[2014] JMSC Civ. 179

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2014 HCV 04772

IN THE MATTER OF the Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act, 2011 (the Charter)

A N D

IN THE MATTER of the Proceeds of Crime Act and Regulations and consequential amendments to the Legal Professional Act and Canons and the General Legal Council of Jamaica, Anti-Money Laundering Guidance for the Legal Profession.

BETWEEN	**THE JAMAICAN BAR ASSOCIATION**	**CLAIMANT**
A N D	**THE ATTORNEY GENERAL**	**FIRST DEFENDANT**
A N D	**THE GENERAL LEGAL COUNCIL**	**SECOND DEFENDANT**

IN CHAMBERS (SUBMISSIONS)

OPEN COURT (JUDGMENT DELIVERED)

Georgia Gibson Henlin, Maurice Manning, Catherine Minto and Shawn Wilkinson instructed by Wilkinson and Co for the claimant

Nicole Foster Pusey QC, Carlene Larmond and Tamara Dickenson instructed by the Director of State Proceedings for the first defendant

Allan Wood QC for the second defendant

October 28 and November 4, 2014

CONSTITUTIONAL LAW – INTERIM INJUNCTION OR STAY – WHETHER SUPREME COURT HAS POWER TO STAY ACT OF PARLIAMENT AND REGULATIONS MADE UNDER ACT OR EXEMPT PERSONS FROM LAW UNTIL CONSTITUTIONALITY OF LAW DECIDED – SECTIONS 91A, 94, 95, 104, 105, 117 OF THE PROCEEDS OF CRIME ACT

SYKES J

[1] The crusade against 'dirty money' has now arrived on the door steps of the legal profession. On October 31, 2013 an amendment to the Proceeds of Crime Act ('POCA') was passed. That amendment enabled the General Legal Council ('GLC'), the body established by the Legal Profession Act ('LPA') for the regulation of the legal profession in Jamaica, to issue guidance notes to the profession regarding compliance with the money regime established by POCA. As part of its mandate, the GLC is authorised to monitor the legal

profession in order to determine whether lawyers are in compliance with the standards laid down by POCA. The GLC can direct third parties to carry out audits to determine compliance with the anti-money laundering regime. Guidance notes have been issued by the GLC. They were gazetted in The Jamaica Gazette Extraordinary of Thursday May 22, 2014, No 22A.

[2] In November 2013, the Minister of National Security issued what is known as The Proceeds of Crime (Designated Non-Financial Institution) (Attorneys-at-law) Order 2013. Under that order, as of June 1, 2014, attorneys at law who fall within the order are now to be known, for the purpose of the anti-money laundering regime, Designated Non-Financial Institutions ('DFNI'). The attorneys also became subject to the anti-money laundering regulations issued under POCA.

[3] The lawyers, through their association, the Jamaican Bar Association ('JBA', the Bar or 'the Association') say that these efforts, in their present form, go too far. They undermine legal profession privilege which itself is a fundamental right guaranteed to the citizens of Jamaica. It is also said that new regime fails to understand properly the role and function of the legal profession in its provision of legal services to the people of Jamaica. The regulatory regime is said to be vague, imprecise and is more intrusive than necessary. This conclusion led the JBA to launch a challenge to the constitutionality of the regime with the ultimate goal being to have it declared, so far as it, in its present form, applies to attorneys, unconstitutional. Until this matter is finally decided, the JBA is asking for an injunction or a stay of the continued operation of the regime until the constitutionality of the matter is conclusively decided. The lawyers say that the present regime runs afoul of sections 13 (3) (a), (j) and 16 of the Charter of Fundamental Rights and Freedoms ('the Charter' or 'the Jamaican Charter').

[4] It must be emphasised that the Association accepts and strongly supports the view that it is desirable to keep dirty money out of the financial system and it supports every lawful effort dedicated to that end. The Association contends that the measures implemented have not taken the least intrusive method and therefore is, prima facie, in breach of section 13 (2) of the Jamaican Charter and is destructive of the rights of Jamaican citizens. The rights are said to be the (a) right to the undivided loyalty of the attorney at law of their choice which is itself an integral part of the right to enjoy legal professional privilege and (b) the right to a strong independent Bar which is free from being agents of the state.

[5] The learned Solicitor General, Mrs Nicole Foster Pusey QC, takes the view that no stay or injunction can or should be granted. First, the very learned Solicitor General submitted that the court cannot grant an injunction against the Crown. Second, even if such a power were available, the criteria for the granting of such an injunction have not been met. Third, any concerns the Association has about legal professional privilege have been addressed and the privilege has been given adequate protection in the regulatory regime. Mr Allan Wood QC for the GLC informed the court that on this application the GLC maintains a neutral position.

[6] While the Solicitor General agrees that there is a serious issue to be tried, the court is of the view that what the serious issue is needs to be spelt out in detail so that the members of the public are fully aware of what the issues are. It is not just about the lawyers. In fact it is not really about the lawyers but about their clients, actual and potential. It is about their right to confidentiality and privacy when consulting or engaging an attorney at law. This court should emphasise that the Bar is not saying that crooked lawyers should be shielded but it is about a fundamental right to which the citizen and indeed anyone within the borders of the Jamaica has and that right should not be taken away under the guise of searching for dirty money.

[7] This matter was heard in chambers but the decision was taken to give reasons in open court because of the great public importance of the case.

[8] The reasons for judgment will set out the concerns of the JBA and place it in the context of legal professional privilege and an independent Bar in order to show how there is a link to the Charter. Then the issue of whether the court has the power to grant interim relief will be addressed and if the court has such a power whether it should be exercised in this case.

The concerns of the Association

[9] Mr Donovan Walker, an attorney at law and President of the JBA, has sworn an affidavit in support of the application for an injunction or stay of the regime so far as it applies to attorneys at law. His affidavit seeks to make several points. These are:

1. the new regime imposes obligations on attorneys that did not exist before;

2. the attorney is required to keep collect and keep information, some of which is not essential for the transaction being done;

3. the primary purpose for imposing the requirement of collecting and keeping information is to turn the attorney into an investigator and to transform lawyer offices ‘into archives for the use of the prosecution’;

4. some of the duties imposed on lawyers are inconsistent with the lawyer’s duty of confidentiality to this client and such impositions will undermine the trust relationship between lawyer and client with the consequence that clients may not tell the lawyer the whole truth about his business for fear that it may be used against him;

5. some aspects of the anti-money laundering regime are too vague and imprecise and expose the attorney to the risk of criminal prosecution.

[10] For Mr Walker the regime is seeking to turn the legal profession into a Trojan horse or a fifth column. Mrs Gibson Henlin submitted the regime in its current form undermines legal professional privilege which she submitted is a fundamental human right. Learned counsel also submitted that the client's interests are not sufficiently protected because there are no detailed provisions indicating how a client may claim legal professional privilege and whether there are any time frames within which he or she is to act. This, it was submitted, stands in sharp contrast to the Canadian POCA which makes a serious attempt to regulate this important aspect of the law. Mrs Gibson Henlin was not saying that the Canadian solution was optimal but it was the product of recognising the importance of the privilege and sought to clarify how the privilege may be claimed, the time within which various parties were to act and the consequences of failing to act within the specified time. By contrast, she submitted, the Jamaican regime does not even pretend to address the issue in a coherent way. It simply speaks to the existence of legal professional privilege and that information and documents subject to legal professional privilege are not to be taken. Beyond that it is silent. The argument is that this right is too fundamental to be left to ad hoc solutions but should be the subject of detailed provisions so that all persons are clear on the procedures when the claim is made. The present regime is too uncertain, vague, imprecise, leaves too much to the goodwill of the state actor and consequently is open to abuse in the hands of the malevolent and misuse in the hand of the inefficient or incompetent. Fundamental rights, the argument goes, should not depend on the uncertain foundation of state benevolence goodwill but on the secure foundation of law.

[11] Learned counsel submitted that there was another principle at stake. This was the undermining of the independence of the Bar and consequently the

undermining of the rule of law. This will be addressed under a separate heading but it is connected to the issue of legal professional privilege.

[12] The court wishes to emphasise that it is important to appreciate that legal professional privilege is for the benefit of Jamaicans and all who seek legal advice from attorneys practicing in Jamaica and not the attorney. The privilege allows all citizens and non-citizens of Jamaica to seek legal advice or legal representation so that he or she can organise his or her affairs properly. In a democratic society founded on the rule law, legal professional privilege is an important right that all members of the public enjoy which every lawyer with a client is duty bound to uphold unless and until the client waives the privilege. The lawyer must uphold the privilege even at the risk of significant inconvenience to himself or herself.

[13] When an attorney in the face of a demand by the state or any other entity declines to produce the information on the ground of legal professional privilege, he or she is really advancing the interest of his client. The client may waive the privilege. If the client waives the privilege then the attorney must produce the information unless there is some other lawful basis to refuse to production of the information. The lawyer becomes involved because the state or some other person may believe that the lawyer has the information needed. The information may be required to take legal action against the very client of the lawyer who is being asked for the information.

[14] It is interesting to note that the in House of Lords in **Regina (Morgan Grenfell & Co Ltd) v Special Commissioner of Income Tax** [2003] 1 AC 563, Lord Hoffman, speaking in the context of an unwritten constitution and no enumerated bill of rights, came to the conclusion that legal professional privilege was a fundamental human right that could only be overridden by express words or necessary implication of a statute. In England, there is no concept of Constitutional supremacy but rather there is Parliamentary

supremacy. Lord Hoffman held that legal professional privilege 'is a necessary corollary of the right of any person to obtain skilled advice about the law [and] [s]uch advice cannot be effectively obtained unless the client is able to put all the facts before the adviser without fear that they may be afterwards disclosed and used to his prejudice' (para. 7). His Lordship also pointed that the privilege has been held by the European Court of Human Rights to be part of the law of privacy. There is, under the Jamaican Charter, the right to privacy (section 13 (3) (j)).

[15] In Canada, the Canadian Supreme Court addressed the matter of legal professional privilege in **R v Lavallee** 216 DLR (4^{th}) 257. The interesting thing to note about these cases (several cases heard together) is that they involved searches of lawyers' offices under section 488.1 of the Criminal Code. That provision made a valiant attempt to set out proper procedures for the search of lawyers' offices. The attempt failed. The importance of the case is the observations made on legal professional privilege. The court noted that while not all communications between a solicitor and a client are covered by legal professional privilege and while recognising that the right was not absolute, nonetheless, the view was expressed that (a) all information protected by the privilege is out of reach for the state and cannot be forcibly discovered, disclosed and is inadmissible in court; (b) the privilege is that of the client and the lawyer is the gatekeeper; and (c) any privileged information acquired by the state without the consent of the privilege holder is contrary to the rule of fundamental justice. In other words information that is subject to legal professional privilege is out of reach whether the method of trying to get the information is by search warrant, disclosure orders or directions given to the attorney. Thus examinations and verifications being done by the GLC in order to determine compliance by the lawyer with the anti-money laundering regime cannot take away the right to legal professional privilege.

[16] The court went on to describe legal professional privilege as a 'principle of fundamental justice and civil right of supreme importance in Canadian law.' The rationale for this was 'the privilege favours not only the privacy interests of a potential accused, but also the interests of a fair, just and efficient law enforcement process' and so properly understood 'the privilege … is a positive feature of law enforcement, not an impediment to it.'

[17] Finally, the court held that despite the fact that legal professional privilege may yield in some contexts, the privilege 'must be as close to absolute as possible to ensure public confidence and retain relevance. As such, it will only yield in certain clearly defined circumstances, and does not involve a balancing of interests on a case-by-case basis.' Consequently the court felt that it was compelled 'to adopt stringent norms to ensure its protection' and the 'protection is ensured by labelling as unreasonable any legislative provision that interferes with solicitor-client privilege more than is absolutely necessary.'

[18] In Jamaica, under the new Charter, section 13 (2) states that any person arrested or detained shall have the right to communicate with and retain an attorney at law. Section 16 (1) and (2) speak to (a) the right of any person charged with a criminal offence to be tried before an independent and impartial court and (b) the right to have one's civil rights, obligations determined by an independent and impartial court. The point is that in both criminal and civil arenas persons are afforded the right to access the courts. How can they do this effectively without skilled legal advice and assistance? If they do not have the right to secure legal advice and assistance then it would be very difficult for them to take full advantage of the fundamental rights and perhaps even more important, prevent the state and others from infringing those rights. If the citizen is to take advantage of the rights and prevent infringement then it follows, in this court's view, that he must be able to seek legal advice and legal representation. This leads to the inevitable conclusion

that legal professional privilege while not expressly stated in the Charter must be an integral foundation of the stated Charter rights and from this stand point is a principle of fundamental justice enjoyed by all citizens of Jamaica and all who seek legal services from attorneys in Jamaica. Therefore, legal professional privilege is indeed a fundamental human right that permeates the Charter. This must be so since without the benefit of legal advice and assistance the voiceless and the powerless will be hampered in securing their Charter rights or indeed any other right. The state cannot be relied on to respect these rights. History is filled with too many examples of abuse of state power. The Magna Carter came out the abuse of power by King John who was eventually brought to book by the nobles of the day. The American Revolution grew out of increasing abuse of power by the King of England. The Holocaust grew of out abuse of power by Nazis in Germany.

[19] That legal professional privilege is a fundamental right was stated by the Court of Appeal of Jamaica before the new Charter came into being in 2011. Panton JA in **The Jamaican Bar Association v The Attorney General** SCCA Nos 96, 202 & 108/2003 (unreported) (delivered December 14, 2005) adopted the view of the High Court of Australia which was that legal professional privilege is a substantive rule of law and further that the privilege was a fundamental right (**The Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission** 213 CLR 543) (paragraph 47). Panton JA also adopted the view of the Privy Council in **B and others v The Auckland District Law Society** [2003] 2 AC 736 (paragraph 48). In that case, the Board held that legal professional privilege was that of the client and the attorney cannot waive it without his or her client's consent. This was a case in which the disciplinary committee wanted documents from the lawyer in order to find out whether allegations of professional misconduct on the part of the lawyers could be substantiated. To put it bluntly not even the disciplinary body for lawyers can gain access to privileged information to investigate misconduct on the part of the lawyer

unless the client waves privilege. In the **Auckland** case Lord Millett was emphatic that (a) privilege remains even after the occasion for it has passed; (b) unless waived once privilege is established it lasts forever unless the client waives it; (c) where privilege is claimed and it is established the reason for not waiving it cannot be enquired into; (d) privilege communication is absolutely inviolable unless that very communication itself is the means of committing a fraud or some crime and (e) the privilege is that of the client and cannot be waived by the lawyer without his client's consent. This court would add that the client's consent must be an informed consent before it can be regarded as genuine consent.

[20] Lord Millett went to demonstrate the analytical failure on the part of the Court of Appeal of New Zealand. The Court of Appeal had advanced the notion that in the circumstances of that case, there was a further balancing of interest to be arrived at between protecting upholding the privilege claim or facilitating investigations into allegedly crooked lawyers. His Lordship held that despite the high public interest in ferreting out dishonest lawyers, legal professional privilege could not be trumped.

[21] While the language of the Australian and English courts does suggest that it is possible for an ordinary statute to override legal professional privilege it is significant to observe the extent to which those courts have refused to find that the statutes in question overrode the privilege. If it is so difficult in those two countries which do not have a bill of rights to find sufficient words to override legal professional privilege, then it should be infinitely more difficult in Jamaica where there is a bill of rights which is predicated on the existence of legal professional privilege. Indeed so insistent have the courts been in Australia and England that to date not a single case has been found in which those courts have held that the words in a statute are sufficiently clear to override legal professional privilege. This may be because there has not been a statute that has been bold enough to state on its face that its purpose is to

destroy legal professional privilege. This leaves the route of necessary implication and up to now no words have been found sufficiently strong to point to this conclusion.

[22] At this stage of Jamaica's legal history there can really be no doubt that legal professional privilege is a fundamental human right enjoyed by all citizens. There can equally be no doubt that any lawyer who fails to make the claim, in appropriate circumstances, on behalf of his client would be seriously failing in his or her duty and responsibility to advance and protect the interest of the client.

[23] In the case of **Descôteaux c. Mierzwinski** 141 DLR (3d) 590 the police secured a warrant to search offices of an agency that provided legal aid to persons who met the eligibility test. The allegation was that the one of the beneficiaries of the legal aid had lied on his form by misstating his means. The police wanted to get the document so that it could be used in evidence. The agency claimed legal professional privilege. The document was sealed and matter went to court. It reached the Supreme Court of Canada. The court gave directions on how the matter should be managed and those directions were to be carried out by the Justice of the Peace. The court found that some of the information sought by the attorney who would have spoken to the defendant may be privileged and some parts not privileged. In light of that there should be an examination of the form to make a determination of what was privileged and what was not and then the non-privileged parts made available to the prosecutors.

[24] Lamer J in **Descôteaux**, 609 cited, approvingly, the following from Laycraft JA in **R v Littlechild** 108 DLR (3d) 340, 347:

> *The privilege protecting from disclosure communications between solicitor and client is a fundamental right--as*

fundamental as the right to counsel itself since the right can exist only imperfectly without the privilege.

[25] This background was necessary in order to understand the submissions made as well as the implications of the submissions. Under section 91(g) the relevant Minister may appoint what is known as a competent authority. The competent authority is defined as the authority authorised in writing by the relevant Minister to monitor compliance of businesses in the regulated sector with anti-money laundering requirements. By virtue of the 2013 Ministerial order lawyers are not part of this sector governed by POCA. The competent authority may also issue guidelines to the businesses in the particular sector. As stated earlier, the GLC is the competent authority for the legal profession.

[26] The 2013 POCA amendment states that the competent authority shall have the authority to carry out inspections or verifications as are necessary. It may issue directions to any business and those directions must be obeyed. The authority is empowered 'to examine and take copies of information or documents in the possession or control of any businesses concerned and relating to the operations of that business.' After getting this information the competent authority may share the information with any other competent authority whether located in Jamaica or overseas (section 91A (2) (c)). In other words, the legislative framework is such that the competent authority in Jamaica may be used as a proxy for overseas law enforcement agencies without any judicial scrutiny or scrutiny by an independent third party. There is the potential for this avenue to be used to avoid making a formal request for information through mutual legal assistance. What safe guard is there to prevent the competent authority taking information from the lawyer at 0900hrs on a given day, scanning and sending it out of the country by, 0910 hours, in light of the capability of many smart phones and tablets to scan material and send instantaneously the information by email? What effective opportunity

would the lawyer or client have in challenging the conduct of the competent authority? This, for Mrs Gibson Henlin, is simply unacceptable.

[27] Section 91A (3) states that nothing in subsection (2) (c) shall be construed as requiring an attorney at law to disclose any information or advice that is subject to legal professional privilege. Mrs Foster Pusey QC suggested that this provision and similar ones found throughout POCA offer sufficient protection to the fundamental right of legal professional privilege. Mrs Gibson Henlin says that they do not because there no clear process for claiming the privilege and having it resolved is outlined.

[28] Section 91A (5) criminalises failure to comply with any requirement or direction issued by the competent authority. The lawyer who runs afoul of this section risks a fine and being barred from the profession.

[29] The present competent authority for lawyers is the GLC but there is nothing in the statute that prevents the Minister from appointing the Commissioner of Police or any other state agency or even an overseas agency as the competent authority. Some have assumed that Minister would not appoint an overseas body or a state investigatory body but the statute contains no such restriction. If these person were appointed as the competent authority would the police or any other agency be properly equipped, in the absence of a clear statutory guidelines, to manage effectively circumstances where legal professional privilege is claimed?

[30] This is how Mrs Gibson Henlin puts the argument. Learned counsel submitted that if the attorney claims privilege that claim in and of itself does not prevent the attorney from being charged with the criminal offence. It is hoped that the prosecuting authority would be reasonable and seek to have the matter resolved outside the criminal process. Indeed Mrs Foster Pusey suggested that the attorney could take the matter to court to ask for a

declaration in the event that he or she is faced with a situation of the kind referred to. Mrs Gibson Henlin's response is that this is not good enough. The resolution of the dispute should not depend on the reasonableness or generosity of spirit of the competent authority or prosecuting agency. The submission was that the statute should condescend to particulars and spell out the process in detail so that all persons know the way forward. The response of this court is this: in light of modern technological capabilities to record and transmit information instantaneously what effective opportunity would a lawyer or citizen have to challenge the conduct in order to prevent the transmission of information that may turn out to be subject to legal professional privilege? In other words, the framework must show that it is real, effective and capable of permitting a claim to legal professional privilege to be made without the risk of the state getting that information before hand.

[31] In this court's view Mrs Gibson Henlin's anxieties are well founded. In looking at section 91A (5), there is no stated mens rea requirement. The provision does not explicitly say that a claim to legal professional privilege made in good faith is a defence. This leaves open the possibility that an attorney who honestly and sincerely makes the claim in good faith but on examination a court finds that the information was not privileged may well be convicted because such a finding must mean that the attorney has in fact failed to comply with a lawful requirement to produce a document not subject to legal professional privilege made by the competent authority.

[32] On the face of it, it is not unreasonable to say that the statute appears to take a narrow approach to the issue of legal professional privilege and does not reflect an understanding of the nuances of legal professional privilege that may be involved in any given case. The case of **Minter v Priest** [1930] AC 558 makes this point perfectly. In that case a lawyer (cynics would say incongruously named) Mr Priest was sued for slander. One Mr Minter had mortgaged a house and ran into financial problems. Mr Minter sought to sell

the property and engaged the services of Mr Taylor to find a purchaser. Mr Taylor found one Mr Simpson as the potential purchaser. Mr Simpson went to a firm of solicitors to borrow money to make the purchase. Mr Simpson and Mr Taylor met Mr Priest and during that exchange Mr Priest is alleged to have made unflattering remarks about Mr Minter. These statements came to the attention of Mr Minter who promptly sued the lawyer. Mr Taylor provided evidence of the remarks at the trial. On the facts the court held that the statement was properly admitted. The significance of the decision is the examination of whether legal professional privilege could arise in the context where the client wanted to borrow money from the attorney. The House held that it could. Lord Buckmaster was at pains to point that the fact that the Mr Simpson wanted to borrow money from the lawyer, that is to create a debtor/creditor relationship, has no inherent power to deprive the transaction of the protection of legal professional privilege. His Lordship was rejecting the proposition that the relationship of lawyer and client never arose because the meeting with the lawyer was about borrowing money. Lord Buckmaster added that he was not prepared to 'assent to a rigid definition of what must be the subject of discussion between a solicitor and his client in order to secure the protection of professional privilege. Just to demonstrate how thorny this issue can be an extract from Lord Buckmaster's judgment is quoted from page 568:

> *I am not prepared to assent to a rigid definition of what must be the subject of discussion between a solicitor and his client in order to secure the protection of professional privilege. That merely to lend money, apart from the existence or contemplation of professional help, is outside the ordinary scope of a solicitor's business is shown by the case of Hagart and Burn-Murdoch v. Inland Revenue Commissioners. But it does not follow that, where a personal loan is asked for, discussions concerning it may not be of a privileged nature. In this case the contemplated relationship*

was that of solicitor and client, and this was sufficient.

There is much to be said in favour of the view that, so far as Taylor was concerned, this privilege was waived, but it does not follow that this enabled the conversation to be disclosed. Simpson was also present as a possible client and no authority has been quoted to establish that in these circumstances it was possible for Taylor to waive a privilege which was as much Simpson's as his own.

The relationship of solicitor and client being once established, it is not a necessary conclusion that whatever conversation ensued was protected from disclosure. The conversation to secure this privilege must be such as, within a very wide and generous ambit of interpretation, must be fairly referable to the relationship, but outside that boundary the mere fact that a person speaking is a solicitor, and the person to whom he speaks is his client affords no protection.

[33] Lord Atkin said at pages 579 – 581:

My Lords, confidential communications passing between solicitor and client are doubly guarded in the law. It is important to emphasize the twofold nature of the protection given; for they are commonly said to be privileged and the word unfortunately tends to confuse two entirely distinct rights.

In the first place they are protected from disclosure whether by production of documents or in oral evidence. This protection is part of the law of evidence. It has no direct relation to the question whether the communication itself constitutes a cause of action. Neither the solicitor nor the

client need be party to the action in which the question of evidence arises. Also it matters not whether the action be for defamation, fraud (subject to limitations to be discussed), breach of trust, breach of contract or otherwise; if the communication comes within the prescribed rule it is inadmissible in evidence. The object is no doubt to enable the persons concerned to communicate freely without fear of exposing themselves or others to actions. But the right to have such communications so protected is the right of the client only. In this sense it is a "privilege," the privilege of the client. If the client chooses to withdraw the veil, the law interposes no further difficulty. The communications are then available as evidence.

Once the communications have been admitted in evidence the second protection comes into force. This affects the question how far the communications can form part of a cause of action. They have become evidential: are they actionable? The protection here is limited. As far as I know it is confined to actions of defamation. I am not aware of any authority which would prevent a client from revealing communications made to him by his solicitor for the purpose of bringing an action of fraud, breach of trust, or negligence against him: just as the communications may if disclosed by the client be used as evidence in any actions by or against a third party. In actions of defamation, however, the communications are "privileged." To what extent this protection goes is in dispute in this case. The defendant's contention, relying upon the recent decision of the Court of Appeal in More v. Weaver is that the communications are absolutely privileged, so that no action of defamation can be brought upon them. The plaintiff's contention is that the

privilege is only a qualified privilege, i.e., that they receive only the ordinary protection of other confidential communications - namely, that the occasion upon which they are made is a privileged occasion, and the plaintiff to succeed must prove express malice. The main question in this case is whether the words complained of were confidential communications between solicitor and client so as to be entitled to the twofold protection I have mentioned. The test for such protection has been defined in different words in a number of cases. I think it is best expressed in two phrases used in the Court of Appeal in the leading case of O'Shea v. Wood. Lindley L.J. adopts the language of Cotton L.J. in Gardner v. Irvin: "professional communications of a confidential character for the purpose of getting legal advice." Kay L.J. refers to the language of Kindersley V.-C. in Lawrence v. Campbell and adopted by Lord Selborne L.C. in Minet v. Morgan, communications passing as "professional communications in a professional capacity." The Lord Justice prefers the former phrase, and emphasizes the importance of the confidential character. As to this it is necessary to avoid misapprehension lest the protection be too limited. It is I think apparent that if the communication passes for the purpose of getting legal advice it must be deemed confidential. The protection of course attaches to the communications made by the solicitor as well as by the client. If therefore the phrase is expanded to professional communications passing for the purpose of getting or giving professional advice, and it is understood that the profession is the legal profession, the nature of the protection is I think correctly defined. One exception to this protection is established. If communications which otherwise would be

protected pass for the purpose of enabling either party to commit a crime or a fraud the protection will be withheld. It is further desirable to point out, not by way of exception but as a result of the rule, that communications between solicitor and client which do not pass for the purpose of giving or receiving professional advice are not protected. It follows that client and solicitor may meet for the purpose of legal advice and exchange protected communications, and may yet in the course of the same interview make statements to each other not for the purpose of giving or receiving professional advice but for some other purpose. Such statements are not within the rule: see per Lord Wrenbury O'Rourke v. Darbishire. Not all communications therefore passing between solicitor and client are protected. How is the question of protection from disclosure to be determined, when there is a dispute? If the judge admits the evidence of what was said or written he destroys the protection: if he does not hear the evidence he cannot determine the dispute.

[34] This long passage was necessary so that the full reasoning of Lord Atkin can be appreciated in order to show that merely to say that information or advice covered by or not covered by legal professional privilege is deceptive simplicity. The discussion by his Lordship shows how intricate the analysis can be. Thus in one conversation parts may be privileged and parts may not. In one document, parts may be privileged and parts not so protected (**Descôteaux**). The substantive complaint of Mrs Gibson Henlin is that the failure to provide an adequate mechanism within the statute or by appropriate subsidiary regulation (since the Minister has the power under section 138 of POCA to give effect to the statute) whereby the issue can be resolved before the state gets access to the information and without the risk of criminal prosecution. Mrs Gibson Henlin seems to be saying that the resolution of the

issue of privilege should not be left to the good will of state officials but rather that there should be a known, transparent and proper mechanism for this to happen.

[35] So while it is true to say that it is not every conversation or everything done by a lawyer attracts legal professional privilege what is clear from **Minter** and **Descôteaux** deciding where the particular information falls is by no means an easy matter. In the present case, if there is an overzealous competent authority who decides to prosecute the lawyer who makes the claim, the lawyer may well be placed in an invidious position – does he or she breach a fundamental human right of his client in order to prove that the information wanted is privileged thereby preventing a conviction or does he or she take the punch on the chin and decline to speak if it is the case that the legal professional privilege cannot be established without giving the details of the engagement and the conversation? A criminal trial takes place in open court. There is the risk of the client's business being published to all the world.

[36] With **Minter** in mind the court looks at the Ministerial order designating lawyers in certain circumstances as DNFIs and the guidance notes given by GLC. Any lawyer who does for his client any of the following is a DNFI:

1. purchase or selling of real estate;

2. managing money, securities or other assets;

3. managing bank accounts or savings accounts of any kind, or securities accounts;

4. organising contributions for the creation, operation or management of companies;

5. creating, operating or managing a legal person or legal arrangement (such as a trust or settlement); or purchasing or selling a business entity.

[37] The guidance notes from the GLC inform attorneys that what is stated in the Ministerial Order is to be interpreted broadly and 'are therefore intended to encompass all services provided by an attorney including assisting in the planning or execution of any of the transactions covered by the activities engaged in the DNFI Order from the time the attorney is first engaged or consulted by or on behalf of the client' (article 14 of guidance notes).

[38] The guidance notes advise attorneys that they are to separate information and documents subject to the privilege from the information and documents related to the activities that make them fall within the DNFI Order. As the **Minter** and **Descôteaux** cases show, this may be no easy task.

[39] From what has been said, if grandson Johnny in Kingston asks grandpa in rural Jamaica for a loan to pay down on a house. Grandpa goes to get advice on his legal rights and the advice is that his name should be placed on the title. His name is placed on the title. If that is the only contact the attorney has with the transaction, it is quite possible, in light of article 14 of the guidance notes to argue that the attorney who advised grandpa is a DNFI because it can conceivably be argued such an attorney has participated in the assisting or planning of the grandson's transaction even though the attorney did nothing else. It does not take much imagination to multiply instances to see how far reaching the regime for lawyers is. Where are the boundaries?

[40] Even the Canons of Professional Ethics for attorneys have jettisoned confidentiality and secrecy and now tell attorneys that it is alright to 'reveal confidence or secrets' in accordance with the provisions of POCA and any

regulations made under the statute. The Canons do not have a commentary and so the attorney has not guidance on what, when and how much to reveal.

[41] Should an attorney be asked to take the risk that a judge may find that information he or she refused to supply under section 91A (2) (c) was not in fact subject to legal professional privilege and therefore ought to be convicted because the criminalising section does not have a claim made in good faith defence? Even alleged thieves under the Larceny Act escape if he made a claim of right in good faith to the item allegedly stolen but an attorney, in good faith, who seeks to uphold a fundamental human right may be convicted of a crime and expelled from his profession is not afforded similar accommodation under section 91A (5).

[42] At the time of **Minter**, the privilege was thought of as evidential but the other cases cited already show the evolution of thought regarding legal professional privilege. It is now a substantive rule of law and a fundamental right according to Panton JA and fundamental human right according to Lord Hoffman. Legal professional privilege is now a mature free standing right that is an integral part of a Constitutional democracy.

[43] Mrs Foster Pusey cited sections 91A (3), 94 (5), 97 (2) (c), 104, 105 and 117 in order to make the point that the statute is replete with references to exemptions or defences based on legal professional privilege. The learned Solicitor General submitted that these sections show that the regime indeed recognises legal professional privilege and gives effect to it. All this is true but the complaint of Mrs Gibson Henlin is that the statutory regime does not go far enough in that given the complexities that can bedevil this area the legislation should do more.

[44] It is convenient to refer to another aspect of **Descôteaux**. In that case the Supreme Court tried to fill gaps in the legislation that authorised the issuing of search warrants to search places generally including lawyers' offices. The

search warrants could be issued to search lawyer's offices even in cases where the lawyer was not suspected of committing a crime. Lamer J recommended that provincial courts and others should try to plug the gap either formally rules of court or informally. This led to intervention by Parliament in the form of section 488.1 of the Criminal Code. Eventually, this provision struck the rock of unconstitutionality and sank. This was the case of **R v Lavallee** 216 DLR (4th) 257. In that case, the court sought to create yet another judicial solution which was to operate while the legislature tried to find an effective statutory solution. One of the problems with the statute was that it did not give the client sufficient opportunity to make the claim for privilege. The next legislation attempt at fixing the problem was found wanting in **Federation of Law Societies v Canada (Attorney General)** which is on its way to the Supreme Court of Canada. It is interesting to observe that one of the judicial recommendations coming from Supreme Court in **Lavallee** is that no Crown agent should even view the material nor have access to them in any manner prior to a judicial determination made regarding legal professional privilege. The point here is that gap filling on such a crucial matter should not be left to the judiciary. Any gap filling by the judiciary is a temporary measure.

[45] Mrs Gibson Henlin stressed the importance of the point about criminalising of the lawyer for what may be an error of judgment. For example, section 94 criminalises failure to report a person who has engaged in a transaction that could constitute or be related to money laundering. Section 94 (5) (a) states that an offence is not committed if there was a reasonable excuse for not disclosing the information or other matter. Section 94 (5) (b) provides that a person does not commit an offence if he is an attorney at law and the information or other matter came to him in privileged circumstances. Section 94 (5) (c) and (5) says that if the person who failed to report had no knowledge or did not suspect that the other person was engaged in money laundering then no offence is committed. The submission here was that the

attorney is given a defence to criminal charge of failing to report the matter. The statute does not provide any mechanism where the issue can be resolved without the attorney being charged. Mrs Foster Pusey suggested reasonableness on the part of the authorities would be a safeguard. The court is not of the view that reasonableness of the state agencies is of great comfort.

[46] What if the attorney formed the view that the person who consulted him was in fact engaged in money laundering but concluded honestly but erroneously that he had received the information in privileged circumstances? Would this amount to a reasonable excuse within section 94 (5) (a)? Some persons would say yes others would say no. This, it is said, is evidence of the imprecision and vagueness of the regime when it comes to attorneys at law and is consistent with a misunderstanding of what attorneys do.

[47] It is appropriate to examine the other main ground advanced by JBA regarding the present anti-money laundering regime: that is the erosion of the independence of the Bar.

Independence of the Bar

[48] In the Canadian case of **Federation of Law Societies v Canada (Attorney General)**, the British Columbia Court of Appeal had to address the Canadian anti-money laundering regime in the context of the Canadian Charter of Rights. The primary judge, at first instance, struck down some parts of the regime on the ground that it infringed lawyer/client privilege. On appeal the judge's decision was affirmed but on different grounds. Hinkson JA found that even if the regime interfered with legal professional privilege, such interference was secondary to what was described as interference with 'the independence of the Bar [which] is a principle of fundamental justice with which the Regime (sic) interferes to an unacceptable degree.'

[49] Frankel JA while agreeing with Hinkson JA on the result took issue with Hinkson JA's conclusion that requiring the lawyer to keep records relating to transactions engaged any liberty interest as the client. His Lordship added that if that was the case in relation to lawyers then the same argument could be made for others person such as stock broker or financial advisers. It is this court's view that, respectfully, Frankel JA did not fully appreciate the implication of being a fiduciary, particularly one which arises necessarily from the fact of the lawyer/client relationship. His Lordship did not give full weight to the concept of fiduciary duty. In **Hodgkinson v Simms** 117 DLR (4^{th}) 161 the Supreme Court of Canada addressed the question of fiduciary duty. The majority and minority were agreed on certain fundamental principles regarding fiduciaries. Sopinka and McLachlin JJ, of the minority, agreed that at the heart of a fiduciary relationship is trust. One party is at the mercy of the other's decision. One party is vulnerable meaning, 'implicit dependence' of one on another. Where the relationship is not a presumptively fiduciary one the court looks for certain indicia which it uses to determine whether a fiduciary relationship exits. La Forest J of the majority held that fiduciary obligations carry with it the special element of trust, loyalty and confidentiality. It is the presence of these elements that, in some instances, moves an allegation of negligent misstatement to the higher plane of breach of fiduciary duty.

[50] In the normal course of things a stock broker or financial adviser is not a presumptive fiduciary. A creditor is not usually in a fiduciary relationship with a borrower. A stock broker and financial adviser are at best persons who owe a duty of care to the client but this is a far cry from being a fiduciary because, ordinarily, such persons have no duty of trust and loyalty to the client. Unless so instructed a stock broker and financial adviser have no affirmative duty to look out for the best interest of his client. By contrast, a fiduciary must see about the welfare of the person to whom he has the fiduciary obligation and has an affirmative duty to promote the best interest of that person.

Consequently, it is one thing to ask a non-fiduciary to collect information and pass it on to state agencies but quite another to demand that fiduciary who is also the person's lawyer to do the same thing. It was this point that Hinkson JA was making.

[51] Once a lawyer is engaged qua lawyer by a client that fact without more makes the lawyer a fiduciary. Once a lawyer is even consulted as a lawyer where the person may be seeking advice or even trying to decide whether he needs a lawyer and before retainer that act of consultation constitutes the lawyer a fiduciary for the purpose of that consultation and a lawyer can be sued if he breaches any fiduciary duty owed to the client. Cambio dealers, dealers in precious metals and stones, accountants are under no so such obligation in law unless by their conduct they cross over the threshold and become a fiduciary. The lawyer immediately comes under a duty of loyalty and fidelity. He cannot have divided loyalties. Fiduciary law is one of the pillars on which the legal profession rests. The complaint of the Bar is that the present regime seeks to transform this fundamental underpinning of the profession without any calibration of the anti-money laundering regime to meet this reality. In other words, the regime as presently constituted deprives the public of the benefit of this principle and this in turn undermines confidence in the legal system which erodes the ability of the public to take advantage of their fundamental rights guaranteed by the Charter and other rights.

[52] A lawyer may be inhibited in his representation of his or her client in litigation or a dispute involving the state because the state may choose to use its power to put pressure on the lawyer by conducting some anti-money laundering investigation of the lawyer and under the guise of that power get information through the lawyer that it could not have received directly from the client or worse, use that power to intimidate the lawyer so that he or she gets rid of that client.

[53] So far as this court is aware, this idea of an independent Bar being itself a principle of fundamental justice has not been articulated until relatively recent times. It is true to say that the value of an independent Bar has been recognised but to say that the value has been enhanced to the point where that principle in and of itself is sufficient to invalidate a statute is certainly new.

[54] The Solicitor General rightly pointed out that section 7 of the Canadian Charter permitted this kind of analysis because of its wording. It says

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

[55] According to Mrs Foster Pusey, section 13 (3) (a) of the Jamaican Charter does not have the words 'principles of fundamental justice.' The Jamaican provision reads:

> *The right to life, liberty and security of the person and the right not to be deprived thereof except in the execution of the sentence of a court in respect of a criminal offence of which the person has been convicted.*

[56] The Solicitor General also said that the concept of fundamental justice has been or is being developed through Canadian case law. This is true. This court's response to this is the idea that lawyer/client privilege is such an integral part of the right to access to a lawyer that the privilege is founded on fundamental justice was decided on a common law basis by two Canadian decisions. In **Re Shell Canada Ltd** 55 DLR (3d) 713 where the issue concerned the issuing of a search warrant to search lawyer's offices Jackett CJ held at page 722:

> *I fully realize that the protection of the confidentiality of the solicitor-and-client relationship has, heretofore, manifested itself mainly, if not entirely, in the privilege afforded to the client against the compulsory revelation of communications between solicitor and client in the giving of evidence in court or in the judicial process of discovery. (There is, of course, another branch of the privilege — the lawyer's brief — which does not require special mention here.) In my view, however, this privilege is a mere manifestation of a fundamental principle upon which our judicial system is based, which principle would be breached just as clearly, and with equal injury to our judicial system, by the compulsory form of pre-prosecution discovery envisaged by the Combines Investigation Act as it would be by evidence in court or by judicial discovery.*

[57] This passage was expressly approved by the Supreme Court of Canada in **Descôteaux**. Thus it was common law reasoning and not bill of rights analysis that led to the conclusion that legal professional privilege is a manifestation of the fundamental principle of right of access to a lawyer.

[58] Having read some of the cases cited in **Federation of Law Societies of Canada**, in the view of this court, notwithstanding the wording of the Canadian Charter, the point that was being made was that the lawyer should not be placed in a position where he is called upon to serve two masters. In **R v Neil** 218 DLR (4th) 671Binnie J reasoned at paragraphs 12 – 16:

> *Appellant's counsel reminds us of the declaration of an advocate's duty of loyalty made by Henry Brougham, later Lord Chancellor, in his defence of Queen Caroline against*

the charge of adultery brought against her by her husband, King George IV. He thus addressed the House of Lords:

> *[A]n advocate, in the discharge of his duty, knows but one person in all the world, and that person is his client. To save that client by all means and expedients, and at all hazards and costs to other persons, and, among them, to himself, is his first and only duty; and in performing this duty he must not regard the alarm, the torments, the destruction which he may bring upon others. Separating the duty of a patriot from that of an advocate, he must go on reckless of consequences, though it should be his unhappy fate to involve his country in confusion.*

(Trial of Queen Caroline, by J. Nightingale, vol. II, the Defence, Part 1 (1821), at p. 8)

These words are far removed in time and place from the legal world in which the Venkatraman law firm carried on its practice, but the defining principle — the duty of loyalty — is with us still. It endures because it is essential to the integrity of the administration of justice and it is of high public importance that public confidence in that integrity be maintained: MacDonald Estate v. Martin, [1990] 3 S.C.R. 1235 (S.C.C.), at pp. 1243 and 1265, and Tanny c. Gurman (1993), [1994] R.D.J. 10 (Que. C.A.). Unless a litigant is assured of the undivided loyalty of the lawyer, neither the public nor the litigant will have confidence that the legal system, which may appear to them to be a hostile and hideously complicated environment, is a reliable and

trustworthy means of resolving their disputes and controversies: R. v. McClure, [2001] 1 S.C.R. 445, 2001 SCC 14 (S.C.C.), at para. 2; Smith v. Jones, [1999] 1 S.C.R. 455 (S.C.C.). As O'Connor J.A. (now A.C.J.O.) observed in R. v. McCallen (1999), 43 O.R. (3d) 56 (Ont. C.A.), at p. 67:

> *... the relationship of counsel and client requires clients, typically untrained in the law and lacking the skills of advocates, to entrust the management and conduct of their cases to the counsel who act on their behalf. There should be no room for doubt about counsel's loyalty and dedication to the client's case.*

13 The value of an independent bar is diminished unless the lawyer is free from conflicting interests. Loyalty, in that sense, promotes effective representation, on which the problem-solving capability of an adversarial system rests. Other objectives, I think, can be related to the first. For example, in MacDonald Estate, supra, Sopinka J. speaks of the "countervailing value that a litigant should not be deprived of his or her choice of counsel without good cause" (p. 1243). Dubin J.A. remarked in R. v. Speid (1983), 8 C.C.C. (3d) 18 (Ont. C.A.), at p. 21:

> *We would have thought it axiomatic that no client has a right to retain counsel if that counsel, by accepting the brief, puts himself in a position of having a conflict of interest between his new client and a former one.*

See also: Teoli c. Fargnoli (1989), 30 Q.A.C. 136 (Que.

C.A.).

14 These competing interests are really aspects of protecting the integrity of the legal system. If a litigant could achieve an undeserved tactical advantage over the opposing party by bringing a disqualification motion or seeking other" ethical" relief using "the integrity of the administration of justice" merely as a flag of convenience, fairness of the process would be undermined. This, I think, is what worried the Newfoundland Court of appeal in R. v. Parsons (1992), 100 Nfld. & P.E.I.R. 260 (Nfld. C.A.), where the accused was charged with the first degree murder of his mother. The Crown sought to remove defence counsel on the basis that he had previously acted for the father of the accused in an unrelated matrimonial matter, and might in future have to cross-examine the father at the son's trial for murder. The accused and his father both obtained independent legal advice, after full disclosure of the relevant facts, and waived any conflict. The father also waived solicitor-client privilege. The court was satisfied there was no issue of confidential information. On these facts, the court concluded that" public confidence in the criminal justice system might well be undermined by interfering with the accused's selection of the counsel of his choice" (para. 30).

15 Sopinka J. in MacDonald Estate, supra, also mentioned as an objective the" reasonable mobility in the legal profession" (p. 1243). In an era of national firms and a rising turnover of lawyers, especially at the less senior levels, the imposition of exaggerated and unnecessary client loyalty demands, spread across many offices and lawyers who in

fact have no knowledge whatsoever of the client or its particular affairs, may promote form at the expense of substance, and tactical advantage instead of legitimate protection. Lawyers are the servants of the system, however, and to the extent their mobility is inhibited by sensible and necessary rules imposed for client protection, it is a price paid for professionalism. Business development strategies have to adapt to legal principles rather than the other way around. Yet it is important to link the duty of loyalty to the policies it is intended to further. An unnecessary expansion of the duty may be as inimical to the proper functioning of the legal system as would its attenuation. The issue always is to determine what rules are sensible and necessary and how best to achieve an appropriate balance among the competing interests.

16 The duty of loyalty is intertwined with the fiduciary nature of the lawyer-client relationship. One of the roots of the word fiduciary is fides, or loyalty, and loyalty is often cited as one of the defining characteristics of a fiduciary: McInerney v. MacDonald, [1992] 2 S.C.R. 138 (S.C.C.), at p. 149; Hodgkinson v. Simms, [1994] 3 S.C.R. 377 (S.C.C.), at p. 405. The lawyer fulfills squarely Professor Donovan Waters' definition of a fiduciary:

> *In putting together words to describe a "fiduciary" there is of course no immediate obstacle. Almost everybody would say that it is a person in whom trust and confidence is placed by another on whose behalf the fiduciary is to act. The other (the beneficiary) is entitled to expect that the fiduciary will*

> *be concerned solely for the beneficiary's interests, never the fiduciary's own. The "relationship" must be the dependence or reliance of the beneficiary upon the fiduciary.*
>
> *(D. W. M. Waters, "The Development of Fiduciary Obligations", in R. Johnson et al eds., Gérard V. La Forest at the Supreme Court of Canada — 1985-1997 (2000), 81, at p. 83.)*
>
> *Fiduciary duties are often called into existence to protect relationships of importance to the public including, as here, solicitor and client. Disloyalty is destructive of that relationship.*

[59] In other words, the lawyer who is engaged by a client is immediately within a presumptive fiduciary relationship. The lawyer owes a duty of loyalty and fidelity to the client. He or she must put the client's interest first. It is this duty which propels the lawyer to claim privilege on behalf of the client even if he has no explicit instructions on the point. While I appreciate Mrs Foster Pusey's point that the expression 'fundamental justice' appears in the Canadian Charter, the crucial point made by Mrs Gibson Henlin, which this court accepts, is that legal professional privilege is one manifestation of the special nature of the relationship between a lawyer and his client and itself is fundamental to justice. The relationship rests on the foundation of unwavering loyalty to his or her client.

[60] This duty of loyalty enables the lawyer to represent the unpopular and the distasteful in any democratic society. The Adolph Hilters of this world are as much entitled to the loyalty of his lawyer as would the Mother Teresas. How could any litigant be confident in his lawyer if it were known that the lawyer

may well be collecting information on him and handing it over to the state? Could such a lawyer convince the client that matters relating to legal professional privilege would not be handed over to the state? Could such a client be confident that he would receive a fair trial or adequate representation or be confident that his instructions were not handed over to the prosecution? This court is of the view that it was these considerations that led Iacobucci J in **Pearlman v Law Society (Manitoba)** 84 DLR (4TH) 105 to observe, quoting from a paper entitled *The Report of the Professional Organisations Committee* (1980) by the Ministry of the Attorney General of Ontario, that an equal high value is place on an independent Bar as is placed on an independent judiciary. It is not for the benefit of the lawyer in their individual capacity but for the benefit of the public at large. It is this tradition that enables perceived 'trouble makers' in any society to resist government tyranny which often times is presented as national security interest or in the best interest of the society.

[61] As this court understood Mrs Gibson Henlin (even though she did not explain in detail), many of the fundamental rights of the Jamaican Charter would become meaningless if the anti-money laundering regime as it presently stands continues unchecked. Clients would be reluctant to speak because of fear that their confidences may be revealed. They would not get proper advice because the lawyer would not have all the information. There is the risk of becoming a police state if lawyers were compelled to be part of the system of information gathering commonly found in totalitarian societies. It is money laundering today. It may be some other offence tomorrow.

[62] Even though it was said earlier, it bears repeating that the Bar is not saying lawyers are to engage in criminal activity. What is objectionable is what appears to be the transformation of the legal profession from independent standing ready to take on an over-bearing state on behalf of their clients to

one where it becomes a proxy investigator against the client and turns over or makes the information available to the state.

[63] This court has read the affidavit of Mr Robin Sykes (filed on behalf of the first respondent), General Counsel of the Bank of Jamaica and Jamaica's primary contact with the Caribbean Financial Action Task Force ('CFATF'), the regional anti-money laundering body. The affidavit speaks to Jamaica's international obligations under various anti-money laundering treaties and conventions. The affidavit outlines what may be the serious consequences for Jamaica and represent what he calls a significant weakening of Jamaica's anti-money laundering framework. The affidavit also went on to say that foreign governments, multilateral agencies and overseas commercial counterparties may conclude that Jamaica is at a higher risk for money laundering. The consequence of this conclusion, if made, is that Jamaica will quite likely find it more difficult to participate in the international financial system.

[64] Mr Sykes indicated that he has read Mr Walker's affidavit. The court cannot help but note that Mr Sykes does not take on board the crucial issue of the possible impairment of legal professional privilege. It is not clear whether he is saying that it is a risk worth taking so long as Jamaica complies with its international obligations. As this court sees it, the issue is not simply a matter of compliance or non-compliance with international norms but rather whether Jamaica can comply with its international obligations and give effect to them in a manner compatible with Jamaica's supreme law which is the Constitution. It is one thing to say that legal professional privilege is respected but if there is a lack of a clear, transparent and effective process and procedure for the issue of legal professional privilege to be resolved claimed and adjudicated upon then simply saying that the privileged documents and information are not subject to be taken is does not amount to much. The declaration is helpful but the crucial test in the mechanisms to claim and protect the right.

[65] These, then are the issues that concern the Bar and why they say an interim injunction or stay should be granted. They say that unless the stay is granted the harm done will be irreparable. The public of Jamaica will or may lose one of their fundamental rights, namely, the right to competent legal advice from a strong and independent Bar which is not a covert operator for the state.

Is there power to grant an injunction or stay of the anti-money laundering regime until the matter is ventilated in the courts?

[66] The Bar says yes to this question. Mrs Foster Pusey says no. The Solicitor General relies on section 16 of the Crown Proceedings Act which prohibits an injunction against the Crown except in crown side proceedings such as judicial review. This case, learned counsel said, is not one of judicial review but a constitutional action where the claimant is seeking to have parts of regime declared incompatible with the Jamaican Charter. Mrs Foster Pusey cited the Court of Appeal's decision in **Brady & Chen Ltd v Devon House Development Ltd** [2010] JMCA Civ 33.

[67] It is the view of this court that a Constitution is a special document. It sets out fundamental rights to be enjoyed by citizens. It usually as the main organs of government and sets out their respective powers. Often times it contains provisions regarding the qualifications and circumstances in which persons can hold certain offices. It is not apparent to me why the Crown Proceedings Act would be applicable in these circumstances.

[68] The Crown Proceedings Act came at time, in England, when the dominant idea was the supremacy of Parliament. England has never had a concept of the supremacy of the Constitution over all else including Parliament. The Crown Proceedings Act of Jamaica mirrored the earlier English equivalent. England does not have a doctrine of Constitutional supremacy but rather Parliamentary sovereignty. Even after the passage of the Human Rights Act,

the court in England, at best, can grant a declaration of incompatibility but do not have the power to declare a statute or regulation ineffective because it failed to comply with the Human Rights Act. This court is not convinced that the Crown Proceedings Act has any application to constitutional matters because at the time of its passage the public law litigation that the statute had in mind was judicial review and not declarations of unconstitutionality.

[69] The express powers conferred on the Supreme Court by section 19 (3) and (4) are:

> *(3) The Supreme Court shall have original jurisdiction to hear and determine any application made by any person in pursuance of subsection (1) of this section and may make such order, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement of, any of the provisions of this Chapter to the protection of which the person concerned is entitled.*
>
> *(4) Where any application is made for redress under this Chapter, the Supreme Court may decline to exercise its powers and may remit the matter to the appropriate court, tribunal or authority if it is satisfied that adequate means of redress for the contravention alleged are available to the person concerned under any other law.*

[70] There is also section 19 (6) which reads:

> *Parliament may make provisions or authorise the making of provisions with respect to the practice and procedure of any court for the purpose of this section and may confer upon that court such powers or may authorise the conferment*

thereon of such powers, in addition to those conferred by this section, as may appear to be necessary or desirable for the purpose of enabling that court more effectively to exercise the jurisdiction conferred upon it by this section.

[71] Mrs Gibson Henlin submitted that there is nothing in section 19 (6) which restricts the power of the court to grant interim relief. Although the facts are different counsel took the view that the following passages from **Methodist Church in the Caribbean and the Americas (Bahamas District) and Others v Symonette and Others; Poitier and Others v Methodist Church of the Bahamas and Others** (2000) 59 WIR 1 support her position. At page 14 Lord Nicholls stated:

The primary and normal remedy in respect of a statutory provision whose content contravenes the Constitution is a declaration, made after the enactment has been passed, that the offending provision is void. This may be coupled with any necessary, consequential relief. However, the qualifying words 'so far as possible' are important. This is no place for absolute and rigid rules. Exceptionally, there may be a case where the protection intended to be afforded by the Constitution cannot be provided by the courts unless they intervene at an earlier stage. For instance, the consequences of the offending provision may be immediate and irreversible and give rise to substantial damage or prejudice. If such an exceptional case should arise, the need to give full effect to the Constitution might require the courts to intervene before the Bill is enacted. In such a case parliamentary privilege must yield to the courts' duty to give the Constitution the overriding primacy which is its due.

> *Their lordships consider that this approach also leads ineluctably to the conclusion that the courts have jurisdiction to entertain a claim that the provisions in a Bill, if enacted, would contravene the Constitution and that the courts should grant immediate declaratory or other relief. The courts have power to inquire into such a claim and consider whether any relief is called for. In their lordships' understanding, that is what is meant by 'jurisdiction' in this context. The exercise of this jurisdiction is an altogether different matter. The courts should exercise this jurisdiction in the restrictive manner just described.*

[72] Mrs Gibson Henlin's submission is an a fortiori argument. If the courts can intervene at the Bill stage then surely the courts can intervene after the passing of the statute which has come into force. Mrs Foster Pusey noted that the claimants in that **Symonette** were granted an injunction (which was not extended subsequently) preventing the Attorney General from appointing a day for the Act to come into force. She correctly observed that the precise legal basis for the injunction is not apparent from the Board's decision. Nonetheless the Solicitor General urged that even if that case provides authority for the courts to intervene and grant interim relief before the particular legislation is declared incompatible with the Constitution that would only be done in exceptional circumstances.

[73] The learned Solicitor General took the view that the entire scope of section 19 of the Charter is predicated on granting a remedy after adjudication on the merits and there is nothing that confers any power on the court to intervene at this stage. Counsel also submitted that should the court not be with her then the balance of convenience as established by Canadian case law has not been met.

[74] The case of **Symonette** does not provide a clear answer but provides building blocks, along with the Canadian cases, from which an answer can be derived. Lord Nicholls said that exceptionally, there may be cases where intervention is needed earlier than after the passing of the statute because the consequences may be immediate and irreversible. Of course, this would be at the Bill stage of the legislative process. The basis of the judicial intervention would be the need to give full effect to the Constitution. The content of the cited passages from Lord Nicholls does suggest that intervention comes after a full hearing on the merits even if the challenge is made at the Bill stage. However, his Lordship's dictum on intervention at the Bill stage was predicated on the premise that offending provision may lead to immediate and irreversible damage. It seems to this court that core idea is the immediacy and the risk of substantial irreversible damage that would justify the court taking intervening in the Parliamentary process. The question then is this: if it can be shown that the '*consequences of the offending provision [of an enacted law] may be immediate and irreversible and give rise to substantial damage or prejudice*' why should there not be interim relief. Intervention in Parliamentary process before the Bill is passed is an exceptional step. So too is either suspending an enacted law or exempting persons from compliance with an enacted law. The primary justification for intervention in both circumstances has to be that the consequences are immediate, irreversible and cause substantial damage or prejudice to persons.

[75] In this case, the submission is that the present statute, regulations and the entire anti-money laundering framework for lawyers create a very serious risk of depriving citizens of the fundamental human right of legal professional privilege. It is said that the consequence would be immediate and irreversible because once the law enforcement agencies see the privileged information there is no telling what they will do with it and privilege once lost cannot be

regained, especially in circumstances where the information can be transmitted overseas.

[76] If the courts can intervene before the Bill is passed and becomes an Act, is there any compelling legal or policy arguments to deny the power to intervene pending resolution of constitutionality of the matter? This court cannot think of any. This court accepts the proposition that the courts can intervene after the Act as come into force and before it is declared unconstitutional. The remaining question is what criteria would be used to determine whether the courts should intervene in the manner suggested by the Association.

Criteria for intervention after law passed and comes into force

[77] It would seem to this court that, at the very least, for the courts to intervene the consequences should be immediate, irreversible and cause substantial damage or prejudice to persons to such an extent that the countervailing public interest in upholding and obeying the law is overridden. This way of stating the matter would suggest that the claimant would need to make a compelling case for intervention which meets the three-stage test articulated below.

[78] Both sides have agreed that the test set out by the Canadian Supreme Court should be applied. Counsel referred to **RJR Macdonald Inc v The Attorney General of Canada and others** 111 DLR (4^{th}) 385. That case in turn reaffirmed its previous decision in **Metropolitan Stores (MTS) Ltd v Manitoba Food & Commercial Workers** 38 DLR (4^{th}) 321 where the test for interim relief was stated. Before getting to the test some important statements were made in the joint judgment of Sopinka and Cory JJ. In **Macdonald** the stay sought would have either exempted the applicants from compliance with the regulations in question or stayed their execution generally. There was an issue of whether the court had the jurisdiction to grant the interim relief

sought. The court found the power in specific statutory and procedural powers. However, the court expressly held that even if the provisions relied on to support the courts power did not in fact do so, the power to grant interim relief would be derived from section 24 (1) of the Canadian Charter. That section reads:

> ***24.*** *(1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.*

[79] Sopinka and Cory JJ held at page 398 – 399:

> *A Charter remedy should not be defeated due to a deficiency in the ancillary procedural powers of the Court to preserve the rights of the parties pending a final resolution of constitutional rights.*

[80] This court adopts this position and states that such a power can be derived from section 19 (1) of the Jamaican Charter which reads:

> *If any person alleges that any of the provisions of this Chapter has been, is being or is likely to be infringed in relation to him, then, without prejudice to any other action with respect to the same matter which is lawfully available that person may apply to the Supreme Court for redress.*

[81] This court is unable to see why this provision along with subsections (2), (3) and (6) prevents an interim remedy where the damage, if unchecked, is immediate, irreversible, substantial and cause irremediable prejudice. Clearly, this power is exceptional but its existence cannot be denied and must

necessarily exist if the courts are to fulfill its mandate as the upholder of the Constitution.

[82] The three questions to be asked when considering whether a stay or exemption should be granted were stated by Sopinka and Cory JJ in **RJR MacDonald** as follows at page 400. The three questions, which are at the end of the passage, were preceded by important observations:

> *The relief sought is significant and its effects far reaching. A careful balancing process must be undertaken.*
>
> *On one hand, courts must be sensitive to and cautious of making rulings which deprive legislation enacted by elected officials of its effect. On the other hand, the Charter charges the courts with the responsibility of safeguarding fundamental rights. For the courts to insist rigidly that all legislation be enforced to the letter until the moment that it is struck down as unconstitutional might in some instances be to condone the most blatant violation of Charter rights. Such a practice would undermine the spirit and purpose of the Charter and might encourage a government to prolong unduly final resolution of the dispute.*
>
> *Are there, then, special considerations or tests which must be applied by the courts when Charter violations are alleged and the interim relief which is sought involves the execution and enforceability of legislation?*
>
> *Generally, the same principles should be applied by a court whether the remedy sought is an injunction or a stay. In*

Metropolitan Stores, at p. 127, Beetz J. expressed the position in these words:

> *A stay of proceedings and an interlocutory injunction are remedies of the same nature. In the absence of a different test prescribed by statute, they have sufficient characteristics in common to be governed by the same rules and the courts have rightly tended to apply to the granting of interlocutory stay the principles which they follow with respect to interlocutory injunctions.*

We would add only that here the applicants are requesting both interlocutory (pending disposition of the appeal) and interim (for a period of one year following such disposition) relief. We will use the broader term "interlocutory relief" to describe the hybrid nature of the relief sought. The same principles apply to both forms of relief.

Metropolitan Stores adopted a three-stage test for courts to apply when considering an application for either a stay or an interlocutory injunction. First, a preliminary assessment must be made of the merits of the case to ensure that there is a serious question to be tried. Secondly, it must be determined whether the applicant would suffer irreparable harm if the application were refused. Finally, an assessment must be made as to which of the parties would suffer greater harm from the granting or refusal of the remedy pending a decision on the merits. It may be helpful to consider

each aspect of the test and then apply it to the facts presented in this case. (emphasis added)

[83] In this passage there is the caution to courts that stopping legislation from having legal effect or suspending legislation that has already become law is a very serious step in a Constitutional democracy founded on the separation of powers doctrine.

Application of test

Whether there is a serious constitutional issue to be tried

[84] The threshold here is said to be a low one. At this stage the court does not make any assessment of the merits but nonetheless if the claim prima facie appears to be weak or strong that fact cannot be ignored. The court is mindful of the fact that at this stage the full facts are not before it and neither has there been any argument about the constitutionality of the law, regulation or conduct that is being challenged. The affidavits and submissions are drafted to meet the application and may not necessarily contain all factual allegations being relied on by the parties. The expression serious issue to be tried is used to contrast with frivolous or vexatious. According to Black's Law Dictionary (9th), frivolous mean 'lacking a legal basis or legal merit; not serious; not reasonably purposeful' and vexatious means 'without reasonable or probable cause or excuse; harassing; annoying.' This present claim is not frivolous or vexatious because it raises very important questions about legal professional privilege, the value and role of an independent Bar and whether the present anti-money laundering regime as it relates to attorneys create a real risk that this right will be compromised. Since the right has been universally recognised as a significant right (Lord Hoffman regards it as a fundamental human right), there is the further issue of whether this right is protected despite there being no express reference to it in the Charter. Is it incorporated in the Charter by necessary implication since a strong argument can be made that it is impossible for any person to secure his legal rights

under the Charter without this privilege? These are all very serious issues. The Association has cleared the first part of the test.

Whether compliance with the present anti-money laundering regime will cause immediate, irreparable and substantial damage

[85] According to JBA, the present state of the entire regime while recognising the right not to produce information that is covered by legal professional privilege has not established any mechanism by which the existence privilege and its scope of application to any particular information is to be determined. Mrs Foster Pusey's suggestion was that we could be guided by the common law. The problem is that the common law does not provide a certain guide except to say, in broad terms, that the matter should be decided by a judge.

[86] In the Canadian Supreme Court case of **Descôteaux c. Mierzwinski** 141 DLR (3d) 590, Lamer J had to address the issue of 'the scope of and procedures for exercising the authority to search lawyers' offices, in view of the confidential nature of their clients' files.' Lamer J noted that a lawyer who communicates confidential information to third parties without the client's consent could be sued for damages. He also noted that any person who accidentally saw the content of the lawyer's file could be prohibited by injunction from disclosing them. His Lordship noted that what began as an exclusionary rule of evidence has over time become a substantive legal principle to the point where his Lordship accepted the proposition that communications related to the purpose of seeking advice from a lawyer are permanently protected from disclosure except the protection be waived. Lamer J observed that legal professional privilege extents to situations where a person consults a lawyer with a view to seeking legal representation and even if the lawyer declines to represent the person the communication even at this stage is protected. Indeed Lamer J stated at pages 606 - 607 that:

The items of information that a lawyer requires from a

person in order to decide if he will agree to advise or represent him are just as much communications made in order to obtain legal advice as any information communicated to him subsequently. It has long been recognized that even if the lawyer does not agree to advise the person seeking his services, communications made by the person to the lawyer or his staff for that purpose are nonetheless privileged (Minter v. Priest, [1930] A.C. 558; Phipson on Evidence, 12th ed., 1976, p. 244, No. 589; 8 Wigmore, Evidence (McNaughton rev. 1961), p. 587, para. 2304).

34 Moreover, the same applies not only to information given before the retainer is perfected concerning the legal problem itself, but also to information concerning the client's ability to pay the lawyer and any other information which a lawyer is reasonably entitled to require before accepting the retainer. First, this information of an administrative nature is just as related to the establishment of the professional relationship as any other information; this is especially clear when, as in the case at bar, the legal aid applicant "must set forth [his] financial means ... and the basis of his claim". In addition, information of this nature that a person gives his lawyer for that purpose may also be highly confidential and would have been kept secret by that person were it not for that person's need of the assistance of a legal adviser.

35 For example, the legal aid form requires the applicant to provide information concerning his dependants. A person could thus be forced to disclose to the legal aid bureau a paternity that had until then been kept secret, in order to

establish his onerous financial obligations and consequently his limited means. One can imagine, given the form the applicant must complete, numerous other situations where the information given would be highly personal.

36 I therefore do not think that a distinction should be made between information that must be given in order to establish the probable existence of a valid claim and that given to establish eligibility from the point of view of financial means, since, on the one hand, information concerning the person's financial situation may be just as highly confidential as any other information and since, on the other hand, the fact of being unable to meet the eligibility requirements respecting financial means is no less fatal to the ability to obtain the services sought.

[87] From this passage one can see how extensive the privilege may be. This now brings into sharp focus some of the provisions of the GLC's anti-money laundering guidance. Those guidance notes stated that lawyers engaged in five categories of activities listed in the DNFI Order are to understand that the order covers activities leading up to or preparatory to the actual performance of the named activities. As Lamer J said **Descôteaux**, speaking in the context of a search warrant, '[o]ne does not enter a church in the same way as a lion's den, or a warehouse in the same way as a lawyer's office.' The same would apply if an attorney's is subject to inspection or verification under section 91A (2).

[88] There when, under section 91A (2) (a), the competent authority may carry out or direct a third party to carry out inspections or such verifications as may be necessary and bearing in mind that section 91A (3) refers expressly to legal professional privilege only in relation to section 91A (2) (c) but not in

respect of section 91A (2) (a). What if the competent authority, in this case the GCL, or any third party appointed by the GCL takes the view that section 91A (3) alone and not section 91A (2) (a) and examines papers that on later examination are indeed subject to legal professional privilege? The privileged information would already have been exposed and what is to prevent them passing on what was seen to another competent authority? The response may be that an injunction could stop them. However, who is going to monitor telephones, emails, text messages and oral communication to see to it that the privileged information seen was not disclosed? The point is that the risk of seeing, taking and using privileged information should be negated by having a clear procedure for this. Should this occur, the client's privileged information would be available without the client waving the privilege. What is there to prevent several 'accidental disclosures' taking place during the inspection? There is no telling what misuse or abuse the state may engage in once it has the privileged information. What the bar is saying is that we must not seek to catch the horse after it has bolted but prevent the horse from even thinking about bolting. The risk of immediate, irreparable and substantial damage is present in this regime.

[89] This court concludes that given the nature of legal professional privilege, should that confidentiality be breached, such information in the hands of the state would lead to irreparable damage. The human experience has been that governments and state agents, without restraints, inevitably abuse their powers. It is this recognition that led to bills of rights coming into being: the majority decided that humans were not to be trusted with absolute power but should have restraints placed on it. From the Magna Carta, to the Constitution of the United States of American to the Constitution of Jamaica – all emerged out of recent history of abuse and dreaded conduct on the part of the state through its agents.

Whether the balance of convenience favours the remedy

[90] Despite the *American Cyanamid* type language, the public interest must be taken into account. This is not a matter of private grievance. The government is not the sole arbiter of what is in the public interest and neither does it represent a monolithic public interest (**RJR MacDonald**). The **RJR MacDonald** case did not detail the reasons for this but the reasons are not hard to find. A bill of rights was placed in the Constitution so that all persons, including unpopular minorities and persons, are guaranteed certain rights which they cannot be deprived of unless the trespass on those rights is shown to be reasonably justifiable in a free and democratic society. On this basis, it is irrelevant whether the majority are in favour of the law. The crucial question is whether it is compatible with the bill of rights which the majority placed in the Constitution because they did not trust the majoritarian premise of democracies to protect fully the rights of all and in particular minorities. This is why the majority agreed to have a check placed on the majority. There is great public interest in seeing that the laws passed conform to the Charter of rights.

[91] The Association has not pointed to any particular attorney who has been subject to the regulation has suffered or about to suffer any specific breach of legal professional privilege. The Association need not do that because the public interest extend to considering any harm that may accrue to members of the public even if no specific member of the Association has suffered specific harm. The reason for this is that in the event of a claim for information made directly to the lawyer, such a lawyer, if he honestly believes that legal professional privilege arise, is under a duty to make the claim even in the absence of any specific instructions from his or her client. The fiduciary duty that the attorney is under compels such action and any failure to make the claim when it should have been made may expose the attorney not only to a claim for damages from the client but also possible disciplinary action from the GLC.

[92] The regulatory regime is now in place and therefore there is strong public interest in seeing to that all laws until set aside are obeyed. There is always the possibility that the Association may fail for a variety of reasons including but not limited to procedural defects.

[93] It was noted in **RJR MacDonald** that 'courts must be sensitive to and cautious of making rulings which deprive legislation enacted by elected officials of its effect' but on the other hand, '[f]or the courts to insist rigidly that all legislation be enforced to the letter until the moment that it is struck down as unconstitutional might in some instances be to condone the most blatant violation of Charter rights and [s]uch a practice would undermine the spirit and purpose of the Charter and might encourage a government to prolong unduly final resolution of the dispute.'

[94] Mr Robin Sykes has pointed out the possible consequences to Jamaica if the anti-money laundering regime is not allowed to stand. He speaks to the reputational harm that may come to Jamaica and if harm should come, the difficulty of erasing that harm. It is therefore appropriate to take account of the economic fortunes of the country and the possible negative effects of putting the anti-money laundering regime on hold. These are possible consequence. This court observes that no one has said that Canada is in breach of its international obligations merely because the regime the Federal Government established to deal with lawyers has been successfully challenged twice. Lest we forget, in Canada, the provisions were not merely suspended but declared unconstitutional and struck down. Canada is still a respected member of the international community.

[95] This court is convinced that the international community would prefer to see that Jamaica has put in place a system that stands on sure constitutional footing rather than have a question mark hanging over it. This court is convinced that the international community has an interest in seeing that

Jamaica's democracy functions as it should with serious legal disputes being resolved through the institutional mechanisms such as the legal system.

[96] Mr Sykes referred to one country within the Caricom region that is being subjected to closer scrutiny from her peers. The affidavit disclosed that that county has done nothing, meaning, absolutely nothing regarding an effective anti-money laundering regime so far as lawyers are concerned. Jamaica has acted but that action has been challenged.

[97] The court must be mindful that it is not part of the judicial function to determine whether the government is doing a good or bad job. The role of the court is simply to restrain possible encroachments on fundamental rights.

[98] Any public body authorised to enforce the law suffers harm by being prevented from carrying out its public function which presumably is for the benefit of the society as a whole.

[99] In order to secure the remedy the Association must show what public interest benefits will flow from granting the remedy. Bearing in mind that the court must assume that legislation and attendant regulations are intended to advance the public interest and any suspension of or exemption from the laws in question will adversely affect the public interest, any applicant for relief prior to the hearing should be able to show that suspension of or exemption from the laws would provide a public benefit. The Association has met this standard. It has shown, prima facie, that there is a real risk that the implementation of the regime in its current form creates the serious risk of depriving the citizens of Jamaica and non-Jamaicans of a confidentiality that they have enjoyed since 1655 when Jamaica became a British colony.

[100] As Lamer J pointed out in **Descôteaux** at page 618:

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

There are certain exceptions to the principle of the confidentiality of solicitor-client communications, however. Thus communications that are in themselves criminal or that are made with a view to obtaining legal advice to facilitate the commission of a crime will not be privileged, inter alia.

[101] This again underscores how fundamental the right is. In another passage, in **Descôteaux**, the Supreme Court of Canada was so zealous in protecting legal professional privilege in the face of search warrant that Lamer J recommended to Justices of the Peace who were asked to issue warrants to search lawyer's offices the following at page 619:

Before authorizing a search of a lawyer's office for evidence of a crime, the justice of the peace should refuse to issue the warrant unless he is satisfied that there is no reasonable alternative to the search, or he will be exceeding his jurisdiction (the substantive rule). When issuing the warrant, to search for evidence or other things, he must in any event

attach terms of execution to the warrant designed to protect the right to confidentiality of the lawyer's clients as much as possible.

[102] Lamer J added that when a lawyer's offices are to be searched, Justices of the Peace are under a duty to be 'particularly demanding.'

[103] It is this court's view that the balance of convenience is in favour of granting the relief. These are the reasons. First, there is no doubt that attorneys are subject to the anti-money laundering laws. That is to say, if the attorneys commit a money laundering offence or are alleged to have committed a money laundering offence they can and should be prosecuted. Second, what is being proposed here is not an instance where the lawyer is accused of money laundering but rather collecting information, keeping it so that on some later date, state agencies, local and overseas, can have access to this gold mine of information. Third, there is no actual provision in the regime as established a clear mechanism for claiming legal professional privilege and having it resolved, without, in some instance, the attorney being exposed to the risk of criminal prosecution. Fourth, the regime as it presently stands, in the absence of guidelines, creates a risk that information given to the lawyer in confidence may be exposed with the attendant harm which cannot be undone because once the information gets out the court, in many instances, will be powerless to stop its use. Fifth, the rights in view are not those of the lawyers in their capacity as lawyers but rather the rights of the entire Jamaican population. The risk involved here is not a limited class of Jamaicans since sale of land and other related transactions are engaged in by Jamaicans of all socio-economic classes so that the issues raised here cannot be discretely managed and restricted to just 'alleged criminals' and even then, 'alleged criminals' are entitled to the protection of law. Sixth, the present regime risks turning lawyers into state agents, a role the profession has never had in its entire history. Seventh, lawyers are now being required to

serve two masters – the client to whom they are fiduciaries and the state to whom they are now informants. Eighth, the public of Jamaica when seeking legal services in some areas would now have as a confidential adviser a man or a woman who would either be collecting data for the state to use against the client or passing on information about the client to the state without the client's knowledge (tipping off offences).

[104] The considerations against this conclusion are (a) whether the public should be deprived of benefit (even if it is improving Jamaica's international standing and image) of the law; (b) possible impact non-enforcement of the law may have in Jamaica, locally and internationally; (c) possible confusion on the part of law enforcement agencies about their actual powers until the issue is settled decisively; (d) other persons asking the court to suspend or exempt them from the law and (e) the great public interest in obeying the law.

[105] Is there a satisfactory third possibility between the two positions articulated by Mrs Gibson Henlin and Mrs Foster Pusey QC? It may be possible for the court to supplement the statutory regime until the matter is heard and determined by the court. However, having examined the Canadian cases where attempts have been made to supplement existing legislation or put in place measures pending a statutory intervention this court is not convinced that that route is desirable. First, there is the risk the judicially proposed solution may fail to take account of some crucial factor. This risk arises because judges would not be inviting the lawyers and others to make proposals and then come up with a workable interim solution. Second, as the facts of the cases have shown, the diversity of circumstances in which legal professional privilege may arise are too numerous for a court to take account of. Third, the court is not a legislative body which has the structure to collate information from various sources and formulate policy.

[106] Whilst this is an interlocutory application the court cannot help but note that in **Lavallee**, the Canadian Supreme Court in invalidating the statutory scheme highlighted a number of deficiencies which appears to be the same with the regime in place. It would be helpful to state some of the deficiencies identified by the Canadian Supreme Court. First, there was the risk of privilege being lost if the lawyer was absent or he failed to respond appropriately at the time of the search. Second, under the Canadian regime at the time, not notice was given to the actual privilege holder who would be the client of the lawyer. Thirdly, even if the lawyer claimed privilege and the matter went to court, there was a serious question of how far the lawyer could actually take the case in the absence of actual instructions from the client on that specific issue. Third, the strict time limits during which the parties had to act was considered insufficient.

[107] Comparing that which was under attack in **Lavallee** with the present regime, it is fair to say that the present regime seems to create a risk that the objective of legal professional privilege will be undermined if the lawyer fails to act appropriately by claiming privilege. There is no provision for notice to be given to the client. There is no provision for the resolution of the issue should the lawyer not be able to contact the client bearing in mind that at the time the issue of legal professional privilege has arisen the lawyer may have long ceased to act for the client.

[108] It should be noted as well that in the **Jambar** case mentioned earlier, Panton JA regarded legal professional privilege as so strict that in the absence of an allegation of criminal conduct on the part of the lawyer and/or his client any search of a lawyer's offices would almost certainly, without more, be held to be a breach of legal professional privilege (paragraph 52). This court cannot help but note that Panton JA had recommended that state officials, the Director of Public Prosecutions and the Association should have dialogue with a view to arriving at a procedure to be followed for search of lawyer's offices. This was said in the context of a search warrant under the

Mutual Assistance (Criminal Matters) Act. There is no reason why that advice could not be applied to this regime.

[109] The risks identified that may result in a breach of legal professional privilege in relation to search warrants are substantially the same in relation to inspections, verifications, examinations, copying and taking of documents described as powers of the competent authority under section 91A (2) (a), (b) and (c). There really is no guidance as who does what, when, where and how if legal professional privilege arises. When inspections are being conducted by the competent authority or a third party engaged by the competent authority what documents are examined in order to determine compliance with the regime? Having examined quite literally all the cases cited and some not cited by counsel this court is in doubt that Association has made out a strong case for interim relief. The interim relief has to go forward. The remaining question, difficult though it may be, is what are the terms of the relief?

[110] The purpose of the present laws is to seek information to trace dirty money, apprehend those involved and take away criminally derived property. No one can deny that this objective must be supported. However, the pursuit of such persons ought not to be done in a manner that creates the risk that fundamental rights are infringed unless shown to be demonstrable justifiable in a free and democratic society. No one has ever contended that the lawyer in a murder case whose client confesses to him should then run off and inform the authorities. In like manner, persons who, in the course of ordering and going about their lawful business, give information to the lawyer that is subject to legal professional privilege should not be at risk of losing that fundamental right because the particular laws have not specified how the right is to be claimed and the methodology of resolution. He should not have to depend on the reasonableness of the state agent.

Conclusion

[111] The Association has succeeded in its application for an interim remedy preventing the operation of the regime as it applies to lawyers. The interim relief does not extend to preventing lawyers being prosecuted for money laundering. The relief extends only to the regime so far as it relates to the regime introduced specifically for attorneys at law after the November 2013 amendment to POCA. The attorneys are to draft an order to give effect to these reasons for judgment and those orders shall be paragraph one of the orders made below. If there is need for more than one paragraph in respect of paragraph one then the additional paragraphs shall be subparagraphs within paragraph one.

[112] This interim relief is granted on condition that the Registrar of the Supreme Court is able to convene a hearing for three days commencing not later than February 2, 2015. The attorneys must be available for those days.

1. Order to reflect reasons for judgment;

2. Hearing to take place on February 2, 3 and 4, 2015 for three days.

3. All affidavits must be filed and served not later than November 28, 2014.

4. Any affidavit in reply must be filed and served not later than December 19, 2014.

5. Written submissions exchanged but not filed not later than January 16, 2014.

6. Parties to exchange list of authorities, including treatises and articles not later than January 10, 2015.

7. Respondents to provide claimant with actual copies of cases, treatises and articles, being relied on with by respondent that are not being relied on by claimant not later than January 17, 2015.

8. Claimant to file bundles which includes copies of cases, treatises and articles being relied on by the respondents not later than January 20, 2015.

9. The bundles (including bundles with affidavits, submissions, cases, treatises) are to be paginated in the following manner:

    i. the core bundle (bundle with pleadings and affidavits) shall be the first bundle and it shall numbered in numerical sequence beginning on page one and going through consecutively to the last page;

    ii. the first page of the next succeeding bundle (bundle with written submissions) shall commence with the next succeeding number from the last page of the core bundle and each page is numbered consecutively to the last page of that bundle;

    iii. the first page of the bundle after the one mentioned is numbered consecutively after the last page of the bundle mentioned at 8 (ii) above. This bundle shall be the bundle with authorities/treatises and articles;

    iv. other bundles should be paginated accordingly after these three bundles.

10. Costs of this application reserved until final disposition of this matter in the Supreme Court.

11. Claimant's attorneys at law to prepare, file and serve order