Citation: The Law Society of B.C. v. A.G. Canada; Federation of Law Societies v. A.G. Canada 2001 BCSC 1593

Date: 20011120
Docket: L013116
Registry: Vancouver

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

THE LAW SOCIETY OF BRITISH COLUMBIA

PETITIONER

AND:

ATTORNEY GENERAL OF CANADA

RESPONDENT

AND:

CANADIAN BAR ASSOCIATION

INTERVENOR

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REASONS FOR JUDGMENT

OF THE

HONOURABLE MADAM JUSTICE ALLAN

(IN CHAMBERS)

Counsel for the petitioner Federation of Law Societies of Canada:	Josiah Wood Q,C. Roy Millen
Counsel for the petitioner Law Society of British Columbia:	Jack Giles Q.C. Cassandra Doulis
Counsel for the intervenor Canadian Bar Association:	Ron A. Skolrood G. Delbigio

M. Bain

Counsel for the respondent Attorney General of Canada:	Harry J. Wruck Q.C. Raymond D. Leong W. Paul Riley
Dates and Place of Hearing:	November 8, 13, and 14, 2001 Vancouver, B.C.

[1] On November 8, 2001, Regulations implementing certain provisions of the ***Proceeds of Crime (Money Laundering) Act***, S.C. 2000, c. 17 (the "Act") came into force. The petitioners, The Law Society of British Columbia (the "Law Society") and the Federation of Law Societies of Canada (the "Federation"), seek to exempt lawyers from the force of that legislation. The Canadian Bar Association (the "CBA") sought and obtained leave to intervene.

[2] The petitioners challenge the constitutional validity of the legislation and seek the following relief:

- a declaration that ss. 5(i) and 5(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" include legal counsel;
- a declaration that ss. 5(i) and 5(j) of the Act be read down so as to exclude legal counsel from "persons and entities" referred to in those subsections;
- a declaration that s. 5 of the Regulations is *ultra vires* the Act and inconsistent with the Constitution of Canada, invalid and has no force and effect;
- interim and interlocutory relief suspending the operation of s. 5 of the Regulations until the hearing of the petitions;
- a declaration that ss. 62 and 63 of the Act be read down so as to exclude legal counsel from "persons and entities" referred to in those sections;
- a declaration that s. 64 is inconsistent with the Constitution of Canada, invalid and of no force and effect; and

- a declaration that s. 17 of the Act is inconsistent with the Constitution of Canada, invalid and of no force and effect.

[3] On this application, the petitioners, supported by the CBA, seek interlocutory relief exempting lawyers from the effect of s. 5 of the Regulations until the petitions can be heard on their merits. They assert that s. 5 of the Regulations makes it a crime for every lawyer to fail to obtain and secretly report to a government agency, any information that has raised suspicion in the course of the lawyer's dealing with his or her client. It is left to the subjective opinion of the lawyer to determine what is a "suspicious transaction". The petitioners say this legislation threatens the independence of the bar and solicitor-client confidentiality, and creates a conflict between lawyers' duties to their clients and their obligation to report confidential information to the government.

[4] The respondent Attorney General of Canada (the "Government") opposes the application.

The impugned legislation:

[5] "Money laundering" occurs when money produced through criminal activity is converted into "clean money", the criminal origins of which are obscured. The legislative

purpose of the Act, described in s. 3, is to enable authorities to detect and deter money laundering, to facilitate the investigation and prosecution of money laundering offences, to enhance law enforcement, and to assist in fulfilling Canada's international commitments to participate in the global battle against money laundering.

[6] The legislation creates the Financial Transactions and Reports Analysis Centre of Canada (the "Centre") and empowers it to gather information concerning money laundering, including "suspicious transactions," and to share it with domestic and international law enforcement agencies.

[7] The Act received Royal Assent on June 29, 2000 and portions of it have been proclaimed in force incrementally. Part I of the Act is entitled "Record Keeping and Reporting of Suspicious Transactions."

[8] On July 5, 2000, a number of sections establishing the infrastructure for the legislative scheme came into force. Those sections included ss. 1 to 4 of Part I setting out the Act's definitions and purpose, Part III which creates the Centre, Part IV which provides the power to make regulations, and Part V which contains the offences and punishment provisions.

[9] Sections 5, 7, 8, 10 and 11 of Part I came into force on October 28th, 2001.

[10] Section 5 of the Act describes the persons and entities that are subject to Part I. While legal counsel are not named, s. 5 (i) refers to "persons engaged in a business, profession or activity described in regulations made under paragraph 73(1)(a)". Section 5(j) refers to "persons engaged in a business or profession described in regulations made under paragraph 73(1)(b), while carrying out the activities described in the regulations".

[11] Sections 73(1)(a) and (b) provide:

> s. 73(1) The Governor in Council may, on the recommendation of the Minister, make any regulations that the Governor in Council considers necessary for carrying out the purposes and provisions of this Act, including regulations
>
> (a) describing businesses, professions and activities for the purpose of paragraph 5(i);
>
> (b) describing businesses and professions for the purpose of paragraph 5(j), and the activities to which that paragraph applies;

[12] The Regulations, which make legal counsel subject to Part 1 of the Act, came into force on November 8th, 2001. Section 5 provides:

> s. 5. Every legal counsel is subject to Part I of the Act when they engage in any of the following activities on behalf of any person or entity, including the giving of instructions on behalf of any person or entity in respect of those activities:
>
> (a) receiving or paying funds, other than those received or paid in respect of professional fees, disbursements, expenses or bail;
>
> (b) purchasing or selling securities, real property or business assets or entities; and
>
> (c) transferring funds or securities by any means.

[13] The term “legal counsel” is defined by s. 2 of the Act as “in the province of Quebec, an advocate or notary and, in any other province, a barrister or solicitor.”

[14] Section 7 of the Act requires the reporting of suspicious transactions:

> s. 7 ...every person or entity shall report to the Centre, in the prescribed form and manner, every financial transaction that occurs in the course of their activities and in respect of which there are reasonable grounds to suspect that the transaction is related to the commission of a money laundering offence.

[15] The “prescribed form and manner” are described in the Regulations. Section 9 of the Regulations requires that a

report under s. 7 of the Act must contain information set out in the Schedule to the Regulations. That Schedule identifies the extensive information that must be included in such a report, known as a "Suspicious Transaction Report." Part G of the Schedule, entitled "Description of Suspicious Activity", requires:

> 1. Detailed description of the grounds to suspect that the transaction is related to the commission of a money laundering offence.

[16] Section 10 of the Regulations requires that a Suspicious Transaction Report be sent to the Centre within thirty days after the person or entity "first detects a fact respecting a transaction that constitutes reasonable grounds to suspect that the transaction is related to the commission of a money laundering office."

[17] Section 8 of the Act prohibits legal counsel from disclosing to their clients that they have made a Suspicious Transaction Report under s. 7 or disclosing the contents of that Report with the intent to prejudice a criminal investigation, whether or not one has begun.

[18] Section 11 of the Act states that nothing in Part I "requires a legal counsel to disclose any communication that

is subject to solicitor-client privilege." The scope of solicitor-client privilege is not defined.

[19] Section 75 of the Act provides that a breach of s. 7 of the Act is a hybrid offence, punishable on indictment by a fine of up to $2,000,000 and imprisonment for up to five years. Section 76 provides that a breach of s. 8 is punishable on indictment by imprisonment of up to two years.

[20] The Centre has published "Guideline 2: Suspicious Transactions", which includes common indicators and industry-specific indicators of money laundering. The petitioners say that many of the indicators to which legal counsel are specifically directed (such as, "client appears to be living well beyond his or her means in light of his or her employment, profession or business") lack specificity and are not unusual or suspicious in the context of a solicitor-client relationship.

The issue:

[21] The narrow issue on this application is whether legal counsel should be exempted from the provisions of s. 5 of the Regulations pending the hearing of the petitions on their merits. The petitioners do not question the general principle that the effect of democratically enacted legislation should

not be suspended temporarily pending a determination of the issues of unconstitutionality or invalidity on the merits. However, they assert that this case is an exception to the general rule and they seek only an exemption from the legislation, continuing the status quo, rather than a suspension of the legislative scheme.

[22] The constitutional issue raised by the petitioners is whether certain provisions of the legislation that impose duties on legal counsel are unconstitutional because they violate the protected right of an independent bar, the ***Constitution Acts 1867*** and ***1982***; and ss. 7, 8 and 10(b) of the ***Canadian Charter of Rights and Freedoms*** (the *"Charter").*

[23] The respondent submits that the petitioners are not entitled to interlocutory relief. Moreover, Mr. Wruck, counsel for the Government, challenges these proceedings for several reasons: (a) the petitioners lack standing to bring these proceedings; (b) this Court is not the *forum conveniens;* (c) interim injunctive relief does not lie against the Crown; (d) the petitioners are seeking a declaration of invalidity without a full hearing; and (e) a constitutional challenge requires adjudicative facts.

The relevant principles of law relating to interim relief on a constitutional challenge to legislation:

[24] Counsel agree that the principles governing interim relief in a constitutional challenge are articulated in ***Manitoba (Attorney General) v. Metropolitan Stores Ltd.***, [1987] 1 S.C.R. 110, ***RJR - MacDonald Inc. v. Canada (Attorney General)***, [1994] 1 S.C.R. 311, and ***Harper v. Canada (Attorney General)***, [2000] 2 S.C.R. 764; 2000 SCC 57. They disagree as to whether the application of those principles to the issues raised by the petitioners entitles them to the relief they seek.

[25] Before considering the issue of whether the petitioners can meet the threshold for interlocutory relief, I propose to consider the Government's objections to the standing of the petitioners and their right to challenge the legislation.

(a) Do the petitioners have standing as proper parties to bring these proceedings?

[26] Mr. Wruck disputes the petitioners' standing to challenge the constitutional validity of the legislation. He asserts that they have no direct legal interest in the impugned legislation because it imposes no obligations or duties on them, and, further, that they cannot satisfy the criteria for public interest standing.

[27] In ***Minister of Justice (Canada) v. Borowski***, [1981] 2 S.C.R. 575, Martland J., for the majority of the Court, described the two methods of attaining standing at p. 598:

> I interpret these cases as deciding that to establish status as a plaintiff in a suit seeking a declaration that legislation is invalid, if there is a serious issue as to its invalidity, a person need only to show that he is affected by it directly or that he has a genuine interest as a citizen in the validity of the legislation and that there is no other reasonable and effective manner in which the issue may be brought before the Court.

[28] The principles of public interest standing were reconsidered in ***Canadian Council of Churches v. Canada (Minister of Employment and Immigration)***, [1992] 1 S.C.R. 236. At p. 253, Cory J., for the Court, stated:

> It has been seen that when public interest standing is sought, consideration must be given to three aspects. First, is there a serious issue raised as to the invalidity of legislation in question? Second, has it been established that the plaintiff is directly affected by the legislation or if not does the plaintiff have a genuine interest in its validity? Third, is there another reasonable and effective way to bring the issue before the court?

[29] The Law Society claims it is directly affected by the impugned legislation, which impacts its obligations to maintain proper standards of professional and ethical conduct by lawyers. Mr. Giles submits that the legislation forces

lawyers to choose between two evils. They must either (1) breach solicitor-client confidentiality, or (2) breach the Act by failing to report clients in order to maintain solicitor-client confidentiality, thus incurring stiff penal sanctions. Either course of action would impose upon the Law Society the obligation to investigate, and discipline where necessary, lawyers who have either breached solicitor-client confidentiality, or who have breached the Act and brought their professional reputation into question.

[30] Pursuant to s. 3 of the ***Legal Profession Act***, S.B.C. 1998, c. 9, the Law Society's paramount statutory duty is to the public interest:

> 3. It is the object and duty of the society
>
> (a) to uphold and protect the public interest in the administration of justice by
>
> (i) preserving and protecting the rights and freedoms of all persons,
>
> (ii) ensuring the independence, integrity and honour of its members, and
>
> (iii) establishing standards for the education, professional responsibility and competence of its members and applicants for membership, and
>
> (b) subject to paragraph (a),
>
> (i) to regulate the practice of law, and

> (ii) to uphold and protect the interests of its members.

[31] The Federation's members are representatives of the governing bodies of the legal profession in all of the Canadian Provinces and Territories, save Nunavut. On August 18, 2001, the members of the Federation unanimously resolved to initiate appropriate legal challenges to the Act and Regulations.

[32] In my opinion, the Law Society has a direct legal interest over and above any general interest by virtue of its statutory obligations imposed by the ***Legal Profession Act.*** In ***Canadian Bar Assn. v. British Columbia (Attorney General)*** (1993), 101 D.L.R. (4th) 410 (B.C.S.C.), the Court dismissed the provincial Attorney General's challenge to the standing of the CBA and the Law Society to attack the constitutional validity of the ***Social Service Tax Amendment Act, 1992***, which imposed a tax on the purchase of legal services. The right of the Law Society to challenge the constitutionality of certain sections of the ***Immigration Act,*** R.S.C. 1985, c. I-2 was not questioned in the recent case of ***The Law Society of British Columbia v. Mangat,*** [2001] S.C.J. No. 66; 2001 SCC 67.

[33] In addition, both petitioners qualify for public interest standing: there is a serious issue as to the constitutional

validity of the impugned legislation, both have a genuine interest in its validity, and there is no other reasonable or effective way to challenge its validity.

[34] I do not agree with Mr. Wruck that the most reasonable and effective method to challenge the legislation would be to have a lawyer who was “directly” affected by the Act test its validity in the context of a specific transaction.

[35] An effective fact-specific *Charter* challenge to the legislation might be raised in two ways. A lawyer who failed to report a suspicious transaction because of concerns about breaching solicitor-client confidentiality could be charged under the impugned legislation, and challenge its constitutionality as a defence to the charges. Alternatively, a lawyer who breached solicitor-client confidentiality by reporting a client could be disciplined by the Law Society for the breach, or sued by the client, and challenge the legislation based on the specific factual circumstances of his or her disciplinary or civil proceedings.

[36] In either case, significant time would elapse before a suitable fact situation arose and ripened to the point that a constitutional challenge could be heard. Were the legislation to be ultimately struck down, lawyers may have, in the

interim, made hundreds of unconstitutional reports to the Centre in violation of their ethical obligations to their clients. If the legislation were upheld, the lawyer bringing the test case would have committed a crime and subjected him or herself to severe criminal penalties. It is neither reasonable nor effective to require that the matter be brought before the Court by either of these routes. The issue is properly raised by the petitioners without the necessity of risking the reputation of an individual lawyer. The challenge is to the validity of the legislation on its face, not to its unconstitutional nature within a specific fact pattern.

[37] The Government did not oppose the CBA's application for intervenor status. Since 1998, the CBA has examined the issues concerning money laundering, suspicious transaction reporting and cross-border currency reporting. It consulted with the Government in connection with the draft Act and Regulations.

(b) *Is the Supreme Court of British Columbia the forum conveniens?*

[38] The doctrine of *forum conveniens* is a recognized principle that a court should not entertain a proceeding where there is another more convenient and appropriate forum in which to hear that proceeding: ***Dudnik v. Canada (Canadian***

Radio-Television and Telecommuni-cations Commission), (1995), 41 C.P.C. (3d) 336 (Ont. Gen. Div.).

[39] Mr. Wruck submits that the *forum conveniens* in this case is the Federal Court. Although the Act and Regulations have application throughout Canada, this Court's jurisdiction does not extend beyond British Columbia. Any order exempting lawyers from the requirement to report suspicious transactions would apply only within British Columbia and lawyers in the rest of Canada would remain bound by the legislation. In contrast, a decision of the Federal Court would have application and be binding throughout Canada, thus avoiding the uncertainty and confusion inherent in the suspension of a law of national application in only one of thirteen jurisdictions.

[40] It is beyond question that the provincial superior courts have the jurisdiction and authority to review the constitutional validity of federal legislation, strike down or declare invalid federal legislation, and grant ancillary interim relief: ***Canada (Attorney General) v. Law Society of British Columbia,*** [1982] 2 S.C.R. 307.

[41] Assuming that the Federal Court has concurrent jurisdiction, the matter remains one of discretion. The matter is urgent, the issues have been argued at length before

me, and challenges to federal legislation have historically been made in the provincial superior courts. In those circumstances, I consider this Court to be the appropriate forum to consider and decide the issues raised in the petitions.

(c) Does interim injunctive relief lie against the Crown?

[42] At common law, injunctive relief does not lie generally against the Crown. Section 22(1) of the ***Crown Liability and Proceedings Act***, R.S.C. 1985, c. C-50, prohibits injunctive relief against the Crown but permits the court "in lieu thereof [to] make an order declaratory of the rights of the parties."

[43] Nevertheless, whether the interim relief sought in constitutional cases is characterized as injunctive relief or a suspension of, or exemption from, the impugned legislation, there is clear authority that such relief is available in appropriate circumstances: ***Metropolitan Stores***, *supra;* ***RJR - MacDonald*** *supra;* and ***Harper***, *supra.* Although interim relief was refused in the circumstances of those cases, the Supreme Court of Canada did not suggest that such relief was not available against the Crown. As Peter Hogg and Patrick Monahan note in *Liability of the Crown*, 3rd ed. (Toronto:

Carswell, 2000) at p. 36: “[t]he Crown cannot use its remedial immunity to shield an unconstitutional act.” Section 24(1) of the *Charter*, which empowers a court of competent jurisdiction to grant “such remedy as the court considers appropriate and just in the circumstances” overrides Crown immunities.

(d) Are the petitioners seeking a declaration of invalidity without a full hearing?

[44] The respondent submits that the effect of any injunction granted by this Court “would be the same as if the Court made an interim declaration that Parliament enacted an invalid law without a full trial or hearing.”

[45] It is true that in many cases, for example ***Gould v. Canada (Attorney General)***, [1984] 2 S.C.R. 124 and ***Harper***, *supra,* the effect of granting interim relief would be to actually determine the rights of the applicant. That would not be the result in this case where the petitioners seek a temporary exemption from the impugned legislation. In effect, they seek no more than a continuation of the status quo.

(e) Do the petitioners lack “an adequate record of adjudicative facts”?

[46] The respondent submits that the Court cannot determine the validity of the legislation in a factual vacuum. A full factual record, containing all of the adjudicative facts and legislative facts, is necessary.

[47] In ***MacKay v. Manitoba,*** [1989] 2 S.C.R. 357, the appellant argued that the ***Manitoba Elections Finances Act*** was unconstitutional because totalitarian or extremist groups could be financed from public funds. Cory J., on behalf of the Court, stated at pp. 361-2:

> *Charter* cases will frequently be concerned with concepts and principles that are of fundamental importance to Canadian society. For example, issues pertaining to freedom of religion, freedom of expression and the right to life, liberty and the security of the individual will have to be considered by the courts. Decisions on these issues must be carefully considered as they will profoundly affect the lives of Canadians and all residents of Canada. In light of the importance and the impact that these decisions may have in the future, the courts have every right to expect and indeed to insist upon the careful preparation and presentation of a factual basis in most *Charter* cases.
>
> …
>
> *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.
>
> (emphasis added)

[48] Accordingly, the Supreme Court declined to hear an issue upon which the appellants had advanced a number of unsubstantiated propositions that were central to their submissions. However, the Court noted, at p. 366, that a further issue (an allegation that statutory funding of candidates in provincial elections could infringe a taxpayer's *Charter* right to freedom of expression) did not require a factual foundation.

[49] In ***Danson v. Ontario (Attorney General)***, [1990] 2 S.C.R. 1086 the Court stated at p. 1099:

> This Court has been vigilant to ensure that a proper factual foundation exists before measuring legislation against the provisions of the *Charter*, particularly where the effects of the impugned legislation are the subject of the attack.

[50] The Court went on to distinguish between adjudicative and legislative facts:

> It is necessary to draw a distinction at the outset between two categories of facts in constitutional litigation: "adjudicative facts" and "legislative facts"…. Adjudicative facts are those that concern the immediate parties: … "who did what, where, when, how, and with what motive or intent…." Such facts are specific, and must be proved by admissible evidence. Legislative facts are those that establish the purpose and background of legislation, including its social, economic and cultural context. Such facts are of a more general nature, and are subject to less stringent admissibility requirements….

[51] Sopinka J. noted, at p. 1100, that in a rare case, the constitutional question could be decided in the absence of a factual foundation:

> This is not to say that such facts must be established in all *Charter* challenges. Each case must be considered on its own facts (or lack thereof).

[52] Sopinka J. quoted Beetz J. in ***Metropolitan Stores****, supra,* at p. 133:

> There may be rare cases where the question of constitutionality will present itself as a simple question of law alone which can be finally settled by a motion judge. A theoretical example which comes to mind is one where Parliament or a legislature would purport to pass a law imposing the beliefs of a state religion. Such a law would violate s. 2(a) of the *Canadian Charter of Rights and Freedoms*, could not possibly be saved under s. 1 of the *Charter* and might perhaps be struck down right away…. It is trite to say that these cases are exceptional.

[53] Sopinka J. went on to say at p. 1101:

> The unconstitutional purpose of Beetz J.'s hypothetical law is found on the face of the legislation, and requires no extraneous evidence to flesh it out. It is obvious that this is not one of those exceptional cases. In general, any *Charter* challenge based upon allegations of the unconstitutional effects of impugned legislation must be accompanied by admissible evidence of the alleged effects. In the absence of such evidence, the courts are left to proceed in a vacuum, which, in constitutional cases as in nature, has always

> been abhorred. As Morgan put it, op. cit., at p. 162: "... the process of constitutional litigation remains firmly grounded in the discipline of the common law methodology."

[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.

The tripartite test for interlocutory relief on a constitutional challenge:

[55] As stated above, the Supreme Court set out the proper principles relating to the stay or suspension of legislation pending a considered determination of its validity in ***Metropolitan Stores Ltd.,*** *supra,* and reaffirmed them in ***RJR – MacDonald,*** *supra*, and ***Harper,*** *supra*.

[56] The basic test for granting interlocutory relief in constitutional proceedings is threefold:

- is there a serious constitutional issue to be determined?
- will the applicant suffer irreparable harm if the relief is not granted? and
- does the balance of convenience, taking into account the public interest, favour the granting of the relief?

[57] Within that general framework, certain specific principles are relevant to the unique circumstances of this case:

- it is assumed that all legislation enacted by a democratically elected government is for the common good;
- only in clear cases will interlocutory injunctions against the enforcement of a law on grounds of alleged unconstitutionality succeed;
- interim relief in constitutional cases will rarely, if ever, be available when it amounts to a final determination of the applicant’s rights;
- there is an important distinction between relief that suspends legislation and that which merely exempts one or more persons from the application of legislation; and
- interim relief that preserves the status quo is less disruptive to the administration of justice than relief that alters the status quo.

(a) is there a serious constitutional issue to be determined?

[58] Section 52(1) of the ***Constitution Act, 1982*** provides that any law inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect. The constitutional questions raised by the petitioners may be framed as follows:

- Is there an arguable case that the independence of the bar, which includes the confidentiality of lawyer-client relations, is a right protected either by the Canadian Constitution, or by the *Charter*, or by both? and

- If so, is there an arguable case that the impugned legislation violates that right?

[59] The respondent asserts that the concepts of an independent bar and solicitor-client confidentiality cannot be raised to the level of a constitutionally protected right. Mr. Wruck contrasts those concepts to a guaranteed *Charter* right, such as the right of a detained person to retain and instruct counsel without delay, and to be informed of that right, pursuant to s. 10(b). He suggests that the petitioners are unable to demonstrate any constitutional right that has been violated by the impugned legislation; at best, the

independence of the bar is a “constitutional convention” which cannot be enforced by the courts.

[60] While the constitutional issues cannot be resolved on this interlocutory application, it is necessary to examine them in some depth to determine whether the petitioners have raised a serious issue to be tried.

Is there an arguable case that the independence of the bar is a constitutionally protected right?

[61] The *Charter* is not the sole source of civil rights and freedoms in Canada. As Peter Hogg notes, in *Constitutional Law of Canada*, 4th ed. (Toronto: Carswell, 1997) at pp. 33-4:

> The Charter will never become the main safeguard of civil liberties in Canada. The main safeguards will continue to be the democratic character of Canadian political institutions, the independence of the judiciary and a legal tradition of respect for civil liberties. The Charter is no substitute for any of these things, and would be ineffective if any of these things disappeared. This is demonstrated by the fact that in many countries with bills of rights in their constitutions the civil liberties which are purportedly guaranteed do not exist in practice.

[62] A major source of the constitutional protection of civil liberties is found in the unwritten norms that underlie the Constitution. In ***Reference Re Remuneration of Judges***, [1997] 3 S.C.R. 3, at para. 92, the Supreme Court, relying on its

earlier decision in ***New Brunswick Broadcasting Co. v. Nova Scotia***, [1993] 1 S.C.R. 319,

> … [agreed] with the general principle that the Constitution embraces unwritten, as well as written rules… . Indeed, given that ours is a Constitution that has emerged from a constitutional order whose fundamental rules are not authoritatively set down in a single document, or a set of documents, it is of no surprise that our Constitution should retain some aspect of this legacy.

[63] The petitioners submit there is ample authority for the proposition that the independence of the bar, and the confidentiality of the lawyer-client relationship, comprise fundamental principles of justice that are deserving of the Court's protection and cannot be infringed by legislation or by governmental action.

[64] In ***Descoteaux v. Mierzwinski***, [1982] 1 S.C.R. 860, at p. 875, Lamer J. found that solicitor-client confidentiality was a "substantive rule" of law. In ***Canada (Attorney General) v. Law Society of British Columbia***, *supra*, the Supreme Court recognized that an independent bar was a cornerstone of a democratic society and that the bar must be free from government regulation. In ***Pearlman v. Manitoba Law Society Judicial Committee***, [1991] 2 S.C.R. 869, at p. 887, Iacobucci J., finding that the self-governing status of the legal profession was "created in the public interest", endorsed the

conclusions of the Ontario Report of the Professional Organizations Committee (1980):

> The authors noted the particular importance of an autonomous legal profession to a free and democratic society. They said at p. 26:
>
> > Stress was rightly laid on the high value that free societies have placed historically on an independent judiciary, free of political interference and influence on its decisions, and an independent bar, free to represent citizens without fear or favour in the protection of individual rights and civil liberties against incursions from any source, including the state.

[65] In the recent decision of ***Mangat***, *supra,* the Supreme Court re-affirmed the value of an independent bar and the critical role it plays in the proper administration of justice. Gonthier J., for the Court, acknowledged that solicitor-client confidentiality is a principle of fundamental justice.

[66] It may also be argued that the interdependent relationship between an independent bar and an independent judiciary requires that the former as well as the latter should be considered unwritten constitutional norms.

[67] It is beyond question that the protection of the independence of the judiciary is an unwritten principle of the

Constitution. In ***Reference Re Remuneration of Judges****, supra,* Lamer C.J., for the majority of the Court, held at para. 83 that "judicial independence is at root an unwritten constitutional principle, in the sense that it is exterior to the particular sections of the *Constitution Acts*." (emphasis in the original). At para. 109, he concluded:

> … the express provisions of the *Constitution Act, 1867* and the *Charter* are not an exhaustive written code for the protection of judicial independence in Canada. Judicial independence is an unwritten norm, recognized and affirmed by the preamble to the *Constitution Act, 1867.* In fact, it is in that preamble, which serves as the grand entrance hall to the castle of the Constitution, that the true source of our commitment to this foundational principle is located.

[68] In ***LaBelle v. Law Society of Upper Canada*** (2001), 52 O.R. (3d) 398 at p. 408 (Ont. S.C.J.), McKinnon J. examined the relationship between the independence of the bar and the independence of the judiciary:

> An independent bar is essential to the maintenance of an independent judiciary. Just as the independence of the courts is beyond question (see ***Valente v. R.***, [1985] 2 S.C.R. 673; 14 O.A.C. 79), so the independence of the bar must be beyond question. The lawyers of the independent bar have been the constant source of the judges who comprise the independent judiciary in English common law history. The "habit" of independence is nurtured by the bar. An independent judiciary without an independent bar would be akin to having a frame without a picture.

[69] Mr. Wruck notes that earlier in his judgment, McKinnon J. referred to the independence of the bar as "a constitutional convention." Citing ***LaBelle***, the petitioners describe the independence of the bar as "a constitutional convention which underlies the rule of law." In fact, it appears settled that "[c]onventions are rules of the constitution that are not enforced by the law courts" (P. Hogg, *Constitutional Law of Canada, supra,* at p. 1-9). With respect, McKinnon J. may be in error in describing the independence of the bar as a constitutional convention. That description clearly conflicts with the petitioners' principal argument that the independence of the bar has been recognized and enforced by the Supreme Court as an unwritten constitutional norm.

[70] The unique role of the legal profession was articulated by McIntyre J. in ***Andrews v. Law Society of British Columbia***, [1989] 1 S.C.R. 143 at pp. 187-188:

> It is incontestable that the legal profession plays a very significant – in fact, a fundamentally important – role in the administration of justice, both in the criminal and the civil law. I would not attempt to answer the question arising from the judgments below as to whether the function of the profession may be termed judicial or *quasi*-judicial, but I would observe that in the absence of an independent legal profession, skilled and qualified to play its part in the administration of justice and the judicial process, the whole legal system would be in a

> parlous state. In the performance of what may be called his private function, that is, in advising on legal matters and in representing clients before the courts and other tribunals, the lawyer is accorded great powers not permitted to other professionals.... By any standard, these powers and duties are vital to the maintenance of order in our society and the due administration of the law in the interest of the whole community.

Is there an arguable case that the independence of the bar is a right protected by the Charter?

[71] The independence of the bar is not an enumerated right in the *Charter*. However, the petitioners submit that the independence of the bar underlies other *Charter* rights and that those rights are without meaning unless lawyers are independent.

[72] In numerous cases the Supreme Court has looked beyond the rights expressed in the *Charter* to protect the principles that underlie those rights. As a result, those principles, in and of themselves, have become *Charter* rights as well. An obvious example is the Court's treatment of an accused person's right under s. 10(b) to retain and instruct counsel without delay upon arrest

[73] On a plain reading, s. 10(b) provides a detained person with the right "to retain and instruct counsel without delay and to be informed of that right." On its face, the section

imposes no further obligations on the police when they arrest or detain a suspect. However, the Court has greatly expanded the rights of an accused under that section. In ***R. v. Manninen,*** [1987] 1 S.C.R. 1233, the Court held that s. 10(b) imposes at least two additional duties on police: they must give the accused a reasonable opportunity to exercise the right, and they must refrain from attempting to elicit evidence from the detainee until he or she has had that opportunity. In ***R. v. Brydges,*** [1990] 1 S.C.R. 190, the Court held that s. 10(b) imposed an obligation on police to inform the detainee of the availability of duty counsel and legal aid. And, in ***R. v. Evans***, [1991] 1 S.C.R. 869, the Court held that the police are under an obligation to ensure that the accused *understands* his or her s. 10(b) right. If it appears that an accused does not understand the right, the police must take steps to facilitate that understanding.

[74] In all of those cases, the Court imposed obligations on the police beyond those required by a plain reading of s. 10(b). Those additional obligations were imposed because they were consistent with the main purpose underlying the s. 10(b) right, which was to facilitate contact with counsel. Without protecting the purpose underlying the right to counsel, the right itself would be meaningless.

[75] By way of analogy, the petitioners argue that the protections afforded to the public by the independence of the bar and the confidentiality of the solicitor-client relationship underlie enumerated *Charter* rights. Specifically, they say that the rights guaranteed by ss. 7, 8 and 10(b) of the *Charter* would be meaningless without those underlying protections.

Does the impugned legislation violate the constitutionally protected norms of an independent bar and solicitor-client confidentiality?

[76] The petitioners submit that the impugned legislation places all lawyers in a profound conflict of interest between their duty of solicitor-client confidentiality owed to a client and their duty to report that client to the government. The legislation provides serious penalties for non-compliance and counsel will be careful to avoid prosecution.

[77] The solicitor-client relationship is a unique one, not comparable to the other professions and entities covered by the Act and Regulations. The principles of fundamental justice that are said to be threatened by this legislation include the independence of the bar, solicitor-client confidentiality, and the duty of loyalty owed by lawyers to their clients.

[78] I conclude that the issues of (a) whether the independence of the bar is a constitutionally protected right and, if so, (b) whether the impugned legislation violates that right, raise serious constitutional questions to be tried.

(b) Will the petitioners suffer irreparable harm if the relief sought is not granted?

[79] The Supreme Court defined "irreparable harm" in ***RJR – MacDonald***, *supra*, at p. 341:

> "Irreparable" refers to the nature of the harm suffered rather than its magnitude. It is harm which either cannot be quantified in monetary terms or which cannot be cured, usually because one party cannot collect damages from the other.

[80] Mr. Wruck submits that lawyers are fully protected by s. 11 of the Act, which provides that legal counsel are not required to disclose any communication that is subject to solicitor-client privilege. Clearly the protection provided by that privilege falls far short of the traditional confidential nature of the solicitor-client relationship that the petitioners seek to preserve.

[81] The petitioners describe the harm caused by the legislation to the administration of justice as irreparable and devastating. They say s. 5 of the Regulations places legal counsel in an irreconcilable conflict of interest with their

clients, struggling to maintain an impossible balance between their duty of loyalty to their clients and their statutory duty to gather evidence against those clients, under threat of serious penalties.

[82] It is clear that if interlocutory relief is not granted, lawyers will be compelled to report information relating to “suspicious transactions” to the Centre for months, or perhaps years, while the constitutional challenge proceeds through the hearing of the petitions and the inevitable appeals. Should the legislation ultimately be read down to exempt lawyers, irreparable harm will have been done. Information will have been collected and reported unconstitutionally. The public’s confidence in an independent bar will have been shaken and the lawyer-client relationship irrevocably damaged.

[83] If the impugned legislation is subsequently upheld, what harm will have accrued to the Government? The historic solicitor-client relationship permitting solicitor-client confidentiality will have been continued, following centuries of tradition. In view of the fact that sixteen months elapsed between Royal Assent to the provisions of Part I and the proclamation of the Regulations enforcing those provisions vis-à-vis lawyers, the respondent cannot characterize the need to alter that relationship as urgent.

[84] I conclude that the petitioners (as well as lawyers and clients, and indeed the administration of justice) may suffer irreparable harm unless lawyers are exempted from reporting suspicious transactions pending a determination of the constitutional issues.

(c) Does the balance of convenience, taking into account the public interest, favour the granting of interlocutory relief?

[85] Determining the balance of convenience in a constitutional case is far more complex than in private disputes. Because it is assumed that laws enacted by democratically elected legislatures are directed to the common good and serve a valid public purpose, interlocutory injunctions are rarely granted in constitutional cases. The applicants in ***Harper***, *supra,* ***Metropolitan Stores***, *supra,* and ***RJR - MacDonald***, *supra,* all failed to establish that the balance of convenience entitled them to the relief they sought.

[86] In ***Harper***, *supra,* the plaintiff sought a declaration that the provisions in the ***Canada Elections Act*** limiting third party spending on campaign advertising were unconstitutional because they unjustifiably limited his right to free expression guaranteed by s. 2(b) of the *Charter.* The trial was heard and judgment reserved. An election was called. The

plaintiff sought an interlocutory injunction restraining the enforcement of third party spending limits pending the trial decision. The trial judge granted the injunction and the Alberta Court of Appeal upheld it. The Government's application for leave to appeal from the injunction and a stay of the injunction was successful in the Supreme Court.

[87] The Court assumed that there was a serious question to be tried and that the plaintiff would suffer irreparable harm in the absence of interlocutory relief. Considering the balance of convenience, McLachlin C.J. stated, at p. 769:

> Applications for interlocutory injunctions against enforcement of still-valid legislation under constitutional attack raise special considerations when it comes to determining the balance of convenience. On the one hand stands the benefit flowing from the law. On the other stand the rights that the law is alleged to infringe. An interlocutory injunction may have the effect of depriving the public of the benefit of a statute which has been duly enacted and which may in the end be held valid, and of granting effective victory to the applicant before the case has been judicially decided. Conversely, denying or staying the injunction may deprive plaintiffs of constitutional rights simply because the courts cannot move quickly enough….

[88] McLachlin C.J. concluded, at p. 771, that "only in clear cases will interlocutory injunctions against the enforcement of a law on grounds of alleged unconstitutionality succeed."

[89] In ***Metropolitan Stores***, *supra,* the Manitoba Labour Board had been empowered by the ***Labour Relations Act*** to impose a

first collective agreement. After the union applied to have the Board impose a contract, the employer sought to have that power declared invalid as contravening the *Charter*. The employer also sought to stay the Board's order until the issue of the legislation's validity had been heard. That motion was denied but the Manitoba Court of Appeal allowed the employer's appeal and ordered a stay. The Supreme Court allowed the union's appeal.

[90] Beetz J., for the Court, considered the importance of taking the public interest into consideration when evaluating the balance of convenience. At p. 135, he reiterated the policy basis for declining interim relief in the majority of cases where the validity of legislation is challenged:

> It seems axiomatic that the granting of interlocutory injunctive relief in most suspension cases and, up to a point, … in quite a few exemption cases, is susceptible temporarily to frustrate the pursuit of the common good.
>
> While respect for the Constitution must remain paramount, the question then arises whether it is equitable and just to deprive the public … from the protection and advantages of impugned legislation, the invalidity of which is merely uncertain, unless the public interest is taken into consideration in the balance of convenience and given the weight it deserves.

[91] In ***RJR - MacDonald***, *supra,* the applicants challenged the constitutional validity of the ***Tobacco Products Control Act*** as violating s. 2(b) of the *Charter.* They sought an interim

exemption from the provisions of the Act regulating the advertising and labelling of tobacco products.

[92] Sopinka and Cory JJ., for the Court, described the careful balancing process that must be undertaken in a case of this kind at pp.333-4:

> On one hand, courts must be sensitive to and cautious of making rulings which deprive legislation enacted by elected officials of its effect.
>
> On the other hand, the *Charter* charges the courts with the responsibility of safeguarding fundamental rights. For the courts to insist rigidly that all legislation be enforced to the letter until the moment that it is struck down as unconstitutional might in some instances be to condone the most blatant violation of C*harter* rights. Such a practice would undermine the spirit and purpose of the *Charter* and might encourage a government to prolong unduly final resolution of the dispute.

[93] Mr. Wruck emphasized the importance of the objectives of the Act. Money laundering of the proceeds of crime is a serious problem both nationally and globally and lawyers, knowingly and unknowingly, act as intermediaries to facilitate these transactions. He described Canada's international commitments to co-operate in efforts to eliminate money laundering from the proceeds of crime. In 1989, Canada and six other nations in the G-7, established the Financial Action Task Force ("FATF") to develop and promote international anti-money laundering standards.

[94] A limited examination of the law in other jurisdictions does not support Mr. Wruck's assertion that other countries have enacted comparable legislation requiring lawyers to report "suspicious transactions".

[95] Both the petitioners and the respondent submitted opinions of experts in U.S. law. There is no counterpart in U.S. law to the Canadian requirement that lawyers report transactions that they have a reasonable basis to believe are "suspicious" and provide the reasons for their conclusion. It is unclear whether such legislation would be constitutional in that country. It appears that any determination as to whether disclosure could be compelled under U.S. law is a fact-intensive question that cannot be decided in the abstract.

[96] In the United Kingdom, the ***Drug Trafficking Act 1994*** provides that a person is guilty of an offence if "he knows or suspects that another person is engaged in drug money laundering." However, that legislation provides an exemption for a professional legal advisor who fails to disclose any matter that came to him in privileged circumstances. "Privileged circumstances", which are defined in the legislation, appear to be far broader than the scope of the traditional "solicitor-client privilege" referred to, but not defined, in the Act. The ***Criminal Justice Act 1988 as amended***

by Criminal Justice Act 1993 contains a similar exemption for legal advisers.

[97] Mr. Wruck advised that on November 13, 2001, the European parliament approved a Directive to amend an earlier 1991 Directive "on the prevention of the use of the financial system for the purpose of money laundering." It is expected that the new Directive will be adopted shortly and it will then be binding on all member states of the European Union. An explanatory memorandum to the draft Directive notes that lawyers would be exempted from any suspicious transaction identification or reporting requirements connected with the representation or defence of the client in legal proceedings, and "again to make full allowance for the professional duty of discretion, as called for by the European Parliament," member states would have the option of allowing lawyers to communicate their suspicions of money laundering to their bar association or equivalent professional body. Those principles are incorporated into the Directive. Para. 17 of the preamble notes:

> Thus, legal advice remains subject to the obligation of professional secrecy unless the legal counsellor is taking part in money laundering activities, the legal advice is provided for money laundering purposes, or the lawyer knows that the client is seeking legal advice for money laundering purposes.

[98] In ***RJR – MacDonald****, supra,* Sopinka and Cory JJ. stated that public interest considerations, which the court must consider when determining both irreparable harm and the balance of convenience, weigh more heavily in a "suspension" case than in an "exemption" case. At p. 346, they explained:

> The reason for this is that the public interest is much less likely to be detrimentally affected when a discrete and limited number of applicants are exempted from the application of certain provisions of a law than when the application of the law is suspended entirely.

[99] In ***RJR – MacDonald***, two tobacco companies sought an exemption from the legislation that required new labelling on tobacco products. The Court concluded that, because there were only three tobacco companies in Canada, the relief sought constituted a suspension rather than a true exemption.

[100] In this case, the petitioners submit that the exemption of lawyers from the provisions of the Act and Regulations would not seriously impair the legitimate steps taken by the Government to investigate and prosecute money laundering. Lawyers comprise a discrete class of persons who have historically occupied a unique position in the administration of justice for the benefit of society. A temporary exemption from the application of Part I would

simply continue the unique position they have traditionally held.

[101] The legislation would remain applicable to all the other persons and entities enumerated in the legislation: banks, credit unions, trust companies, loan companies, securities dealers, investment counsellors, foreign exchange brokers, life insurance brokers, money services businesses, accountants, real estate brokers, and the like. Hence, interlocutory relief would only minimally infringe the legislative intent of Parliament and it would prevent the alleged infringement of the constitutional rights of lawyers and the public.

[102] Although the status quo is not determinative in an interlocutory application in a constitutional challenge, I consider that an exemption in this case would continue the status quo, preserving the confidentiality inherent in the historic solicitor-client relationship. I am unable to agree with Mr. Wruck that the status quo has been defined by the introduction of the impugned legislation.

[103] The harm identified by the petitioners is serious. The harm to the Government by exempting lawyers until the merits of the issues are fully argued is minimal. The Act itself does not impose a reporting duty on legal counsel. By

exempting lawyers from the Regulations, the Act remains intact and applicable to all other persons and entities described in the Act and the Regulations.

[104] It should be noted that, even without the obligations imposed by this legislation, lawyers are subject to codes of conduct and ethical obligations imposed by Law Societies and to the provisions of Part XII.2 of the Criminal Code. They cannot engage in money laundering schemes or be a party to any transactions with clients that conceal or convert property or proceeds that they believe to involve money laundering.

[105] The exemption of lawyers from the effect of the legislation would not undermine the legislative scheme. In ***Metropolitan Stores****, supra,* at p. 147, the Supreme Court disagreed with a statement made by Linden J. in ***Morgantaler v. Ackroyd*** (1983), 42 O.R. (2d) 659 that the courts will grant interlocutory injunctive relief only in “exceptional” or “rare” circumstances. Beetz J. stated:

> It seems to me that the test is too high at least in exemption cases when the impugned provisions are in the nature of regulations applicable to a relatively limited number of individuals and where no significant harm would be suffered by the public….

[106] I conclude that this is an exceptional case in which the balance of convenience favours the granting of interlocutory relief. Such relief, which simply postpones the application of Part I to the legal profession, continues the status quo and the unique position that counsel have historically held.

Conclusion:

[107] While the Government's goal of deterring and prosecuting money laundering offences is laudatory, the fundamental values of the Constitution must be protected. As McLachlin J. stated in the context of a s. 1 analysis in ***RJR – MacDonald Inc. v. Canada (Attorney General)***, [1995] 3 S.C.R. 199 at p. 329:

> The bottom line is this. While remaining sensitive to the social and political context of the impugned law and allowing for difficulties of proof inherent in that context, the courts must nevertheless insist that before the state can override constitutional rights, there be a reasoned demonstration of the good which the law may achieve in relation to the seriousness of the infringement. It is the task of the courts to maintain this bottom line if the rights conferred by our constitution are to have force and meaning. The task is not easily discharged, and may require the courts to confront the tide of popular public opinion. But that has always been the price of maintaining constitutional rights. No matter how important Parliament's goal may seem, if the state has not demonstrated that the means by which it seeks to achieve its goal are reasonable and proportionate to the infringement of rights, then the law must perforce fail.

[108] The proclamation of s. 5 of the Regulations authorizes an unprecedented intrusion into the traditional solicitor-client relationship. The constitutional issues raised deserve careful consideration by the Court. The petitioners seek a temporary exemption from the legislation until the merits of their constitutional challenge can be determined. I conclude that the petitioners have satisfied the tripartite test for the exemption they seek. They are entitled to an order that legal counsel are exempt from the application of s. 5 of the Regulations pending a full hearing of the Petitions on their merits.

"M.J. Allan, J."
The Honourable Madam Justice M.J. Allan