

(Where is) the Tipping Point for
Governmental Regulation of Canadian
Lawyers? Perhaps it is in Paradise:
Critically Assessing Regulation of
Lawyer Involvement with Money
Laundering After *Canada (Attorney
General) v Federation of Law Societies
of Canada*

R E B E C C A B R O M W I C H *

ABSTRACT

The Supreme Court of Canada in *Canada (Attorney General) v Federation of Law Societies of Canada*¹ confirmed that Canada's Provincial and Territorial Law Societies have the sole jurisdiction to regulate the conduct of lawyers sufficiently to prevent and curtail lawyers' involvement in money laundering, ousting the jurisdiction of Federal authorities which otherwise regulate and control money laundering in other sectors. Consequently, this decision places a high burden on law societies as regulators, and assumes

* Rebecca Jaremko Bromwich, PhD, LL.M, LL.B, is a faculty member in the Department of Law and Legal Studies at Carleton University, where she serves as Director of the Graduate Diploma in Conflict Resolution program. She is also a co-editor of RobsonCrim, the blog of Robson Hall law school, and serves as a *per diem* Crown Attorney. Note that the author did not rely on nor divulge any confidential information in the research or analysis relating to this paper. All sources relied upon are part of the public record. The author is a former employee of the Federation of Law Societies of Canada.

¹ *Canada (AG) v Federation of Law Societies of Canada*, 2015 SCC 7, [2015] 1 SCR 401 [FLSC].

their capacity to meet it. This article critically examines the extent to which law societies are positioned to effectively meet that burden, and, relatedly, what implications this may have for the future of lawyer self-regulation in Canada. The article critiques the extent to which law societies have the capacity to combat the use of law practices as shields for money laundering as well as what capacity legal regulators as currently constituted reasonably have to do so in the future. With reference to the 2016 Report of the Intergovernmental body developing and promoting policies to combat money laundering and terrorist financing (FATF), this article raises concerns that the Supreme Court of Canada's judgment in the *Federation of Law Societies* case rests on a shaky foundation whereby money laundering was unexplored as an issue because it was conceded to be a global problem. It suggests that the current magnitude of money laundering in a globalized economy, as revealed by the Panama Papers and Paradise Papers, among other sources, coupled with the low capacity of law societies to address it renders the global threat of money laundering sufficiently calamitous to the international monetary system for governmental regulation of lawyers, as opposed to continued self-regulation, to be an appropriate course of action justifiable under s. 1 of the *Charter*.

I. INTRODUCTION

"The tipping point is that one magic moment ...where everything can change all at once." — Malcolm Gladwell²

In *Canada (Attorney General) v Federation of Law Societies of Canada*,³ the Supreme Court of Canada ruled that lawyers are exempted from the regime governing the conduct of other financial intermediaries, such as accountants, through means of the Federal agency entitled Financial Transactions and Reports Analysis Centre of Canada (FINTRAC). This agency is permitted to search for and seize data identifying illegal transactions and those involved in them. In the case, the Federation of Law Societies of Canada (FLSC), an umbrella association composed of provincial and territorial legal self-regulating bodies, successfully challenged the constitutional applicability of this anti-money-laundering legislation to

² Malcolm Gladwell, *The Tipping Point: How Little Things Can Make a Big Difference* (New York: Back Bay Books, 2002) at 4.

³ *FLSC*, *supra* note 1.

the legal profession. The Supreme Court held that the constitutional entitlement of clients to solicitor-client confidentiality rendered unconstitutional the applicability of the FINTRAC regime to lawyers.⁴ Essentially, this decision leaves prevention of complicity in money laundering by lawyers in the purview of provincial and territorial law societies to regulate, curb, and control.

The *FLSC* case confirmed that it falls within the responsibility of Canada's Law Societies to regulate the conduct of lawyers sufficiently to prevent and curtail lawyers' involvement in money laundering. Regulating lawyers with respect to their participation in money laundering falls outside of the ambit of FINTRAC. This article critically analyses the efficacy of measures being taken by provincial, federal, and territorial law societies across Canada to prevent complicity by Canadian lawyers in money laundering. From this analysis, it identifies gaps in existing regulation and makes suggestions for change to improve existing regulatory regimes.

The Financial Action Task Force (FATF),⁵ an intergovernmental body headquartered in Paris that sets standards for resisting money laundering worldwide, raised serious concerns about Canada's approach to money laundering in its September 2016 Report, indicating that "legal counsels, legal firms and Quebec notaries... constitute a significant loophole"⁶ in Canada's anti-money-laundering and counter terrorist financing regimes. The FATF Report stated that Canada failed to make ample progress on several fronts.⁷ After the *FLSC* case, it is confirmed that lawyers and legal

⁴ *Ibid* at para 110.

⁵ The Financial Action Task Force (FATF) is an inter-governmental body that was established in 1989 by the ministers of its member nations. The stated objectives of the FATF are to set standards and promote effective implementation of legal, regulatory, and operational measures for combating money laundering, terrorist financing, and other "related threats to the integrity of the international financial system." The FATF is therefore a "policy-making body," which works to generate the necessary political will to bring about national legislative and regulatory reforms in these areas. See online: <<http://www.fatf-gafi.org/about/>>.

⁶ FATF, *Anti-Money Laundering and Counter Terrorist-Financing Measures, Canada* (Paris: Fourth Round Mutual Evaluation Report, FATF, 2016), online: <<http://www.fatf-gafi.org/media/fatf/documents/reports/mer4/MER-Canada-2016.pdf>>. The report indicates that Canada has made progress in regulating the not-for-profit sector, as well as the financial sector, but that significant gaps exist in the regulation of "non-financial" industries, and specifically the legal profession after the *FLSC* case.

⁷ *Ibid*.

entities are not required to adhere to anti-money laundering obligations that are put in place to govern banks and other financial institutions. In consequence, the FATF is not satisfied with the mechanisms available under Canada's existing regulatory regimes for lawyers and notaries, characterizing the regulatory regimes applicable to lawyers, and notaries as leaving "gaping holes" in Canada's reporting system.⁸ The FATF Report further contends that "the legal profession in Canada is especially vulnerable to misuse for money laundering and terrorist financing risks," linked to a great extent with the profession's involvement in transactions such as real estate deals and the oversight of client trust accounts.⁹

This article discusses the current capacities of law societies to curb money laundering in the context of the magnitude of it as a problem, and what the ability and positionality of legal self-regulators to do so implies for the efficacy of continued lawyer self-regulation in Canada. First, the article looks at the general regime for addressing money laundering in Canada. Then, it considers the decision in the *FLSC* case, in particular troubling the inattention in that decision to questions of the capacity of lawyer self-regulators in Canada to address threats to the public interest involved in money laundering. It moves on to discuss the regime for self-regulation currently in place in relation to the legal profession in Canada, and, subsequently, to critically assess the capacity of those regulators to deal with the large-scale issue of money laundering. It then looks at alternative models in place in other jurisdictions where government is involved in lawyer regulation and lawyers are publicly regulated. From this analysis, the article contends that, without a considerable increase in resources allocated to the problems of money laundering and terrorist financing, existing Canadian professional self-regulatory regimes for lawyers and notaries are positioned with neither the practical ability nor expertise to surmount the daunting task of countering money laundering and that therefore, professional self-governing regulatory regimes are inadequate to ensure lawyers are not involved in money laundering. The article concludes with the contention that, in the context of globalized economics and correspondingly massive amounts of money laundering, lawyer self-regulation needs to either be bolstered by significant fiscal support from public agencies, or to be eradicated in favour of the installation of a public legal services regulator.

⁸ *Ibid.*

⁹ *Ibid* at 15.

II. MONEY LAUNDERING

The FATF Report in 2016, the Panama Papers that same year, and the Paradise Papers in 2017, all overwhelmingly show that Canadian businesses and law firms are involved in the massive flow of monies across jurisdictions. It is less clear, but certainly suggested, by the FATF Report, that lawyers and law firms are implicated in illicit dimensions of this flow, including through money laundering. The scope of the movement of money across jurisdictions, as well as of money laundering as a field of criminal activity both in Canada and worldwide, are immense. Money laundering is connected with a variety of criminal enterprises, including terrorist financing.¹⁰ In 2011, the RCMP estimated the annual cost of money laundering to the Canadian economy alone as between \$5 and \$15 billion.¹¹ In a globalized economy, the illicit movement of money across international borders is a very significant issue. The United Nations Office on Drugs and Crime¹² estimates that as of 2016 the amount of money laundered around the world each year is 2 - 5% of the global GDP, totalling \$800 billion - \$2 trillion in current US dollars.¹³

Money laundering is criminalized in the *Criminal Code of Canada* and the general structure for preventing it is managed through regulatory prohibitions in Canada. Money laundering is described in s. 462.31 of the *Criminal Code of Canada* as “laundering the proceeds of crime.”¹⁴ It is a term that refers to various methods by which “dirty money” acquired through criminal or terrorist activities is transitioned through legitimate businesses. This process converts the “dirty” money into “clean” money, not easily traceable to criminal activity. Once laundered, the money cannot be easily linked to the person, organization, or transaction from which it originated; once laundered, money can be spent.

¹⁰ For discussion, see e.g. Rachel Ehrenfeld, *Funding Evil: How Terrorism Is Financed and How to Stop It* (Chicago: Bonus Books, 2005).

¹¹ Shannon Brennan & Roxanne Vaillancourt, *Money Laundering in Canada, 2009* (Ottawa: Statistics Canada, 2015), online: <<http://www.statcan.gc.ca/pub/85-005-x/2011001/article/11454-eng.htm>>.

¹² United Nations Office on Drugs and Crime (UNODC), *Money Laundering and GDP* (Vienna: UNODC, 2017), online: <<https://www.unodc.org/unodc/en/money-laundering/globalization.html>>.

¹³ *Ibid.*

¹⁴ *Criminal Code*, RSC 1985, c C46, s 462.31.

As enacted in 2000 and amended in 2008, Canada's *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*¹⁵ establishes a regulatory regime with the ambit of curtailing money laundering and illicit terrorist financing activities. Working with the definition of money laundering set out in s. 462.31(1) of the *Criminal Code*,¹⁶ the regulatory statute sets forth measures that require professionals to collect and maintain information as well as enjoin them to prepare prescribed documents about their clients to be retained and submitted as required to the regulator. The Act establishes FINTRAC to administrate its regime. The legislation and the regulations enacted under it permits FINTRAC to execute warrantless searches of the offices and computers belonging to people or entities that are subject to the Regime, and sets out penal sanctions for non-compliance with its provisions. As originally enacted, the Act applied to lawyers and other professionals equally. On its website, FINTRAC defines money laundering as: "the process used to disguise the source of money or assets derived from criminal activity. Profit-motivated crimes span a variety of illegal activities from drug trafficking and smuggling to fraud, extortion and corruption."¹⁷

Without question, especially since the Panama Papers were the files of one law firm, lawyers are implicated across jurisdictions in questionable financial transactions involving the movement of monies across borders in clandestine ways. Much of this flow of money is not money laundering *per se*, and much of it is not illegal but, certainly, some of it may be. The ease and magnitude of lawyers' involvement with questionable financial dealings moving money across borders, and, in some cases, laundering it, was highlighted in 2016 with the watershed release of the "Panama Papers," in which, by means of a leak of electronic data held by a law firm, 11.5 million publicly released records reveal a global professional context where law firms and banks sell financial secrecy to politicians, billionaires, celebrities, professional athletes, drug traffickers and fraudsters alike.¹⁸ The Panama

¹⁵ *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*, SC 2000, c 17 [the Act], online: <<http://laws-lois.justice.gc.ca/eng/acts/P-24.501/>>.

¹⁶ *Criminal Code*, *supra* note 14, s 462.31(1).

¹⁷ Financial Transactions and Reports Analysis Centre of Canada (FINTRAC), *What Is Money Laundering?* (Ottawa: Financial Transactions and Reports Analysis Centre of Canada, 2015), online: <<http://www.fintrac-canafe.gc.ca/fintrac-canafe/definitions/money-argent-eng.asp>>.

¹⁸ The International Consortium of Investigative Journalists (ICIJ), *Giant Leak of Offshore Financial Records Exposes Global Array of Crime and Corruption* (Washington: ICIJ,

Papers, a data leak from a single law firm – Mossack Fonseca - alone identify 143 politicians, including 12 world leaders, their families, and associates from around the world as having been actively using offshore tax havens, as well as scores of criminal transaction. An estimated 625 Canadians are named in the documents comprising the Panama Papers.¹⁹ Complicity of lawyers in large scale money laundering and tax evasion transactions was again suggested with the release, in November 2017, of the “Paradise Papers.” These were another set of several million records that, when publicly released by means of a data leak, revealed no overtly illegal activity, but did underscore the secret movement, facilitated by lawyers and banks, of billions of dollars across jurisdictions, certainly avoiding, if not provably evading, taxation.²⁰

In response to the magnitude and complexity of the problem of money laundering, jurisdictions across the developed world have enacted a variety of laws to counter it.²¹ On the international level, organizations such as the International Monetary Fund²² and the United Nations have also developed strategies to counter money laundering, understanding it as an urgent global problem.²³

Money laundering can either involve individual white-collar criminality, broader corporate criminality on the part of an entity, or both. Money laundering is a type of white-collar crime that sits in a somewhat vague and morally grey area. This is because the primary illegal behavior producing the funds is not necessarily perpetrated by the money launderers, who are

2016), online: <<https://panamapapers.icij.org/20160403-panama-papers-global-overview.html>>.

¹⁹ Daniel Tencer, “Canadian Names in Panama Papers Leak Unveiled in Searchable Database,” *Huffington Post* (9 May 2016), online: <https://www.huffingtonpost.ca/2016/05/09/panama-papers-canadian-names_n_9869810.html>.

²⁰ See e.g. “Paradise Papers: Everything You Need to Know About the Leak,” *BBC* (10 November 2017), online: <<http://www.bbc.com/news/world-41880153>>.

²¹ For discussion, particularly of European provisions, see e.g. Toby Graham, Evan Bell & Nicholas Elliott, *Butterworths International Guide to Money Laundering Law and Practice* (London, UK: Clays Ltd, 2003).

²² See William E Holder, “The International Monetary Fund’s Involvement in Combating Money Laundering and the Financing of Terrorism” (2003) 6:2 *J of Money Laundering Control* at 383–387.

²³ The webpage “United Nations Actions Against Terrorism” provides a comprehensive list of links to UN counter-terrorism efforts, including access to documentation and sites maintained by UN specialized agencies, online: <http://www.un.org/en/counterterrorism/>.

financial intermediaries who derive their power to be intermediaries from their legitimate business dealings in many instances, and may not otherwise be engaged in criminal behaviour. In Canada, money laundering is prohibited by the *Criminal Code*,²⁴ ss. 462.31, 83.02, 83.03, and by the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*²⁵ at s. 3.

Section 462.31(1)²⁶ of the *Criminal Code* defines “laundering of proceeds of crime” as anyone who:

uses, transfers the possession of, sends, or delivers to any person or place, in any manner and by any means, any property or any proceeds of any property with the intent to conceal or convert that property or those proceeds, knowing or believing that all or part of that property or of those proceeds was obtained or derived directly or indirectly as a result of

(a) the commission in Canada of a designated offence; or

(b) an act or omission anywhere that, if it had occurred in Canada, would have constituted a designated offence.

Interpretive guidance for Courts dealing with the *Criminal Code* money laundering provisions was recently provided in *R v Tan Tien Nguyen*.²⁷ There, the Ontario Superior Court clarified that the offence of money laundering has three essential elements, as follows:

a. dealing with property or proceeds of crime in almost any manner or any means imaginable, including sending, delivering, transferring, altering, disposing, using, etc...;

b. having an intent to conceal or convert the property or proceeds; and

c. knowing or believing that all or part of the property or proceeds was obtained directly or indirectly, as a result of the commission of a designated offence.²⁸

In *R v Tejani*,²⁹ the *mens rea* of money laundering offences was previously held to involve belief or knowledge that the proceeds were derived from the commission of a crime.

²⁴ *Criminal Code*, *supra* note 14, ss 462.31, 83.02, 83.03.

²⁵ The Act, *supra* note 8, s 3.

²⁶ *Criminal Code*, *supra* note 14, s 462.31(1).

²⁷ *R v Tan Tien Nguyen*, 2013 ONSC 605.

²⁸ *Ibid* at para 315.

²⁹ *R v Tejani* (1999), 138 CCC (3d) 366, 1999 CanLII 3765 (Ont CA).

III. MONEY LAUNDERING AND SOLICITOR-CLIENT PRIVILEGE: THE SUPREME COURT OF CANADA'S DECISION IN *FEDERATION OF LAW SOCIETIES OF CANADA*

In *Canada (Attorney General) v Federation of Law Societies of Canada*,³⁰ the Supreme Court of Canada struck down provisions of Canada's federal anti-money laundering legislation as they pertained to the duties of lawyers to report money laundering, and as such concerned searches of law offices. The disputed regulations would have required lawyers to collect information about their clients as well as information about financial transactions by those clients. Further, it would have required lawyers to turn the client information collected over to Federal government authorities on demand.³¹ The Supreme Court found that the impugned regulatory requirements violated *Charter* protections against unreasonable search and seizure (s. 8), and rights to security of the person (s. 7). The impugned provisions were found to be unconstitutional because they lead to a violation of solicitor-client privilege, a privilege that protects communications between lawyers and their clients from being disclosed without the client's permission. Justice Cromwell, writing for a majority of the Supreme Court of Canada, held that this violation of the client's ss. 7 and 8 rights under the *Charter* was not justifiable under s. 1.³²

The *FLSC* case officially began in 2011, when the *FLSC* filed a petition in British Columbia.³³ However, while the specific case resolved by the Supreme Court of Canada in *FLSC* began in 2011, the legal debate between the Federation of Law Societies of Canada and the Federal Government as to whether the federal anti-money laundering and terrorist financing regime should apply to lawyers and Quebec notaries had been ongoing since at least 2001. Their petition challenged the constitutionality of a number of sections of the *Act* and its regulations. At this first instance, the BC Chambers Judge held that the impugned provisions violated the rights of clients and lawyers in particular because it impinged upon solicitor-client

³⁰ *FLSC*, *supra* note 1.

³¹ Regulations made under the *Act* particularize how the legislative scheme applies to legal counsel: the Proceeds of Crime (Money Laundering) and Terrorist Financing Regulations, SOR/2002-184.

³² *FLSC*, *supra* note 1 at para 9.

³³ *Federation of Law Societies of Canada v Canada (Attorney General)*, 2011 BCSC 1270.

privilege. This interference with solicitor-client privilege was unconstitutional as a violation of the clients' rights under s. 7 of the *Charter*.

The British Columbia Court of Appeal upheld the decision at first instance on appeal in 2013.³⁴ Upon further appeal, the Supreme Court of Canada upheld the original decision.³⁵ More in-depth discussion of this series of decisions has been offered in scholarly commentary elsewhere.³⁶ There were significant points of difference between the analyses of different levels of Court with respect to ss. 7 and 8 of the *Charter*. It is beyond the scope of this article to consider the Court's *Charter* analysis of solicitor-client privilege in detail. Rather, the purpose of this article is to consider the reliance on lawyer self-regulation that is the consequence and the upshot of the *FLSC* decision. As a result of that decision, lawyers are exempt from reporting to government information about "suspicious transactions" involving their clients.

The Supreme Court of Canada in the *FLSC* case held that sections 62, 63, 63.1, and 64 of the *Act* were unconstitutional to the extent that they applied to documents in law offices or otherwise in the possession of legal counsel and legal firms. The Court held that the impugned provisions, insofar as they relate to lawyers and law offices, infringe s. 8 of the *Charter*. The Court took a particularly dim view of the *de facto* authorization by these provisions of the sweeping searches of law offices and was concerned about the prospects of such cases to risk breaching solicitor-client privilege. The principles governing searches of law offices set out in *Lavallee, Rackel & Heintz v Canada (Attorney General)*,³⁷ were applied. More specifically, the

³⁴ *Federation of Law Societies of Canada v Canada (Attorney General)*, 2013 BCCA 147.

³⁵ *FLSC*, *supra* note 1.

³⁶ See e.g. Amy Salyzyn, "A False Start in Constitutionalizing Lawyer Loyalty in Canada (*Attorney General*) v *Federation of Law Societies of Canada*" (July 2016) *Supreme Court Law Review*, Ottawa Faculty of Law Working Paper No 2016-28, online: <<https://ssrn.com/abstract=2812652>> [forthcoming].

³⁷ *Lavallee, Rackel & Heintz v Canada (AG)*, 2002 SCC 61, [2002] 3 SCR 209. These principles were set out at para 49 of that decision, as follows:

1. No search warrant can be issued with regards to documents that are known to be protected by solicitor-client privilege.
2. Before searching a law office, the investigative authorities must satisfy the issuing justice that there exists no other reasonable alternative to the search.
3. When allowing a law office to be searched, the issuing justice must be rigorously demanding so to afford maximum protection of solicitor-client confidentiality.

Court in *FLSC* affirmed that solicitor-client privilege must remain as close as possible to absolute in order to be relevant, and that Court must enforce rigorous norms to ensure its protection.

The *FLSC* case is part of a broader trend within Canadian courts of constitutionalizing solicitor-client privilege, as has been pointed out by others.³⁸ For instance, the Supreme Court of Canada held in the administrative law context that determining where a statute permits review of documents over which solicitor-client privilege is asserted is Question of Law of Central Importance and outside the relative expertise of the decision-maker.³⁹

However, in its focus on solicitor-client privilege, and not on money laundering, in *FLSC*, this decision both fails to appreciate the pressing and substantial need to deal with money laundering and terrorist financing and

4. Except when the warrant specifically authorizes the immediate examination, copying and seizure of an identified document, all documents in possession of a lawyer must be sealed before being examined or removed from the lawyer's possession.

5. Every effort must be made to contact the lawyer and the client at the time of the execution of the search warrant. Where the lawyer or the client cannot be contacted, a representative of the Bar should be allowed to oversee the sealing and seizure of documents.

6. The investigative officer executing the warrant should report to the justice of the peace the efforts made to contact all potential privilege holders, who should then be given a reasonable opportunity to assert a claim of privilege and, if that claim is contested, to have the issue judicially decided.

7. If notification of potential privilege holders is not possible, the lawyer who had custody of the documents seized, or another lawyer appointed either by the Law Society or by the court, should examine the documents to determine whether a claim of privilege should be asserted, and should be given a reasonable opportunity to do so.

8. The Attorney General may make submissions on the issue of privilege, but should not be permitted to inspect the documents beforehand. The prosecuting authority can only inspect the documents if and when it is determined by a judge that the documents are not privileged.

9. Where sealed documents are found not to be privileged, they may be used in the normal course of the investigation.

10. Where documents are found to be privileged, they are to be returned immediately to the holder of the privilege, or to a person designated by the court.

³⁸ Mahmud Jamal & Brian Morgan, "The Constitutionalization of Solicitor-Client Privilege" (2003) SCLR 20 at 213.

³⁹ *Alberta (Information and Privacy Commissioner) v University of Calgary*, 2016 SCC 53.

rests upon problematic dominant beliefs about the necessity and efficacy of lawyer self-regulation as an inherent good.⁴⁰ The balance struck by the Court would be more appropriate to a historical socioeconomic context that predated the massive flow of monies across national jurisdictions that is evidenced in the FATF Report, the Panama Papers, and the Paradise Papers. Further, it is highly problematic at a time where self-regulation for lawyers is being eroded in virtually all jurisdictions with the exception of Canada, and where movements towards public regulation of lawyers are not resulting in issues for the independence of the bar.

The *FLSC* case is one installment in a long series of Supreme Court of Canada cases that have bolstered the doctrines of solicitor-client and litigation privilege in Canada, and which have had the ancillary consequence of shoring up lawyer self-regulation against scrutiny and protecting the power of lawyers as an interest group. These cases include, notably, *Canada (Privacy Commissioner) v Blood Tribe Department of Health*,⁴¹ and followed most recently by *Lizotte v Aviva Insurance Company of Canada*.⁴² The *FLSC* case is unique amongst these cases in that it applies specifically to money laundering.

From beginning to end, the decision of the majority of the Supreme Court of Canada, authored by Justice Cromwell, focused on the interests of the public in solicitor-client privilege. Little was said about money laundering as a global problem, and the notion that the public interest is engaged in the issue of money laundering was not seriously discussed. Notably, Justice Cromwell, writing for a majority of the Supreme Court of Canada, did recognize and acknowledge that the regulation of money laundering is a pressing and substantial objective.⁴³ However, the majority nonetheless found that the impugned legislation failed under the test set out in *R v Oakes*⁴⁴ because “there are less drastic means of achieving the

⁴⁰ See especially *FLSC*, *supra* note 1 at paras 77–80, where Cromwell J declines to rule on the question of whether, as submitted by the Federation, the notion of independence of the Bar “essentially places lawyers above the law” as contended by the Attorney General at para 78. In declining to rule on this question, the judgment accepts foundational assumptions about the independence of the bar as being linked inextricably to self-regulation that this article argues are untenable.

⁴¹ *Canada (Privacy Commissioner) v Blood Tribe Department of Health*, 2008 SCC 44.

⁴² *Lizotte v Aviva Insurance Company of Canada*, 2016 SCC 52.

⁴³ *FLSC*, *supra* note 1 at para 59.

⁴⁴ *R v Oakes*, [1986] 1 SCR 103, 53 OR (2d) 719 [*Oakes*].

same objectives.”⁴⁵ The fact that the majority decision of the Court conceded, without discussing the dimensions of, money laundering as a pressing and substantial issue, resulted in the inclusion within the judgment of almost no analysis of the scope, breadth, and nature of money laundering as a problem. By conceding that money laundering is a “pressing and substantial” concern without discussing it, the Court in *FLSC* focused in on the public benefit of access to counsel at the expense of appreciating the public harm associated with large scale financial crime. It also offered no analytical space for comparison of the capacity, systemic tendency, and inclination of the self-regulating machinery of Canada’s legal profession to adequately address money laundering. In my view, the inattention to the scope of the problem results in a flawed and problematic ruling on what means might ameliorate it.

While the perspective taken in this article concurs with that articulated by Justice Cromwell concerning the violation of the s. 8 rights of clients and the s. 7 rights of lawyers under the *Charter*, it takes issue with the conclusion⁴⁶ that these limitations are not reasonably justifiable in a free and democratic society, and thereby not justifiable under the test set out in *Oakes*,⁴⁷ to assess whether infringements on *Charter* rights are constitutionally permissible. It is true that the Court has held that, to save a violation of s. 7 under s. 1, the Court needs to find there to be a very compelling reason akin to war, or other serious calamity.⁴⁸ This article contends that the scope and scale of money laundering is sufficiently calamitous to the global economy to be compelling enough to save a violation under s. 7. At bottom, what this article is suggesting is in keeping with the 2016 FATF Report: that the scope, breadth, and impacts of money laundering on a global scale are so immense as to in fact be sufficiently calamitous as virulent threats to the integrity of the international monetary system to merit consideration under this section. Consequently, the inattention of the Court in the *FLSC* case to the gravity of the context renders it a flawed decision.

Because the decision contains no specific consideration of the enormity of the scope of money laundering, it also contains no express consideration

⁴⁵ *FLSC*, *supra* note 1 at para 61.

⁴⁶ *Ibid* at para 9.

⁴⁷ *Oakes*, *supra* note 44 at para 70.

⁴⁸ See *Re BC Motor Vehicle Act*, [1985] 2 SCR 486 at 518, 24 DLR (4th) 536.

of the adequacy, spottiness or unevenness of Law Societies' ability to regulate money laundering across Canada and effectively enforce those regulations is given a paucity of consideration. The concession that money laundering is a problem without exploration of the extent of that problem results in a lack of critical assessment of the practical ability of Law Societies to regulate money laundering. Even though the Court concedes that the eradication of money laundering is a pressing and substantial objective, the inattention in the judgment to the magnitude of the problem distorts what might be an appropriate remedy.

Justice Cromwell's decision does state that he does not intend to interfere with the legislature's ability to regulate in pursuit of its valid goal to prevent money laundering and terrorist financing. In relation to the search provision, he states: "I do not foreclose the possibility that Parliament could devise a constitutionally compliant inspection regime without a judicial pre-authorization requirement."⁴⁹ Further, he sets forth: "Parliament is entitled, within proper limits which I have outlined, to impose obligations beyond those which the legal profession considers essential to effective and ethical representation."⁵⁰ A concurring decision was rendered by Chief Justice MacLachlin and Justice Moldaver.

The FLSC decision leaves Canadians in the position of relying exclusively upon the law societies as regulators to address money laundering. In the following section, this article sets forth a critical perspective on the extent to which this reliance is reasonable.

IV. REGULATORY REGIMES FOR LAWYERS ACROSS CANADA

If legal regulators, as currently constituted in Canada, lack the capacity, and are neither positioned nor inclined, to effectively regulate lawyers' involvements with money laundering, this concern calls into question their efficacy as regulators for the profession on other respects as well. In Canada, lawyers are part of a self-regulated profession falling constitutionally within provincial and territorial jurisdiction. This self-regulation of lawyers is widely assumed to be a tradition of long duration, has been described as a "sacred cow" in Canada by Devlin and Heffernan,⁵¹ and persists despite

⁴⁹ FLSC, *supra* note 1 at para 56.

⁵⁰ *Ibid* at para 113.

⁵¹ Richard F Devlin & Porter Heffernan, "The End(s) of Self Regulation?" (2008) 45:5

changes elsewhere in the world. Notwithstanding the claim that self-regulation of lawyers' conduct is a longstanding tradition under the common law, however, when looked at in historical context, lawyer self-regulation of the sort that the Court protects in the *FLSC* case is a relatively recent phenomenon. As Amy Salyzyn has pointed out, the notion, now widely embraced, and underpinning the *FLSC* decision, that lawyer self-regulation is conducted in the public interest, is a relatively recent suggestion.⁵²

What lawyer self-regulation means was clarified and confirmed by the Supreme Court of Canada in *Pearlman v Manitoba Law Society Judicial Committee*.⁵³ In the *Pearlman* case, the Supreme Court of Canada explained that it viewed governance of the legal profession as being composed of three aspects of control, those being control over: 1) who is permitted to practice law, 2) what conditions or requirements will be placed upon those who seek to practice law, and 3) what means are to properly be employed to enforce those conditions/requirements.⁵⁴

While there are broad similarities between the manner in which the legal profession is self-regulated across the country, there are important differences between the jurisdictions as well. There are thirteen law societies convened across Canada, and each runs its own regulatory regime. A coordination and facilitation function as between the law societies is performed by the Federation of Law Societies of Canada.⁵⁵ In each Law Society, a volunteer board of elected leaders (often called "benchers") takes time out of their professional practices to be involved in self-government of the profession.⁵⁶ Additionally, each law society, as well as the *FLSC*, employs professional staff to deal with regulatory and policy issues. Some law

Alta L Rev 169 at 171.

⁵² Amy Salyzyn, "From Colleague to Cop to Coach: Contemporary Regulation of Lawyer Competence" (24 October 2016) in *Canadian Bar Review*, Ottawa Faculty of Law Working Paper No 2016-43, online: <<https://ssrn.com/abstract=2858332>> [forthcoming].

⁵³ *Pearlman v Manitoba Law Society Judicial Committee*, [1991] 2 SCR 869, 84 DLR (4th) 105.

⁵⁴ *Ibid* at 886.

⁵⁵ For discussion, see e.g. Alice Woolley et al, *Lawyers' Ethics and Professional Regulation*, 2nd ed (Toronto: LexisNexis Canada, 2012).

⁵⁶ For discussion, see e.g. Alice Woolley, *Understanding Lawyers Ethics in Canada* (Toronto: LexisNexis Canada, 2011).

societies have large staff complements (such as the Law Society of Ontario), while others operate on a much smaller scale, like those of the Territories.

Each law society across Canada has a mechanism for dealing with money laundering. The FLSC acts as a coordinating and facilitating body striving to synchronize the workings of each individual law society. It is not in itself a regulator, however, but an association of agencies. The FLSC is not an authority with binding power over any of its constituent parts. The law societies are really its clients or members. The FLSC has provided “Model Rules to Fight Money Laundering and Terrorist Financing.”⁵⁷ These rules include a model rule prohibiting lawyers from collecting more than \$7,500 in cash from a client,⁵⁸ as well as rules requiring lawyers to verify the identities of clients.⁵⁹

While the FLSC model rules themselves are not enforceable, they, or similar rules, have now been adopted in jurisdictions across Canada. Quebec is a notable exception to the general pattern of self-regulation of lawyers across Canada since its Barreau et Chambre des notaires “co-regulate” with government.⁶⁰

As a result of the decision of the Supreme Court of Canada in *FLSC*, law societies that regulate lawyers across Canada have implemented their own anti-money laundering rules by barring lawyers from receiving more than \$7,500 in cash on a particular file, in most cases, and by requiring them to obtain and verify their clients’ identities and keep certain records on hand.

⁵⁷ Federation of Law Societies of Canada (FLSC), *Model Rule on Client Identification and Verification Requirements* (Ottawa: FLSC, 2008), online: <<http://flsc.ca/wp-content/uploads/2014/10/terror2.pdf>>.

⁵⁸ The full text of the FLSC Model Rule on Cash Transactions can be viewed at Federation of Law Societies of Canada (FLSC), *Model Rule on Cash Transactions* (Ottawa: FLSC, 2014), online: <<https://flsc.ca/wp-content/uploads/2014/10/terror1.pdf>>.

⁵⁹ The FLSC Model Rule on Client Identification and Verification Requirements can be viewed at Federation of Law Societies of Canada (FLSC), *Model Rule on Client Identification and Verification Requirements* (Ottawa: FLSC, 2014), online: <<https://flsc.ca/wp-content/uploads/2014/10/terror2.pdf>>.

⁶⁰ See e.g. Laurel S Terry, Steve Mark & Tahlia Gordon, “Trends and Challenges in Lawyer Regulation: The Impact of Globalization and Technology” (2012) 80:6 *Fordham L Rev* 2661.

V. EFFICACY AND GAPS

The intention of this article is to link the watershed revelations of the Panama Papers and the Paradise Papers with the decision of the Supreme Court of Canada in *FLSC* in contending that these events render the time ripe for Canadian jurisdictions to re-think lawyer self-regulation in general. The context in which lawyer self-regulation does exist in a broader environment of neoliberal promotion of self-regulation for professions, and is in large part a product of lobbying by powerful law societies in support of lawyer self-regulation also merits further consideration, but that is beyond the scope of this article.⁶¹ Money laundering is specifically considered because it demonstrates how the present moment carries a particular urgency rendering lawyer self-regulation, which was always already problematic, untenable. In addition to Salyzyn's critical questioning of whether lawyers self-regulate in the public interest or in their own,⁶² many concerns have been raised in recent years about whether the self-regulation of the legal profession in Canada is effective, fair, transparent, and consistent.⁶³ Lawyer self-regulation in Canada has been likened to a "dead parrot" by Harry Arthurs, who contended in 1995 that "no regulatory effort [is] invested in enforcement" of the *Rules* of professional conduct of Canada's Federal and Provincial law societies.⁶⁴ The effectiveness, fairness, equities, transparency, and amenability to corruption within regimes for

⁶¹ For discussion, see e.g. Joan Brockman, "Money for Nothing, Advice for Free: The Law Society of British Columbia's Enforcement Actions Against the Unauthorized Practice of Law" (2010) 29 Windsor Rev Legal & Soc Issues 1-43.

⁶² Salyzyn, *supra* note 52.

⁶³ Richard Devlin, "Breach of Contract?: The New Economy, Access to Justice and the Ethical Responsibilities of the Legal Profession" (2002) 25:2 Dalhousie LJ 335.

⁶⁴ Harry W Arthurs, "The Dead Parrot: Does Professional Self-Regulation Exhibit Vital Signs?" (1995) 33:4 Alta L Rev 800 at 803. Arthurs also argued that the level of regulatory effort expended didn't matter very much, rather that the "ethical economy" of the profession was determined by factors other than regulatory intervention, including the circumstances of the practice of law. While Arthurs did not advocate governmental regulation of lawyers, his argument is consistent with the contention made in this paper that the economic significance of money laundering and the relative impunity with which lawyers can engage in it, are important predictors of high levels of unethical conduct on the part of lawyers. While governmental regulation might not deter lawyers from participating in money laundering, it could ensure investment in efforts to ensure accountability for those who do.

lawyer self-regulation have been called into question in recent years in a myriad of ways in Canada.

The early months of 2017 witnessed a boom in investigative journalism exposing problems with lawyer conduct and lawyer self-regulation. A *Toronto Star* exposé revealed multiple instances in which Law Societies across Canada, and particularly the Law Society of Upper Canada, failed to report criminal behavior on the part of lawyers to police.⁶⁵ The *Star* study documented the cases of over 230 lawyers sanctioned by the Law Society of Upper Canada in the preceding ten years, all of whom who had stolen, defrauded or diverted some \$61 million held in trust funds for clients, and very few of whom were reported to police. Also in 2017, a CBC Fifth Estate documentary entitled “Betrayal of Trust”⁶⁶ highlighted cases in which client money had been misappropriated and mishandled by lawyers across Canada, as well as client allegations that lawyer services were performed in a “shoddy” manner. This docu-drama and the *Toronto Star* investigation revived public ire about lawyer self-regulation, which had also been raised in relation to lawyer misconduct, including allegations of sexual misconduct, by leading figures in the self-regulation network itself. This last concern was brought into particular prominence with *Law Society of Upper Canada v Hunter*,⁶⁷ in which a former Treasurer, which is the title of the highest officer of the Law Society of Upper Canada, faced allegations of sexual misconduct. Self-government of the legal profession may produce concerns that the legal profession is not providing the public with meaningful opportunities to access justice.⁶⁸

Public concerns with lawyer self-regulation are longstanding. They have been, for instance, raised about how well law societies set forth and enforce the obligations of a lawyer in relation to physical evidence of a crime, public infamy in the case of Ontario lawyer Ken Murray.⁶⁹ It was Murray who for months hid videotapes in his law office that were crucial pieces evidence against serial killer Paul Bernardo (Cooper). Alarms have also been raised

⁶⁵ Kenyon Wallace, Rachel Mendleson & Dale Brazao, “Broken Trust,” *The Toronto Star* Projects (5 May 2014), online: <<http://projects.thestar.com/broken-trust/>>.

⁶⁶ CBC, “Betrayal of Trust,” *The Fifth Estate* (17 February 2017), online: <<http://www.cbc.ca/fifth/episodes/2016-2017/betrayal-of-trust>>.

⁶⁷ *Law Society of Upper Canada v Hunter*, 2007 ONLSP 0027, [2007] LSDD No 8.

⁶⁸ Devlin & Heffernan, *supra* note 51.

⁶⁹ *R v Murray*, 2000 48 OR (3d) 544, [2000] OJ No 2182 (Sup Ct J).

about the efficacy of legal self-regulators in assuring lawyer competence in the face of negligence allegations in relation to lawyers, as well as the remedial action taken by law societies to rectify this.⁷⁰ Other concerns have been raised about discriminatory or biased practices detrimentally affecting “racialized licencees,”⁷¹ and the extent to which self-regulation may perpetuate, rather than alleviate, the marginalization of lawyers who are members of historically marginalized groups. Further concerns were raised in 2007 by the Competition Bureau, in which a report relating to all self-regulated professions across Canada had questioned whether continued self-regulation was the best choice for lawyers.⁷²

While all of these concerns received short bursts of media attention and public debate, none of them resulted in a sustained public critique of lawyer self-regulation across Canada, and “curiously,”⁷³ the approach taken in Canada has been to shore up the current self-regulatory regime for lawyers. Somewhat oddly, concern about the legal profession and its ability to self-regulate, and whether its self-regulation is in the public interest, have never yet reached a “tipping point” in Canadian public debate. We have not experienced widespread public calls for an end to lawyer self-regulation.

It becomes surprising that changes to lawyer regulation have not been seriously considered by policy makers in Canada particularly in light of arguments made by prominent legal scholar Alice Woolley as well as scholar, lawyer, and former Dean of Western University’s Law School, Philip Slayton. Woolley advocates for change to the regulatory regime for lawyers in Canada. She takes a relatively moderate view that lawyer self-regulation in Canada is seriously flawed, but does not call for an end to it, rather

⁷⁰ Paul Paton, “The Independence of the Bar and the Public Interest Imperative: Lawyers as Gatekeepers, Whistleblowers or Instruments of State Enforcement?” in Law Society of Upper Canada Task Force on the Rule of Law and Independence of the Bar, *In the Public Interest: The Report and Research Papers of the Law Society of Upper Canada’s Task Force on the Rule of Law and the Independence of the Bar* (Toronto: Irwin Law, 2007).

⁷¹ Law Society of Upper Canada (LSUC), *Challenges Facing Racialized Licensees: Final Report* (Toronto: LSUC, 2014), online: <http://www.lsuc.on.ca/uploadedFiles/Equity_and_Diversity/Members/Challenges_for_Racialized_Licensees/stratcom-challenges-facing-racialized-licensees-final-report.pdf>.

⁷² Canada, Competition Bureau, *Self-Regulated Professions: Balancing Competition and Regulation* (Gatineau, Que: Competition Bureau of Canada, 2007), online: <[http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/Professions-study-final-E.pdf/\\$FILE/Professions-study-final-E.pdf](http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/Professions-study-final-E.pdf/$FILE/Professions-study-final-E.pdf)> at 61–78.

⁷³ Devlin & Heffernan, *supra* note 51.

seeking changes to the ways in which lawyer self-regulation is administered.⁷⁴ More specifically, Woolley calls for government and lawyer co-regulation through the establishment of legal regulatory review offices in each province and territory. She proposes that lawyers should be governed by lawyers, government, and non-lawyers together.

Slayton takes a more radical view. In his book, *Lawyers Gone Bad: Money, Sex and Madness in Canada's Legal Profession*,⁷⁵ Slayton details a series of egregious instances of misconduct by Canadian lawyers and argues, that taken together with the “ineffective and confused treatment”⁷⁶ of those lawyers by regulators support the assertion that radical change is needed to the manner in which lawyers are regulated in Canada. Slayton argues that lawyer self-regulation has “the tendency to create, encourage, or permit transgression.”⁷⁷ More specifically, Slayton contends:

There are no good arguments for the view that only lawyers can regulate lawyers, and many good arguments for the contrary position. Disciplinary action should be in the hands of an independent body; for a law society to investigate, prosecute, and judge, violates elementary principles of justice.⁷⁸

Woolley similarly contends that it is fallacious to suggest that independence of the bar necessitates lawyer self-regulation.⁷⁹ Slayton made these arguments about matters unrelated to money laundering, and called for public regulation of lawyers even before the current controversy around lawyers' involvement in money laundering came into public view. Woolley, too, published her critiques of lawyer self-regulation in 2011, before the FATF Report, Panama, and Paradise papers shed light on the magnitude of money laundering as a financial crisis.

If Slayton is correct and lawyer self-regulation is “ineffective and confused”⁸⁰ when dealing with small-scale forms of misconduct at the local

⁷⁴ See e.g. Alice Woolley, “Rhetoric and Realities: What Independence of the Bar Requires of Lawyer Regulation” (1 June 2011), SPP Research Paper No 11-9, online: <<https://ssrn.com/abstract=1920921>>.

⁷⁵ Phillip Slayton, *Lawyers Gone Bad: Money, Sex and Madness in Canada's Legal Profession* (Toronto: Penguin Canada, 2008).

⁷⁶ *Ibid* at 316.

⁷⁷ *Ibid* at 318.

⁷⁸ *Ibid*.

⁷⁹ Woolley, *supra* note 74.

⁸⁰ Slayton, *supra* note 75.

level, or if Woolley is correct that lawyer self-regulation “could be improved and made better able to ensure that lawyers act as zealous advocates within the bounds of legality”⁸¹ through co-regulation with government and the establishment of a separate tribunal for discipline, or both, then policy-makers should take seriously the suggestion they both make: that lawyer self-regulation as it currently exists is not tenable.

The capacity of lawyer self-regulation to adequately police lawyers’ conduct, problematic in principle and practice in general becomes still more worrisome at the level of high-stakes global finance and illicit electronic monetary transactions across jurisdictions. Further, if Salyzyn is correct that lawyer self-regulation is not necessarily or obviously in the public interest, it becomes clear that legal regulators are not well positioned to address money laundering if the complicity in it is profitable for the profession as a whole. The FATF Report provides compelling evidence that Canada’s provincial and territorial self-regulating bodies for lawyers and notaries are neither constituted, equipped, nor resourced appropriately to independently handle the tasks of barring money laundering and countering terrorist financing. While the FATF is relatively satisfied that Canada’s public regulatory mechanisms for dealing with money laundering other than in the context of law firms are satisfactory, to the contrary, it finds the measures taken by the legal profession inadequate. Indeed, “in light of the risks,” of leaving the task of preventing money laundering through firms to the law societies, the September 2016 FATF Report said, the Supreme Court ruling in *FLSC* “raises serious concerns.”⁸² The FATF’s report contends that subjecting all financial institutions and non-financial businesses to anti-money laundering obligations must be a priority for Canada.

VI. ALTERNATIVE REGULATORY OPTIONS: OTHER JURISDICTIONS AND PUBLIC BODIES

Self-regulation was historically the dominant model for governance of the legal profession in Common Law jurisdictions, certainly across the Commonwealth until this century.⁸³ However, this is no longer the case.

⁸¹ Woolley, *supra* note 74 at 46.

⁸² FATF, *supra* note 6.

⁸³ Julia Black, “Critical Reflections on Regulation” (2002) 27 *Austl J Leg Philosophy* 1 at

Several key jurisdictions, including England, the birthplace of the common law tradition itself, now no longer govern their legal professions by means of forms of self-regulation. Further, the model by which lawyers are regulated in the United States is complex and state-based, involving accountability generally to the Supreme Courts of each state jurisdiction.⁸⁴

For example, the legal profession in Scotland, in Australia, as well as that of England and Wales are now publicly regulated by government rather than by lawyers.⁸⁵ Illustratively, under *The Legal Services Act*⁸⁶ [LSA], which received Royal Assent on 30 October 2007, regulation of lawyers is carried out by a public, governmental body in England and Wales. The Solicitors Regulation Authority is the public regulatory body in those jurisdictions.⁸⁷ This new legislative regime effected a significant change in the approach to regulation of lawyers' professional enterprises and their conduct. The LSA enacted a new regulatory regime that departs radically from the traditional approach in which regulators prosecute individual complaints of alleged rule violations. Rather than being driven by complaints and run by lawyers, the LSA functions on the basis of outcomes-focused regulation (OFR), and places clients, and the public, not lawyers, at the centre of the analysis. Involved in OFR is a high level focus on principles and big picture outcomes affecting the provision of legal services. Certainly, Slayton⁸⁸ has argued strongly for similar changes in Canada.

Legislation in Australia and Scotland also now provides for governmental participation in the regulation of lawyers. For instance, in New South Wales, the *Legal Profession Act*⁸⁹ provides for this. In Scotland,

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⁸⁴ Thomas D Morgan & Ronald D Rotunda, *Problems and Materials on Professional Responsibility* (Westbury, NY: Foundation Press, 1995) at 35.

⁸⁵ For discussion, see e.g. Terry, Mark & Gordon, *supra* note 60.

⁸⁶ *The Legal Services Act, 2007* c 29, online: <<http://www.legislation.gov.uk/ukpga/2007/29/contents>>.

⁸⁷ Susan Fortney, "Legal Services Board, Market Impacts of the Legal Services Act of 2007 – Baseline Report (Final) 2012" (15 February 2013), online: <<http://research.legalservicesboard.org.uk/wp-content/media/Impacts-of-the-LSA-2012-Final-baseline-report.pdf>>

⁸⁸ Slayton, *supra* note 75 at 317.

⁸⁹ *Legal Profession Act, 2004, No 112*, online: <<http://www.legislation.nsw.gov.au/#/view/act/2004/112>>.

co-regulation came into effect through the *Legal Services (Scotland) Act*.⁹⁰ The public regulation, or co-regulation, of lawyers in jurisdictions outside of Canada has not eradicated the existence of solicitor-client privilege (sometimes called lawyer professional privilege, as in Scotland), although in jurisdictions apart from Canada, the privilege is understood to be “subsumed in the common law”⁹¹ and has not taken on the constitutional status it has in Canada.

It is not the intention of this article to suggest that public regulation of lawyers would be a panacea. All of the systems described, where co-regulation or public regulation have come into effect, are not without flaws. Indeed, the apparent low level of interest on the part of the Canadian government in prosecuting the wealthy elite for white collar crime⁹² generally calls into question how effective a public regulator might be at enforcing anti-money laundering provisions against lawyers. The ambit of this article is simply to suggest that the particular, and pressing, problem of money laundering presents a context rendering it appropriate to trouble the assumption that lawyer self-regulation is necessarily required in order for the legal profession to flourish, and to highlight how Canada’s regime for lawyer self-regulation is increasingly out of step with global trends.

VII. CONCLUSION: REACHING THE TIPPING POINT

As many have noted, with the globalization of the world economy, there is a high level of interdependence between nations in the international monetary system. At the same time, the legal profession is in flux. Globalization presents the growing challenge of interjurisdictional connectedness, and with it, an unprecedented and colossal flow of money between borders. This flow of monies between jurisdictions carries the potential of calamitous consequences to the tax bases and social infrastructures of domestic jurisdictions. At the same time, western

⁹⁰ *Legal Services (Scotland) Act, 2010*, asp 16, online: <http://www.legislation.gov.uk/asp/2010/16/pdfs/asp_20100016_en.pdf>.

⁹¹ See *Narden Services Ltd v Inverness Retail and Business Park Ltd & Ors*, 2008 SC 335.

⁹² Some have contended inattention to crimes committed by the wealthy and powerful is illustrated by the failure of Canada to establish a national Securities regulator. For a background discussion, see e.g. Canada, Department of Finance, “Government of Canada Moves to Protect Canadian Investors” (26 May 2010), online: <<https://www.fin.gc.ca/n10/10-051-eng.asp>>.

countries are witnessing a period of unfolding radical change to the way law is practiced in multinational mega-firms, and with consultants doing off-shored legal work. Alongside the changes to the profession, there has been change to regulation of lawyers in many jurisdictions. Many factors are contributing to this, and so too to changes to the ways in which lawyers are regulated.⁹³ Similarly, many concerns have been raised about the capacity of lawyers to self-regulate in Canada.⁹⁴ In response, jurisdictions around the globe are moving away from lawyer self-regulation to alternative regulatory models, and in some jurisdictions, the notion of solicitor-client privilege has been eroded.⁹⁵ However, except for the province of Quebec, Canada has not moved away from lawyer self-regulation. To the contrary, lawyer self-regulation is becoming increasingly constitutionally entrenched.

This article has argued that the decision of the majority of the Supreme Court of Canada in *FLSC* is deeply problematic because the balancing undertaken within it under s. 1 does not expressly consider either the global scope of the public harms effected by money laundering or the existential threat money laundering poses to the international monetary system. By failing to engage with the urgency and calamitous nature of this context in a s. 1 analysis, the majority decision in *FLSC* does not adequately consider the balance the mischief sought to be remedied by the impugned regulatory scheme and the oversight of lawyers it entailed as against the capacity of self-regulating bodies overseeing the legal profession to do so appropriately. While the Supreme Court applied the correct legal test, it did so without considering the full range of policy issues at stake. Now, with the FATF Report available, government should not hesitate to move forward to regulate money laundering by providing regulatory oversight of, and support for, the work of law societies in ensuring money laundering facilitated by lawyers does not take place.

The deference to lawyers' rights in *FLSC* to a point of declining to definitively refute a contention that lawyers are "above the law"⁹⁶ is part of a larger context of exceptionalism and acceptance of dominant

⁹³ Black, *supra* note 83.

⁹⁴ Slayton, *supra* note 75.

⁹⁵ In the EU, for example, corporate counsel do not enjoy solicitor-client privilege: *Akzo Nobel Chemicals Ltd and Akros Chemicals Ltd v European Commission*, [2010] EUECJ C-550/07.

⁹⁶ *FLSC*, *supra* note 1 at para 78.

understandings that self-regulation by lawyers is a public good. In a global context where most jurisdictions have stepped away from lawyer self-regulation, Canada's increasingly entrenched self-regulation model for lawyers and notaries is out of step with common law trends. This dissonance is rendered particularly knotty in light of the watershed data breaches in the Panama Papers and Paradise Papers. Evident concerns about lawyer complicity in money laundering, and the global magnitude of the threat money laundering poses to the stability of the international monetary system, signal the opportune moment at which a tipping point has been reached. Either lawyer self-regulation in Canada needs to be resourced and supported in a different way through public funds, or Canada's regime for lawyer self-regulation should give way to a new model that involves government oversight more in accordance with those now prevalent across common law jurisdictions. Members of the public should be concerned, and government should be concerned on their behalf as self-regulating law societies have neither the capacity, nor resources, nor constitution necessary to adequately ensure that lawyers are not participating in money laundering.

It is further problematic to assume that the Benchers (other terms) of law societies, as duly elected members of the Bar in the relevant jurisdiction, selected by their peers out of a wide range of practice areas, really have the required expertise to deal with money laundering. As Woolley has suggested, reform to the lawyer self-regulatory system could be effected by involving government and the public.⁹⁷ An alternative possibility might be to infuse law societies with public funds to supplement their resources, allocating large sums of public monies to be administered privately would no doubt be less publicly palatable than government taking control of lawyer regulation. Given the scope and scale of this problem, it seems that now should be the time to start contemplating how a public regulatory regime for lawyers might be implemented in Canada. As discussed, the Common Law jurisdictions of England and Wales, Scotland, and Australia have already changed their regulatory model for lawyers, and as such provide useful examples of how this might be successfully accomplished. It is worrisome to consider, that, if the legal profession, and government, together fails to regulate money laundering, the profession and even the public become complicit in money laundering and corporate crime.

⁹⁷ Woolley, *supra* note 74.

This article has examined current issues relating to concerns about participation by lawyers in money laundering and what the FATF Report identifies as troubling gaps in the regulatory regime intended to fill it. It has contended that law societies across Canada, while they may have subjectively benevolent intentions and legal expertise, lack the necessary resources and logistical capacity to curtail money laundering, and are in any case constituted in a way that is inherently problematic as protectionist of lawyers. Governmental oversight is necessary for regulatory work towards curtailing money laundering. Concern about lawyers' roles in the multi-billion dollar global business of money laundering should constitute the point that tips Canada away from uncritical acceptance of unsupportable assumptions about the necessity of lawyer self-regulation into an alternative, publicly-led, regulatory regime for lawyers.