

SILENCE IS GOLDEN - OR IS IT? FINTRAC AND THE SUSPICIOUS TRANSACTION REPORTING REQUIREMENTS FOR LAWYERS

Paul Waller* and Katrin Roth von Szepesbela**

I. THE WORLD AND TERRORISM

SINCE THE TWO TOWERS OF THE WORLD TRADE Center in New York collapsed violently on September 11, 2001, we hear, read, and perhaps even speak the word "war" on a daily basis. The President of the United States, Mr. George W. Bush, used it to describe the terrorist attacks on the United States as "acts of war." When the shock and disbelief were replaced by anger and plans for retaliation, we were told that the world is now at "war with terrorism."

Who Is The Enemy?

Who is it that the world is currently at war with? Until recently, Hollywood blockbusters focused on aliens and extra-terrestrials trying to take over and colonize the earth.¹ In reality, the world's enemies are more likely to hail from our own planet, although, in many cases they are as unidentifiable as an extra-terrestrial species. Today, organized crime and terrorism are the declared enemies of the world. However, underlying organized crime and terrorism is the role that lawyers have played and continue to play in the illegal laundering of money. This issue has received global attention and is at the point where restoring public confidence in the legal system may only be possible if lawyers utilize their privileged position to assist in the fight against these activities that threaten our countries, our societies, and indeed our world.

II. "DIRTY MONEY" - THE FUEL OF ORGANIZED CRIME AND TERRORISM

Money really does make the world go round, even when obtained through illegal means. Money is the fuel on which the machines of organ-

* LL.B. (UM) 2004

** Diploma in Banking and Finance (OSZ Banken und Versicherungen, Berlin, Germany) 1994, LL.B. (UM) 2004

¹ For example: *Signs, Independence Day.*

ized crime, terrorism and war are run. The generation of profits is the goal of most, if not all, criminal activity. Those profits are processed to disguise their illegal origin in order to ensure that the criminal actors and terrorists can enjoy them without jeopardizing their illegal source. The process of legitimizing the illegal proceeds of crime is called money laundering. Money laundering has been described as “the Achilles heel of criminal activity.”² The criminal actors and terrorists must find a way to control the sometimes substantial amounts of profit without risking detection of their activities. This becomes increasingly difficult given that the amounts of money generated and laundered is suspected to be between two and five percent of the world’s gross domestic product.³ The U.S. Department of Treasury has suggested that US \$600 billion represents a conservative estimate of the amount of money laundered each year.⁴

The money laundering process is continuous, with new dirty money constantly being introduced into the financial system.⁵ The vast majority of criminals would not be in the “business” of crime if it were not for the

² “Basic Facts about Money Laundering” Financial Action Task Force of Money Laundering, (October, 2002), online: <http://www.fatf-gafi.org/MLaundering_en.htm> (date accessed: February 2003).

³ “The International Monetary Fund estimates that the amount of money laundering occurring on a yearly basis could range between 2 and 5 percent of the world’s gross domestic product—or somewhere between \$600 billion and \$1.5 trillion. Estimates come from a variety of sources based upon both macroeconomic theories and on microeconomic approaches. The U.S. Department of the Treasury has suggested that \$600 billion represents a conservative estimate of the amount of money laundered each year, and some U.S. law makers believe that, not only does the amount lie somewhere between \$500 billion and \$1 trillion, but that half is being laundered through U.S. banks. Due to the clandestine nature of laundering activity, governments and concerned organizations cannot accurately quantify the amount of money laundered each year. Some estimates suggest that the amount of money laundered each year is approximately \$2.8 trillion, an amount more than four times greater than the figure generally accepted.” Source: “Money Laundering”, *FBI Law Enforcement Bulletin* v.70 no.5 (May 2001): p.1-9.

Online: <<http://www.lib.msu.edu/harris23/crimjust/moneylau.htm>> See also, United Nations Office on Drug and Crime, “Global Programme Against Money Laundering”. Online: <http://www.unodc.org/unodc/en/money_laundering.html>.

⁴ William R. Schroeder, “Money Laundering” (May 2001), Vol. 70 Num. 5 *FBI Law Enforcement Bulletin*, online: <<http://www.fbi.gov/publications/leb/2001/may01leb.pdf>> (date accessed: February 2003).

⁵ “Guideline 1: Backgrounder” Financial Transactions and Reports Analysis Centre of Canada [hereinafter FINTRAC], online: <http://www.fintrac.gc.ca/publications/guide/archive/21-11-2002/1/1_e.asp> (date accessed: February 2003).

tremendous profits to be made. There is a direct relationship between the profitability of most types of crime and their prevalence. A major objective of the battle against crime in Canada and elsewhere is therefore, to deprive criminals of these illicit gains. Only by effectively laundering illegal assets/funds can criminals use them to benefit from their crimes.⁶

When we think of money laundering, we may envision criminals with old suitcases full of dollar bills trying to transport these funds personally out of a country. Nothing could be further from the truth. Today, money laundering schemes are large-scale operations, often involving complex and sophisticated corporate structures to legitimize these illegal gains. In order to keep the illegal gains undetected, criminal actors must seek the assistance of professionals, like accountants and lawyers, to establish suitable business structures, unless of course, they are professionals themselves.

III. SOURCES OF "CLEAN" MONEY

The primary concern of criminal actors is the concealment of their criminal activities so that they can continue to enjoy the profits derived from its operation. Dirty money can serve as a paper trail that leads state agents directly to its source. In order to avoid tracing, the money must be 'clean' before it can be safely used.

A simple example may help illustrate the paper trail function of money: If bank robbers obtain numbered bills from the robbed bank, and those bills are registered, then the robbers will trigger the trail-function as soon as they begin to use the money to purchase goods or services. Once notified by members of the public, the police are able to trace the original source of the money. The information is obtained by various means, including: interviewing witnesses such as retail sales personnel; by reviewing security camera tapes (for pictures of a person trying to circulate registered bills); and by taking fingerprints at the retail outlet. Such methods will assist the police in identifying and capturing the criminal actors.⁷

Therefore, in order to avoid detection, getting the money clean is the ultimate goal. To do so, money laundering is usually comprised of three stages⁸:

First, there is the initial or placement stage. At this stage the criminal actor infuses the proceeds of crime into the financial system. This could be done by way of depositing small amounts of cash in several accounts,

⁶ *Ibid.*

⁷ See: RCMP Guidelines: *A Preventive Guide for Small Business & Currency Exchanges in Canada* Online: <http://www.rcmp.ca/poc/laundry_e.htm#need>.

⁸ United Nations Office on Drugs and Crime: "The Money Laundering Cycle" Online: <http://www.unodc.org/unodc/en/money_laundering_cycle.html>.

or by way of purchasing monetary instruments, such as cheques or money orders.

The second stage is the layering stage. At this stage the criminal actor begins to give the funds a legitimate appearance by converting and/or moving the funds. For example, the funds could be invested through certain investment vehicles. The funds may also be sent electronically to accounts held in other jurisdictions.

The third stage is the integration stage. At this stage the proceeds of crime re-enter the legitimate economy. The criminal actor often begins to benefit from laundered funds at this stage by, for example, purchasing luxury goods, or investing in real estate or business ventures.

If the proceeds of crime passed all three stages without being detected, the illegal origin of the funds has been successfully concealed. To prevent this legitimization of profits from criminal activities, the three-staged chain must be broken. If the criminal actor can be prevented from enjoying the illicit fruits of their labour, then, it is reasoned, those criminal activities will be curbed and may even become extinct.

IV. THE INTERNATIONAL COMMUNITY'S BATTLE AGAINST ORGANIZED CRIME AND TERRORISM

In order to effectively fight organized crime and terrorism, we must aim to impede and block the criminal actors from their financial resources, which enable them to commit further crimes. Money laundering is inextricably linked to the underlying criminal activity that generated it,⁹ and makes it possible for criminal activity to continue and grow. Preventing the criminal actors from laundering proceeds of crime will discourage the criminal actors from continuing with the criminal activity. Information about money launderers' activities help not only to track down the criminal actors and bring them to justice, but also allows for their now "clean" assets to be seized and, ultimately reimburse taxpayers for costs incurred during investigations of the crimes committed. Money laundering operations, especially large-scale operations, are an international phenomenon of enormous reach,¹⁰ and a problem of global concern.¹¹

⁹ *Supra* note 2.

¹⁰ *The National Money Laundering Strategy for 2000* U.S. Department of the Treasury and U.S. Department of Justice, online: <<http://www.treas.gov/press/releases/docs/ml2000.pdf>> (date accessed: February 2003).

¹¹ "IMF Executive Board Discusses Money Laundering" (29 April 2001) *International Monetary Fund, Public Information Notice No. 01/41*, online: <<http://www.imf.org/external/np/sec/pn/2001/pn0141.htm>> (date accessed: February 2003).

A) Birth of the Financial Action Task Force

The problem of money laundering is of such universal proportions that virtually every country in the world has introduced measures to combat this illegal activity.¹² The introduction of new steps to close off the conventional means of access into the financial system for dirty money has resulted in the criminal element seeking out and using new 'gateways' by which to cleanse their bounty. In 1989, the Financial Action Task Force (FATF) was created at the G-7 Summit held in Paris. In 1990, this international organization, then made up of 28 member countries, issued 40 Recommendations to combat money laundering. These measures not only narrowed and closed off the traditional avenues of money laundering and applied pressure on others to be more vigilant of this problem, but also created a shift by money launderers to seek new and more secretive ways of 'cleansing' their ill-gotten gains. By 1998, the use of professionals, including lawyers, to facilitate money laundering was beginning to be recognized not only as a serious problem, but one that the international community needed to address.¹³ It was not until 1999 that the international law-keeping community explicitly recognized this shift and acknowledged that professionals, including lawyers, were being used more and more in intricate laundering schemes. The 1998/99 Annual Report by the FATF notes:

The experts have observed a growing tendency for professional service providers, such as accountants, **solicitors** [emphasis added], company formation agents and other similar professionals, to be associated with more complex laundering operations.¹⁴

The FATF describes its role as follows: The FATF is a multi-disciplinary body that brings together the policy-making power of legal, financial and law enforcement experts from its members. The FATF monitors its members' progress in implementing anti-money laundering measures; reviews and reports on laundering trends, techniques and counter-

¹² See Report by Financial Action Task Force on Money Laundering (FATF) dated February 2004. Online: <http://www1.oecd.org/fatf/pdf/PR-20040227_en.PDF>.

¹³ The 1998 Report of the UN Office for Drug Control and Crime Prevention on financial havens, banking secrecy and money laundering refers to the frequent misuse of lawyers and accountants to help hide criminal funds.

¹⁴ Financial Action Task Force On Money Laundering Annual Report 1998-1999, online: <http://www.fatf-gafi.org/pdf/AR1999_en.pdf> at 31, (date accessed: February 2003).

measures; and promotes the adoption and implementation of FATF anti-money laundering standards globally.¹⁵

The Gatekeepers Initiative involved the inclusion of those 'at the doors of entry' into the financial system, and was first dealt with by governments at the Ministerial Conference of the G-8 Countries on Combating Transnational Organized Crime, held October, 1999, in Moscow. The Initiative seeks to define the roles and responsibilities of lawyers and others in combating money laundering activities. In a document known as the Moscow Communiqué, the G-8 Members agreed to bring their respective anti-money laundering regimes into closer alignment and "to consider putting certain responsibilities, as appropriate, on those professionals, such as lawyers, accountants, company formation agents, auditors, and other financial intermediaries who can either block or facilitate the entry of organized crime money into the financial system."¹⁶

There is also considerable international pressure coming from the United States after the terrorist attacks on the World Trade Center. The American position was made clear shortly after the September 11 attacks:

"Americans are asking: How will we fight and win this war? We will direct every resource at our command—every means of diplomacy, every tool of intelligence, every instrument of law enforcement, **every financial influence** [emphasis added], and every necessary weapon of war—to the disruption and to the defeat of the global terror network."

President George W. Bush, Address to the Joint Session of Congress and the Nation, September 20, 2001.¹⁷

The September 11th attacks led the world's international organizations to take immediate action against terrorist financing. On September 28, 2001, the United Nations Security Council (UNSC) adopted Resolution 1373 that reaffirmed earlier UN counter-terrorism resolutions 1269 and 1368, and requires states to take prescribed actions to combat terrorism

¹⁵ *Supra* note 2.

¹⁶ Communiqué for the Ministerial Conference of the G-8 Countries on Combating Transnational Organized Crime (Moscow, 19-20 October 1999), online: <<http://www.library.utoronto.ca/g7/adhoc/crime99.htm>> (date accessed: February 2003).

¹⁷ Kevin L. Shepherd, "In the Wake of September 11: USA PATRIOT ACT and the Gatekeeper Initiative: Surprising Implications for Transactional Lawyers" (September/October 2002) *Probate and Property*.

and the financing of terrorism.¹⁸ The attacks also provided the impetus for individual countries to enact new counter-terrorism legislation or strengthen existing statutes. Not surprisingly, the United States was leading the way. The U.S. Congress passed the *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001*¹⁹ on October 26, 2001. As the title of the legislation suggests, the goal is to disrupt the means that provide support to terrorist activities. The U.S. government recognized that 'the broad new authorities' provided in the *USA PATRIOT Act* will have significant influence on the relationships between U.S. financial institutions and their individual and institutional customers.²⁰ This is indicative of the United States government's desire to close off any means of access to the financial markets to individuals or corporations for the purposes of financing terrorist activities. International anti-money laundering organizations also refocused much of their attention on how to prevent the flow of funds from falling into the hands of terrorists.

B) Revision of the FATF 40 Recommendations

The position in favour of including lawyers in the requirement of reporting suspected money laundering activities by their clients gained further support from the FATF in 2001 after the World Trade Center attacks. An Extraordinary Plenary on the Financing of Terrorism was held in Washington, D.C. on October, 2001. It was agreed that all countries should adopt and implement new international standards to assist with the global struggle to combat terrorism called the "Special Recommendations on Terrorist Financing."²¹ A primary goal of the proposal was to "more effectively deny terrorists and their supporters' access to

¹⁸ United Nations Security Council Resolution 1373 (adopted 28 September 2001). Though not mentioning the role lawyers can play to facilitate the financing of terrorism, the resolution recognizes *the need for States to complement international cooperation by taking additional measures to prevent and suppress, in their territories through all lawful means, the financing and preparation of any acts of terrorism*, online: <<http://ods-dds-ny.un.org/doc/UNDOC/GEN/N01/557/43/PDF/N0155743.pdf?OpenElement>> (date accessed: February 2003).

¹⁹ *USA PATRIOT Act*, Pub. L. No. 107-56 (12 October 2001).

²⁰ "Money Laundering and Financial Crimes" United States Department of State, *International Narcotics Control Strategy Report* (2001), online: <<http://www.state.gov/g/inl/rls/nrcrpt/2001/rpt/8487.htm>> (date accessed: March 2003).

²¹ "Special Recommendations on Terrorist Financing" FATF, online: <http://www1.oecd.org/fatf/SrecaTF_en.htm> (date accessed: February 2003).

the international financial system.”²² The head note to the report read:

Recognising the vital importance of taking action to combat the financing of terrorism, the FATF has agreed these Recommendations, which, when combined with the FATF Forty Recommendations on money laundering, set out the basic framework to **detect, prevent and suppress the financing of terrorism and terrorist acts** [emphasis added].²³

During the review of the FATF 40 Recommendations, FATF created three working groups to address those areas considered to be the most controversial, including Working Group C (Gatekeepers). This working group addressed questions relating to the application of money laundering requirements on non-financial institutions (including lawyers, accountants, notaries, etc).²⁴ On May 30, 2002, the FATF issued the Review of the Forty Recommendations Consultation Paper.²⁵ It was this report that provided for the current momentum in member countries to legislatively curtail the involvement of lawyers in money laundering activities. The chief reasons to specify lawyers as important in the fight against money laundering are:²⁶

- It has been commonly observed that criminals use lawyers' client accounts for the placement and layering of funds. In many countries, this offers the advantage to the launderer of the protection that is afforded by legal professional privilege or professional secrecy.
- In a number of countries, lawyers provide a service as a “gatekeeper”, that is, through their specialized expertise they are able to create the corporate vehicles, trusts, and other legal arrangements that facilitate money laundering.
- Lawyers offer the financial advice that is a required element of complex money laundering schemes.
- The use of lawyers together with the corporate entities can provide the criminal with a veneer of respectability for the money laundering operations.

²² *Supra* note 13.

²³ *Supra* note 17.

²⁴ *Supra* note 13.

²⁵ “Review of the Forty Recommendations Consultation Paper” FATF, online: <http://www.fatf-gafi.org/pdf/Review40_en.pdf> (date accessed: January 2003).

²⁶ *Ibid.* at para. 272.

The FATF also suggests that there has been an increase in the use of services provided by lawyers as the anti-money laundering controls in the financial sector have become effectively implemented.²⁷ The recognition by the FATF that lawyers, when providing financial services to clients, can play a vital role in the fight against money laundering led to reporting requirements of suspicious activities in some countries.

C) The FATF and Legal Privilege

The FATF recognizes that there could be concerns relating to the issue of solicitor-client privilege and that the application of the requirement to report suspicious transactions will need to be closely examined. Although professional secrecy or privilege is a principle that exists in all FATF member states, the precise boundaries of each vary depending on the structure of the relevant legal system. The stated objective is "to make it more difficult for actual or potential money launderers to attempt to misuse the services of the lawyer, while still taking into account fundamental rights."²⁸ In the end, the FATF expects member countries to include lawyers within that framework, and provides three options for their inclusion. They are as follows:

Option 1 - Lawyers and independent legal professionals in all their activities.

Option 2 - Lawyers and independent legal professionals, but only where they are acting as financial intermediaries on behalf of or for the benefit of the client.

Option 3 - Lawyers and independent legal professionals where they are involved in the planning or execution of financial, property, corporate or fiduciary business for the client.²⁹

The FATF also stated that the general principle should be that lawyers be obliged to comply with the requirement to make reports of suspicious activity. In the end however, it is clear that the FATF can only make recommendations and it is up to each country to come to its own conclusion regarding the issue of solicitor-client privilege. According to the FATF, it would be for "each jurisdiction to determine the matters that would fall under legal professional privilege or professional secrecy relating to lawyers, notaries or other professionals, but the rule of secrecy or privilege may not apply (depending on the laws of the country concerned) if the

²⁷ *Ibid.* at para. 273.

²⁸ *Ibid.* at para. 274.

²⁹ *Ibid.* at para. 288.

lawyer or notary has knowledge or a strong suspicion (in some countries, this extends to 'suspicion') that their services are being abused for money laundering or criminal purposes."³⁰

The FATF has completed its review of the Forty Recommendations. The revised Forty Recommendations (2003) can be found on the FATF website.³¹

V. ROLE OF LEGAL COUNSEL: THE GATEKEEPERS

Most countries holding a membership in the FATF agree that lawyers have become common elements to complex money laundering schemes. Lawyers often play key roles in helping money laundering schemes to flourish.³² As the schemes become increasingly complex, criminal actors turn to the expertise of legal professionals in their effort to launder the proceeds of their crimes. The FATF describes some functions performed by lawyers as a gateway through which criminal actors must pass if they want to convert or move the money in a way that conceals its true origin. Thus, says the FATF, legal professionals serve as a sort of "gatekeeper," since they knowingly or even unknowingly provide the criminal actors with the tools to legitimize the illegal gains and thereby facilitate their access to laundered money.

Professional services that help criminal actors gain access to a variety of economic systems include: legal advice, advocacy, wills, property transactions, investment services, trusts, company formation and administration, as well as introduction to banks. Lawyers hold a special status, which can be exploited by criminal actors in their attempts to give the appearance of legitimacy to any suspicious transaction.

To illustrate the important role of legal counsel, two examples are provided by the FATF:³³

First Example: Lawyer assists in setting up a complex laundering scheme

This case involved 19 individuals in the medical service industry, one being both a lawyer and an accountant. This dossier submitted for prosecution contained 123 violations involving conspiracy, false claims, wire

³⁰ *Ibid.*

³¹ "The Forty Recommendations" FATF, online: <http://www1.oecd.org/fatf/pdf/40RECS-2003_en.pdf>.

³² "Report on Money Laundering Typologies 2000-2001" (February 2001) Financial Action Task Force on Money Laundering, online <http://www.oecd.org/fatf/pdf/TY2001_en.pdf> (date accessed: February 2003).

³³ *Ibid.*

fraud and money laundering. The false claims involved fictitious patient claims and claims for services which were not provided. The two primary subjects employed the lawyer's services to set up four interrelated shell corporations as the controlling entities. In addition, eight nominee corporations were created to generate fictitious health care service records reflecting in-home therapy and nursing care. Health care providers including therapists, registered nurses and physicians operated the nominee corporations. To keep the health care billing, tax return filings and bank account records synchronized, the two main subjects relied on the lawyer/accountant defendant.

In excess of USD 4 million was laundered through bank accounts in cities of the north and south-east of the country and through suspected offshore accounts. Numerous accounts were created at four or five separate banks for purposes of amassing and moving these funds. Cashier's cheques often were purchased and even negotiated through the lawyer/accountant's trust account for concealment of property acquisition. This defendant was sentenced to two years in exchange for his co-operation.

Both primary defendants were ordered to forfeit real and personal property, including the USD 4 million and purchased property. They received five and two year prison sentences respectively. Two additional related case defendants (one being an elected official), laundered an additional USD 2 million and were charged with 33 violations of the law in a separate case. They were ordered to forfeit USD 95,000 in currency. The former elected official received a five-year prison sentence.

Second Example: Failure to disclose suspicious activity by legal professional

A firm of lawyers was asked by a client to assist in the arrangement of a substantial loan to a third party. The solicitor tasked with assisting the client was instructed to request some form of guarantee from the third party. The third party initially sent an insurance bond, which turned out on inspection to be worthless. The lawyer requested another guarantee and received share certificates in a foreign company; however, these proved to have been stolen. The lawyer made a third request and received some prime bank guarantees with a value far in excess of the initial loan. The lawyer was then asked by the first client to assist in the sale of the prime bank guarantees by certifying as to their authenticity, which he proceeded to do using letterhead stationery from the law firm. Despite the suspicious circumstances, the lawyer made no disclosure to law enforcement and, at the time of writing, left his firm potentially exposed due to his willingness to "certify" documents often known to be used in international frauds.

VI. REQUIREMENTS OF LAWYERS IN FOREIGN JURISDICTIONS

To illustrate the different reporting regimes either currently in place or being contemplated in major economic centres, the following examples of the European Union, Germany, the United Kingdom, and the United States are provided.

A) The European Union

The European Union has been a leader when it comes to imposing the reporting of suspicious transactions. In 1991 the European Commission enacted Council Directive 91/308/EEC³⁴ on prevention of the use of the financial system for the purpose of money laundering. In 1999, a proposal to update the 1991 Directive was introduced. This proposal would extend the fight against laundering beyond drug offences to include the proceeds of all organized crime and fraud damaging the European Communities' financial interests. It was also at this stage that the EU recognized the seriousness of permitting a loophole for professionals to exist, and extended "the coverage of the current Directive (previously limited to the financial sector) to a series of non-financial activities and professions which are vulnerable to misuse by money launderers. Requirements, as regards to client identification, record keeping and reporting of suspicious transactions, would therefore be extended to external accountants and auditors, real estate agents, notaries and lawyers carrying on financial transactions, dealers in precious stones and metals, transporters of funds and casinos."³⁵

The relevant sections adopted on December 4, 2001 of the Directive³⁶ are as follows:

³⁴ "Council Directive 91/308/EEC of 10 June 1991 on prevention of the use of the financial system for the purpose of money laundering" The Council Of The European Communities, online: <http://www.uic.it/en/antiriciclaggio-en/altro_en/UE_1991_06_10.htm > (date accessed: January 2003).

³⁵ "Money laundering: Commission proposes to extend scope of EU Directive", online: <http://europa.eu.int/comm/internal_market/en/finances/general/99-498.htm> (date accessed: February 2003).

³⁶ Directive 2001/97/EC of the European Parliament amending Council Directive 91/308/EEC (28 December 2001), online: <<http://www.imolin.org/EUdir01e.htm>> (date accessed: February 2003).

(15) - Extends Reporting Requirement to Lawyers

The obligations of the Directive concerning customer identification, record keeping and the reporting of suspicious transactions should be extended to a limited number of activities and professionals which have been shown to be vulnerable to money laundering.

(16) - When Subject to the Directive

Notaries and independent legal professionals, as defined by the Member States, should be made subject to the provisions of the Directive when participating in financial or corporate transactions, including providing tax advice, where there is the greatest risk of the services of those legal professionals being misused for the purpose of laundering the proceeds of criminal activity.

(17) - Exemption From Reporting Due to Privilege

However, where independent members of professions providing legal advice which are legally recognized and controlled, such as lawyers, are ascertaining the legal position of a client or representing a client in legal proceedings, it would not be appropriate under the Directive to put these legal professionals in respect of these activities under an obligation to report suspicions of money laundering. There must be exemptions from any obligation to report information obtained either before, during or after judicial proceedings, or in the course of ascertaining the legal position for a client. Thus, **legal advice remains subject to the obligation of professional secrecy unless the legal counselor is taking part in money laundering activities, the legal advice is provided for money laundering purposes, or the lawyer knows that the client is seeking legal advice for money laundering purposes** [emphasis added].

(20) - Allows For Reporting To Self-Regulating Bodies

In the case of notaries and independent legal professionals, Member States should be allowed, in order to take proper account of these professionals duty of discretion owed to their clients, to nominate the bar association or other self-regulatory bodies for independent professionals as the body to which reports on possible money laundering cases may be addressed by these professionals. The rules governing the treatment of such reports and their possible onward transmission to the authorities responsible for combating money laundering and in general the appropriate forms of

cooperation between the bar associations or professional bodies and these authorities should be determined by the Member States.

Article 2(a) - Activities Covered By This Directive

Member States must ensure that the obligations laid down in this Directive are imposed on the following...legal or natural persons acting in the exercise of their professional activities: notaries and other independent legal professionals, when they participate, whether:

- (a) by assisting in the planning and execution of transactions for their client concerning the:
 - (i) buying and selling of real property or business entities;
 - (ii) managing of client money, securities or other assets;
 - (iii) opening or management of bank, savings or securities accounts;
 - (iv) organization of contributions necessary for the creation, operation or management of companies;
 - (v) creation, operation or management of trusts, companies or similar structures;
 - (vi) or by acting on behalf of and for their client in any financial or real estate transaction;

Though this Directive does place stringent reporting requirements on lawyers when involved in financial dealings, it also leaves much of how this Directive will be implemented up to each of the individual member nations. Each country is able to determine to whom a Suspicious Transaction Report (STR) is to be handed. It can be submitted to the country's Financial Investigating Unit (FIU) - the equivalent of Canada's FINTRAC - or to the Bar Association, Law Society or other self-regulating organization. Central to the scope of this paper is that the EU Directive recognizes that there are situations when solicitor/client privilege will be relevant and applicable to circumstances involving money laundering. EU Members are not required to apply the suspicious transactions reporting obligations to lawyers with regard to information they receive from or obtain on one of their clients, in the course of ascertaining the legal position of their client while defending the client during judicial proceedings, including advice on instituting or avoiding proceedings, whether such information is received or obtained before, during or after such proceedings. Information received and suspicions that arise out of the actual transactional duty carried on by a lawyer on behalf of the client would

result in a reporting requirement.³⁷

EU Members were to implement the Directive by June 30, 2003. Already, the U.K. has legislation in place implementing the Directive. Since the adoption of the initiative, Denmark, Germany, Netherlands, Austria, Hungary, Slovenia, Belgium, Finland, Ireland, Spain, France, Italy, Latvia, Lithuania and Slovakia have enacted legislation to implement the Directive.³⁸

B) Germany

On June 21, 2002, Germany passed a broad new laundering law that creates its first Financial Intelligence Unit (FIU) and brings "gatekeeper" functions applicable to lawyers and other professionals under the scope of the legislation. An important element of Germany's new "Law for Improvement of the Fight Against Money Laundering"³⁹ is that accountants, real estate brokers, lawyers and notaries are added to the list of institutions that must undertake certain internal security measures to deter money laundering. Lawyers and notaries are required to do so only when they regularly engage in certain activities that do not involve representing persons in criminal proceedings. This policy is also consistent with the EU Directive. The internal security measures include appointing a person responsible for anti-money laundering activities, including internal policies and controls, and development of "appropriate business and client security systems" to prevent laundering and terrorist financing. The law imposes a "know your customer" approach, whereby suspicious activity translates into reporting duties on attorneys and notaries when they plan or execute transactions that involve:

- Buying and selling of real estate or businesses
- Managing money, securities or other assets for their customers
- Opening or administering bank or securities accounts
- Incorporating or administering trusts

With the implementation of this law, Germany became one of the first

³⁷ Bruce Zagaris, "The Gatekeepers Initiative: An Emerging Challenge For Professional Advisors of International Business and Tax Matters." (27-29 October 2002) *ABA/ABA Money Laundering Enforcement Seminar*.

³⁸ *Ibid.* <http://www.ccbe.org/doc/En/mld_implementation.pdf>.; See also *EU says six members dragging feet on anti-money laundering law*, Feb. 9, 2004: Online: <<http://www.eubusiness.com/afp/040209160946.rpjpgm5x5>>.

³⁹ (BGBl. I S. 1770).

countries in the European Union to implement the EU Directive.⁴⁰

C) The United Kingdom

The U.K. has been a world leader in making the mandatory reporting requirements for lawyers consistent with the Gatekeepers Initiative. For some time, U.K. law has made it mandatory to report knowledge or suspicion of money laundering that is related to drug trafficking and terrorism.⁴¹ However, a newly enacted U.K. bill⁴² brings the obligation to report suspicions about money laundering transactions beyond the contexts of drug trafficking and terrorism. As noted earlier, lawyers who give legal advice or provide criminal defense will have no reporting obligations, even if they have knowledge or suspicion of money laundering related to drug trafficking or terrorism.⁴³ When the second Directive was under consideration, the Law Society of England and Wales stated their position that though “there are different views internationally on the extent to which lawyers should become involved in measures to combat money laundering, particularly reporting of suspicions,” the “U.K. leads the way in its reporting obligations for lawyers.”⁴⁴

On February 11, 2003, during debate in Parliament, the Financial Secretary made it clear that an expanded Gatekeepers Initiative would be the law in her country:

We are currently consulting on the new money laundering regulations. We have had discussions with the Law Society about the basis on which the U.K. will implement the EU 2nd money laundering directive which extends money laundering obligations to lawyers. The U.K. already has a robust system and requires lawyers to file suspicious transaction reports covering money laundering unless excepted by legal professional privilege. The new directive will, through the proposed money laundering regulations 2003, extend various other obligations such as appointment of a Money Laundering

⁴⁰ Saskia Rietbroek, “Terrorism, EU Directive spawn new laundering law in Germany”, (August 2002) *Money Laundering Alert* at 11.

⁴¹ *Drug Trafficking Act 1994* (c.37) and the *Criminal Justice and Public Order Act 1994* (c.33).

⁴² *Proceeds of Crime Act 2002* (c.29) received Royal Assent on July 24 2002.

⁴³ *Ibid.*

⁴⁴ “Money Laundering Advisory Committee Second Meeting of HM Treasury”, (20 November 2002), online: <<http://www.hm-treasury.gov.uk/mediastore/other-files/milacminutes1202.pdf>> (date accessed: January 2003).

Reporting Officer, customer identification and reporting, to lawyers that will further strengthen the UK system.⁴⁵

The most vocal opposition to the revised second Directive has come from international organizations representing lawyers. The Council of the Bars and Law Societies of the European Union expressed some criticism of the current Directive. In particular, this organization "reminded the institutions that any obligation imposed by law on a lawyer to inform authorities of suspicions only of a client's activities, is a breach of the fundamental rights of citizens to professional secrecy and confidentiality, which in turn is based upon the fair administration of, and access to justice."⁴⁶ The Berlin Bar Association labeled the new German law a "massive intrusion" into clients' privacy rights. The association unsuccessfully sought to block the law arguing that "law enforcement is an issue for the prosecutor."⁴⁷ These protests are likely to fall upon deaf ears as those in Europe opposing the Gatekeepers Initiative face an uphill battle, since compliance with the EU 2nd Directive is compulsory.⁴⁸

D) The United States

Shortly after the terrorist attacks on September 11, Congress enacted the 342-page *USA PATRIOT Act*⁴⁹ to "deter and punish terrorist acts in the United States and around the world [and] to enhance law enforcement investigatory tools." Title III of the Act, known as the *International Money Laundering Abatement and Anti-Terrorist Financing Act of 2001*,⁵⁰ is aimed at combating international money laundering and the financing of terrorist organizations.

⁴⁵ The United Kingdom Parliament, Debates (11 February 2003) (Ruth Kelly, Financial Secretary), online: <<http://www.parliament.the-stationery-office.co.uk/pa/cm200203/cmhansrd/cm030211/text/30211w09.htm>> (date accessed: March 2003).

⁴⁶ "Money laundering: The CCBE is against the extension of reporting obligations to the legal profession." Council of the Bars and Law Societies of the European Union, online: <<http://www.lawscot.org.uk/pdfs/newsletter%20UK%20final.pdf>> (date accessed: March 2003).

⁴⁷ *Supra* note 35.

⁴⁸ "The Gatekeepers Initiative: Professionals as anti-money laundering enforcers: online: <<http://www.aba.com/NR/rdonlyres/2489FAAB-FFAF-49B-8172-79DB89A258F0/33357/2ABanoun.pdf>>.

⁴⁹ *Supra* note 15.

⁵⁰ *International Money Laundering Abatement and Anti-Terrorist Financing Act of 2001* [title III, § 301 *et seq.*, of the *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001*, *supra* note 15].

The *2001 National Money Laundering Strategy*⁵¹ identified the unique role the legal profession plays in that country with regards to stopping the flow of dirty money into the financial system. Together, the Financial Crimes Enforcement Network (FinCen), the Asset Forfeiture and Money Laundering Section, and the Department of Justice Criminal Division, announced the desire to educate legal professional organizations on anti-money laundering efforts. Surprisingly, the approach taken was to only participate in the FATF review of the 40 Recommendations, and as a result, no legislative changes were contemplated.

Quite unbelievably, the country that suffered most directly from the events of September 11, 2001, still has not implemented any meaningful legislation or regulations to address the Gatekeepers Initiative. There are currently no reporting duties on lawyers when they suspect or even have knowledge that their clients are engaging in money laundering. Without such a safeguard, lawyers in the United States will continue to be viewed as attractive vehicles to launder money. Ironically, it is this dirty money that the U.S. government itself has identified as being, in large part, responsible for the World Trade Center attacks. In contrast, the U.S. government's reaction to another major setback -the Enron scandal - came swiftly. Shortly after the attacks of September 11th, 2001, the collapse of Enron was a serious economic blow that shook investors' faith in the markets. It did not take the government long in this instance to react, and in 2002, the *Sarbanes-Oxley Act*⁵² was enacted. Under this statute, lawyers are required to report any violation of securities law, which ultimately sets aside the attorney-client privilege in cases of monetary harm, but when the safety of the public is at stake, the government has been much slower to react.

According to the Department of Justice, aside from ethical requirements, the current obligations of lawyers and accountants in the United States to report suspicious activities with respect to money laundering are rather minimal.⁵³

Surprisingly, the *2002 National Money Laundering Strategy*⁵⁴ does not make any mention of the Gatekeepers Initiative. Moreover, the paper only

⁵¹ *The 2001 National Money Laundering Strategy* U.S. Department of the Treasury and U.S. Department of Justice, online:

<<http://www.usdoj.gov/criminal/afmls/ml2001.pdf>> (date accessed: January 2003).

⁵² *Sarbanes-Oxley Act of 2002*, Pub. L. No. 107-204 (30 July 2002).

⁵³ *Supra* note 45.

⁵⁴ *The 2002 National Money Laundering Strategy* U.S. Department of the Treasury and U.S. Department of Justice, online:

<<http://www.treas.gov/press/releases/docs/monlaund.pdf>> (date accessed: February 2003).

alludes to the FATF 40 Recommendations and states that a response to them should be released in the spring of 2003. The Recommendations were reviewed and updated in 2003⁵⁵ and the likelihood that the U.S. will implement a Gatekeepers Initiative does seem probable. Indicative of this were the comments made by a Department of Justice official on January 30, 2003, after lawyers were indicted on a complex money laundering and tax fraud scheme. He stated:

This indictment focuses upon the "gatekeepers" of money laundering and fraud. Often the only reason criminals can launder money and conceal their elaborate fraud schemes is because they have the knowing or wilfully blind assistance of professionals such as lawyers and accountants. By prosecuting these gatekeepers, the Justice Department is attempting to close doors that are currently open and available to money launderers. *Accountants, lawyers and businessmen or women who consciously avoid knowing what their clients are actually doing or who knowingly assist their clients in laundering money and perpetrating fraud can expect to be charged and prosecuted along with those clients* [emphasis added].⁵⁶

VII. THE IMPORTANCE OF SUSPICIOUS TRANSACTIONS REPORTS

Suspicious or unusual transaction reports have a key function in the overall anti-money laundering programmes of individual FATF members. These types of reports can help establish important precedents, from which assessments about money laundering schemes and operations can be made. Suspicious transaction reports can also effectively contribute to successful outcomes in proceeds of crime investigations.⁵⁷ In fact, the vast majority of investigated or prosecuted money laundering cases within the jurisdictions of FATF members show that they have relied heavily on

⁵⁵ *Supra* note 27.

⁵⁶ Gregory G. Lockhart, United States Attorney for the Southern District of Ohio, "Another Lawyer And A Cayman Island Corporation Charged In Connection With Former National Revenue Corporation Exec's Multi-Million Dollar Fraud And Money Laundering Scheme" (30 January 2003) U.S. Attorney's Office News Release, online: <<http://www.usdoj.gov/>> (date accessed: February 2003).

⁵⁷ FATF-XIII Annual Report (2001-2002), online: <http://www1.oecd.org/fatf/pdf/TY2002_en.pdf> (date accessed: February 2003).

those reports for information when identifying trends, methods, and patterns of money laundering operations. Often, the reports have not only assisted in investigations, but were also a direct source of an investigation or prosecution.

The FATF found that any investigation or prosecution for the money laundering offence occurs only in conjunction with an investigation of the main offence. Therefore, the suspicious transaction reports are not only crucial to the detection and prosecution of money laundering offences, but also essential to the solving of the underlying crimes. Given the importance of suspicious transaction reports, the FATF expressed concerns about the current exclusion of non-financial professionals, such as lawyers, from the reporting requirements in some FATF member jurisdictions. The FATF stressed the urgent need to have the reporting requirements extend to lawyers due to their significant gatekeeper function.⁵⁸ The following is an example for the purposes of illustration supplied by the FATF:

Example: Lawyer fails to file STR

“L” was a solicitor practising in an FATF jurisdiction. A client indicated to “L” that he wanted to deposit a sum of money into his trust account. This was agreed to and the sum of USD 15,000 taken to his office, counted, receipted and subsequently deposited in his trust account. A short time later this process was repeated with a further USD 184,000 deposited. A week later the process was repeated but, on this occasion, the sum was nearly USD 37,000. The following day the total amount of USD 67,000 was disbursed through a mortgage payment by direct credit to a bank and a further payment of USD 59,000 direct payment to the client’s estranged wife.

The bank that had received the initial three deposits made suspicious transaction reports to the FIU, based on a concern over the amount and that this was largely made up of a single denomination of banknotes. Representatives from the national bar association subsequently spoke to “L” concerning the deposits. “L” expressed the view that it was the responsibility of the financial institution to submit STRs to the FIU under the anti-money laundering law and that he was therefore not required to do so. After his meetings with the bar association investigators, “L” reported the transactions to the FIU.

⁵⁸ In March 2004 a study of RCMP cases revealed that in 49.7% of the cases, “lawyers” was the profession that came into contact with the proceeds of crime detected. “Money Laundering in Canada: An Analysis of RCMP cases,” Online: <<http://www.yorku.ca/nathanson>> by Stephen Schneider.

Law enforcement investigators later searched "L's" office as part of a money laundering investigation tied to drug trafficking offences allegedly carried out by his client. "L" was later charged under anti-money laundering legislation with failing to file suspicious transaction reports. In his defence, "L" claimed to have held no suspicions in relation to the deposits and supported his claim with various references to the known financial affairs of his client.

In deciding this case, the judicial authorities stated that ignorance of the existence of the legal obligation to report was not a defence to this charge. It also found that transactions involved in this case lacked any credible explanation and that they must have been relevant to the investigation or prosecution of a money laundering offence. "L" was subsequently convicted for failing to report the transactions.

An unnamed FATF expert alleges that while lawyers who are unwilling to co-operate and participate in the efforts to combat money laundering may have concerns about solicitor-client confidentiality, they may also be fearful of losing clients over reporting requirements. The FATF expert cites the lack of public pressure for lawyers to report suspicious transactions as a factor for the legal professions' resistance to imposed reporting requirements.

While suspicious transaction reports may play a different role in various money laundering schemes, the consensus amongst FATF members appears to be that more often than not, such reports are of great assistance in identifying unusual or suspicious financial activities and ultimately, in fighting organized crime.

VIII. CANADA'S ROLE IN THE GLOBAL COMMUNITY

In Canada, approximately 17 billion dollars are laundered annually.⁵⁹ Canada is a member of the FATF, and is therefore required to adhere to the principles laid down by the FATF. The FATF's Forty Recommendations set out the basic framework for anti-money laundering efforts and were

⁵⁹ "Ottawa to unveil new money laundering bill" CTV.ca News Staff, online: <http://www.ctv.ca/servlet/ArticleNews/story/CTVNews/1043976781402_44/?hub=Canada> (date accessed: February 2003). See also "Money Laundering in Canada: An analysis of RCMP cases," Online: <<http://www.yorku.ca/nathanson>> by Stephen Schneider, March 2004.

designed to be of universal application to all members. They cover the criminal justice system and law enforcement, the financial system and its regulation, and demand international cooperation.⁶⁰

A mutual evaluation exposed Canada as a country that failed to comply with those regulations.⁶¹ Canada was required to file a progress report with the FATF, and did so in 1998. The progress report contained a number of proposals made by the Department of the Solicitor General.⁶²

In Canada, the laundering of money is a criminal offence.⁶³ In order for a Court to convict an accused of money laundering, the Crown need only prove that the accused person believed that the money was the proceeds of crime. It need not show that this belief was correct. The Crown also need not prove that the accused intended to disguise or hide the origin of the money. However, the Crown must prove intent to conceal or convert.⁶⁴

Since its mutual evaluation, Canada has provided a number of progress reports to the FATF. In its effort to comply with the Forty Recommendations, Canada enacted new legislation that reflects both the recommendations by the FATF, and the proposals made to the FATF.

IX. CANADA'S FIGHT AGAINST MONEY LAUNDERING AND TERRORIST FINANCING

In June of 2000, the Government enacted the *Proceeds of Crime (Money Laundering) Act*. Later, the *Act* was amended and renamed *Proceeds of Crime (Money Laundering) and Terrorist Financing Act* (the *Act*).⁶⁵ The object of the *Act* is to facilitate combating the laundering of proceeds of crime and the financing of terrorist activities, as well as to establish the Financial Transactions and Reports Analysis Centre of Canada (FINTRAC).⁶⁶

In creating FINTRAC, the federal government sought to establish an independent agency⁶⁷ that achieves the following objectives:

⁶⁰ "The Forty Recommendations" FATF, online: <http://www.fatf-gafi.org/40Recs_en.htm> (date accessed: January 2003).

⁶¹ FATF-IX Annual Report (1997-1998).

⁶² FATF-X Annual Report (1998-1999). Online: <http://www1.oecd.org/fatf/Ctry-orgpages/ctry-ca_en.htm>.

⁶³ *Criminal Code*, R.S.C. 1985, c. C-46, s. 462.31.

⁶⁴ *R. v. Tejani* (1999), 138 C.C.C. (3d) 366 (Ont. C.A.), leave to appeal to S.C.C. refused 42 C.C.C. (3d) vi, 253 N.R. 397n, Note: To date there appears to be no case law explaining the difference between "to hide" and "to conceal."

⁶⁵ *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*, 2000 c. 17 [hereinafter the *Act*].

⁶⁶ *Ibid.*

⁶⁷ *Ibid.* at s. 40; 2001, c. 41, s. 65.

- a) acts at arm's length from law enforcement agencies and other entities to which it is authorized to disclose information;
- b) collects, analyses, assesses and discloses information in order to assist in the detection, prevention and deterrence of money laundering and of the financing of terrorist activities;
- c) ensures that personal information under its control is protected from unauthorized disclosure;
- d) operates to enhance public awareness and understanding of matters related to money laundering; and
- e) ensures compliance with Part 1.

FINTRAC's official website⁶⁸ further explains the organization's objectives, as does the *Act* itself.⁶⁹

The objective of the *Act* is stated as follows:

1. to implement specific measures to detect and deter money laundering and the financing of terrorist activities to facilitate the investigation and prosecution of money laundering and terrorist financing offences, including:
 - establishing record keeping and client identification requirements for financial services providers and other persons that engage in businesses, professions or activities that are susceptible to being used for money laundering, and the financing of terrorist activities;
 - requiring the reporting of suspicious financial transactions and of cross-border movements of currency and monetary instruments; and
 - establishing an agency that is responsible for dealing with reported and other information.
2. to respond to the threat posed by organized crime by providing law enforcement officials with the information they need to investigate and prosecute money laundering or terrorist financing offences, while ensuring that appropriate safeguards are put in place to protect the privacy of persons with respect to personal information about themselves; and

⁶⁸ "Proceeds of Crime (Money Laundering) and Terrorist Financing Act" FINTRAC, online: <http://www.fintrac.gc.ca/act-loi/1_e.asp> (date accessed: February 2003), (identical to s. 3 of the Act).

⁶⁹ *Supra* note 57 at s. 3; 2001, c. 41, s. 50.

3. to assist in fulfilling Canada's international commitments to participate in the fight against transnational crime, particularly money laundering and the fight against terrorist activities.

A) Part 1 of the Act: Record Keeping and Reporting of Suspicious Transactions

The *Act* applies to various individuals and entities, including authorized foreign banks, credit unions, life insurance companies, trust and loan companies, accountants, real estate brokers, government departments that sell money orders to the public and accept deposit liabilities, as well as casinos.⁷⁰

The *Act* imposes a duty to retain records of financial transactions.⁷¹ The *Act* further requires that financial transactions be reported if there are reasonable grounds to suspect that the money is related to a money laundering offence or terrorist activity financing.⁷² Types of reports that currently need to be made under the *Act* include: Suspicious Transactions Reports, Terrorist Property Reports, Large Cash Transactions Reports, and Electronic Funds Transfer Reports.⁷³ Once a report is made, the reporting person must not disclose that a report was made, nor must they disclose the content of that report, nor whether an investigation has been launched or not.⁷⁴ In other words, reporting persons are not permitted to 'tip off' their clients. For example, reporting persons may have to refrain from asking certain questions, if they normally would not ask those questions when completing a certain transaction.⁷⁵ All transactions prescribed by regulations made by the Governor in Council must be reported to FINTRAC.⁷⁶

Persons reporting in good faith to FINTRAC are protected from any criminal or civil proceedings against them.⁷⁷ Part I of the *Act* does not

⁷⁰ *Supra* note 57 at s. 5; 2001, c. 41, s. 51.

⁷¹ *Ibid.* at s. 6.

⁷² *Ibid.* at s. 7.

⁷³ "FINTRAC's Guidelines", online:

<http://www.fintrac.gc.ca/publications/guide/archive/guide_e.asp> (date accessed: February 2003).

⁷⁴ *Supra* note 57 at s. 8.

⁷⁵ "What are Suspicious Transactions?" FINTRAC guideline 2: Suspicious Transactions, online: <http://www.fintrac.gc.ca/publications/guide/archive/21-11-2002/2/2_e.asp#22> (date accessed: February 2003).

⁷⁶ *Supra* note 57 at s. 9.

⁷⁷ *Ibid.* at s. 10.

require legal counsel to disclose any communication that is subject to the solicitor-client privilege.⁷⁸ In order to assist persons and entities that are required to report, FINTRAC has released nine guidelines, which are available on the FINTRAC website.⁷⁹

B) Part 5 of the Act: Offences and Punishment

The intentional contravention of the reporting requirement provisions in section 7 of the *Act* will result in the imposition of a fine of up to \$2,000,000 or up to five years of imprisonment.⁸⁰

X. REQUIREMENTS FOR LEGAL COUNSEL UNDER THE PROCEEDS OF CRIME (MONEY LAUNDERING) AND TERRORIST FINANCING ACT

The Proceeds of Crime (Money Laundering) and Terrorist Financing Act provides the following definition for lawyers: "legal counsel" means, in the Province of Quebec, an advocate or a notary and, in any other province, a barrister or solicitor.⁸¹

The requirements for legal counsel are laid out in the following provision:⁸²

5. Every legal counsel is subject to Part I of the *Act* when they engage in any of the following activities on behalf of any person or entity, including the giving of instructions on behalf of any person or entity in respect of those activities:

- a) receiving or paying funds, other than those received or paid in respect of professional fees, disbursements, expenses or bail;
- b) purchasing or selling securities, real property or business assets or entities; and
- c) transferring funds or securities by any means.

In short, this provision provides that every legal counsel is subject to all of Part I of the *Act*, which means they are required to report suspicious

⁷⁸ *Ibid.* at s. 11.

⁷⁹ "FINTRAC" online: <<http://www.fintrac.gc.ca>>.

⁸⁰ *Supra* note 57 at s. 75(1).

⁸¹ *Supra* note 57 at s. 2.

⁸² *Proceeds of Crime (Money Laundering) Suspicious Transactions Regulations*, SOR/2001-317, s. 5.

transactions as per section 7 of the *Act* in the prescribed form and manner, as set out in section 9 of the Regulations under the *Act*. Any suspicious transaction report is required to include the following information:⁸³

- 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 involved;
- 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.

XI. THE CONSTITUTIONAL CHALLENGE IN CANADA

In November of 2001, the Law Society of British Columbia (LSBC) and the Federation of Law Societies of Canada (jointly, the Petitioners) commenced a legal proceeding⁸⁴ before the British Columbia Supreme Court.

⁸³ *Federation of Law Societies of Canada v. Canada (Attorney General)*, [2002] N.S.J. No. 199.

⁸⁴ *Law Society of British Columbia v. Canada (Attorney General)*, [2002] 3 W.W.R. 455, affirmed [2002] B.C.J. No. 130.

The Federation, on behalf of all Law Societies in Canada, contends that certain provisions of the Act and regulations thereunder are unconstitutional because they violate the protected right of an independent bar, the *Constitution Acts 1867 and 1982*, and ss. 7, 8 and 10(b) of the *Canadian Charter of Rights and Freedoms*⁸⁵ (the "Charter"). Following the case in British Columbia, similar proceedings commenced in Alberta,⁸⁶ Ontario,⁸⁷ Nova Scotia,⁸⁸ and Saskatchewan.⁸⁹ All of the cases but one were decided in favour of the federation.

A. The Supreme Court of British Columbia Decision - A Critique

The Federation of Law Societies in cooperation with the Law Society of British Columbia (the "petitioners") brought a petition before the B.C. Supreme Court seeking a declaration that lawyers are exempt from the force of the *Proceeds of Crime (Money Laundering) Act* (the "Act"), as it was then called.⁹⁰ The petitioners, challenging the constitutionality of the Act, sought interim and interlocutory relief, suspending the operation of s. 5 of the Regulations under the Act until the case was decided on its merits.

The court, when setting out the impugned legislation, listed and described a number of contentious provisions of the Act in a very technical fashion. At no time did the court state or comment on the purpose and the objective of the Act and its importance to the Canadian and international community. When describing the process of money laundering, there was nothing mentioned about the dimension of the problem or the impact on the victims of the crimes underlying that process.

Perhaps one reason for this phenomenon is the fact that the Attorney General of Canada based his opposition to the petitioners' application on procedural rather than substantive issues. Nevertheless, in view of the seriousness of allegations made and issues raised, it would appear rea-

⁸⁵ *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act*, 1982, Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

⁸⁶ *Federation of Law Societies of Canada v. Canada (Attorney General)*, [2001] A.J. No. 1697.

⁸⁷ *Federation of Law Societies of Canada v. Canada (Attorney General)*, 207 D.L.R. (4th) 740.

⁸⁸ *Federation of Law Societies of Canada v. Canada (Attorney General)*, [2002] N.S.J. No. 199.

⁸⁹ *Federation of Law Societies of Canada v. Canada (Attorney General)*, [2002] S.J. No. 200.

⁹⁰ S.C. 2000, c. 17. Note: It was later renamed to *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*.

sonable to infer that this *Act* is deemed to have been enacted in the public's interest.

The petitioners asserted that the *Act* threatened the independence of the bar, solicitor-client confidentiality, and created a conflict between lawyers' duties to their clients and their obligation to report confidential information to the government.

One of the fundamental rules of evidence law is that "he or she who asserts must prove." While the petitioners made a variety of assertions, no evidence was presented to the court that supported any of them. Despite this, the court accepted the petitioners' arguments. This is only one of a number of flaws in the petitioners' argument that the court treated with astounding leniency by way of characterizing this case as rare and exceptional.

1. Failure to obtain and secretly report any information

The petitioners further argued that s. 5 of the Regulations makes it a crime for lawyers to fail to obtain and secretly report to FINTRAC any information that has raised suspicion in the course of the lawyers' dealings with their clients. The court concluded, or at least accepted, that it is left to the subjective opinion of the lawyer to determine what a suspicious transaction is.

This is, at the very least, an overstatement. Pursuant to section 9 of the *Act*, lawyers are only required to report *prescribed* financial transactions that occur in the course of their activities. Section 7 requires lawyers to report 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 or a terrorist activity financing offence. There is no need to "obtain" any information in addition to the information required to complete the suspicious transaction. Nor is there a need to "secretly report" to FINTRAC. Section 8 provides that lawyers shall not disclose that they have made a report under section 7, or disclose the contents of such a report, *with the intent to prejudice a criminal investigation*, whether or not a criminal investigation has begun. Absent of such intent, lawyers are free to inform their clients of any reports made.

2. The Subjective Standard

Whether or not it is left to the subjective opinion of lawyers to determine what constitutes a suspicious transaction, it is nevertheless a debatable standard given the language of section 7. On the one hand, the

word "reasonable" seems to suggest that an objective standard rather than a subjective standard applies. However, given that the offences under the *Act* are hybrid offences, and given the severe punishment that may result from committing such offences, it is questionable whether a purely objective standard should apply, especially since the *Act* makes intent a necessary element for establishing that an offence has been committed.

If, on the other hand, the court is correct and the standard is indeed purely subjective, then why would lawyers give it a negative connotation? A subjective standard would mean that lawyers are free to exercise their discretion in deciding whether or not transactions they engage in raise suspicion. In that case, the Crown could not argue that those lawyers, who did in fact engage in suspicious transactions and failed to report it, ought to have been suspicious.

The solution may be the introduction and application of an objective-subjective standard, with the question being: Would a reasonable professional with the experience of this professional have become suspicious when engaging in the transaction in question?

3. Failure to report amounts to a crime

It is not a crime for lawyers to merely fail to report a suspicious transaction. Pursuant to section 75(1), an offence under the *Act* has been committed when a lawyer *knowingly* contravenes section 7 of the *Act*. Failing to comply with section 8 of the *Act* is also punishable under section 76, but here the reporting section itself requires intent. Thus, in order for lawyers to have committed a crime, the Crown must prove that they acted knowingly or intentionally when contravening the reporting provisions of the *Act*.

In order to further evaluate this part of the argument by the petitioners, it is helpful to turn to the language of the impugned provision in the Regulations.

The language in section 5 of the Regulations makes it clear that lawyers must actually *engage* in certain listed activities before they are subject to the reporting requirements. The ambiguous meaning of the word 'engage' calls for interpretation. Nevertheless, whatever the ultimate meaning of the word 'engage' turns out to be, it appears that lawyers must be part of, or play a role in the activity, in order to trigger the reporting requirement provisions. Merely advising clients regarding a transaction may not necessarily amount to lawyers engaging in the listed activities, depending on the circumstances of the case.

If lawyers were in fact engaged in suspicious transaction, they would

either be engaged knowingly or unknowingly. If they are engaged knowingly, then they are committing a crime. Therefore, if their act was intentional, they will likely not make a report; otherwise they would incur liability under the *Act* and would also be in contravention of the provisions of the *Criminal Code*. In addition, those lawyers who engage in such conduct will also be subject to punishment through the Law Society in their respective province.

In contrast, if they are engaged in such a transaction unknowingly and later discover the true criminal nature of a transaction, it is their ethical and legal obligation to report the criminal activity. Failing to report ongoing or future criminal activities will not only result in severe punishment of those lawyers through legal and professional authorities, but will also bring the administration of justice into disrepute.

4. Procedural Issues

The Attorney General of Canada opted to oppose the application for interlocutory relief by way of presenting an argument that was geared towards certain procedural issues. Presumably, and perhaps quite properly, the Attorney General, relying on established principles and weighty precedents, perceived those grounds to be sufficient to dispose with the application. Suffice to say at this point that the court took it upon itself to correct the Attorney General's view of the current state of the law.

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

The first question that arose dealt with the issue of standing. The *Act* does not contain any requirements of any Law Society, the Federation of Law Societies of Canada, or the Canadian Bar Association, yet, it is those three entities that commenced these proceedings. It is important to consider who the petitioners were exactly representing. Were they acting on their own behalf, on behalf of Canadian lawyers, or acting in the public interest? Despite significant disagreement on this point, it did not stop the court from finding that the petitioners attained standing. While the court recited the claims of the petitioners, it did not provide reasons for finding a direct legal interest over and above any general interest. It appears that the court, in a sense, equated the petitioners with the 'group' who was undoubtedly affected by the *Act*; namely, lawyers.

In addition, the court found that the petitioners also qualified for public interest standing since, in its opinion, a serious issue was raised. It was held that the petitioners had a genuine interest in the validity of the *Act*,

and there was no other reasonable or effective way to challenge the validity of the *Act*. The last reason supplied by the court seems surprising given that not only lawyers could challenge the *Act* in case of a breach of the solicitor-client privilege, but also clients who, as set out earlier, own the privilege and whose rights may be adversely affected.

It is even more surprising that the court was concerned with the significant amount of time that would elapse before a "suitable fact situation arose and ripened to the point that a constitutional challenge could be heard" if an affected lawyer had to challenge the *Act*. The reason why this comes as a surprise is that the very purpose of this application for injunctive relief is to prevent lawyers from being subjected to severe criminal penalties immediately upon this part of the *Act* coming into force. If there was such an urgent need for the temporary exemption from section 5 of the Regulations and, ultimately, Part 1 of the *Act*, why would the court anticipate that it would take a significant amount of time before a "suitable fact situation arose?"

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

The second procedural question dealt with the doctrine of *forum conveniens*. The court in deciding the issue did not answer the question that the doctrine poses, namely, "Is there another more convenient and appropriate forum in which to hear a proceeding?" If so, then the court should not entertain that proceeding. Instead, the court claimed jurisdiction and exercised its discretion, only acknowledging that the Federal Court may have concurrent jurisdiction. The *Act* is a federal statute and therefore applies to all provinces and territories. The Federal Court could have decided this matter for all of Canada, rather than for just the one province, namely British Columbia.

The court recited the Attorney General's submission that an order from the British Columbia Supreme Court would only apply in British Columbia, however, in the end, it issued an order saying that legal counsel are exempt from section 5 of the Regulations without limiting its application to the court's jurisdiction. Arguably, the court paved the way for the petitioners to seek a declaration that the order be extended to be applicable beyond the borders of British Columbia. Interestingly enough, the Federation of Law Societies of Canada sought that very declaration in the subsequent proceedings in four other provinces dealing with the same application for injunctive relief.

c) Does interim injunctive relief lie against the Crown?

The third procedural issue dealt with the question of injunctive relief lying against the Crown. The court accepted that at common law and pursuant to statute,⁹¹ injunctive relief does not lie against the Crown. However, since the court viewed this case as being a constitutional case, even before the case had been decided on its merits, the court referred to authority that, in its opinion, stands for the proposition that injunctive relief from impugned legislation is available in appropriate circumstances. It is noteworthy that in all three previous decisions⁹² decided and relied on by this very same court, the Supreme Court of Canada had refused to grant the interim relief sought. The Supreme Court of Canada in *Harper v. Canada (Attorney General)*,⁹³ said that:

“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.”

Instead of adhering to the unambiguous guidelines set out by the Supreme Court of Canada, the court referred to a textbook note⁹⁴ and went on to utilize (once again) its discretion to override the Crown's immunity, stating that the Crown could not use its immunity to shield an unconstitutional act. In order to make that statement, the court must have not only prematurely decided that there was a constitutional issue in this case, but also that the legislation was unconstitutional.

This approach by the court should raise great concern because the court granted a remedy available under Section 24(1) of the *Charter*, when the very issue to be determined in that case was whether or not the *Act* did in fact violate any *Charter* rights.

⁹¹ *Crown Liability and Proceedings Act*, R.S.C. 1985, c. C-50, s. 22(1).

⁹² *Manitoba (Attorney General) v. Metropolitan Stores Ltd.*, [1987] 1 S.C.R. 110, *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311, and *Harper v. Canada (Attorney General)*, [2000] 2 S.C.R. 764.

⁹³ *Harper*, *supra* note 85.

⁹⁴ Peter Hogg and Patrick Monahan, *Liability of the Crown*, 3rd ed (Toronto: Carswell, 2000) at 36.

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

The rule is that no injunctive relief should be granted when the effect of granting interim would be to actually determine the rights of the applicant. The court in effect, disregarded this important rule and clear authority from the Supreme Court of Canada when it declared this case to be an exception to the general rule.

The court accepted the petitioners' argument that they were merely seeking an exemption from the *Act* rather than suspending the impugned legislation. Unfortunately, the court did not consider that this exemption, given the important role of lawyers in the money laundering process, might well amount to a suspension of the legislative scheme. On the surface, it may seem as if that exemption applies only to one section of the Regulations, but by granting the exemption from section 5 of the Regulations, lawyers are effectively exempted entirely from Part 1 of the *Act*.

The court further accepted that the lawyers seek to continue the status quo. Since the court chose not to explain what that status quo is, we are left with another mystery. But, even assuming that there was at some point in time such status quo, the traditional role of lawyers has changed drastically over time. Furthermore, apart from the former status quo, current events and global concerns have most certainly altered it.

In short, the court decided the case on its merits before there was a full hearing, which is precisely what the Attorney General argued.

e) Do the petitioners lack an "adequate record of adjudicative facts?"

In addressing the issue of the factual vacuum, the court again assumed that this was, in fact, a *Charter* case. The Attorney General pointed out that there was no factual foundation for the petitioners' argument. All of the petitioners "factual" submissions regarding the effects of the *Act* have a striking resemblance to pure speculation. Once again, weighty authority from the Supreme Court of Canada⁹⁵ supported the Attorney General's position, and yet the court declared this case as a 'rare case' that merited the grant of an exception to the general rule. The court in declaring this case to be exceptional, appears to imply that, in its opinion, not only does the *Act* violate the *Charter*, but also that the provisions of the impugned legislation could be saved under section 1 of the *Charter*.

⁹⁵ *MacKay v. Manitoba*, [1989] 2 S.C.R. 357, and *Danson v. Ontario* (Attorney General), [1990] 2 S.C.R. 1086.

The court, without giving any reasons whatsoever, accepted the petitioners' argument that this is a case of pure law, where there was no requirement for any supporting factual evidence. In addition, the court opined that even if there was any factual evidence, the position of the petitioners could not possibly have been improved by it.

In short, there was admittedly no evidence presented by the petitioners, there was no determination as to whether any *Charter* rights were violated, and there were clear requirements for an adequate factual foundation. Despite all of the submissions, the court simply decided that there was really no need for any facts and moved on to apply the test for interlocutory relief.

5. The test for granting interlocutory relief

a) *Is there a serious issue to be tried?*

When the court stated the tripartite test, it amended the first branch to read: "Is there a serious *constitutional* issue to be determined?" That appears to be inconsistent with the traditional statement of the test, where the fact that the issue is constitutional in nature is only but one factor to consider when determining whether or not there is serious issue to be decided. Unfortunately, the court assumed that there was in fact a constitutional issue to be determined, despite the lack of evidence in support of that assumption. More importantly, we were not even told which provisions of the *Constitution Act, 1892*, the *Act* in question was in conflict with.

The court attempted to frame the constitutional question and based its analysis on this phrasing:

- a) Is there an arguable case that the independence of the bar, which includes the confidentiality of lawyer-client relations, is a right protected either by the Canadian *Constitution*, or by the *Charter*, or by both?
- b) If so, is there an arguable case that the impugned legislation violates that right?

The court searched for a constitutional right, thereby assumed that the independence of the bar may well constitute a right in itself. It would be interesting to know whose right it would be, and who could claim/defend that right if it does indeed exist. Due to the way in which the constitutional question was framed, some clarification is necessary.

The court states that the independence of the bar includes the confidentiality of lawyer-client relations. What then is the independence of the bar and what are lawyer-client relations?

(i) Independence of the bar

Nowhere in the *Charter* or in the *Constitution* does the phrase "independent bar" appear. To accept the concept of an independent bar as a constitutionally protected right would amount to the creation of a new right. In drafting the *Constitution* and the *Charter*, Parliament did give some thought to the role of lawyers, hence section 10(b) of the *Charter*. Parliament did not expressly include the independence of the bar as an enumerated right. The court then turned to the possibility of implying such a right by looking to unwritten rules.

The petitioners argued that the independence of the bar comprised a fundamental principle of justice. The Supreme Court acknowledged that an independent bar plays a critical role in the administration of justice.⁹⁶ It is also undisputed that the judicial independence is at its root, an unwritten constitutional principle.⁹⁷ However, an independent bar and an independent judiciary are not the same, even though they may be interrelated. In any event, this case was not concerned with the administration of justice.

Although the *Act* defines legal counsel as to include all lawyers, the description of the activities in section 5 of the Regulations makes it readily apparent that the reporting requirements mainly, if not solely, apply to lawyers handling certain types of business transactions. Thus, it is difficult to comprehend the concern underlying an assertion that the independence of the bar would be threatened. Most lawyers affected by the *Act* are more akin to business people, who transact on the behalf of their clients, as opposed to litigants, who are involved in the administration of justice. Therefore, the independence of the bar is not an issue given the scope of the transaction the *Act* applies to.

Nevertheless, the court uses the example of section 10(b), where duties were imposed that, by necessity, underlies the enumerated right.⁹⁸ Again, the court failed to distinguish between lawyers who are acting as litigants in criminal cases, and lawyers who are merely facilitating business transactions.

The reasoning in the next part of the court's decision is difficult to follow. It is not clear whether the petitioners argued that the whole *Act* was unconstitutional or if they were referring to certain provisions. It is also not clear whether they were seeking only an exemption, or whether they sought to have the whole *Act* declared invalid.

⁹⁶ *The Law Society of British Columbia v. Mangat*, [2001] S.C.J. No. 66.

⁹⁷ *Reference re Remuneration of Judges*, [1997] 3 S.C.R. 3.

⁹⁸ *R. v. Manninen*, [1987] 1 S.C.R.

The petitioners argued that sections 7, 8 and 10(b) of the *Charter* require the protection of the public by the independence of the bar. It is noteworthy that the need of the public for such protection is stressed, as opposed to the need for protection of the lawyers who are subject to the *Act* that is in question in this interim relief application. The public protection argument, while a valid argument, does not seem to further advance the discussion relating to the impugned *Act* in this case, or more specifically section 5 of the Regulations. In addition, if the petitioners' concern is the protection of the public, then why did they only seek an exemption from Part 1 of the *Act* instead of seeking to be excluded from Parts 2 and 3 as well?

Who is really affected by the *Act*? The *Act* affects lawyers and their clients, but not all lawyers and not all clients. It only affects clients who engage lawyers in transactions that give lawyers reasonable grounds for suspicion. The broad public is unaffected by the provisions of the *Act*. There is no need to protect the public if the public is not in need of protection. It is the money launderers and those who assist them in their money laundering activities who are affected and who are, arguably, in need of protection. That need for protection seems satisfied by the *Charter*. Section 5 of the Regulations does not seem to set aside any established *Charter* values.

(ii) *Lawyer-Client Relations and Solicitor-Client Privilege*

What exactly the allegations are with respect to the relationship between solicitors and their clients may remain a mystery, since neither the lawyers nor the courts appear to use certain terminology revolving around this issue with any degree of consistency. There is mention of phrases such as "solicitor-client privilege," "solicitor-client confidentiality," "lawyer-client relations," and "solicitor-client relationship." It is important to keep in mind that the concept of solicitor-client privilege is narrower, and in more than one way, altogether different from the concept of confidentiality.

(iii) *Solicitor-Client Privilege*

Solicitor-client communications related to the seeking, forming, or providing of legal advice are protected. A privilege is a substantive evidentiary rule that gives the client protection from disclosure of solicitor-client communications outside of the courtroom.⁹⁹

Solicitor-Client privilege is a class privilege under common law that protects the relationship between solicitors and their clients.¹⁰⁰ It is the

⁹⁹ *Descoteaux v. Mierzwinski* (1982), 70 C.C.C. (2d) 385 (S.C.C.).

¹⁰⁰ David M. Paciocco and Lee Stuesser, *The Law of Evidence* (Essentials of Canadian law), (Irwin Law, Toronto 2002, 3rd edition), at 182.

client who owns the privilege and not the lawyer, and has been termed the "highest privilege recognized by the courts."¹⁰¹ The party who seeks to have privileged communications admitted as evidence at trial bears the burden of showing that there is a pressing reason for revoking the privilege in the case at bar.

Certain communications, however, are not protected. For example, if the communications are criminal in themselves, or take place to facilitate or further criminal activities, then no privilege can be claimed.¹⁰² Nevertheless, privilege continues to protect the communications relating to a crime committed in the past.

The solicitor-client privilege appears to have been created primarily to protect solicitor-client communications in the context of court proceedings. If that were correct, then the concept of solicitor-client privilege would be greatly broadened by declaring it to be operative in the course of ordinary business activities, such as those that are listed in section 5 of the Regulations of the *Act*. There is no need to extend the privilege in the context of this case, since the *Act* specifically excludes protected communication.

In addition, there is a public safety exception to the solicitor-client privilege. The Supreme Court of Canada set out a three-part test to help determine if solicitor-client privilege should yield to the public safety: First, there must be a clear risk to an identifiable person or group of persons. Second, there must be a risk of serious bodily harm or death. Third, the danger must be imminent. If the test is satisfied, then the only part of the communications disclosed is that which is required to protect the public from the anticipated harm.¹⁰³ Given this narrow exception to the privilege, it is reasonable to anticipate that it will be applied in extraordinary circumstances only, if it were to be applied in the context of the *Act*.

(iv) Solicitor-Client Confidentiality

The B.C. Supreme Court acknowledges that section 11 of the *Act* expressly provides that nothing in Part 1 requires a legal counsel to disclose any communication that is subject to solicitor-client privilege. However, we are told that the scope of the solicitor-client-privilege is not defined in the *Act*. How is that detrimental to the lawyers? Would not any attempt to define the common law principle amount to a limitation of that principle? And, is not the absence of a definition of solicitor-client privilege equal to the absence of a limitation of the privilege?

¹⁰¹ *Ibid.* at 196.

¹⁰² *Ibid.* at 189.

¹⁰³ *Smith v. Jones* (1999), 132 C.C.C. (3d) 225 (S.C.C.).

While the rather broad phrase “any communication” may require interpretation, there are common law precedents and the academic texts dealing with solicitor-client communications and its scope. Therefore, any attempt at a definition in the *Act* itself could have hardly amounted to a meaningful contribution to the ongoing discussion. The court also states that the protection provided by the solicitor-client privilege falls far short of the traditional confidential nature of the solicitor-client relationship that the petitioners seek to preserve.

If solicitor-client confidentiality is different from and broader than the solicitor-client privilege, then what is its scope? It may prove helpful to examine the “traditional solicitor-client relationship.” Lawyers are governed by the Code of Ethics and the Rules of their respective Law Societies. The Rules and the Code pertaining to ethical questions, questions of duties owed, etc. are similar, if not almost identical across Canada.¹⁰⁴

In 1920, the Canadian Bar Association, and later the Law Societies in Canada, approved the Canons of Legal Ethics. Those Canons are ethical principles that should be observed by the members of the legal profession. The very first rule reads as follows:

To the state

- He owes a duty to the State, to maintain its integrity and its law and not to aid, counsel, or assist any man to act in any way contrary to those laws.

Given this rule, that peacefully coexists with the rule pertaining to duties owed to clients, it is interesting that the petitioners submitted that lawyers would find themselves in a profound conflict of interest between their duty of solicitor-client confidentiality and their duty to report that client to the government if they were subjected to the reporting requirements. It appears that even without the requirements of the *Act*, lawyers have an obligation not to assist criminal actors in their money laundering efforts. Indeed, this rule is even broader than the reporting requirements of the *Act* in that it does not require knowledge or intent on part of the lawyers who aid, counsel or assist a person to act contrary to the *Act*.

The second rule in the Canons of Legal Ethics includes the following:

¹⁰⁴ Note: In examining the duties owed by lawyers we will use the rules that govern lawyers in Manitoba to illustrate the requirements lawyers are subjected to.

To The Client

- He should endeavour by all fair and honourable means to obtain for his client the benefit of any and every remedy and defence which is authorized by law. He must, however, steadfastly bear in mind that the great trust of the lawyer is to be performed within and not without the bounds of the law. The office of the lawyer does not permit, much less does it demand of him, for any client, violation of law or any manner of fraud or chicanery.
- He should not, except as by law expressly sanctioned, acquire by purchase or otherwise any interest in the subject matter of the litigation being conducted by him. He should act for his client only and having once acted for him he should not act against him in the same matter or in any other matter related thereto, and should scrupulously guard and not divulge his client's secrets or confidences.

This rule clearly sets out that lawyers ought not to act outside the boundaries of the law. Again there is no limitation of the rule by way of requiring knowledge or intent, which means that a lawyer should not violate the law for any client. If lawyers were to engage in suspicious transactions without reporting the client to the authorities, those lawyers would be in violation of this rule and the law, since they would be engaging in money laundering activities. This rule also sets out a confidentiality requirement, and there does not seem to be a conflict of interest concern, considering the rules have been the same for more than 80 years.

The reporting requirement provisions of the *Act* do not require lawyers to do anything they are not already obliged to do, based on their own principles of ethics. If any argument were to be made then it would not be that there is a conflict, but that there is redundancy. However, even if there is redundancy, it is up to Parliament to decide what legislation to pass. In addition, looking at the statistics, those ethical rules have not proven to be effective enough to prevent lawyers from becoming knowingly or unknowingly engaged in money laundering activities.

In addition to the Canons of Legal Ethics, there are the Codes of Professional Conduct. The following rules and guiding principles are crucial to this case:

RULE

The lawyer has a duty to hold in strict confidence all information concerning the business and affairs of the client acquired in the course of the professional relationship, and

should not divulge such information unless disclosure is expressly or impliedly authorized by the client, required by law or otherwise permitted or required by this Code.¹⁰⁵

Guiding Principles

1. The lawyer cannot render effective professional service to the client unless there is full and unreserved communication between them. At the same time the client must feel completely secure and entitled to proceed on the basis that without any express request or stipulation on the client's part, matters disclosed to or discussed with the lawyer will be held secret and confidential.¹⁰⁶

2. This ethical rule must be distinguished from the evidentiary rule of lawyer and client privilege with respect to oral or written communications passing between the client and the lawyer. The ethical rule is wider and applies without regard to the nature or source of the information or to the fact that others may share the knowledge.¹⁰⁷

4. The lawyer owes a duty of secrecy to every client without exception, regardless of whether it be a continuing or casual client. The duty survives the professional relationship and continues indefinitely after the lawyer has ceased to act for the client, whether or not differences have arisen between them.¹⁰⁸

¹⁰⁵ Manitoba Law Society Code of Professional Conduct, CHAPTER 4, CONFIDENTIAL INFORMATION

¹⁰⁶ " . . . [I]t is absolutely necessary that a man, in order to prosecute his rights or defend himself . . . should have recourse to lawyers, and . . . equally necessary . . . that he should be able to place unrestricted and unbounded confidence in the professional agent, and that the communications he so makes to him should be kept secret, unless with his consent (for it is his privilege and not the privilege of the confidential agent) . . .", per Jessell, M.R. in *Anderson v. Bank of British Columbia* (1876), L.R. 2 Ch.D. 644 at 649 (C.A.).

¹⁰⁷ Cf. Orkin and Tollefson, "Privileged Communications in Canada" (1967) Proceedings of 4th International Comparative Law Symposium, Univ. of Ottawa Press 32 at 36.

¹⁰⁸ "...[A] fundamental rule, namely the duty of a solicitor to refrain from disclosing confidential information unless his client waives the privilege . . . Because the solicitor owes to his former client a duty to claim the privilege when applicable, it is improper for him not to claim it without showing that it has been properly waived," per Spence, J. in *Bell et al v. Smith et al.*, [1968] S.C.R. 644 at 671. To waive, the client must know of his rights and show a clear intention to forgo them: *Kulchar v. March & Benkert*, [1950] 1 W.W.R. 272 (Sask. K.B.).

Confidential Information Not to be Used

5. The fiduciary relationship between lawyer and client forbids the lawyer to use any confidential information covered by the ethical rule for the benefit of the lawyer or a third person, or to the disadvantage of the client.

Disclosure Where Lawyer's Conduct in Issue

10. Disclosure may also be justified in order to establish or collect a fee, or to defend the lawyer or the lawyer's associates or employees against any allegation of malpractice or misconduct, but only to the extent necessary for such purposes.¹⁰⁹

Disclosure to Prevent a Crime

11. Disclosure of information necessary to prevent a crime will be justified if the lawyer has reasonable grounds for believing that a crime is likely to be committed and will be mandatory when the anticipated crime is one involving violence.¹¹⁰

Disclosure Required by Law

13. When disclosure is required by law or by order of a court of competent jurisdiction, the lawyer should always be careful not to divulge more information than is required. (Emphasis added)

(v) Conflict of duties to clients and obligation to report suspicious transactions

A review of those rules and guidelines makes it clear that while lawyers do owe a duty of secrecy or a duty of confidentiality to their clients, information can be disclosed under certain circumstances, such as where the law requires disclosure, as would be the case with the *Act* in question. Considering that disclosure may be justified in order to

¹⁰⁹ There is no duty or privilege where a client conspires with or deceives his lawyer: *The Queen v. Cox* (1885), L.R. 14 Q.B.D. 153 (C.C.R.). *Supra* note 101 at p.86 as to the exceptions of crime, fraud and national emergency.

¹¹⁰ To oust privilege the communication must have been made to execute or further a crime or fraud - it must be prospective as distinguished from retrospective: *R. v. Bennett* (1964), 41 C.R. 227(B.C.S.C.) and cases there cited.

establish or collect a fee, members of the public may view the arguments advanced in this case to be a sham more than anything else. How could lawyers explain to their clients that on one hand, they are going to court to protect their client's information from being disclosed for the purpose of combating organized crime and terrorism, but on the other hand, they will disclose that same information to collect their fees?

Also, the rules expressly provide that disclosure of information necessary to prevent a crime will be justified if the lawyer has reasonable grounds for believing that a crime is likely to be committed. Money laundering is a crime. The language of the *Act* ("reasonable grounds") appears strikingly similar to the language used in the rule. Where is the conflict when it comes to the reporting requirements of suspicious transactions?

One issue that does require clarification is the timing issue:

(vi) The Timing Issue

The *Act* requires lawyers to report only completed transactions, which raises an interesting issue of timing. The time and state of the suspicious transactions may be crucial for the determination of the scope of lawyers' obligations to report such transactions.

If a suspicious transaction has been completed, then that transaction must be reported. However, in that case the crime would have already been committed. In turn, that triggers the solicitor-client privilege, which the *Act* expressly declares to be paramount to the need to report.

If a suspicious transaction has not yet been completed, then there is no requirement to report under the *Act*. However, in that case the transaction would occur in the future. That means that in order to prevent a future crime, the solicitor-client privilege may be set aside by way of invoking the public interest exception.

The most interesting situation would occur, if lawyers, who are unknowingly engaging in a transaction, become suspicious at the very moment they transact, or while only part of the transaction had been completed. In that case the transaction is not completed and a future crime would have been intercepted.

b) Absent an injunction will there be irreparable harm to the party seeking this remedy?

The court concluded that irreparable harm will be done to the lawyers should the *Act* ultimately be read down to exempt lawyers, since the information will have been collected and reported unconstitutionally. It is perhaps appropriate to point out once more that lawyers do not seem to be

required by the *Act* to *collect* any information above and beyond the information that is required to complete the suspicious transaction. The court went on to say that the public's confidence in an independent bar would be shaken and the lawyer-client relationship damaged.

In reference to the earlier arguments made in this paper, we must respectfully disagree. The independence of the bar is not in any way affected by the reporting requirements under the *Act*. The public's confidence would not have been shaken nor would the lawyer-client relationship have been damaged by this requirement since there are no new reporting duties in the *Act* that the lawyers are not already subjected to under their own ethical rules.

When examining the harm to the government, despite the test requiring the court to examine only the harm to the applicants, the court limited itself to asking only that one question. Regrettably, the court, in our view, failed to provide an adequate answer. Since the court raised the question we feel compelled to provide a short answer: The harm to the government is that there is perhaps crucial information with respect to suspicious transaction that was not reported for a period of over one year. That means that the criminal actors continue to launder their money through law firms without being disturbed. That also means that lawyers continue to fall victim to money laundering schemes, and that lawyers continue to be engaged in money laundering transactions, which amount to a violation of ethical and legal rules. Due to the exemption for lawyers, more criminal actors continue to successfully launder money, and the legal profession could be facilitating the commission of crimes and acts of terrorism.

c) The Balance of (In)convenience

Once again, the court concluded that this was an exceptional case, that the general rules ought not to apply, and decided that the balance of convenience favoured the granting of interlocutory relief. As a general rule, it is assumed that laws enacted by democratically elected legislatures are directed to the common good and serve a valid public purpose, which is why interlocutory injunctions are rarely granted in constitutional cases. The court accepted that the question was whether it was equitable and just to deprive the public from the protection and advantages of impugned legislation, the invalidity of which is merely uncertain, unless the public interest is taken into consideration in the balance of convenience, and given the weight it deserves.¹¹¹

¹¹¹ *Metropolitan Stores*, *supra* note 85.

The Attorney General emphasised the importance of the *Act*, and asserted that other countries either have enacted or are about to enact comparable legislation. The court responded that a "limited examination of the law in other jurisdictions" did not support that argument. It seems that if, on the one hand, the Attorney General presents evidence and the court conducts a "limited examination," it is not enough to support his assertion, whereas on the other hand, if the lawyers do not bring any factual evidence, it is sufficient, since no evidence is required. As though this did not cause enough confusion, the court goes on to say that "[i]t appears that any determination as to whether disclosure could be compelled under U.S. law is a fact-intensive question that cannot be decided in the abstract."

The question then remains as to what is the difference between the issue of reporting requirements in the U.S. and Canada? Earlier, when the Attorney General pointed out that the court should refrain from making a determination in a factual vacuum, the court decided that no factual foundation was necessary, since they deem this to be a question of law. Unless the laws and the issues in the U.S. are fundamentally different from the laws in Canada, an outsider may be tempted to compare this type of reasoning to a double standard.

The court accepted that an exemption of lawyers from the provisions of the *Act* and Regulations would not seriously impair the legitimate steps taken by the government to investigate and prosecute money laundering, since the legislation would remain applicable to all other persons and entities. Hence, the court concluded that the interlocutory relief would only minimally infringe the legislative intent of Parliament and it would prevent the alleged infringement of the constitutional rights of lawyers and the public.

With all due respect, this reasoning seems flawed. First, the court again assumes that there are certain constitutional rights of lawyers and the public that may be infringed upon when it had yet to be determined what rights, if any, were being infringed. Secondly, lawyers knowingly or unknowingly play a crucial role, especially in the large-scale money laundering schemes. If the *Act* remains applicable to all other persons and entities, then that means that all those other persons and entities must report suspicious transactions. Naturally, skilled money launderers will seek to utilize the professional services of lawyers on a more frequent basis. Lawyers provide a vast variety of professional services, which are perfect avenues for money launderers to move their illegal funds. This exemption will effectively undermine the legislative scheme.

The court used the harm test again to determine that the harm to the petitioners is serious, whereas the harm the government faces is minimal.

As discussed earlier, we cannot agree with this conclusion. At this stage of the test, the interest of the public should be considered rather than an undefined status quo or the unique position that counsel have historically held. It is certainly in the public's best interest to have money laundering and terrorist financing curbed. With respect to the unique position that counsel has historically held, as the ethical rules for lawyers show, nothing in the *Act* attempts to change this unique position. But even if there was a change to the traditional position of a lawyer, it may well be justified given the purpose of the *Act* and considering that the world has somewhat changed since the 1920s.

B. The British Columbia Court of Appeal's Decision

The Honourable Chief Justice Binch, writing for a unanimous Court of Appeal, upheld the Decision of the learned Chambers Judge, the Honourable Madam Justice Allan. However, in his reasons he states that "[i]n an appeal of this nature the question for this Court is whether there has been an error of law or principle. To the extent that the orders appealed from involve an exercise of discretion, this Court cannot interfere only because it might have exercised the discretion in a different manner." It would appear that this quote speaks for itself, and requires no further comment.

C. The Government's Reaction to the Courts' Decisions

In May of 2002, an agreement between the federation and the Attorney General of Canada was reached: until the constitutional issues have been decided all lawyers and law firms are exempt from the requirements under Part 1 of the *Act*. Lawyers and law firms neither need to record nor report suspicious transactions. They continue, however, to be subjected to Part 2 of the *Act*, and must report cross border transactions involving currency and monetary instruments if they physically move the currency or monetary instruments, or if they act on their own behalf. If they act on behalf of a client, then it is the client who needs to meet the reporting requirements.¹¹²

¹¹² "In Most Circumstances Clients, Not Lawyers, Must Report Cross-Border Transactions Reportable Under The Proceeds Of Crime Legislation" Federation of Law Societies (February 2003), online: <<http://www.flsc.ca/en/whatsnew/singlewhatsnew.asp?ID=71>> (date accessed: March 2003).

According to the Law Society of British Columbia, the hearing date for the constitutional challenge is set for November 2004.¹¹³

XII. CONCLUSION

The introduction of a Gatekeepers Initiative in Canada and around the world continues to evolve. The anticipated release of the results of the FATF consultation process, followed by a U.S. response, the mandatory implementation of the EU revised Directive by member states, and the constitutional challenge in Canada set for November 2004, make the issue surrounding the role lawyers play in money laundering schemes a hot topic around the globe.

The restoration of public confidence in the legal system may be an impossible task if lawyers are permitted to support illegal money laundering activities in Canada, namely by way of being exempt from the suspicious transaction reporting requirements.

Lawyers should not have to be compelled by legislation to assist in the fight against activities that threaten our country, our society, indeed our world. Instead of hiding behind the shield of solicitor-client privilege, it should be the *privilege* of the legal profession to assist in combating these threats.

¹¹³ Online: <<http://www.lawsociety.bc.ca>>.