IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Federation of Law Societies of Canada v. Canada (Attorney General),* 2011 BCSC 1270

Date: 20110927
Docket: L013117
Registry: Vancouver

Between:

Federation of Law Societies of Canada

Petitioner

And

Attorney General of Canada

Respondent

And

Canadian Bar Association,
Chambre des Notaires du Québec,
Barreau du Québec and
The Law Society of British Columbia

Interveners

Before: The Honourable Madam Justice Gerow

Reasons for Judgment

Counsel for the Petitioner, Federation of Law Societies of Canada:	J.L. Hunter, Q.C. R.W. Millen
Counsel for the Respondent, Attorney General of Canada:	J.E. Brongers C. Rupar B.J. Wray P. Nostbakken
Counsel for the Intervener, Chambre des Notaires du Québec, Barreau du Québec:	R. Doray L. Berdnikoff

Counsel for the Intervener, The Law Society of British Columbia:	L.T. Doust, Q.C. M.A. Feder A.M. Juba N. Isaac
Counsel for the Intervener, Canadian Bar Association:	R.A. Skolrood A.M. Kemshaw M. Berger S.P. Glickman (Articling Student)
Place and Date of Hearing:	Vancouver, B.C. May 9-13 and 16, 2011
Place and Date of Judgment:	Vancouver, B.C. September 27, 2011

Introduction

[1] The petitioner is the national coordinating body of the 14 provincial and territorial governing bodies of the legal profession in Canada. The petitioner is challenging the anti-money laundering and terrorist financing legislation that was enacted by the federal government, insofar that it applies to lawyers, on the basis that it is unconstitutional. The petitioner asserts that some of the provisions of the legislation violate ss. 7 and 8 of the *Canadian Charter of Rights and Freedoms*. To that end, the petitioner has filed a Notice of Constitutional Question seeking determinations of whether certain provisions of the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act,* S.C. 2000, c. 17, as amended [the *Act*] and the *Proceeds of Crime (Money Laundering) and Terrorist Financing Regulations*, SOR/2002-184, as amended [the *Regulations*], are inconsistent with the Constitution of Canada to the extent that they apply to lawyers.

[2] The interveners support the petitioner. The interveners are the Barreau du Québec and the Chambre des Notaires du Québec (collectively referred to as the "Québec law societies"), the Canadian Bar Association (the "CBA") and the Law Society of British Columbia (the "Law Society").

[3] The respondent takes the position that Parliament is constitutionally able to impose anti-money laundering and terrorist financing obligations on lawyers. The respondent asserts that the legislation is valid and has been adopted to address the pressing and substantial problem of money laundering and terrorist financing. Its proposed application respects both clients' and lawyers' constitutionally protected rights under the *Charter*. Therefore, the provisions impugned by the petitioner are constitutionally sound and should be permitted to operate in order to address the scourge of money laundering and terrorist financing as Parliament has intended.

[4] The issues are:

1) Is there a sufficient factual basis on which to determine whether the impugned provisions infringe ss. 7 and 8 of the *Charter*?

2) Is it permissible for the interveners to argue issues not raised by the petitioner in the Notice of Constitutional Question?

3) Do the impugned provisions, as they apply to legal counsel and law firms, infringe ss. 7 and 8 of the *Charter*? If so, is the infringement reasonable and justified under s. 1 of the *Charter*?

4) If the impugned provisions infringe the *Charter*, what is the appropriate remedy?

[5] For the following reasons, I have concluded that legal counsel should be exempted from the *Act* because the obligations imposed by the *Act* infringe s. 7 of the *Charter*, and the infringement is not reasonable and justifiable under s. 1 of the *Charter*. As a result, the issue of whether certain of the impugned provisions of the *Act* and *Regulations* infringe s. 8 of the *Charter* need not be considered. The appropriate remedy is to read down the *Act* and *Regulations* to exclude legal counsel and legal firms and to sever certain sections.

Background

[6] As stated earlier, the petitioner is the national coordinating body of the 14 provincial and territorial governing bodies of the legal profession in Canada. Its member law societies are charged with the responsibility of regulating Canada's 95,000 lawyers and Québec's 3,500 notaries in the public interest. The petitioner is a leading voice on a wide range of issues of national and international importance involving justice and regulatory matters critical to the protection of the public.

[7] Money laundering and terrorist financing are significant public policy concerns with international dimensions. In order to address them, Parliament has enacted the *Act* which imposes anti-money laundering and terrorist financing obligations on certain businesses and professions that are vulnerable to being exploited by criminals who seek to conduct illicit transactions. These obligations include requiring financial institutions and intermediaries to conduct client identification and verification, keep records of financial transactions, establish internal anti-money

laundering and terrorist financing programs and report certain transactions to the Financial Transactions Reports Analysis Centre of Canada ("FINTRAC").

[8] As indicated by its title, the *Act* concerns money laundering and terrorist financing. By adopting this legislation, Canada is fulfilling its commitment to the international community to effect a coordinated response to the crimes of money laundering and terrorist financing.

[9] The objects of the *Act* are stated in s. 3, which provides:

> The object of this Act is
>
> (*a*) to implement specific measures to detect and deter money laundering and the financing of terrorist activities and to facilitate the investigation and prosecution of money laundering offences and terrorist activity financing offences, including
>
> > (i) establishing record keeping and client identification requirements for financial services providers and other persons or entities that engage in businesses, professions or activities that are susceptible to being used for money laundering or the financing of terrorist activities,
> >
> > (ii) requiring the reporting of suspicious financial transactions and of cross-border movements of currency and monetary instruments, and
> >
> > (iii) establishing an agency that is responsible for dealing with reported and other information;
>
> (*b*) to respond to the threat posed by organized crime by providing law enforcement officials with the information they need to deprive criminals of the proceeds of their criminal activities, while ensuring that appropriate safeguards are put in place to protect the privacy of persons with respect to personal information about themselves; and
>
> (*c*) to assist in fulfilling Canada's international commitments to participate in the fight against transnational crime, particularly money laundering, and the fight against terrorist activity.

[10] The petitioner challenges the constitutionality of the *Act* and the *Regulations* (collectively referred to as the "Regime"), as it applies to the legal profession.

[11] The petitioner asserts that the Regime violates s. 7 of the *Charter* by jeopardizing the liberty of lawyers and clients in a manner that fails to conform with the principles of fundamental justice, namely:

> (a) solicitor-client confidentiality and privilege;

(b) lawyers' duty of loyalty to their clients; and

(c) the independence of the bar.

[12] The petitioner's central complaint is that the Regime requires lawyers to collect information from their clients and retain it so that the information can be available for law enforcement officials if they wish to review it. The petitioner says this requirement turns lawyers into state agents tasked with collecting information from their own clients for potential use by the state against the clients.

[13] The petitioner asserts the Regime also violates s. 8 of the *Charter*, by authorizing state agents employed by FINTRAC to conduct warrantless searches of lawyers' offices at any time.

[14] FINTRAC is an administrative financial intelligence unit that operates independently from law enforcement agencies. It is established under the *Act* and is mandated to facilitate the detection, prevention and deterrence of money laundering and terrorist financing by collecting information, analyzing it and disclosing it to law enforcement agencies. FINTRAC is also responsible for monitoring compliance with anti-money laundering and terrorist financing obligations imposed on certain businesses and professions under the *Act*.

[15] The petitioner agrees that requiring lawyers to take steps to deter criminals from employing them to launder money and finance terrorism is a valid societal goal. However, any system to deter money laundering and terrorist financing must respect Canada's fundamental constitutional principles. The petitioner says that the law societies have developed rules to regulate the conduct of lawyers, which ensure that the goal of deterring criminals from employing lawyers is met and which strikes the appropriate balance with Canada's constitutional structure. In this context, the impugned provisions constitute an unjustifiable infringement of ss. 7 and 8 of the *Charter*.

[16] Lawyers were first made subject to the Regime in November 2001. As of that date, lawyers were required to report to FINTRAC "suspicious transactions"; i.e.

transactions for which there were reasonable grounds to suspect they related to the commission of a money laundering offence or a terrorist financing offence.

[17] In November 2001, the petitioner and the Law Society commenced parallel petitions challenging the constitutional validity of the application of the Regime to lawyers and seeking immediate interlocutory relief.

[18] An interlocutory injunction was granted on November 20, 2001, exempting legal counsel in British Columbia from the application of s. 5 of the *Proceeds of Crime (Money Laundering) Suspicious Transaction Regulations*, S.O.R./2001-317, pending the hearing of the petitions. Similar injunctions were obtained in Alberta, Ontario, Nova Scotia and Saskatchewan: *Federation of Law Societies of Canada v. Canada (Attorney General),* [2001] A.J. No. 1697 (Q.B.); *Federation of Law Societies of Canada v. Canada (Attorney General)* (2002), 57 O.R. (3d) 383 (S.C.J.); *Federation of Law Societies of Canada v. Canada (Attorney General)*, 2002 NSSC 95; *Federation of Law Societies of Canada v. Canada (Attorney General)*, 2002 SKQB 153.

[19] In May 2002, the petitioner and the respondent agreed that the petitions would serve as a test case in respect of the issues raised. As well, the respondent consented to interlocutory injunctions on the same terms as the November 20, 2001 order in all of the remaining jurisdictions where injunctions had not been granted.

[20] Following the granting of the injunctions, the various provincial law societies have adopted rules regarding the receipt of cash, and client identification and verification.

[21] In 2004, the Law Society of British Columbia adopted a rule prohibiting British Columbia's lawyers from receiving or accepting $7,500 or more in currency in the course of a single transaction, subject to certain exceptions.

[22] The petitioner developed a similar model rule in 2004 (the "No Cash Rule"). The No Cash Rule prohibits receipt of cash in an aggregate amount of $7,500 or more in respect of any one matter where the lawyer is engaged on behalf of a client

in respect of receiving or paying funds; purchasing or selling securities, real property or business assets or entities; or transferring funds or securities by any means. There are exceptions where a lawyer receives or accepts cash from a financial institution or public body, a peace officer, a law enforcement agency or other Crown agent acting in his or her official capacity, or pursuant to a court order or to pay a fine or penalty. The No Cash Rule allows a lawyer to accept or receive an amount of $7,500 or more in cash for professional fees, disbursements, expenses or bail. Any refund greater than $1,000 out of such money must be made in cash.

[23] The No Cash Rule is intended to augment long-standing law society rules prohibiting lawyers from engaging in illegal activity by preventing lawyers from being unwittingly involved in money laundering and terrorist financing, while maintaining the long-standing principles underlying the solicitor-client relationship. It has been adopted by all of the petitioner's member law societies except Québec. It is expected that relevant rules will come into force shortly in Québec.

[24] In 2008, the petitioner adopted a model rule on client identification and verification (the "Client ID Rule"). It has been adopted by all member law societies, except for Québec, where it is expected that the relevant rules will come into force shortly. It should be noted that s. 43 of the *Notaries Act*, R.S.Q. c. N-3, already requires notaries to undertake certain procedures concerning the verification of identity of parties.

[25] The Client ID Rule has two basic requirements. First, lawyers must identify all clients who retain them to provide legal services by recording basic information, such as the client's name, address, telephone number and occupation (for an individual) or business activities (for a corporation or other entity). There are certain exceptions for in-house counsel, duty counsel and agents of lawyers who have already fulfilled the requirements of the rule.

[26] Second, when lawyers provide legal services in respect of the receiving, paying or transferring of funds, the Client ID Rule imposes additional requirements to verify client identity. This requires lawyers to obtain independent source documents

such as a driver's licence, birth certificate, passport or other government-issued identification that verifies the client's identity.

[27] There are certain exceptions from the verification requirements. For example, when a lawyer is required to verify the identity of a client who is not physically present, the Client ID Rule provides that the lawyer must obtain an attestation from an agent who has seen the client's identification. Lawyers are required to retain verification records for the duration of the lawyer-client relationship and for at least six years following the completion of the retainer.

[28] The Client ID Rule reflects basic due diligence practices that prudent lawyers undertake, regardless of the existence of such a rule, to ensure that clients are who they represent themselves to be. To the extent that lawyers were not performing the level of due diligence set out in the Client ID Rule previously, the existence of the rule and the law societies' role requires lawyers to do so now.

[29] The law societies have taken steps over the past few years to educate their members about the No Cash Rule and the Client ID Rule. The law societies have adopted two primary means to ensure that lawyers comply with law society rules; namely, annual reports and audits.

[30] Many of the law societies' annual reports which their members are required to file have specific questions concerning compliance with the No Cash Rule and the Client ID Rule. The evidence is that the law societies follow up on any reported non-compliance with the rules in order to determine the details of the non-compliance, educate the member about the rule, prevent repeated non-compliance and, where appropriate, refer the member to the disciplinary process.

[31] The law societies also audit their members' practices. In some jurisdictions, the law society staff perform the audit function, while in other jurisdictions the audit is performed by independent auditors. Most audit programs target law practices that are deemed to be at risk of non-compliance with law society rules, which is based on factors such as an indication or prior history of non-compliance, areas of practice, or

years of call. Additionally, many law societies randomly audit law practices with the goal of auditing every practice in the jurisdiction over a given period. That period ranges between two and seven years, depending on the law society. Auditors in all programs specifically check for compliance with the No Cash Rule and the Client ID Rule.

[32] Auditors have full and unrestricted access to all of the lawyer's books, records and files, including confidential information. There is evidence that the experience with audits indicates they are very likely to identify and address any breaches of law society rules.

[33] In addition to annual reports and audits, law societies learn of potential breaches of their rules from member self-reporting and complaints from other members, clients and the public. All of the law societies have disciplinary procedures which may impose consequences when a rule breach is uncovered. There are numerous potential consequences from a reprimand to disbarment, with a variety of intermediate consequences. A primary goal of disciplinary proceedings is remedial; namely to address the problem that caused the breach, and ensure the lawyer takes steps to prevent recurrence. Specific and general deterrence are also significant factors.

[34] There have been very few breaches of the No Cash Rule. For example, the evidence in British Columbia is that the Law Society Discipline Committee has issued four decisions involving breaches of the No Cash Rule since its implementation in 2004. The Committee found the lawyers involved guilty of professional misconduct and/or in breach of the rule and imposed fines and costs. The evidence is that there are no reported disciplinary proceedings involving a breach of the Client ID Rule.

[35] In addition to the law societies' educational and compliance activities, many law societies have also mandated continuing professional development by members.

[36] The goal of all of these activities is to ensure that the law societies discharge their primary mandate, of regulating the legal profession in the public interest.

[37] Since 2002, there have also been changes to the Regime. Between 2002 and 2005, various provisions of the Regime which had been enacted but not yet in force, were brought in. As well, Parliament repealed the sections which had been stayed by the various court orders.

[38] On June 12, 2002, ss. 6, 62, 64 and 65 of the *Act* came into force and in 2006, ss. 6.1 and 63.1 came into force. Sections 6 and 6.1 of the *Act* are the statutory authority for the Regime's client identification and verification requirements, which are at issue in these proceedings. Sections 6 and 6.1 require certain persons and entities to keep records and verify clients' identity as prescribed by the *Regulations*. Sections 62-65 relate to FINTRAC's search authority.

[39] Section 10.1 of the *Act* which was added in 2006, provided that ss. 7 and 9 of the *Act* (the reporting obligations) do not apply to legal counsel and legal firms when they are providing legal services.

[40] Regulations that came into force on December 30, 2008, pursuant to ss. 5(i), 5(j) and 73(1) of the *Act,* made the client identification and verification, recording and compliance provisions in the Regime applicable to the legal profession: *Regulations Amending Certain Regulations Made Under the Proceeds of Crime (Money Laundering) and Terrorist Financing Act*, SOR/2007-293.

[41] On January 19, 2010, the petitioner and respondent agreed to a Consent Order exempting legal counsel and legal firms from the *Regulations* pending determination of the proceeding, such exemption to be retroactive to December 30, 2008.

Relevant Constitutional and Legislative Provisions

[42] Sections 1, 7 and 8 of the *Charter* provide:

> 1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.
>
> 7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.
>
> 8. Everyone has the right to be secure against unreasonable search or seizure.

[43] Section 52(1) of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.) 1982, c. 11, provides:

> 52. (1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

[44] The petitioner seeks declarations that:

- Sections 5(i) and (j) of the *Act* are inconsistent with the Constitution of Canada, and of no force or effect, to the extent that the reference in those subsections to “persons and entities” includes legal counsel or legal firms;

- Sections 5(i) and (j) of the *Act* be read down so as to exclude legal counsel and legal firms from the “persons and entities” referred to in those subsections;

- Sections 11.1, 33.3, 33.4 and 59.4 of the *Regulations* are *ultra vires* the *Act*, and unconstitutional, and therefore of no force and effect;

- Sections 62 and 63.1 of the *Act* be read down so as to exclude legal counsel and legal firms from the “dwelling houses” referred to in the section;

- Section 63 be read down so as to exclude offices of legal counsel and legal firms from the “dwelling-houses” referred in the section;

- Section 64 of the *Act* is unconstitutional and of no force and effect.

[45] Sections 5(i) and (j) of the *Act* provide:

(*i*) persons and entities engaged in a business, profession or activity described in regulations made under paragraph 73(1)(*a*);

(*j*) persons and entities engaged in a business or profession described in regulations made under paragraph 73(1)(*b*), while carrying out the activities described in the regulations.

[46] Sections 62, 63, 63.1 and 64 of the *Act* provide:

62. (1) An authorized person may, from time to time, examine the records and inquire into the business and affairs of any person or entity referred to in section 5 for the purpose of ensuring compliance with Part 1, and for that purpose may

(*a*) at any reasonable time, enter any premises, other than a dwelling-house, in which the authorized person believes, on reasonable grounds, that there are records relevant to ensuring compliance with Part 1;

(*b*) use or cause to be used any computer system or data processing system in the premises to examine any data contained in or available to the system;

(*c*) reproduce any record, or cause it to be reproduced from the data, in the form of a printout or other intelligible output and remove the printout or other output for examination or copying; and

(*d*) use or cause to be used any copying equipment in the premises to make copies of any record.

(2) The owner or person in charge of premises referred to in subsection (1) and every person found there shall give the authorized person all reasonable assistance to enable them to carry out their responsibilities and shall furnish them with any information with respect to the administration of Part 1 or the regulations under it that they may reasonably require.

63. (1) If the premises referred to in subsection 62(1) is a dwelling-house, the authorized person may not enter it without the consent of the occupant except under the authority of a warrant issued under subsection (2).

(2) A justice of the peace may issue a warrant authorizing the authorized person to enter a dwelling-house, subject to any conditions that may be specified in the warrant, if on *ex parte* application the justice is satisfied by information on oath that

(*a*) there are reasonable grounds to believe that there are in the premises records relevant to ensuring compliance with Part 1;

(*b*) entry to the dwelling-house is necessary for any purpose that relates to ensuring compliance with Part 1; and

(*c*) entry to the dwelling-house has been refused or there are reasonable grounds for believing that entry will be refused.

(3) For greater certainty, an authorized person who enters a dwelling-house under authority of a warrant may enter only a room or part of a room in which

the person believes on reasonable grounds that a person or an entity referred to in section 5 is carrying on its business, profession or activity.

63.1 (1) For an examination under subsection 62(1), an authorized person may also serve notice to require that the person or entity provide, at the place and in accordance with the time and manner stipulated in the notice, any document or other information relevant to the administration of Part 1 in the form of electronic data, a printout or other intelligible output.

(2) The person or entity on whom the notice is served shall provide, in accordance with the notice, the documents or other information with respect to the administration of Part 1 that the authorized person may reasonably require.

64. (1) In this section, "judge" means a judge of a superior court having jurisdiction in the province where the matter arises or a judge of the Federal Court.

(2) If an authorized person acting under section 62, 63 or 63.1 is about to examine or copy a document in the possession of a legal counsel who claims that a named client or former client of the legal counsel has a solicitor-client privilege in respect of the document, the authorized person shall not examine or make copies of the document.

(3) A legal counsel who claims privilege under subsection (2) shall

> (*a*) place the document, together with any other document in respect of which the legal counsel at the same time makes the same claim on behalf of the same client, in a package and suitably seal and identify the package or, if the authorized person and the legal counsel agree, allow the pages of the document to be initialled and numbered or otherwise suitably identified; and
>
> (*b*) retain it and ensure that it is preserved until it is produced to a judge as required under this section and an order is issued under this section in respect of the document.

(4) If a document has been retained under subsection (3), the client or the legal counsel on behalf of the client may

> (*a*) within 14 days after the day the document was begun to be so retained, apply, on three days notice of motion to the Deputy Attorney General of Canada, to a judge for an order
>
> > (i) fixing a day, not later than 21 days after the date of the order, and a place for the determination of the question whether the client has solicitor-client privilege in respect of the document, and
> >
> > (ii) requiring the production of the document to the judge at that time and place;
>
> (*b*) serve a copy of the order on the Deputy Attorney General of Canada; and
>
> (*c*) if the client or legal counsel has served a copy of the order under paragraph (*b*), apply at the appointed time and place for an order determining the question.

(5) An application under paragraph (4)(*c*) shall be heard in private and, on the application, the judge

(*a*) may, if the judge considers it necessary to determine the question, inspect the document and, if the judge does so, the judge shall ensure that it is repackaged and resealed;

(*b*) shall decide the question summarily and

(i) if the judge is of the opinion that the client has a solicitor-client privilege in respect of the document, order the release of the document to the legal counsel, or

(ii) if the judge is of the opinion that the client does not have a solicitor-client privilege in respect of the document, order that the legal counsel make the document available for examination or copying by the authorized person; and

(*c*) at the same time as making an order under paragraph (*b*), deliver concise reasons that identify the document without divulging the details of it.

(6) If a document is being retained under subsection (3) and a judge, on the application of the Attorney General of Canada, is satisfied that no application has been made under paragraph (4)(*a*) or that after having made that application no further application has been made under paragraph (4)(*c*), the judge shall order that the legal counsel make the document available for examination or copying by the authorized person.

(7) If the judge to whom an application has been made under paragraph (4)(*a*) cannot act or continue to act in the application under paragraph (4)(*c*) for any reason, the application under paragraph (4)(*c*) may be made to another judge.

(8) No costs may be awarded on the disposition of an application under this section.

(9) The authorized person shall not examine or make copies of any document without giving a reasonable opportunity for a claim of solicitor-client privilege to be made under subsection (2).

(9.1) The authorized person shall not examine or make copies of a document in the possession of a person, not being a legal counsel, who contends that a claim of solicitor-client privilege may be made in respect of the document by a legal counsel, without giving that person a reasonable opportunity to contact that legal counsel to enable a claim of solicitor-client privilege to be made.

(10) If a legal counsel has made a claim that a named client or former client of the legal counsel has a solicitor-client privilege in respect of a document, the legal counsel shall at the same time communicate to the authorized person the client's latest known address so that the authorized person may endeavour to advise the client of the claim of privilege that has been made on their behalf and may by doing so give the client an opportunity, if it is practicable within the time limited by this section, to waive the privilege before the matter is to be decided by a judge.

[47] Sections 11.1, 33.3, 33.4 and 59.4 of the *Regulations* provide:

> 11.1 (1) Every financial entity or securities dealer that is required to confirm the existence of an entity in accordance with these Regulations when it opens an account in respect of that entity, every life insurance company, life insurance broker or agent or legal counsel or legal firm that is required to confirm the existence of an entity in accordance with these Regulations and every money services business that is required to confirm the existence of an entity in accordance with these Regulations when it enters into an ongoing electronic funds transfer, fund remittance or foreign exchange service agreement with that entity, or a service agreement for the issuance or redemption of money orders, traveller's cheques or other similar negotiable instruments, shall, at the time the existence of the entity is confirmed, take reasonable measures to obtain and, if obtained, keep a record of
>
> (*a*) where the confirmation is in respect of a corporation, the name and occupation of all directors of the corporation and the name, address and occupation of all persons who own or control, directly or indirectly, 25 per cent or more of the shares of the corporation; and
>
> (*b*) where the confirmation is in respect of an entity other than a corporation, the name, address and occupation of all persons who own or control, directly or indirectly, 25 per cent or more of the entity.
>
> (2) Where the person or entity is not able to obtain the information referred to in subsection (1), the person or entity shall keep a record that indicates the reason why the information could not be obtained.
>
> (3) Where the entity the existence of which is being confirmed by a person or entity under subsection (1) is a not-for-profit organization, the person or entity shall determine, and keep a record that sets out, whether that entity is
>
> (*a*) a charity registered with the Canada Revenue Agency under the *Income Tax Act*; or
>
> (*b*) an organization, other than one referred to in paragraph (*a*), that solicits charitable financial donations from the public.
>
> ...
>
> 33.3 (1) Subject to subsection (2), every legal counsel and every legal firm is subject to Part 1 of the Act when they engage in any of the following activities on behalf of any person or entity:
>
> (*a*) receiving or paying funds, other than those received or paid in respect of professional fees, disbursements, expenses or bail; or
>
> (*b*) giving instructions in respect of any activity referred to in paragraph (*a*).
>
> (2) Subsection (1) does not apply in respect of legal counsel when they engage in any of the activities referred to in that subsection on behalf of their employer.
>
> 33.4 Subject to subsection 62(2), every legal counsel and every legal firm shall, when engaging in an activity described in section 33.3, keep the following records:

> (*a*) a receipt of funds record in respect of every amount of $3,000 or more that they receive in the course of a single transaction, unless the amount is received from a financial entity or a public body; and
>
> (*b*) where the receipt of funds record is in respect of a client that is a corporation, a copy of the part of official corporate records that contains any provision relating to the power to bind the corporation in respect of transactions with the legal counsel or legal firm.
>
> ...
>
> 59.4 (1) Subject to subsections (2) and 62(2) and section 63, every legal counsel and every legal firm shall, in respect of a transaction for which a record is required to be kept under section 33.4,
>
> (*a*) in accordance with subsection 64(1), ascertain the identity of every person who conducts the transaction;
>
> (*b*) in accordance with section 65, confirm the existence of and ascertain the name and address of every corporation on whose behalf the transaction is conducted and the names of the corporation's directors; and
>
> (*c*) in accordance with section 66, confirm the existence of every entity, other than a corporation, on whose behalf the transaction is conducted.
>
> (2) Subsection (1) does not apply in respect of a transaction for which funds are received by a legal counsel or legal firm from the trust account of a legal firm or from the trust account of a legal counsel who is not acting on behalf of their employer.

Parties' Positions

The Federation of Law Societies of Canada

[48] The petitioner challenges the constitutionality of the Regime as it applies to the legal profession. First, the petitioner asserts that recording and related obligations imposed on lawyers pursuant to Part 1 of the *Act* violates s. 7 of the *Charter* by jeopardizing the liberty of lawyers and clients in a manner that fails to conform with the principles of fundamental justice, namely:

(a) solicitor-client confidentiality and privilege;

(b) lawyers' duty of loyalty to their clients; and

(c) the independence of the bar.

[49] Second, the petitioner asserts that ss. 62-64 of the *Act* violate s. 8 of the *Charter*, by authorizing state agents to conduct warrantless searches of lawyers' offices at any time.

[50] Third, the petitioner takes the position that, in addition to being unconstitutional, the Regime is unnecessary because members of the legal profession are bound by strict ethical codes, bylaws and regulations, imposed by the law societies. Law societies' rules include numerous provisions intended to prevent lawyers from wittingly and unwittingly assisting in money laundering or terrorist financing activities by clients, and are backed by the law societies' enforcement regimes. As a result of actions the law societies have taken, including the adoption of the No Cash Rule and Client ID Rule, they have demonstrated their commitment to ensure that the legal profession offers no "gap" through which proceeds of crime and terrorist financing can flow.

[51] Fourth, the petitioner submits that the appropriate remedy is to read down and declare invalid the impugned sections of the *Act* and *Regulations* to the extent they purport to apply to lawyers and law offices.

The Canadian Bar Association

[52] The CBA endorses the submissions advanced by the petitioner, specifically that the impugned provisions of the Regime violate ss. 7 and 8 of the *Charter*. The CBA points to the unique position of lawyers and law firms in the administration of justice, and submits that the Regime undermines that unique role and therefore interferes with the administration of justice. The CBA asserts that the Regime also violates the right to counsel and the rule against overbreadth. As a result, the impugned provisions are unconstitutional.

The Law Society of British Columbia

[53] The Law Society adopts the petitioner's submissions. The Law Society emphasizes that the Regime violates s. 7 of the *Charter* because it would deprive lawyers of their liberty in a manner inconsistent with the principles of fundamental

justice, and is at odds with solicitor-client confidentiality and privilege, a lawyer's duty of loyalty and the independence of the bar. The Law Society submits that the Regime violates s. 8 of the *Charter* because it allows warrantless searches of law offices and requires the disclosure of client names and addresses. The Law Society takes the position that when it comes to lawyers, the law societies are in the best position to fulfill Canada's international treaty obligations concerning money laundering and terrorist financing.

The Barreau du Québec and the Chambre des Notaires du Québec

[54] The Québec law societies support the petitioner's position and submit that the impugned provisions are unconstitutional insofar as they apply to lawyers. The Québec law societies are the professional bodies responsible for lawyers and notaries practising in the province of Québec. As such, they are directly affected by the impugned provisions that impact their obligations to maintain proper standards of professional and ethical conduct of lawyers and notaries. Those standards dictate that lawyers and notaries must preserve the secrecy of all confidential information that becomes known to them in the practice of their profession, and keep absolutely secret documents and information known to them by reason of their profession. Professional secrecy must remain as close to absolute as possible if it is to retain relevance.

[55] To effect its mandate under the Regime, FINTRAC can collect, assess and disclose information in order to assist in the detection, prevention and deterrence of money laundering and the financing of terrorist activities, and may conduct a warrantless search to examine the records and inquire into the business affairs of any person or entity, including legal counsel and their firms. To the extent that such actions are taken against lawyers, notaries and their firms, the Québec law societies assert that the Regime violates ss. 7 and 8 of the *Charter.*

[56] Further, the Québec law societies argue the Regime violates the preamble to the *Constitution Act, 1867*, in that:

- it compels legal counsel to violate the right to professional secrecy of their clients in the name of the state, often without the consent or knowledge of the client and without intervention of an independent tribunal;

- it places legal counsel in a situation of conflict of interest between the interest of their clients, their own interests and the interests of the state; and

- legal counsel are no longer independent in the relationships they maintain with their clients because they are compelled to act for the state.

Attorney General of Canada

[57] The respondent takes the position that the Regime is valid legislation and has been enacted to fulfill Canada's international obligations in the fight against money laundering and terrorist financing. Parliament has made a considered policy choice that the legislation should apply to lawyers, and has tailored the Regime in a careful manner taking into account the important and unique role that lawyers play in Canadian society.

[58] The respondent submits that if ss. 5(i) and 5(j) of the *Act* are declared of no force and effect to the extent that references to "persons and entities" include legal counsel or legal firms, the effect will be to automatically invalidate ss. 33.3, 33.4, 33.5 and 59.4 of the *Regulations*. Further, the relief sought will impact s. 11.1(1) of the *Regulations*, which prescribes the requirements for obtaining and keeping records of individuals who own or control companies or other entities; although it applies to several types of financial institutions and other individuals, not just lawyers. As well, if the Regime does not apply to legal counsel and legal firms, FINTRAC will have no authority or need to conduct audits of the legal counsel and the constitutionality of ss. 62, 63, 63.1 and 64, which relate to FINTRAC's compliance audit powers, will become moot.

[59] The respondent disagrees with the petitioner and the interveners that imposing record keeping and retention requirements on lawyers in the manner set out in the Regime violates s. 7. The respondent submits that some minor reading into ss. 62-65 will bring the Regime into conformance fully with the principles set out in *Lavallee, Rackel & Heintz v. Canada (Attorney General)*, 2002 SCC 61, [2002] 3 S.C.R. 209, which will cure any infringement of s. 8 of the *Charter*.

[60] In the alternative, the respondent asserts that the impugned provisions are saved by s. 1 of the *Charter*.

[61] The respondent also advances some preliminary arguments, which I will deal with first. The respondent asserts that the petitioner's case is based solely upon speculation regarding how the impugned provisions might impact clients and lawyers. The respondent takes the position that the Court should refuse the petitioner's request to strike down the legislation in the absence of any real adjudicative facts. As well, some of the interveners have advanced new grounds for challenging the Regime that go beyond what is being argued by the petitioner and set out in the Notice of Constitutional Question which, the respondent submits, should not be entertained by this Court.

Analysis

Constitutional issues should not be decided in a factual vacuum

[62] The respondent points to the fact that the stay in this matter has effectively blocked the application of the Regime to lawyers. The respondent submits that, as a result, the Court does not have a factual basis upon which it can adjudicate whether or not the impugned provisions of the Regime infringe the *Charter*. At best, the Court has the view of a single counsel, Warren Wilson, Q.C., a retired corporate solicitor, who speculates how the Regime might affect the legal profession if the injunction precluding the application of the legislation to legal counsel and legal firms is lifted. Therefore, it is not possible to determine in advance whether a specific compliance audit conducted by FINTRAC in respect of a specific lawyer will be *Charter*

compliant. In other words, the respondent is taking the position that the petition is premature because the Regime has not been applied to lawyers.

[63] The petitioner takes the position that the respondent's argument must be rejected on two grounds.

[64] First, following the November 2001 interlocutory order, the parties agreed to proceed with a hearing of the merits of the petitioner's challenge to the constitutionality of the Regime as a national test case without attempting to enforce the Regime against lawyers. The parties further agreed "to take all reasonable measures to ensure that a full and complete record is before the court" for that purpose, and that interlocutory injunctions would remain in place in all jurisdictions pending the outcome of these proceedings, including all appeals. Finally, the parties agreed that the Petition could be amended to address any subsequent measures imposed under the *Act* on lawyers.

[65] Second, the petitioner submits there is an abundance of facts on the record, most of which are uncontroversial, and which are more than sufficient to enable the Court to determine the constitutional issues at stake. The evidentiary record before the Court, and the fact that the Regime has never been enforced against lawyers, is the result of multiple court orders, the majority of which were by consent, and two agreements among the parties. The petitioner submits that the respondent cannot now challenge the adequacy of the record.

[66] The reluctance of the courts to engage in *Charter* analyses in a factual vacuum was recently commented on by the Ontario Court of Appeal in *Abou-Elmaati v. Canada (Attorney General)*, 2011 ONCA 95 at para. 39, where the Court noted "[i]t is not only unnecessary but also usually unwise to attempt to decide constitutional issues in the absence of a concrete factual situation."

[67] The Supreme Court of Canada discussed the need for a proper factual foundation for *Charter* arguments in *Mackay v. Manitoba*, [1989] 2 S.C.R. 357 and

Danson v. Ontario (Attorney General), [1990] 2 S.C.R. 1086. In *Mackay*, Cory J. stated at 361-362:

> Charter decisions should not and must not be made in a factual vacuum. To attempt to do so would trivialize the Charter and inevitably result in ill-considered opinions. The presentation of facts is not, as stated by the respondent, a mere technicality; rather, it is essential to a proper consideration of Charter issues. A respondent cannot, by simply consenting to dispense with the factual background, require or expect a court to deal with an issue such as this in a factual void. Charter decisions cannot be based upon the unsupported hypotheses of enthusiastic counsel.

[68] In *Danson* at 1099-1100, Sopinka J. distinguished between two categories of facts: adjudicative facts, which concern the immediate parties; and legislative facts, which establish the purpose and background of the legislation. Adjudicative facts are specific and must be proved by admissible evidence, whereas legislative facts are more general in nature and subject to less stringent requirements for admissibility. At 1100-1101, Sopinka J. noted that *MacKay* did not stand for the proposition that such facts must be established in all *Charter* challenges. Rather each case must be considered on its own facts, or lack thereof. However, in general, there must be admissible evidence of the alleged effects of the impugned legislation in a *Charter* challenge based upon allegations that the effects of the legislation are unconstitutional.

[69] The appellant in *Danson* was attacking rules that provided for the assessment of costs against solicitors personally in certain circumstances. The appellant sought to attack the impugned rules on the basis of their alleged effects on the legal profession in Ontario. At 1101-1102, Sopinka J. held that adjudicative evidence of the effects, i.e. evidence of the actual use or threatened use of the impugned rules, and legislative evidence, i.e. evidence of the purpose, history and perception among the profession of the rules, was required. What the appellant needed to show was not that the impugned rules were applied against him personally, but admissible evidence that the effects of the impugned rules violated the *Charter*.

[70] The issue whether there was an insufficient factual basis to decide the constitutionality of the impugned provisions was argued by the respondent in

response to the petitioner's interlocutory injunction application. In *Law Society of B.C. v. Canada (Attorney General)*, 2001 BCSC 1593 at paras. 46-54, Allan J. fully canvassed the relevant authorities, and concluded as follows:

> [54] In summary, a constitutional challenge to legislation must usually be based on an adequate factual foundation. However, the Supreme Court has stated that in some cases, legislative facts will suffice, and a court may consider the issues without reference to specific adjudicative facts. Moreover, cases involving questions of pure law may not require any supporting factual evidence. The petitioners submit that the unconstitutional purpose of the impugned legislation is obvious on its face and, arguably, this case is one of pure law. In my opinion, adjudicative facts generated by a lawyer who had created a specific fact pattern within a solicitor-client relationship would not advance the analysis of the constitutional issues raised by the petitioners.

[71] The respondent raised the issue again on appeal from the order granting the injunction, and the Court of Appeal held that the chambers judge had not made an error of law or principle: *Law Society of B.C. v. Canada (Attorney General)*, 2002 BCCA 49 at paras. 5 and 7.

[72] In *Lavallee,* the Supreme Court of Canada dealt with three separate appeals regarding the constitutionality of s. 488.1 of the *Criminal Code*. Section 488.1 set out a procedure for determining solicitor-client privilege over documents seized in a law office pursuant to a warrant. At para. 4, Arbour J., writing for the majority, noted that the facts of the three cases were not controversial, nor were they determinative. She went on to summarize the facts in three paragraphs.

[73] In *R. v. Mills*, [1999] 3 S.C.R. 668, the Supreme Court of Canada dealt with an argument that the application to challenge the constitutionality of a section of the *Criminal Code* dealing with the production of records in a sexual offence proceeding was premature. At paras. 36-41, the majority held that the accused need not prove the legislation would violate his *Charter* rights. Instead, he can establish that the legislation is unconstitutional in its general effect. The question to be asked is whether the record provides sufficient facts to permit a court to properly determine the issues raised. A determination that the legislation is "unconstitutional in its general effect involves an assessment of the effects of the legislation under reasonable hypothetical circumstances."

[74] In this case, the petitioner is asserting that the Regime is unconstitutional in its general effect.

[75] I agree with the petitioner that the record is more than sufficient to determine the constitutional issues at stake. The parties have collectively filed 50 affidavits and exhibits. The petitioner has filed Mr. Wilson's affidavit which provides information about what the hypothetical effects would be if the Regime was applied to lawyers. The record the parties filed is 15,000 pages, including lengthy Brandeis briefs. In its submissions, the respondent provided an extensive review of the facts, numbering approximately 130 pages. As well, the respondents have presented legislative evidence regarding the purpose and history of the impugned provisions.

[76] Accordingly, I have concluded there is a proper factual foundation to measure the legislation against the provisions of the *Charter*, and that the petition is not premature.

Can the interveners advance new grounds for challenging the Regime that are not set out in the Notice of Constitutional Question?

[77] The second preliminary issue the respondent raises is that the interveners have advanced new grounds for challenging the Regime that go beyond what is being argued by the petitioner and set out in the Notice of Constitutional Question.

[78] The respondent asserts the CBA has advanced two additional principles of fundamental justice, namely the independence of the judiciary and the right to counsel, that are allegedly infringed by the impugned provisions. As well, the Québec law societies argue that the legislation violates the preamble to the *Constitution Act, 1867.* The respondent takes the position that those grounds for challenging the Regime should not be entertained by this Court.

[79] An intervener's role is to provide its unique perspective to the issues raised by the main parties. The test to be met by a proposed intervener was summarized by Sopinka J. in *Reference Re: Worker's Compensation Act, 1983 (Nfld.)*, [1989] 2 S.C.R. 335 at 339, as requiring a demonstration that the proposed intervener has an

interest in the proceeding and the ability to make submissions which will be useful and different from the other parties.

[80] The intervener is not, however, given licence to present entirely new issues not raised by the parties. In *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69, [2005] 3 S.C.R. 388 at para. 40, the Supreme Court of Canada confirmed that:

> ... It is always open to an intervener to put forward any legal argument in support of what it submits is the correct legal conclusion on an issue properly before the Court, provided that in doing so its legal argument does not require additional facts, not proven in evidence at trial or raise an argument that is otherwise unfair to one of the parties.

[81] The respondent submits that this principle is particularly important in cases involving a Notice of Constitutional Question. The Notice sets out the parameters of the constitutional issues to be argued and provides any interested Attorneys General with an indication of what will and will not be argued during the hearing.

[82] In the case at bar, the respondent says it did not oppose any of the interveners' applications for intervener status on the implicit assumption that the interveners would respect these basic principles when it came time to presenting their submissions.

[83] I agree that insofar as the interveners are attempting to raise arguments that the Regime violates other sections of the *Charter* which have not been raised by the petitioner, in particular the Québec law societies' argument based on the preamble to the *Constitution Act, 1867* and the CBA's arguments based on s. 10(b) of the *Charter*, those arguments should not be entertained as those issues are not before the Court.

Do the recording and related obligations imposed on lawyers pursuant to Part 1 of the *Act* infringe s. 7 of the *Charter*?

[84] For the following reasons, I have concluded that the recording and related obligations imposed on lawyers pursuant to Part 1 of the *Act* infringe s. 7 of the *Charter*.

[85] Section 7 of the *Charter* provides:

> Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

[86] The role of the Court in a s. 7 *Charter* analysis was set out in *R. v. Clay*, 2003 SCC 75, [2003] 3 S.C.R. 735 at para. 4:

> The task of the Court in relation to s. 7 of the *Charter* is not to micromanage Parliament's creation or continuance of prohibitions backed by penalties. It is to identify the outer boundaries of legislative jurisdiction set out in the Constitution. Within those boundaries, it is for Parliament to act or not act. … The Court's concern is not with the wisdom of the prohibition but solely with its constitutionality.

[87] The analytical structure governing a s. 7 determination requires an applicant to establish that:

- the impugned legislation constitutes a deprivation of life, liberty or security of the person; and
- the deprivation does not accord with the principles of fundamental justice.

See: *R. v. D.B.*, 2008 SCC 25, [2008] 2 S.C.R. 3 at para. 37; *Canada (Prime Minister) v. Khadr*, 2010 SCC 3, [2010] 1 S.C.R. 44 at paras. 12 and 22.

[88] The petitioner submits that the first requirement is easily met in this case because a breach of the *Act* or *Regulations* may result in a deprivation of liberty to both lawyers and clients.

[89] The respondent concedes that s. 7 of the *Charter* is engaged because the liberty of the lawyer is at risk for failure to comply with the Regime. However, the respondent asserts that clients' liberty interests are not at risk under the Regime. As well, although it concedes that a lawyer's liberty interests are potentially at stake under the Regime, the respondent disagrees that the potential deprivation of liberty is not in accordance with the principles of fundamental justice.

[90] Section 74 of the *Act* provides:

> Every person or entity that knowingly contravenes any of sections 6, 6.1 or 9.1 to 9.3, subsection 9.4(2), sections 9.5 to 9.7 or 11.1, subsection 12(1) or (4) or 36(1), section 37, subsection 55(1) or (2), section 57 or subsection 62(2), 63.1(2) or 64(3) or the regulations is guilty of an offence and liable
>
> (*a*) on summary conviction, to a fine of not more than $50,000 or to imprisonment for a term of not more than six months, or to both; or
>
> (*b*) on conviction on indictment, to a fine of not more than $500,000 or to imprisonment for a term of not more than five years, or to both.

[91] The threat of imprisonment under s. 74 constitutes a clear deprivation of liberty: *R. v. D.B.* at para. 38; *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486 at para. 74.

[92] In *R. v. D.B.,* at paras. 45-46, the Supreme Court of Canada reiterated that a framework for assessing whether a principle meets the threshold required to be a principle of fundamental justice had been provided in *R. v. Malmo-Levine*, 2003 SCC 74, [2003] S.C.R. 571 and *Canadian Foundation for Children, Youth and the Law v. Canada*, 2004 SCC 4, [2004] 1 S.C.R. 76. The petitioner must establish the following:

> (1) there is a legal principle;
>
> (2) there is a consensus that the rule or principle is fundamental to the way in which the legal system ought fairly to operate; and
>
> (3) the principle is capable of being identified with sufficient precision so as to yield a manageable standard against which to measure deprivations of life, liberty or security of the person.

[93] As stated earlier, the petitioner submits that the impugned provisions violate the principles of fundamental justice by:

- infringing on solicitor-client privilege;
- infringing the lawyer's duty of loyalty to the client; and

- compromising the independence of the bar.

[94] The petitioner alleges that by requiring lawyers to collect information from their clients and retain it so that the information can be available for law enforcement officials if they wish to review it, the Regime turns lawyers into state agents. As a result, the Regime puts the lawyers' clients' liberty at risk.

[95] The respondent takes the position that despite the liberty interest of the lawyer being engaged, an analysis of the purpose of and procedures set out in the *Act*, including the ability to claim solicitor-client privilege when warranted, clearly demonstrates that any deprivation of rights that occurs is within the principles of fundamental justice.

[96] The respondent argues, first, that the focus of the *Act* in respect of lawyers is very narrow. Consequently, the related *Charter* issue is similarly focussed. Second, the objective of the *Act* is to ensure compliance of lawyers with their responsibilities under the legislation, not to "catch" clients committing criminal offences. The respondent says that the client's liberty is not at risk under the Regime. Third, the rules and regulations imposed by the law societies to deal with money laundering and terrorist financing are subject to the same constitutional scrutiny as is the *Act*.

[97] The respondent submits that a contextual approach to the interpretation of s. 7 of the *Charter* should be undertaken as has been emphasized by the Supreme Court of Canada: see *R. v. Mills* at paras. 61-62; *R. v. Wholesale Travel Group Inc.,* [1991] 3 S.C.R. 154 at 224-225. In this case, the context to be considered is Canada's international obligations to help combat money laundering and terrorist financing, and the fact that lawyers are purposely or unwittingly part of that problem.

[98] The respondent states that the framers of the *Charter* did not include solicitor-client privilege as a constitutional right and therefore solicitor-client privilege is not directly protected by s. 7 of the *Charter*. The respondent asserts the statements of the Supreme Court of Canada in *R. v. National Post*, [2010] 1 S.C.R. 477 at para. 39, *R. v. McClure*, [2001] 1 S.C.R. 445 at para. 49, and *Lavallee* at paras. 49

and 51, are, at their highest point, a recognition of solicitor-client privilege as a principle of fundamental justice in the limited circumstances where the client's liberty is directly at stake. The respondent points to Arbour J.'s comment in *Lavallee* at para. 23, that when a person is the target of a criminal investigation, the need for the full protection of the privilege is activated. The respondent argues the most that can be taken from these cases is that where solicitor-client privileged information is being specifically used against an individual or being withheld from an individual in a proceeding in which that individual's liberty is at stake, solicitor-client privilege may be seen as a principle of fundamental justice pursuant to s. 7 of the *Charter.* The respondent submits that situation does not exist in this case.

[99] The respondent asserts that solicitor-client privilege is most akin to the rule of law in terms of the constitutional principles that have been recognized by the Supreme Court of Canada. However in *British Columbia v. Imperial Tobacco Canada Ltd.*, [2005] 2 S.C.R. 473 at paras. 57-68, Major J. writing for the majority, rejected the view that the rule of law could be used to attack the content of legislation.

[100] The respondent says that therefore, absent a valid constitutional challenge to legislation either through the *Charter* or some other constitutional imperative such as the division of powers, Parliament must be seen as competent to legislate a limitation or restriction on solicitor-client privilege. The importance of the privilege, and the principles that underlie it, are protected by limiting interference with the privilege to those occasions when it is absolutely necessary, and by requiring that Parliament use clear and specific language to express its intention to abrogate the privilege.

[101] The respondent takes the position that in analyzing whether there is a s. 7 violation, the only principles of fundamental justice that are relevant are the lawyers' liberty because none of the impugned sections infringe in any way the liberty of the client. Any penalties imposed by the Regime are imposed against counsel. Therefore, the petitioner's statements that s. 74 of the *Act* jeopardizes the clients' liberty are incorrect.

[102] The respondent submits that the *Act* does not provide law enforcement officials with evidence from lawyers for the purpose of incriminating lawyers' clients. The *Act* exempts lawyers from the reporting requirements. Moreover, the only information that FINTRAC might obtain from a compliance audit of a lawyer that can be passed on to law enforcement officials is information regarding the lawyer's non-compliance with the record obtaining and retention requirements under Part 1 of the *Act*. Therefore, the petitioner is wrong to assert that the *Act* is designed to allow law enforcement officials to obtain evidence regarding client misfeasance from a lawyer's office.

[103] The respondent asserts that the *Act* has no impact on clients who seek legal representation or advice. It applies only when a lawyer chooses to act as a financial intermediary by effecting financial transactions on a client's behalf. Furthermore, while a lawyer who agrees to move money in this manner becomes subject to certain obligations, the *Act* does not impose any punishment on clients if the lawyer then fails to comply with these obligations. Therefore, the petitioner is wrong to argue that clients' s. 7 *Charter* rights are engaged.

[104] The respondent argues that a lawyer who knowingly fails to comply with the *Act* risks imprisonment (thereby engaging a lawyer's s. 7 *Charter* rights), but such a deprivation does not infringe any of the principles of fundamental justice advanced by the petitioner. There is no evidence that if a lawyer were to be prosecuted for an offence under the *Act* it would necessarily compromise the client's interest in any privileged solicitor-client information. There is no persuasive evidence that fear of prosecution for such an offence will lead lawyers to systematically fail to discharge their duty of loyalty to their clients by providing privileged solicitor-client information to law enforcement. As well, there is no evidence that requiring lawyers to effect anti-money laundering and terrorist financing measures in the limited circumstance of acting as a financial intermediary will compromise the independence of the bar or will impact it in a manner that will not allow people to obtain robust and effective representation in their legal disputes with the state. The respondent submits that,

therefore, a client's s. 7 *Charter* rights are not violated by the impugned provisions of the *Act*.

[105] In my view, the approach taken by the respondent is overly narrow. The Supreme Court of Canada has stated that the solicitor-client privilege is a "principle of fundamental justice and civil right of supreme importance in Canadian law": *Lavallee,* at para. 36. It is not an absolute right, and is subject to exceptions, but must be as close to absolute as possible to ensure public confidence and retain relevance. As such, solicitor-client privilege will only yield in clearly defined circumstances: *McLure*, at paras. 34-35.

[106] In *Maranda v. Richer,* [2003] 3 S.C.R. 193, the Court considered solicitor-client privilege in the context of a search of a lawyer's office and the issue of whether information in lawyers' billings is privileged. Lebel J. reviewed the prior decisions of the Court and noted at para. 12:

> The aim in those decisions was to avoid lawyers becoming, even involuntarily, a resource to be used in the criminal prosecution of their clients, thus jeopardizing the constitutional protection against self-incrimination enjoyed by the clients.

[107] At para. 22, Lebel J. stated the scope of solicitor-client privilege is broad and referred to Lamer J.'s statements in *Descoteaux v. Mierzwinski*, [1982] 1 S.C.R. 860 at 892-893:

> In summary, a lawyer's client is entitled to have all communications made with a view to obtaining legal advice kept confidential. Whether communications are made to the lawyer himself or to employees, and whether they deal with matters of an administrative nature such as financial means or with the actual nature of the legal problem, all information which a person must provide in order to obtain legal advice and which is given in confidence for that purpose enjoys the privileges attached to confidentiality. This confidentiality attaches to all communications made within the framework of the solicitor-client relationship, which arises as soon as the potential client takes the first steps, and consequently even before the formal retainer is established.

[108] It is irrelevant that the information sought to be collected is not at a level of critical secrecy. Any information that must be collected by a lawyer as a condition of

providing legal advice and is solely for potential use by the state interferes to an unacceptable degree with the solicitor-client relationship.

[109] The Court made similar comments in *Canada (Privacy Commissioner) v. Blood Tribe Department of Health,* 2008 SCC 44, [2008] 2 S.C.R. 574 at para. 10:

> ... While the solicitor-client privilege may have started life as a rule of evidence, it is now unquestionably a rule of substance applicable to all interactions between a client and his or her lawyer when the lawyer is engaged in providing legal advice or otherwise acting as a lawyer rather than as a business counsellor or in some other non-legal capacity. [Citations omitted]

[110] The respondent says that the purpose of the Regime, as it applies to lawyers, is not to combat money laundering and terrorist financing but to ensure that lawyers are complying with their obligations under the legislation.

[111] The respondent's submission that the only reason lawyers are required to collect and retain information from their clients is to ensure that the lawyers are complying with their obligations under the legislation is inconsistent with its submissions that the Regime has been enacted in order to combat money laundering and terrorist financing and the need to have lawyers subject to what it describes as anti-money laundering and terrorist financing measures. In its submission at paragraphs 211 and 220, the respondent states:

> 211. The primary rationale for imposing these record keeping requirements on lawyers is to deter illicit transactions, failing which they may help establish a paper trail with respect to illicit funds that could, in appropriate circumstances and with the proper judicial authorization, be accessed by law enforcement.
>
> 220. FINTRAC itself cannot impose penalties. Rather, if FINTRAC becomes aware of information obtained through its compliance audits that it suspects on reasonable grounds is evidence of a contravention of the anti-money laundering requirements, it may disclose this information to the appropriate law enforcement agencies.

[112] It is clear from the respondent's submissions that lawyers are being required to collect information from their clients to establish a paper trail for law enforcement agencies to access. In my opinion the impugned provisions infringe the solicitor-client relationship insofar as they provide that lawyers are required to obtain and

retain information about their clients which can be accessed by FINTRAC and provided to law enforcement agencies.

[113] The comments of the Supreme Court of Canada in *Blood Tribe Department of Health* are apposite in this situation:

> 9. Solicitor-client privilege is fundamental to the proper functioning of our legal system. The complex of rules and procedures is such that, realistically speaking, it cannot be navigated without a lawyer's expert advice. It is said that anyone who represents himself or herself has a fool for a client, yet a lawyer's advice is only as good as the factual information the client provides. Experience shows that people who have a legal problem will often not make a clean breast of the facts to a lawyer without an assurance of confidentiality "as close to absolute as possible":
>
> > [S]olicitor-client privilege must be as close to absolute as possible to ensure public confidence and retain relevance. As such, it will only yield in certain clearly defined circumstances, and does not involve a balancing of interests on a case-by-case basis.
> >
> > [Citations omitted]
>
> It is in the public interest that this free flow of legal advice be encouraged. Without it, access to justice and the quality of justice in this country would be severely compromised. The privilege belongs to the client not the lawyer. In *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143, at p. 188, McIntyre J. affirmed yet again that the Court will not permit a solicitor to disclose a client's confidence.
>
> ...
>
> 21. ... Client confidence is the underlying basis for the privilege, and infringement must be assessed through the eyes of the client. To a client, compelled disclosure to an administrative officer, even if not disclosed further, would constitute an infringement of the confidentiality. The objection is all the more serious where (as here) there is a possibility of the privileged information being made public or used against the person entitled to the privilege... [Citations omitted]

[114] The respondent asserts there is a distinction between lawyers who provide legal advice to clients and lawyers who act as “financial intermediaries.” The respondent argues that the Regime has no impact on clients who seek legal representation or advice. As well, the respondent asserts that the only information the Regime requires lawyers to obtain and retain is in the nature of tombstone information; i.e. name, date, etc.

[115] A number of cases have addressed the distinction between a lawyer providing legal advice and a lawyer acting as a financial intermediary, i.e. not acting in a professional capacity.

[116] For example, in *Maranda,* the RCMP searched a law office and seized accounting records. The RCMP had been conducting an investigation of one of Mr. Maranda's clients for money laundering and drug trafficking. The RCMP obtained a search warrant for Mr. Maranda's law office on the basis that the search would lead to the discovery of information about the client's commission of the offence of possession of proceeds of crime. The affidavit in support of the application for the search warrant did not suggest the lawyer was involved in or participated in the offences with which his client was being investigated. The Court held that in the circumstances of the case, the lawyer's billings must be deemed to fall within the category of information protected by solicitor-client privilege. At para. 30, Lebel J. reiterated that not everything that occurred in a solicitor-client relationship was privileged, and noted there are cases where courts have concluded the lawyers have been acting as a conduit for transfers of funds, and not in a legal capacity.

[117] The petitioner does not challenge the respondent's ability to regulate a lawyer's conduct of a financial transaction when it is unconnected with the provision of legal services. However, the Regime is not limited to lawyers acting as financial intermediaries as asserted by the respondent. Rather, it purports to regulate all lawyers' conduct of their clients' affairs, regardless of whether lawyers are providing legal advice to their clients. The respondent's assertion that the Regime will not affect clients who only seek "legal representation" from "traditional" lawyers is not consistent with the scope of the Regime.

[118] Rachel Grasham, the Chief of Financial Crimes Domestic in the Department of Finance, provided an affidavit regarding the purpose and background of the Regime. One of Ms. Grasham's primary roles is to provide advice to the Minister of Finance with respect to the Minister's responsibilities for the Regime and the

implementation of the *Act* and *Regulations*. Ms. Grasham deposes that the client identification records, which are required to be kept under the Regime, "may assist law enforcement in investigating and prosecuting money launderers, and may also help detect the path that illicit funds have taken through the financial system." In other words, she deposes that the purpose of the Regime is to require lawyers to create and keep a paper trail to be used by law enforcement to incriminate the lawyers' clients.

[119] Ms. Grasham's evidence is consistent with the object of the *Act* set out in s. 3.

[120] To assist in meeting this purpose, the Regime provides that lawyers must:

- identify clients, and verify that identity, when the lawyer receives $3,000 or more in the course of a transaction;

- create, obtain and retain prescribed records in relation to the client and the transaction;

- produce to FINTRAC any document or information on demand, including by warrantless search, and provide FINTRAC with client names and contact information; and

- develop and maintain a regime to ensure compliance with these obligations.

[121] Pursuant to s. 33.3 of the *Regulations*, "every legal counsel and every legal firm" is obliged to comply with the client identification and verification provisions when, on behalf of any person or entity, they receive or pay funds, or give instructions regarding the receipt or payment of funds, other than funds received or paid in respect of professional fees, disbursements, expenses or bail.

[122] Section 33.4 of the *Regulations* provides that a "receipt of funds record" must be created when $3,000 or more funds are received in the course of a transaction. "Funds" include cash, currency or securities, or negotiable instruments or other

financial instruments, in any form: s. 1(2) of the *Regulations*. The record need not be created if the funds are received from a financial entity or a public body.

[123] Section 1(2) of the *Regulations* defines a "receipt of funds records":

> "receipt of funds record" means, in respect of a transaction in which an amount of funds is received, a record that contains the following information:
>
> (*a*) if the information is not readily obtainable from other records that the recipient keeps and retains under these Regulations, the name of the person or entity from whom the amount is in fact received and
>
> (i) where the amount is received from a person, their address and date of birth and the nature of their principal business or their occupation, and
>
> (ii) where the amount is received from an entity, their address and the nature of their principal business;
>
> (*b*) the date of the transaction;
>
> (*c*) the number of any account that is affected by the transaction, and the type of that account, the full name of the person or entity that is the account holder and the currency in which the transaction is conducted;
>
> (*d*) the purpose and details of the transaction, including other persons or entities involved and the type and form of the transaction;
>
> (*e*) if the funds are received in cash, whether the cash is received by armoured car, in person, by mail or in any other way; and
>
> (*f*) the amount and currency of the funds received.

[124] Where funds are received from another lawyer's trust account, the recipient's receipt of funds record need not include the information set out in s. 1(2)(c): s. 33(5) of the *Regulations*.

[125] Section 33.4(b) of the *Regulations* provides that where funds are received from a corporate client, the lawyer must keep "a copy of the part of official corporate records relating to the power to bind the corporation in respect of the transactions."

[126] In addition to creating a receipt of funds record, a lawyer must verify the identities of those involved. Pursuant to ss. 59.4(1) and 64-67 of the *Regulations*, a lawyer must:

- ascertain the identity of every person who conducts the transaction;

- confirm the existence of and ascertain the name and address of every corporation on whose behalf the transaction is conducted and the names of the corporation's directors; and

- confirm the existence of every entity, other than a corporation, on whose behalf the transaction is conducted.

[127] Section 59.4(2) of the *Regulations* provides that the verification requirements do not apply when the funds are received from another lawyer's trust account.

[128] Sections 64-64.1 of the *Regulations* provide that an individual's identity must be verified by reference to government-issued documents such as a passport or driver's licence. Where the individual is not physically present before the lawyer, the lawyer may rely on an agent to verify the individual's identity.

[129] Sections 65 and 66 of the *Regulations* provide that a lawyer is required to verify a corporation's name and address, as well as the addresses of its directors by reference to a document that ascertains the entity's existence, such as an official document filed in a government registry.

[130] Section 11.1 of the *Regulations* provides that the lawyer is required to take "reasonable measures" to obtain and keep records of the name and occupation of all directors, and the name, address and occupation of all persons who own or control, directly or indirectly, 25% or more of the entity (i.e. in the case of a corporation, its shares). In the case of a not-for-profit organization, the lawyer must determine and record whether the organization is a registered charity or otherwise solicits charitable financial donations from the public.

[131] "Reasonable measures" are not defined. If the lawyer cannot obtain the information, a record must be kept to explain why the information could not be obtained.

[132] In his affidavit submitted by the petitioner, Mr. Wilson deposes that some information required by the Regime goes beyond what is required under the law

society rules and standard due diligence by lawyers. For example, the account number and holder that is affected by a transaction, the identity of every person (including non-clients) who conducts a transaction, and information regarding indirect control of corporations and other entities may all be information that is not required by the lawyer to serve the client or satisfy law society rules.

[133] Sections 68-70 of the *Regulations* provide that the records required by the Regime must be retained for at least five years after the completion of the transaction. The records must be kept in such a way that they can be produced to FINTRAC within 30 days after a demand.

[134] Section 9.6 of the *Act* requires lawyers to implement a program to ensure compliance with their obligations under the Regime. A compliance program must assess the risk of a money laundering or a terrorist activity financing offence in the course of their activities. If the risk is high, the lawyer must institute enhanced due diligence measures. Each lawyer or law firm must appoint a person to be responsible for the compliance program, develop and apply written compliance policies and procedures, and create a training program for employees.

[135] While s. 10.1 of the *Act* limits the application of the reporting and disclosure requirements under ss. 7 and 9 of the *Act* where lawyers and legal firms are "providing legal services," there is no provision limiting the application of the rest of Part 1 to lawyers and legal firms that are only acting as financial intermediaries; i.e. there is no exemption under the *Act* for lawyers' recording of clients' information even if they are providing legal services.

[136] The *Act* provides that information can be accessed by FINTRAC under ss. 62-64. The whole purpose of the Regime, as indicated by the title of the *Act*, is criminal in nature. The Regime is aimed at "combatting the laundering of proceeds of crime and combatting the financing of terrorist activities," i.e. to detect and prevent criminal activity. As a result, it is my opinion that the exemption for lawyers and legal firms contained in s. 10.1 from the reporting and disclosure requirements under ss. 7

and 9 of the *Act* does not safeguard clients' liberty interests because client information can be accessed under other provisions of the *Act* and *Regulations*.

[137] Section 11 of the *Act* provides that nothing in Part 1 of the *Act* "requires a legal counsel to disclose any communication that is subject to solicitor-client privilege"; however, the extent of the solicitor-client privilege is not defined. Although the respondent asserts that s. 11 applies to the whole of the *Act*, it is limited by its wording to Part 1. Therefore, it would not apply to Part 3 of the *Act*, which authorizes warrantless search and seizure of documents in lawyers' offices. Section 11 provides that legal counsel must not disclose any communication that is subject to solicitor-client privilege and was meant to address the suspicious transaction reporting requirement which, pursuant to s. 10.1, no longer applies to lawyers. It does not offer any protection from the recording and record retention obligations in the *Act* and *Regulations* or the search and seizure provisions set out in ss. 62-64 of the *Act*.

[138] Section 64 of the *Act* provides that when a FINTRAC official is about to examine a document in the possession of a legal counsel who claims that a named client or former client has solicitor-client privilege over, the document cannot be examined or copied. However, the provision places the onus on the client or lawyer to apply to a judge for an order that solicitor-client privilege applies. The section sets out a very short time limit within which the application must be made, 14 days after the document has been seized. In the event the application is successful, the section provides that no costs are payable to the client and lawyer. The respondent asserts this provision is to the benefit of an applicant because no costs will be awarded if the applicant is unsuccessful. However, if Parliament was concerned about protecting the applicant in this situation, it could have easily drafted the section to provide that no costs would be payable by an unsuccessful applicant.

[139] As set out earlier, s. 65 provides that FINTRAC may disclose to the appropriate law enforcement agencies any information it becomes aware of under

ss. 62-63.1 and that it suspects, on reasonable grounds, is evidence of a contravention of Part 1 of the *Act*.

[140] In my view, it is clear that the clients' liberty interests are at stake. The respondent has provided extensive evidence and submissions regarding the problems and criminal activity associated with both money laundering and terrorist financing. The respondent argues that the application of the Regime to lawyers is necessary because "the use of lawyers figures prominently in criminals' efforts to launder the proceeds of their crimes."

[141] The respondent acknowledges in its submissions that one of the purposes of the Regime is to have lawyers create a paper trail which can be used to prosecute their clients for money laundering and terrorist financing. This is consistent with Ms. Grasham's evidence that one of the policy reasons for imposing anti-money laundering measures on lawyers is that "lawyers are vulnerable to being used to effect financial transactions in aid of money laundering." It is also consistent with the object of the *Act* set out in s. 3.

[142] It is apparent that the underlying purpose of the record keeping and record retention provisions of the Regime, as it applies to lawyers and legal firms, is to advance the criminal law interest of deterring, detecting, investigating and prosecuting crimes committed by lawyers' clients by having lawyers create a paper trail that can be used to prosecute their clients. That underlying purpose clearly puts clients' liberty interests at stake.

[143] As noted in *Maranda*, the Supreme Court of Canada's decisions have identified that solicitor-client privilege plays a fundamental role in the criminal justice system and to the protection of the rights of accused persons. To that end, Lebel J. stated at para. 37 that: "[i]t is important that lawyers, who are bound by stringent ethical codes not have their offices turned into archives for the use of the prosecution."

[144] In my opinion, imposing the recording and related obligations contained in Part 1 of the *Act* on legal counsel and legal firms would result in having lawyers' offices turned into archives for the use of the prosecution, and would violate the principles of fundamental justice insofar as it erodes the solicitor-client privilege. As well, as stated earlier, it is my opinion that the impugned provisions put both lawyers and clients' liberty interests in jeopardy. Accordingly, I have concluded that the record collection and related obligations pursuant to Part 1 of the *Act* as it relates to legal counsel and legal firms infringe s. 7 of the *Charter*.

Do ss. 62-64 of the *Act* violate s. 8 of the *Charter* by authorizing state agents to conduct warrantless searches of lawyers' offices?

[145] In its submissions, the respondent acknowledges that the petitioner's s. 8 *Charter* challenge is aimed at the provisions in the *Act* which authorize FINTRAC to conduct compliance audits, and is, necessarily, being advanced in the alternative to the petitioner's s. 7 *Charter* challenge to the anti-money laundering obligations imposed on legal counsel by the *Act*. The respondent concedes that if the petitioner succeeds in obtaining a constitutional exemption for legal counsel from the Regime, FINTRAC will have neither the authority nor the need to conduct audits of legal counsel and the constitutionality of the compliance provisions will become moot.

[146] Having found that the recording and related obligations imposed on lawyers pursuant to Part 1 of the *Act* violates s. 7 of the *Charter*, it is my view that I need not consider whether the Regime also infringes upon s. 8 of the *Charter*.

Is the infringement reasonable and justified under s. 1 of the *Charter*?

[147] The respondent submits that in the event an infringement of the *Charter* is found, the Regime can be justified under s. 1. However, for the following reasons, I do not agree that the s. 7 of the *Charter* infringement is justified under s. 1.

Respondent's position

[148] The respondent takes the position that the objective of the Regime is necessary because there is a gap in Canada's anti-money laundering and terrorist

financing regime. The respondent asserts that subjecting lawyers to the Regime is necessary in order to meet Canada's international commitments to the fight against money laundering and terrorist financing, including meeting its commitments as a member of the Financial Action Task Force (the "FATF").

[149] The FATF is an inter-governmental body whose purpose is the development and promotion of policies, both at the national and international level, to combat money laundering and terrorist financing. The FATF is a standard-setting body that works to generate the necessary political will to bring about national legislative and regulatory reforms in these areas.

[150] The respondent says the FATF has provided a clear and significant impetus with respect to the evolution of the Canadian anti-money laundering and terrorist financing regime, including the coverage of lawyers. A strong rationale for the imposition of anti-money laundering and terrorist financing requirements on lawyers is the fact that they are covered by the FATF standards under the definition of designated non-financial businesses and professions.

Petitioner's position

[151] The petitioner takes position that the infringement is not necessary because there is no regulatory gap in regards to lawyers. The petitioner points to the steps taken by the provincial and territorial law societies to prevent lawyers from being used by criminals to effect money laundering and terrorist financing schemes.

[152] The law societies have adopted no cash and client identification rules. As well, all of the law societies have extensive professional conduct rules and undertake activities to promote and ensure compliance with their rules, including education, annual self-reporting, audits and investigations.

[153] Therefore, to the extent that the purpose of the Regime is to ensure adequate client identification and record-keeping by professionals, those objectives are already being met in regards to the legal profession by virtue of the law societies' regulation of their members.

[154] Any implementation of the FATF recommendations must be done in accordance with Canada's legal and constitutional principles. The law societies' rules and procedures meet Canada's international commitments by responding to FATF's recommendations to have proportionate and dissuasive criminal, civil or administrative sanctions available, while preserving the legal and constitutional requirement for solicitor-client privilege.

Interveners' position

[155] The interveners support the petitioner and say the Regime is unnecessary *vis-à-vis* lawyers because the law societies already have adequate rules and procedures in place to oversee lawyers. The law societies' rules and procedures accomplish the Regime's objectives without imperilling solicitor-client privilege and confidentiality, the duty of loyalty and the independence of the bar.

[156] The law societies have demonstrated their ability to implement effective measures such as the client Identification and verification rules, and the no cash rule. As well, they have established positive track records regarding compliance and discipline of their members.

[157] The interveners agree with the petitioner that Canada can fulfill its international obligations to comply with the FATF recommendations through the self-regulation of lawyers under the various legal professions acts.

Analysis

[158] Section 1 of the *Charter* provides:

> The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

[159] In *Canadian Broadcasting Corp. v. Canada (Attorney General)*, 2011 SCC 2 at para. 64, the Court confirmed that the test articulated by Dickson C.J. in *R. v. Oakes*, [1986] 1 S.C.R. 103, is to be applied in determining whether s. 1 applies to justify an infringement of a *Charter* right:

> The test developed by Dickson C.J. in *Oakes* is well known. When a protected right is infringed, the government must justify the limit by identifying a pressing and substantial objective, demonstrating that there is a rational connection between the objective and the infringement of the right, and showing that the chosen means interferes as little as possible with the right and that the salutary effects of the measure outweigh its deleterious effects.

[160] The onus of proving the limitation of a right is reasonable and demonstrably justified in a free and democratic society is on the party seeking to uphold the limitation. The standard of proof is the balance of probability: *Oakes*, at 137.

[161] The s. 1 analysis is two-part. The first part of the assessment is to consider the impugned law's purpose, and whether the law's objective is sufficiently important or significant to limit a *Charter* right. The respondent must establish that the impugned provisions "advance concerns that are pressing and substantial in a free and democratic society": *Canadian Broadcasting Corp.* at para. 65.

[162] In the first part, the respondent is not required to provide concrete evidence of the problem it seeks to address. The discharge of the burden of proof on the balance of probabilities may be completed through logic and the application of reason to what is known: *Harper v. Canada (A.G.)*, 2004 SCC 33, [2004] 1 S.C.R. 827 at paras. 77-79.

[163] In the second part, the severity of the deleterious effects is taken into account: *Trociuk v. British Columbia (A.G.)*, 2003 SCC 34, [2003] 1 S.C.R. 835 at para. 33.

[164] However, as stated in *Charkaoui v. Canada (Citizenship and Immigration)*, [2007] 1 S.C.R. 350 at para. 66, exceptional circumstances must be present for s. 1 to save the impugned law when there is an infringement of s. 7 of *Charter*:

> The *Charter* does not guarantee rights absolutely. The state is permitted to limit rights -- including the s. 7 guarantee of life, liberty and security -- if it can establish that the limits are demonstrably justifiable in a free and democratic society. This said, violations of s. 7 are not easily saved by s. 1. In *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486, Lamer J. (as he then was) stated, for the majority:
>
> > Section 1 may, for reasons of administrative expediency, successfully come to the rescue of an otherwise violation of s. 7, but only in cases

> arising out of exceptional conditions, such as natural disasters, the outbreak of war, epidemics, and the like.
>
> The rights protected by s. 7 -- life, liberty, and security of the person -- are basic to our conception of a free and democratic society, and hence are not easily overridden by competing social interests. It follows that violations of the principles of fundamental justice, specifically the right to a fair hearing, are difficult to justify under s. 1: *G. (J.)*. Nevertheless, the task may not be impossible, particularly in extraordinary circumstances where concerns are grave and the challenges complex.

[165] This point was also addressed in *Lavallee* in the context of a law office search under s. 488.1 of the *Criminal Code*. Arbour J., writing for the majority, concluded at para. 46:

> For these reasons, I find that s. 488.1 more than minimally impairs solicitor-client privilege and thus amounts to an unreasonable search and seizure contrary to s. 8 of the *Charter*. The appellants did not make any submissions on the issue of whether s. 488.1 could be saved under s. 1 of the *Charter* in the event it was found to be unconstitutional, as I have found it to be. Although this Court has left open the possibility that violations of ss. 7 and 8 could be saved under s. 1 in exceptional circumstances, this is clearly not such a case....In particular, if, as here, the violation of s. 8 is found to consist of an unjustifiable impairment of the privacy interest protected by that section, everything else aside, it is difficult to conceive that the infringement could survive the minimal impairment part of the *Oakes* test. ... I therefore conclude that s. 488.1 could not be saved by s. 1: while effective police investigations are indisputably a pressing and substantive concern, s. 488.1 cannot be said to establish proportional means to achieve that objective inasmuch as it more than minimally impairs solicitor-client privilege. [Citations Omitted]

[166] Although Arbour J.'s comments were in the context of a s. 8 violation, it is my view that they are equally relevant in this instance where a s. 7 violation has been found.

Is the objective of the Regime pressing and substantial?

[167] There is no question that the Regime's objectives of combating money laundering and terrorist financing advance concerns that are pressing and substantial in our society. Extensive evidence was filed about the negative impact that money laundering and terrorist financing have on Canada and the international community

[168] The international recognition of the problems associated with money laundering and terrorist financing is evidenced by the creation of the FATF in the late 1980s. As indicated earlier, the FATF is an inter-governmental body whose purpose is to develop recommendations for measures to combat money laundering and terrorist financing. The FATF has grown to include 34 countries, and makes recommendations to its members to be incorporated into legislation to combat money laundering and terrorist financing.

[169] As set out in the respondent's factum, the purpose of money laundering is to allow profits from criminal enterprises to be turned into what appear to be legitimate funds. It is estimated that hundreds of billions of dollars each year are laundered in one form or another. The size of the problem is of such magnitude that it is a national and global concern.

[170] The evidence establishes that apart from the obvious negative impact of providing benefits to and assisting criminal activity, money laundering causes great economic damage. It depresses the economy by distorting the allocation of economic resources within the economy, ultimately slowing economic growth and increasing the share of the economy under the control of criminal organizations. Money laundering also damages economic institutions, particularly the financial institutions, through which laundered funds flow. Ongoing crime harms the economy in which it occurs. Honest businesses cannot compete with businesses that derive income from money laundering.

[171] Internationally, money laundering allows illegal movement of proceeds of corruption and crime from developing countries.

[172] Terrorist financing is also destructive. To support and carry out their activities, terrorists must have access to funds. They use a variety of methods to raise funds, some of which are legitimate, which makes tracking such funds more difficult than tracking money laundering efforts. Countries that are not direct targets of terrorist activities, such as Canada, are still vulnerable in that they are used as a base for funding, materials procurement, recruitment and dissemination of propaganda.

[173] In a report prepared by Richard Reynolds, the Officer in Charge of the Financial Intelligence Branch of the RCMP, he states that terrorist elements are present in Canada for those very reasons, i.e. it represents a base from which terrorists can gather funding and conduct procurement activity.

[174] In my view the respondent has established that the objectives of the Regime, i.e. to combat money laundering and terrorist financing in Canada, are pressing and substantial.

Are the means chosen proportionate to the objective of the legislation?

[175] For the following reasons I have concluded that the respondent has not established that the means chosen are proportionate to the objective of the legislation.

[176] The second part of the *Oakes* test requires an evaluation of the means chosen to advance the legislative purpose, based on three inquiries set out at 139:

1) Is there a rational connection between the aim of the *Act* and the *Charter* infringement?

2) Do the impugned provisions minimally impair the *Charter* guarantee?

3) Is the attainment of the legislative goal outweighed by the infringement of the *Charter* right?

[177] As stated in *Canadian Broadcasting Corp.*, at 51:

> At the second stage of the *Oakes* analysis, the court must determine whether there is a rational connection between the means used and the legislature's objectives. Here, the defendant must establish a connection between the infringement and the benefit that was sought in adopting the means, and this is to be done either by providing concrete evidence or, where it is impossible to provide such evidence, on the basis of reason or logic ... "The government must show that it is reasonable to suppose that the limit may further the goal, not that it will do so'....[Citations omitted]

[178] The respondent's position is that in order for Canada to meet its international commitments, the Regime needs to be applied to lawyers and legal offices, as well

as other professions and banks. The respondent submits that the problems associated with lawyer-facilitated money laundering and terrorist financing are real and of great concern to the government, the law societies and the international community.

[179] The respondent submits that there are numerous ways in which lawyers are particularly vulnerable to money laundering schemes. The respondent points to evidence that lawyers have been caught up in money laundering activities both intentionally and innocently. The respondent asserts that lawyers are especially susceptible to acting as gatekeepers, who furnish direct access to the financial system. Lawyers can also provide expertise to facilitate complex money laundering schemes, and provide services relating to the real estate and corporate worlds. The professional status of lawyers and the solicitor-client privilege can be used by money launderers or individuals financing terrorism to shield or minimize suspicion surrounding their activities.

[180] The respondent points out that the FATF conducted studies that indicated that lawyers could be used in money laundering and terrorist financing activities. As a result, the FATF has recommended that measures be taken to combat lawyer-facilitated money laundering and terrorist financing. The respondent asserts that if the Regime is not applied to lawyers and law offices, Canada will not be meeting its international obligations.

[181] It is clear from the case law that the demands of Canada's international obligations have to be reconciled with the procedural rights guaranteed under the *Charter.* In *Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, [2002] 1 S.C.R. 3 at paras. 59-60, the Court noted that:

> 59. ... the principles of fundamental justice expressed in s. 7 of the *Charter* and the limits on rights that may be justified under s. 1 of the *Charter* cannot be considered in isolation from the international norms which they reflect. A complete understanding of the *Act* and the *Charter* requires consideration of the international perspective.
>
> 60. International treaty norms are not, strictly speaking, binding in Canada unless they have been incorporated into Canadian law by enactment. However, in seeking the meaning of the Canadian Constitution, the courts

> may be informed by international law. Our concern is not with Canada's international obligations qua obligations; rather, our concern is with the principles of fundamental justice. We look to international law as evidence of these principles and not as controlling in itself.

[182] While the FATF has recommended money laundering legislation should apply to lawyers and law firms, there is evidence that the various signatories of FATF do not comply with all of the recommendations. For example, Australia has not complied with the recommendation as yet.

[183] As well, the respondent has filed an affidavit from Marc Gottridge, a United States attorney, which indicates that the United States has not complied with FATF's recommendations. Mr. Gottridge deposes that he is:

> ... not aware of any federal legislation or regulation in the United States imposing client verification obligations or 'know your client requirements on lawyers or law firms. Lawyers in the U.S., unlike (for example) bankers, are not under any legal obligation to record, verify and conduct due diligence on information concerning a client's identity or transactions for the purpose of complying with U.S. anti-money laundering laws. Accordingly, there are no due diligence or obligations to retain records in that regard.

[184] The evidence does not establish that Canada's international stature will be affected in any significant way by the continuation of the *status quo*, whereby lawyers are subject to law society rules but not to the Regime. In that regard, there is no evidence that Canada's decision not to impose the suspicious transaction reporting requirements on lawyers, despite the FATF recommendations, has had any impact on its stature in the international community.

[185] As acknowledged by the respondent, the FATF only recommends that lawyers be required to take certain measures when they act as financial intermediaries, not when providing traditional legal services such as advocacy, representation and legal advice. Furthermore, the FATF recommendations recognize that anti-money laundering measures must not interfere with solicitor-client privilege.

[186] As set out earlier, the law societies have adopted detailed client identification and verification requirements and restrictions on the receipt of cash, in addition to

their professional conduct rules. Further, law societies undertake an extensive range of activities to promote and ensure compliance with their rules, including education, annual self-reporting, audits and investigations.

[187] As such, to the extent that one of the purposes of the Regime is to ensure adequate client identification and record-keeping by professionals, those objectives are already being met in respect of the legal profession by virtue of the law societies' regulation of their members.

[188] The respondent asserts that the law societies are as much a stranger to the solicitor-client relationship as the FINTRAC and that providing the law societies with access to this information is no less intrusive of the solicitor-client privilege than is the case for FINTRAC.

[189] However, this argument does not acknowledge the role of self-regulation of the legal profession to ensure an independent bar and the protection of fundamental legal values such as the solicitor-client relationship.

[190] For example in British Columbia the *Legal Profession Act*, S.B.C.1998, c. 9, s. 3 states the object and duty of the law society is "to uphold and protect the public interest in the administration of justice".

[191] The public interest has been found by the courts to be fundamentally connected to a self-regulating bar that is independent from the influence of the State. In *Canada (Attorney General) v. Law Society of British Columbia*, [1982] 2 S.C.R. 307 at 335-336, the Court stated:

> … The independence of the Bar from the state in all its pervasive manifestations is one of the hallmarks of a free society. Consequently, regulation of these members of the law profession by the state must, so far as by human ingenuity it can be so designed, be free from state interference, in the political sense, with the delivery of services to the individual citizens in the state, particularly in fields of public and criminal law. The public interest in a free society knows no area more sensitive than the independence, impartiality and availability to the general public of the members of the Bar and through those members, legal advice and services generally.

[192] It follows that, where a law society is exercising its role by regulating its members to protect the public's interests, replacement of that role with a federal statute that permits the intrusion on solicitor-client privilege is contrary to the public interest.

[193] The protection of the solicitor-client privilege has evolved in the case law to a fundamental principle of law: *Lavallee* at para. 36. There are few reported cases in which the Courts have supported a government agency in a contest with solicitor-client privilege.

[194] By comparison, the courts have supported law societies in their need to review otherwise privileged documents in the course of carrying out their mandate of regulating the legal profession in the public interest.

[195] Two theories have emerged to explain why law societies are entitled to review privileged documents as part of their investigation of lawyers' conduct. On one justification, law societies may review privileged communications because the privilege extends to the law society, usually by reference to its statutory duties. Accordingly, no breach of the privilege occurs. This is sometimes referred to as the "envelope theory," i.e. that the envelope of privilege extends to the law societies. The second justification for permitting law societies to review privileged documents when investigating lawyers is that it is "absolutely necessary" for them to do so in order to meet the responsibility of self-regulation.

[196] Solicitor-client privilege has given way to the overriding principle that members of law societies must be required to make full disclosure of their activities as professionals when under investigation for complaints by the law societies: See *Robertson Stromberg, Re* (1995), 128 Sask.R. 107 (C.A.), and *Skogstad v. The Law Society of British Columbia*, 2007 BCCA 310, [2007] 9 W.W.R. 218 at para. 8; *Histed v. Law Society of Manitoba*, 2007 MBCA 150, 287 D.L.R. (4th) 577 at para. 37, leave to appeal ref'd (2008), 245 Man. R. (2d) 321.

[197] In *Law Society of Saskatchewan v. Merchant,* 2008 SKCA 128 at paras. 54-58, the court found that "the *Act* gives the Law Society the significant responsibility of governing the legal profession in Saskatchewan and of ensuring the profession's ongoing integrity" including a duty to investigate complaints. As a result, Law Society review met the "absolutely necessary" test for infringing solicitor-client privilege.

[198] In both *Histed* and *Greene v. Law Society of British Columbia*, 2005 BCSC 390, it was noted that the *Legal Professions Act* of those jurisdictions provided for the need of accountability to take precedence over solicitor-client privilege. In *Greene*, emphasis has been placed on the language of the legislation as ensuring that the information reviewed must remain confidential.

[199] In *Skogstad* at paras. 18 and 19, the Court of Appeal referred to the *Legal Profession Act* and concluded that:

> On a plain reading of s. 88(1) there would be no violation of solicitor-client privilege if the member were to answer the question put to him by counsel for the Law Society. He would be "deemed conclusively not to have breached any duty or obligation" to the client.
>
> The client remains protected pursuant to ss. 88(2) and (3). The former imposes solicitor-client privilege on the recipient of the information and the latter prohibits disclosure of the information except for purposes contemplated by the Act or the Law Society Rules.

[200] In *Stewart McKelvey Stirling Scales v. Nova Scotia Barristers Society*, 2005 NSSC 258, the right of the Nova Scotia Barristers Society to review privileged documents was confirmed even in the absence of specific legislation (although the Nova Scotia legislation did contain provisions protecting the information in the hands of the society). In reaching that conclusion, the Court relied on the unique role of law societies in regulating the legal profession.

[201] Although the reasoning in the judgments varies, primarily on the basis of the underlying legislation in each of the provinces, the results are consistent. The decisions dealing with law societies' review of lawyers' files have consistently recognized the unique role law societies play in the regulation of the legal profession

and have consistently supported the necessity of law societies' review of privileged documents as part of that role.

[202] By contrast, there are very few instances where government agencies have been permitted to breach solicitor-client privilege, and no instances where government agencies have been permitted to impose a requirement as a condition of receiving legal advice that clients provide information to the lawyer that the government may wish to access later.

[203] Accordingly, it is my view that the respondent has not established that the provincial and territorial law societies are as much strangers to the solicitor-client relationship as is a government agency.

[204] I agree with the petitioner's submission that the regulation of lawyers by the law societies minimally impairs solicitor-client privilege while providing an effective and constitutional anti-money laundering and terrorist financing regime.

[205] Having the law societies regulate lawyers and law offices in this regard, and leaving the federal government to regulate banks and other professions, is in keeping with the Constitution, which anticipates that various levels of government will cooperate to achieve common goals: Peter W. Hogg, *Constitutional Law of Canada*, loose-leaf, 5th ed., Vol. 1 (Toronto: Carswell, 2007), ch. 5 at 5-45.

[206] Law societies are focused exclusively on regulating the legal profession in the public interest. They do so actively; for example by auditing all of their members every few years. By contrast, the evidence is that over the past five years, FINTRAC has only examined 900 of 75,000 entities subject to the Regime. FINTRAC must supervise many categories of persons and entities that are regulated under the Regime, from financial institutions to securities dealers and from casinos to money services businesses. A considerable number of these persons and entities are otherwise unsupervised, unlike lawyers.

[207] FINTRAC concedes that if lawyers were subject to the Regime, FINTRAC would seek to enter into a Memorandum of Understanding with the law societies or

the petitioner, with the aim of having law societies supervise lawyers' compliance with the Regime. In my view, this demonstrates FINTRAC's satisfaction with the law societies' abilities to ensure their members' compliance.

[208] Law society regulation of their members imposes the least intrusion on the integrity of the solicitor-client relationship. As the authorities make clear, maintaining the integrity of the solicitor-client relationship is fundamental to the proper administration of justice in Canada. Any intrusion on that relationship must be minimized to the greatest extent possible. See: *MacDonald Estate v. Martin,* [1990] 3 S.C.R. 1235 at 1244; *Lavallee* at paras. 36, 49; *Maranda* at paras. 12, 37; *Foster WheelerPower Co. v. Société intermunicipale de gestion et d'élimination des déchets (SIGED) inc.,* 2004 SCC 18, [2004] 1 S.C.R. 456 at para. 34.

[209] Given the law societies' ongoing mandate and commitment to regulate their members in the public interest, including through specific measures to combat money laundering and terrorist financing, further intrusion has not been demonstrated to be necessary or appropriate.

[210] Although the respondent submits that in order for Canada to fulfil its international commitments it is necessary that lawyers be subjected to the Regime, as indicated earlier other members of FATF, most notably the United States, have not imposed money laundering or terrorist financing restrictions on lawyers. Additionally, as pointed out by the petitioner, FATF does not include the regulation of lawyers in its "core" recommendations.

[211] To the extent that the FATF recommends that certain requirements be imposed by "law or regulation", the professional conduct rules imposed by law societies satisfy that recommendation, as the power to make the rules is conferred by legislation. For example, in British Columbia s. 11 of the *Legal Professions Act* permits the law society to "make rules for the governing of the society, lawyers, articled students and applicants, and for the carrying out of this *Act*."

[212] In my opinion, the regulation of the profession by the law societies satisfies the FATF recommendation that proportionate and dissuasive criminal, civil or administrative sanctions be available for non-compliance with anti-money laundering requirements. The law societies' power to disbar lawyers serves as a strong incentive for lawyers to comply with law society rules, including the no cash and client identification rules. Further, a range of disciplinary options short of disbarment, including reprimands, fines and suspension, are available to the law societies. In any event, FINTRAC cannot impose criminal sanctions. Rather, FINTRAC refers such matters to the police, an option also available to law societies.

[213] Given that the law societies have addressed the issue of client identification and verification as well as restrictions on the receipt of cash, the respondent has not established that the impugned provisions meet this part of the *Oakes* test. The respondent has not in my opinion demonstrated that there is a rational connection between the objective and infringement of the right, that the Regime interferes as little as possible with the right, or that the salutary effects of the measure outweigh its deleterious effects.

[214] As a result, I have concluded that s. 1 does not apply to justify the infringement of the s. 7 *Charter* rights.

Remedy

[215] For the following reasons, I have concluded that the appropriate remedy for the *Charter* breach is to read down the impugned sections to exclude lawyers and legal firms from the definition of persons and entities in ss. 5(i), 5(j), 62, 63 and 63.1 of the *Act*, and to sever s. 64 of the *Act* and ss. 33.3, 33.4 and 59.4(1) of the *Regulations* and to declare them of no force or effect.

[216] The petitioner seeks remedies pursuant to s. 52 of the *Constitution Act, 1982.* In *Schachter v. Canada,* [1992] 2 S.C.R. 679, the Supreme Court of Canada considered the appropriate remedies for a *Charter* breach which is not justified under s. 1 at 695-96:

> A court has flexibility in determining what course of action to take following a violation of the Charter which does not survive s. 1 scrutiny. Section 52 of the Constitution Act, 1982 mandates the striking down of any law that is inconsistent with the provisions of the Constitution, but only "to the extent of the inconsistency". Depending upon the circumstances, a court may simply strike down, it may strike down and temporarily suspend the declaration of invalidity, or it may resort to the techniques of reading down or reading in. In addition, s. 24 of the Charter extends to any court of competent jurisdiction the power to grant an "appropriate and just" remedy to "[a]nyone whose [Charter] rights and freedoms ... have been infringed or denied". In choosing how to apply s. 52 or s. 24 a court will determine its course of action with reference to the nature of the violation and the context of the specific legislation under consideration.
>
> The flexibility of the language of s. 52 is not a new development in Canadian constitutional law. The courts have always struck down laws only to the extent of the inconsistency using the doctrine of severance or "reading down". Severance is used by the courts so as to interfere with the laws adopted by the legislature as little as possible. Generally speaking, when only a part of a statute or provision violates the Constitution, it is common sense that only the offending portion should be declared to be of no force or effect, and the rest should be spared.

[217] At 715, Lamer C.J. noted that while there is no easy formula for a court to decide whether severance or reading in is appropriate in a particular case, the twin guiding principles are respect for the legislature and respect for the *Charter.*

[218] In considering the appropriate remedy, the primary goals of a court are to avoid undue intrusion in the legislative sphere, and to be as faithful as possible to the legislature's purpose. In order to achieve those goals the court must consider the extent of the inconsistency, the remedy which best corrects the inconsistency, and whether the remedy should be temporarily suspended: *Schachter* at 707, 715-716.

[219] Although it is apparent from ss. 5(1) and (j) of the *Act* and s. 11.1 of the *Regulations* that Parliament intended to define “persons and entities” to include legal counsel and legal firms, as a result of the various interlocutory orders and agreements between the petitioner and the respondent, the Regime has been in force for 10 years without application to the legal profession. There is no evidence that Parliament’s purpose in implementing the Regime has been frustrated over that period of time as a result of the exclusion of lawyers from it. As well, there is no evidence that lawyers have become “the most sought after resource by criminal

organizations" to launder proceeds of crime, as suggested in a 2003 report prepared by Joseph Bolduc, one of the respondent's affiants.

[220] The effect ss. 5(i) and (j) of the *Act* and s. 11(1) of the *Regulations* is to make legal counsel and legal firms subject to Part 1 of the *Act*, including the obligations to collect and retain information. Given my conclusion that such an application would be an infringement of s. 7 of the *Charter* in a manner that is not justified under s. 1, and having considered the principles enunciated in *Schachter*, it is my opinion that the appropriate remedy is to read down the *Act* and *Regulations* to exclude legal counsel and legal firms

[221] As well, given the respondent's concession that if a s. 7 violation is found, and the petitioner succeeds in obtaining a constitutional exemption for legal counsel and legal firms, the provisions in the *Act* which authorize FINTRAC to conduct compliance audits will also fall, it is my opinion that ss. 62, 63 and 63.1 of the *Act* should be read down to exclude legal counsel and legal firms.

[222] In my view, reading down the *Act* to exclude legal counsel and legal firms is appropriate, as this remedy respects both Parliament's objectives of controlling money laundering and terrorist financing by not interfering with the operation of the remaining portion of the *Act*, and the s. 7 *Charter* rights of lawyers and their clients. The *Act* can be read down to exclude legal counsel and legal firms from the scope of ss. 5(i) and 5(j) and to exclude their offices from the search and seizure provisions in ss. 62, 63 and 63.1 of the *Act* without impacting the significance of the *Act*, or the remaining portion of the *Act* insofar as it applies to other professions or entities.

[223] I agree with the petitioner that s. 64 of the *Act* and ss. 33.3, 33.4 and 59.4(1) of the *Regulations* cannot be read down because they expressly refer to legal counsel and legal firms. Rather, the appropriate remedy is severance of those provisions, and a declaration that they are of no force and effect. As well, the words legal counsel and legal firms should be severed from s. 11.1 of the *Regulations*.

[224] Professor Hogg discussed the use of severance as a technique to preserve the constitutional validity of legislation in *Constitutional Law of Canada,* at 40-12:

> Severance is the appropriate remedy when only part of the statute is held to be invalid, and the rest can independently survive. In that case, a court will hold that the bad part of the statute should be struck down and severed from the good part, thereby preserving the part that complies with the Constitution.

[225] In *Schachter* at 697, Lamer C.J. discussed the impact of severance:

> [T]he doctrine of severance requires that a court define carefully the extent of the inconsistency between the statute in question and the requirements of the Constitution, and then declare inoperative (a) the inconsistent portion, and (b) such part of the remainder of which it cannot be safely assumed that the legislature would have enacted it without the inconsistent portion.

[226] Severing the words “or legal counsel or legal firm” from ss. 11.1(1) of the *Regulations* would leave the remainder of the subsection intact. However, s. 64 of the *Act* and ss. 33.3, 33.4, 33.5 and 59.4 of the *Regulations* relate solely to legal counsel and legal firms. As such, they should be severed and struck down.

Conclusion

[227] In summary, I have concluded that the Regime infringes s. 7 of the *Charter* insofar as it applies to lawyers and law firms because it puts both lawyers and their clients’ liberty interests in jeopardy by requiring lawyers to collect and retain information about clients, and make the information available to the government to aid in combating money laundering and terrorist financing. As well, I have concluded that the infringement is not justified under s. 1 of the *Charter*.

[228] In my opinion the appropriate remedy is to read down some of the impugned provisions, and sever and strike down other portions.

[229] Accordingly, I am making the following declarations:

- Sections 5(i) and (j) of the *Act* are inconsistent with the *Constitution of Canada* and are of no force and effect to the extent that “persons and entities” includes legal counsel and legal firms;

- Sections 5(i), 5(j), 62, 63 and 63.1 of the *Act* will be read down to exclude legal counsel and legal firms from the operation of those sections;

- Section 64 of the *Act* and ss. 33.3, 33.4 and 59.4(1) of the *Regulations* are severed and struck down; and

- The words “or legal counsel or legal firm” in s. 11.1 of the *Regulations* will be severed and struck down.

[230] The parties have agreed the interlocutory injunctions would remain in place in all jurisdictions pending the outcome of these proceedings, including all appeals. As a result, there is no need to make any order regarding when the remedies will become effective.

[231] The petitioner is entitled to costs of the petition at Scale B.

“Gerow J.”