedrock legal principle of our free society. It enables both individual and organizational clients to communicate with their lawyers in confidence, which is essential to preserving all clients’ fundamental rights to effective counsel. The Canadian decision should serve as an important reminder to U.S. legislators and regulators that federal regulation of the legal profession has limits, including limits on measures that intrude on the privilege or on the broader confidential lawyer-client relationship.

Those who know of the U.S. government’s attempts to impose anti-money laundering and counter-terrorist financing mandates on U.S. lawyers will identify with the history behind the Canadian ruling. Fifteen years ago, the Canadian Parliament enacted a sweeping anti-money laundering law requiring financial intermediaries—including lawyers—to collect, record and retain material. The law created a new agency to oversee compliance, and it allowed that agency to search for and seize material. Non-compliance subjected the offender to fines and imprisonment. Regulations adopted in 2002 subjected lawyers to the law’s recordkeeping and client-verification requirements and allowed the government to search and seize records, subject to a limited exception for the privilege.
The Federation of Law Societies of Canada challenged the constitutionality of these measures as they applied to lawyers and prevailed at every step of the litigation that spanned more than a decade. The court’s recent decision struck down those portions of the law allowing warrantless searches and seizures of lawyers’ offices and those requiring lawyers to monitor and report their clients’ financial activities to the government. The court reasoned that each of these actions would undermine both the privilege and the lawyer’s duty to the client.

Although the American Bar Association supports reasonable and necessary domestic and international efforts to combat money laundering and terrorist financing, we believe a voluntary, risk-based compliance approach aimed at educating lawyers about how to detect and prevent these problems works best and is far preferable to intrusive federal regulation of the legal profession that would erode the attorney-client privilege and harm clients.

Toward that end, the ABA adopted voluntary good practices guidance in 2010 designed to help lawyers to detect and prevent money laundering in their practices. Last year, the ABA also collaborated with the International Bar Association and the Council of Bars and Law Societies of Europe to produce a lawyer’s guide with practical tips for detecting and preventing money laundering, highlighting the ABA’s commitment—both domestically and internationally—to educating the profession in this area.

The decision by Canada’s highest court eloquently recognizes the critical role that the attorney-client privilege and the confidential lawyer-client relationship play in our justice system. Although we are heartened by the opinion that will protect the Canadian legal profession from intrusive regulation, legislative and regulatory efforts that could imperil the same values remain in the United States.

The ABA will continue its vigorous efforts to protect the U.S. legal system from this regulatory overreach while educating the profession about the menace of money laundering and terrorist financing. The proper administration of justice demands no less.

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