Date: 20020321
Docket: SB. 176587

2002

IN THE SUPREME COURT OF NOVA SCOTIA
[Cite as Federation of Law Societies v. A.G. 2002 NSSC 095

BETWEEN:

FEDERATION OF LAW SOCIETIES OF CANADA and the
NOVA SCOTIA BARRISTERS' SOCIETY

Applicants

-and-

ATTORNEY GENERAL OF CANADA

Respondent

DECISION

HEARD: before the Honourable Chief Justice Joseph P. Kennedy, in the Supreme Court of Nova Scotia, Halifax, Nova Scotia, February 20, March 12, 21, 2002.

ORAL DECISION: March 21, 2002 Written Release: April 17, 2002

COUNSEL: Joel Fichaud, Q.C. and Melanie Comstock, for the Applicant
Michael Donovan and James Whiting A/C for the Respondent

KENNEDY, C.J.:

[1] The Federation of Law Societies of Canada and the Nova Scotia Barristers' Society, the applicants, are challenging the constitutionality of the application of the *Proceeds of Crime, (Money Laundering) and Terrorist Financing Act* S.C. 2001 c. 41 to legal counsel under s. 5 of the *Proceeds of Crime (Money Laundering) Suspicious Transaction Reporting Regulations SOR/2001-317*, those regulations made pursuant to that *Act*.

[2] This application seeks, on behalf of Nova Scotia lawyers, an order exempting legal counsel from the operation of the legislation pending the ultimate determination of the constitutional issue.

[3] The *Act* has received Royal Assent and is being implemented progressively. Certain sections of the *Act* are already in force. By virtue of an Order in Council dated August 28, 2001, ss. 5, 7, 8, 10 and 11 of the *Act* came into force on October 28, 2001.

[4] Section 5(1), 5(j) and 73 of the *Act* authorize the Governor in Council to enact regulations subjecting certain classes of persons and entities to the provisions of the *Act*.

[5] The *Proceeds of Crime (Money Laundering) Suspicious Transaction Report Regulations* ("Regulations"), came into force on November 8, 2001. Section 5 of the Regulations provides that every legal counsel is subject to Part 1 of the *Act*. Part 1 of the *Act* includes ss. 5, 7, 8, 10 and 11. Every legal counsel 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 of bail;

(b) purchasing or selling securities, real property or business assets or entities; and

(c) transferring funds or securities by any means."

[6] "Legal counsel" is defined in s. 2 of the *Act* as "in the Province of Quebec, an advocate or a notary and, in any other province, a barrister or solicitor".

[7] One of the applicants' principal concerns relates to s. 7 of the *Act*, which came into force on October 28, 2001 by the Order in Council, and was made applicable to legal counsel as of November 8, 2001, by s. 5 of the Regulations.

[8] Section 7 of the *Act* requires the reporting of "suspicious transactions":

> "...every person or entity shall report to the [Financial Transactions and Reports Analysis] 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."

[9] The "prescribed form and manner" is set out in the Regulations. Section 10 of the Regulations provides that the person shall send a report to the Centre within 30 days after first detecting a fact that constitutes reasonable grounds to suspect that a transaction is related to the commission of a money laundering offence constitutes reasonable grounds to suspect.

[10] Section 9 of the Regulations provides that, the information required to be reported to the Centre is set out in the Schedule to the Regulations as the "Suspicious Transaction Report". A Suspicious Transaction Report must include the following information:

(a) the type of reporting person or entity;

(b) the identification number of the place of business where the transaction occurred;

(c) the full name of the reporting person or entity;

(d) the full address of the business where the transaction occurred;

(e) the name and telephone number of contact person;

(f) the date and time of the transaction, including the posting date if different;

(g) the purpose and details of the transaction, including the type and amount of funds and other institutions or accounts that are in volved;

(h) the method of the transaction;

(i) the identification number of the individual who first detected a fact respecting a suspicious transaction;

(j) complete account details, including account and branch number, type of account, full name of each account holder, date account opened and closed, and current status of account;

(k) full information on individual conducting transaction, including name, address, country of residence, personal telephone number, government identification (e.g. passport number), date of birth, occupation, employer, business telephone number and address;

(l) a detailed description of the grounds to suspect that the transaction is related to the commission of a money laundering offence; and

(m) any other action taken as a result of suspicion.

[11] Section 8 of the *Act* prohibits legal counsel from disclosing to their clients that they have made this Suspicious Transaction Report, or disclosing the contents of such a report with the intent to prejudice a criminal investigation, whether or not such an investigation has begun.

[12] Under the *Act* a breach of s. 7 is punishable on indictment by a fine of up to $2,000,000 and imprisonment for up to five years. A breach of s. 8 of the *Act* is punishable on indictment with imprisonment of up to two years.

[13] The requirements specific to lawyers are qualified by s. 11 which states that nothing in Part I "requires a legal counsel to disclose any communication that is subject to solicitor-client privilege". The scope of this privilege is not defined and I can say, that it has been my experience that, the extent of solicitor-client privilege is commonly subject to debate.

[14] The applicant has argued that there is a constitutional right to protect communications between a lawyer and a client that is not covered by privilege and would not be covered by the privilege exemption.

[15] The Government of Canada has been of assistance to those lawyers who might be confused as to their obligation under the *Act*, by the publication of "Suspicious Transaction Guidelines" which sets out indicators of money laundering. These include, to give two examples, both the obvious, (ie. client admits or makes statements about involvement in criminal activities) and the not so obvious (ie. "client insists that a transaction be done quickly").

[16] This is not the first such application brought by Canadian lawyers in response to this legislation. Similar applications seeking interim relief have been brought, in British Columbia, Alberta and Ontario.

[17] On November 20, 2001, *Law Society of British Columbia* v. *Canada (Attorney General)* [2001] B.C.J. No. 2420, Justice Marion Allan, of the British Columbia Supreme Court, issued an order exempting legal counsel in that Province from the application of the *Act*, pending final determination of the constitutional issue. An appeal by the Attorney General of Canada against that order was dismissed by the British Columbia Court of Appeal decision dated January 29, 2002.

[18] On December 6, 2001, *Federation of Law Societies of Canada* v. *Canada (Attorney General)* [20011 A.J. No. 1697, Justice Watson of the Alberta Supreme Court also granted an order that provided interim relief to legal counsel in Alberta, but which was different in form, in that Justice Watson directed that, while Alberta lawyers would be required to complete the reports required by the *Act*, these reports would be sent to the Alberta Law Society to be held by that Society under seal, pending the determination of the constitutional challenge.

[19] On January 9, 2002, *Federation of Law Societies of Canada* v. *Canada (Attomey General)* [2002] O.J. No. 17, Justice Maurice Cullity of the Ontario Superior Court of Justice exempted lawyers in Ontario from the operation of the *Act*, until the final determination of the constitutional issues, using an order similar to that which was issued by Justice Allan of the British Columbia Court.

[20] I am now informed that, as recently as March 13, 2002, the Attorney General of Canada's application for leave to file an interlocutory appeal from the decision of Justice Cullity was dismissed.

[21] The Attorney General of Canada does not intend to extend the exemptions issued by those courts in those three provinces and to the other provinces of

Canada, and so we have this application seeking interim relief for the lawyers of Nova Scotia.

[22] Before visiting the balancing process that this application requires, I think that it may be useful to consider some of the evidence by way of affidavit put forward by both sides in this application, in order to get an overall sense of what is at stake here.

[23] The Attorney General of Canada asks this Court to give thought to the significance of this legislation. He has produced the affidavit of Richard Lalonde dated 6 February, 2002.

[24] Mr. Lalonde is Chief of Financial Crimes with the Federal Department of Finance.

[25] He speaks of "money laundering" in Canada as a matter of both national and international concern. He says that the activity seeks to conceal the criminal origin of money, which is most effectively done by using the financial and legal systems of more than one country, and consequently efforts to combat this activity require

international cooperation. As a result, Canada is a party to a number of international agreements aimed at the suppression of "money laundering".

[26] Initially this "dirty" money, so-called, involved money that was primarily derived from drug trafficking, however, particularly since the events of September 11, 2001, there is increased awareness of "money laundering" as a means of facilitating terrorist financing.

[27] The successful efforts of law enforcement agencies focussed on the use of banks and other financial institutions have, says Mr. Lalonde, now resulted in criminals increasingly using professionals, such as lawyers and accountants, in their "money laundering" schemes that involve increasingly more complex transactions.

[28] Law enforcement officials have sought and obtained changes in international agreements and domestic legislation to adapt to this change in the manner of the criminal activity.

[29] Mr. Lalonde says that "money laundering" serves to corrupt and undermine the financial and legal systems of the countries in which it is allowed to take place.

[30] Those jurisdictions that do not have effective anti-money laundering laws will become magnets for illegal funds derived from other countries where such legislation exists and is strictly enforced.

[31] And finally, because of the importance of lawyers as "gate keepers" to the financial system, any anti-money laundering legislation that exempts lawyers from its operation will be ineffective, says Mr. Lalonde and will attract a flood of illegal money to transactions handled by Canadian lawyers.

[32] The applicants have produced evidence in support of the temporary exemption sought.

[33] Clayton Ruby, a lawyer of national reputation, points out in his affidavit, produced by the applicants, dated January 15, 2002, that the *Act* creates a major dilemma for lawyers, placing them in a conflict between professional duty to a client's loyalty and confidentiality, and their legal duty to report suspicious activities to the authorities on the threat of penal sanction.

[34] Clayton Ruby suggests that the effect will be that both lawyers and their clients will have their constitutionally protected rights violated, pending the hearing of these constitutional issues, and that those violations will take place in a manner that he says cannot be remedied. There will be no reasonable remedy.

[35] So I repeat, that the issue that is before this Court is, should this Court grant an interlocutory injunction exempting Nova Scotia lawyers from s. 5 of the Regulations, pending the determination of the constitutional challenge?

[36] I have had the benefit of those decisions that I mentioned, the benefit of the decisions rendered by the judges in the other provinces who have dealt with similar applications, in British Columbia, Alberta and Ontario, and I will say that I am in general agreement with the analyses of Justices Allan, Watson and Cullity. I do not expect to improve on that reasoning, or the clarity of expression demonstrated in those decisions.

[37] Further, I will say at the outset that I agree with the submission of the applicants, that interlocutory relief is available against the Crown in constitutional proceedings, really a non-issue before this Court, but I will say that I am in agreement with that and the citations given were *Manitoba (Attorney General)* v.

Metropolitan Stores, [1987] 1 S.C.R. 110; *RJR - MacDonald* v. *Canada (Attorney General)*, [1994] 1 S.C.R. 311 and *Harper* v. *Canada (Attorney General)*, [2002] 2 S.C.R. 764. In fact, the Attorney General before this Court and this application, did not argue that issue.

[38] The proper test for interlocutory relief in a constitutional challenge has been dealt with in those previous decisions noted, and I agree with the manner in which those trial judges characterized that test. It is the "tripartite test" that is applicable. I will describe that three part test by citing Justice Allan in *Law Society of British Columbia* v. *Canada (Attorney General)*, [2001] B.C.J. No. 2420 at paras. 55-56:

> "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?"

SERIOUS CONSTITUTIONAL ISSUE

[39] Let me address the first part of the tripartite test, serious issue to be tried in this case, in this specific. The Attorney General of Canada in this application, acknowledges that there is a serious constitutional issue to be determined, while questioning some of the applicant submissions as to the extent and nature of that issue, acknowledges that there is a serious issue to be determined, but questions the extent and the nature of that issue put forward.

[40] The applicants have satisfied this primary test. They point out that the *Act* compels lawyers, under risk of imprisonment, to gather based on a suspicion, incriminating information about their clients and report that information to the prosecuting authorities.

[41] Counsel are therefore, to use the confidential relationship with their clients to obtain the information, report that information, and are prohibited from notifying their clients that the reporting has occurred. Thus, argue the applicants, lawyers are forced by statute to act inconsistent with their duty of loyalty and confidentiality to their clients, and in doing so, breach the Standards of the Legal Ethics and Professional Conduct Code issued by the Nova Scotia Barristers'

Society. That Code is before this Court in evidence, set out in the affidavit of the Executive Director of that Society, Darrel Pink. Those standards are, I am satisfied, basic to the practice of law, not only in Nova Scotia, but throughout this country.

[42] Cullity, J. in the Ontario Court, dealt with the same submissions. A similar affidavit from Clayton Ruby was in evidence before that judge in that court, so I cite from his decision with approval. This is Cullity, J. in the Ontario Superior Court, paras. 4 1-43:

> "Is there a serious constitutional issue to be determined?
>
> ¶ 41 I have no hesitation in giving an affirmative answer to this question.
>
> ¶ 42 In imposing a duty on legal practitioners to give secret reports of their clients' transactions to a government agency, the legislation clearly impinges on, and alters, the traditional relationship between solicitors, or counsel, and their clients. It does not merely override a lawyer's ethical duty of confidentiality -something that has always been possible in legal proceedings with respect to matters not subject to solicitor-client privilege - it strikes at the lawyer's duty of loyalty and the client's privilege against self-incrimination as well as the principle that lawyers should be independent of government. The duty of loyalty is affected not only by the obligation to make secret reports to government about a client's transactions and personal details but, also, because of the inevitable involvement of the lawyer's personal interests and potential liability to severe

> penalties when decisions whether to report are to be made.
>
> ¶ 43 The existence and importance of these duties and principles have been affirmed in many cases including *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143, at page 187; *Canada (Attorney General) v. Law Society of British Columbia*, [1982] 2 S.C.R. 307, at pages 335-6; *Law Society of British Columbia v. Mangat*, [2001] S.C.J. No. 66 (Quicklaw), at paras. 16-17; *LaBelle v. Law Society of Upper Canada* (2001), 52 O.R. (3d) 398 (S.C.J.); *Descóteaux v. Mierzwinski*, [1982] 1 S.C.R. 860, at page 875; *MacDonald Estate v. Martin*, [1990] 3 S.C.R. 1235; and *Szarfer v. Chodos* (1986), 54 O.R. (2d) 663; affirmed (1988), 54 D.L.R. (4th) 383 (C.A.). The extent to which they give rise to constitutionally-protected rights as necessary components of the federal democratic political structure of this country, or as underlying, and implied in, the rights guaranteed by sections 7, 8 and 10(b) of the Charter, must, I consider, be characterized as serious constitutional issues raised by the legislation."

[43] I am continuing to quote from Cullity, J.'s decision, it is at that point that he acknowledges the constitutional issue to be determined.

> "In view of the limits on the scope of the privilege relating to communications between solicitor and client, I am in respectful agreement with the finding of Allan, J. that the provisions of section 11 of the *Act* are not sufficient to prevent such issues from arising."

[44] I find, based on the submission and evidence before me, that the determination of Cullity, J. is correct. There are constitutionally protected rights at

issue here. There is a serious constitutional issue to be determined, and I particularly agree that s. 11, the section that excludes privileged communication from the reporting requirement, does not sufficiently address the potential for constitutional breach.

IRREPARABLE HARM

[45] As to the second aspect of the tripartite test, irreparable harm, the applicants submit that the second test is also clearly satisfied in this matter.

[46] They say, if not exempted from the operation of the *Act,* lawyers become agents of the state, notifying prosecutorial authorities of their clients' "suspicious" activities. The applicants in support, cite Justice Allan of the British Columbia Court, paras. 82-84:

> "¶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.
>
> ...

> ¶ 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."

[47] The Attorney General of Canada before me, in response asked this question; where is the real evidence of this irreparable harm? The Attorney General says time has now passed since the legislation has become operative and yet the applicants continue to rely on general speculative assertions contained in the affidavit such as Clayton Ruby's, without putting forward specific hard evidence of harm, provided by lawyers functioning subject to the *Act*. The Attorney General asks, where are the pernicious effects predicted, actually occurring in Nova Scotia?

[48] The applicants respond that such evidence is unnecessary to demonstrate irreparable harm and that it would be difficult to produce at any rate, given counsels' obligation of confidentiality to the client.

[49] I agree with the findings of Cullity, J. of the Ontario Court, in his decision, and I quote from the Ontario decision at para. 47:

> "¶47 In the light of Mr. Ruby's opinions which were not challenged in his cross-examination by counsel for the Attorney General - and the correctness of which might well be inferred without evidence, from the terms of the

> legislation itself and the judicial decisions which recognize the importance of the professional and fiduciary duties of lawyers to their clients - I am in full agreement with the conclusions of Allan J. with respect to this requirement:"

[50] So that is Cullity, J. making reference to Allan, J. in the British Columbia Court.

[51] That evidence of Clayton Ruby are, as I indicated, also in evidence before this Court. I am satisfied, as was Cullity, J. that they are reasonable opinions that fully and sufficiently support the conclusion that, the legislation will cause irreparable harm to the historic solicitor-client relationship and the public's confidence in the independence of the bar.

[52] I am satisfied further that, these are constitutional issues. The applicants have satisfied the second test of the tripartite procedure.

BALANCE OF CONVENIENCE

[53] It is at this stage that this Court must consider which of the parties will suffer the greater harm from the granting, or the refusal to grant, the interim relief sought. It is this test, this third test that has been the subject of the strongest debate on this application, with very good argument being made on both sides.

[54] At the outset, it is useful, I think, to set out the principles that play a role, that must be considered, in addressing this last of the three tests, addressing those principles in this case. And again, I can do no better than cite Allan, J. of the British Columbia Court when she says at para. 57:

> "¶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;
>
> ...
>
> *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."

[55] Firstly, as to the question of whether what is sought hereby is a suspension of the legislation, or an exemption, let me address that issue.

[56] The significance of that classification is set out in RI]? - MacDonald at p. 346:

> "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 the law than when the application of certain provisions of a law than when the application of the law is suspended entirely."

[57] That is the significance of the distinction. The Attorney General argues that, while the applicants characterize this as an exemption case, they are in fact seeking to exempt all lawyers in Nova Scotia from the application of s. 5 of the Regulations which only applies to lawyers.

[58] This, submits the Attorney General, cannot reasonably be said to be the "limited number of applicants" that *RJR - MacDonald* refers to. Rather, the

substance of this application, the real substance of the application, says the Attorney General, is a request to suspend the operation of s. 5 of the Regulations.

[59] The applicants argue that the legislation subjects other individuals' occupations, like bankers, life insurance agents, money service businesses, accountants, real estate brokers, and other individuals and occupations are subjected to the requirements for filing reports under the *Act*.

[60] This request then, says the applicants, applying only to legal counsel, is therefore an exemption, not a suspension. I agree.

[61] I find that this is an exemption case, an application for exemption and I will address the balance of convenience arguments accordingly. The non-lawyers will continue to report and the legislation will remain in tact and functioning in the public interest, although perhaps not as effectively.

[62] It is assumed that this legislation enacted by the democratically elected Parliament of Canada, serves the public good. I refer again to the *Harper* case at p. 771:

> "Courts will not lightly order that laws that Parliament or a legislature has duly enacted for the public good are inoperable in advance of complete constitutional review, which is always a complex and difficult matter. It follows that only in clear cases will interlocutory injunctions against the enforcement of a law on grounds of alleged unconstitutionality succeed."

[63] The "public interest", however, is not only for the government to determine. Cullity, J. of the Ontario Superior Court of Justice makes this point well at para. 49:

> "However, the government does not have a monopoly on the public interest. As Cassells points out at page 303:
>
> > 'While it is of utmost importance to consider the public interest in the balance of convenience, the public interest in Charter litigation is not unequivocal or asymmetrical in the way suggested in Metropolitan Stores. The Attorney General is not the exclusive representative of a monolithic "public" in Charter disputes, nor does the applicant always represent only an individual as claimed. Most often, the applicant can also claim to represent one vision of the 'public interest'. Similarly, the public interest may not always gravitate in favour of enforcement of existing legislation.'
>
> It is, we think, appropriate that it be open to both parties in an interlocutory Charter proceeding to rely upon considerations of the public interest. Each party is entitled to make the court aware of the damage it might suffer prior to a decision on the merits. In addition, either the applicant or the respondent may tip the scales of convenience in its favour by demonstrating to the

> court a compelling public interest in the granting or refusal of the relief sought. 'Public interest' includes both the concerns of society generally and the particular interest of identifiable groups. (RJR - Macdonald Inc., at pages 343-4)"

[64] The applicants submission on public interest is that this action is not brought to sustain the practice patterns of lawyers. This of public interest here, the applicants suggest that goes well beyond the interest of lawyers, the practice patterns of lawyers, rather, the application is brought out of concern for the public interest in the administration of justice.

[65] That public interest, would be severely damaged by

(1) the interference with the independence of the bar,

(2) the statutorily mandated conflict of interest,

(3) the breach of the confidentiality and fiduciary relationship between counsel and clients,

(4) the interference with the candour that is required between a counsel and his client, allowing for proper representation, and

(5) the interference for the rights of individuals to have effective legal representation as guaranteed by the *Charter*.

[66] There is good reason, argue the applicants, to separate lawyers from those other individuals, professions, entities, institutions, who are required to report under the *Act*. There is good reason to separate lawyers.

[67] The functions of legal counsel are at the heart of the constitutionally protected principles of fundamental justice. The rule of law, the right to counsel, the right to remain silent, the privilege against self-incrimination and the right to a fair trial. That's why, these are the reasons why, these are the principles that the applicants say they are trying to protect. That is the public interest. That is the broad public interest that they say they represent. The proper functions of legal counsel sustain and allow for the constitutionality, the entrenched principles that are so significant to the maintenance of the rule of law.

[68] There is significant public interest to be protected here, say the applicants.

[69] This cannot be said, they say, for other individuals and groups required to report. Those groups are not involved with the constitutionally entrenched principles that they speak of.

[70] The irreparable harm described in the affidavit of Clayton Ruby would be harm to the public that could not be remedied if after trial the legislation was struck down.

[71] An order temporarily exempting lawyers would not seriously, the applicants say, compromise the legislation anyway. The applicants say, that given the extensive list of persons and entities that would continue to be required to report suspicious transactions, there is limited additional public benefit, which is derived from extending the application to the function of lawyers. The applicants suggest that if legal counsel accepts, a large amount of cash to be held in trust, that cash is ordinarily deposited with the bank, or other financial institution, which institution will be required to report suspicious transactions. They say that if a transaction involves real estate, than the broker will be subject to reporting provisions. They say that the purchase of a business, or the sale of a business will involve almost certainly, accountants, who will be required to report suspicious transactions.

[72] It is difficult to imagine, say the applicants, a suspicious transaction of which counsel would have knowledge, of which lawyers would have knowledge, for which one of the other classes of regulated persons or entities would not also be involved and be required to report.

[73] Lawyers, of course, will continue to be governed by the Criminal Code and will not aid or abet money laundering crimes with impunity. Solicitor-client privilege at common law, does not protect communications in aid of a criminal purpose where there is danger to the public safety and they cite Justice Cory in *Smith v. Jones*, [1999] 1 S.C.R. 455 to support that premise.

[74] Rather, the logical reason, say the applicants, the obvious reason to extend the application of the *Act* to lawyers is this, it allows the government to use counsels' confidential and fiduciary relationship, to use counsels' relationship, to capture information and then by prohibiting counsel from notifying the client to continue to use that relationship to capture further confidences.

[75] The applicants say, that allowing the application will simply revive the status quo as it existed before the *Act*, prevent the compromise of rights of clients and legal counsel, pending constitutionality.

[76] The Attorney General has countered that this is a law enacted by Parliament for the overwhelming public good. The Attorney General refers to again, the affidavit of Richard Lalonde that I have quoted from previously. It expresses the

obvious public interest in controlling money laundering, particularly, the Attorney General now makes reference to the need for Canada to participate in the international effort to prevent terrorist activity, terrorism, which concerns have been heightened by recent events.

[77] The public interest, says the Attorney General, addressed by this *Act*, is "overwhelming and obvious".

[78] I am mindful of the increased significance of the international control of money laundering, increased significance that it has taken on since the need to combat terrorism, has become so clear and urgent. I know that I am mindful that the Richard Lalonde affidavit points out that, that as transactions become more complex, lawyers are increasingly involved in money laundering schemes, often without their knowledge. That is what Mr. Lalonde says, I have no reason to question.

[79] Nevertheless, after having assessed both arguments, I find that the balance of convenience favours the applicants.

[80] I find that on balance, the temporary exemption from the operation of s. 5 of the Regulations under the *Act*, the section that applies to lawyers only, I find that on balance, that although such exemption will perhaps compromise the legislation, that such will be preferable to allowing even for a limited period, the significant constitutional harm that will result from requiring lawyers to secretly report on their clients' activities, requiring lawyers to become informers, requiring lawyers to become secret government agents.

[81] I again cite Justice Allan finalizing this matter, at p. 16, paras 107-108:

> "¶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.'"

[82] Remember please, that that was a section 1 analyses but there is significance to be taken from it. Allan, J. goes on to say:

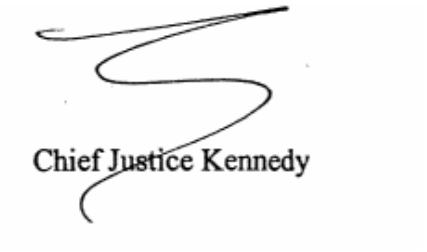
> "¶108 The proclamation of s. 5 of the Regulations authorizes an unprecedented intrusion into the traditional solicitor-client relationship. The constitutional issues raised deserve careful consideration by the Court."

[83] I find, as did the judges before me who have heard these applications, that the applicants have satisfied the tripartite test.

[84] This is one of those unusual "clear cases" contemplated by *Harper*, *supra*, (at p. 771) that justifies a finding that the public interest in enforcing Parliament's law is outweighed by the harm inflicted by the law on the applicant.

[85] I have considered the remedy granted by the Alberta Court of Queens Bench, however I am concerned, in light of what I have found with the obligation on lawyers to file secret, albeit sealed, reports and so I prefer the remedy granted by the British Columbia and Ontario Courts.

[86] I allow the application and grant an order exempting legal counsel in this Province, practising in Nova Scotia, from the application of s. 5 of the *Proceeds of Crime (Money Laundering) Suspicious Transactions Regulations*, until the final decision of this Court, or any appeal therefrom, on the merits of the constitutional challenge.



Halifax, Nova Scotia