[2017] **JMFC Full 02**

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE FULL COURT

CLAIM NO. 2014 HCV 0772

BEFORE: **THE HONOURABLE MISS JUSTICE PAULETTE WILLIAMS**
THE HONOURABLE MR JUSTICE DAVID FRASER
THE HONOURABLE MRS JUSTICE SHARON GEORGE

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

AND

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**
AND	**THE ATTORNEY GENERAL**	**1ST DEFENDANT**
AND	**THE GENERAL LEGAL COUNCIL**	**2ND DEFENDANT**

Richard Mahfood Q.C., R.N.A. Henriques Q.C., Georgia Gibson Henlin,M. Maurice Manning, Shawn Wilkinson, Catherine Minto and Akuna Noble instructed by Wilkinson Law for the Claimants.

Nicole Foster-Pusey Q.C., Carlene Larmond, Carla Thomas and Andre Molton instructed by the Director of State Proceedings for the 1st Defendant.

Allan Wood Q.C., Dr. Lloyd Barnett, Caroline Hay, Symone Mayhew and Sundiata Gibbs instructed by Symone Mayhew for the 2nd Defendant.

March 23 – 26, 2015; April 21 and May 4, 2017.

The Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act, 2011– Whether the Regime infringes sections 13(3)(a),(c), (j) and (r), 14(2)(d), 16(1), (2) and (6)(c) of the Charter – The Proceeds of Crime Act, 2007, as Amended – Whether the reporting obligations imposed on attorneys by sections 94 and 95 breaches attorney/client privilege, legal professional privilege, the principle of confidentiality between attorney and client and creates a conflict of interest without any safeguards that may be justified in a free and democratic society-whether the provisions are unclear, uncertain and unambiguous and therefore incapable of application – Whether the reporting obligations creates a situation of divided loyalty and loses sight of the fiduciary role and capacity of attorneys in regards to their clients – Whether the tipping off provisions as contained in section 97 mandates attorneys to engage in an act of disloyalty and has thereby transformed them into agents against their clients – Whether the Regime engages the liberty interests of attorneys and clients in a manner that infringes section 13(3)(a) – Whether the application of POCA, as amended, to attorneys is inconsistent with the integral and essential role of attorneys in the proper administration of justice and the maintenance of the rule and infringes on the independence of the bar – Whether the powers of the second defendant to examine and take copies of information or documents in the possession of attorneys infringes s. 13(3)(j) – Whether the entry of the second defendant onto

attorneys premises is warrantless and without lawful authority – Whether the entry of the second defendant onto attorneys' premises and the mandatory compliance of the attorney, who is faced with the threat of imprisonment, constitutes prima facie infringements of sections 13(3)(a) and (j) of the Charter – Whether the obligation to keep records pursuant to the regulations breaches the duty of confidentiality, creates a conflict of interest and fundamentally breaches the attorney's duty of fidelity owed to the client – Whether any infringement is demonstrably justified in a free and democratic society

P. Williams J

[1] I have had the pleasure of reading in draft the joint judgment of my colleagues D. Fraser J and George J which comprehensively deals with all the issues raised in this matter. I have nothing useful to add. I agree with their conclusion that we cannot grant the declarations, stay and injunction sought by the claimant.

D. Fraser and S. George JJ

BACKGROUND

[2] The scourge of organized crime and money laundering has become increasingly prevalent in the Jamaican society. It represents a significant security challenge for the State. The response to this has included what Sykes J at the interlocutory stage in this matter aptly referred to as "a crusade against 'dirty money'"(See: ***The Jamaican Bar Association v The Attorney General and The General Legal Council*** [2014] JMSC Civ.179 – Paragraph 1).

[3] This campaign against dirty money has been ongoing in the international context for some time. The dangers of corruption, transnational crimes and money laundering have been universally recognized and a high percentage of democratic states have established statutory regimes to deal with these

threats, in compliance with their national responsibilities and international obligations.

[4] There are several international instruments that have been promulgated relating to measures to combat money laundering and the financing of terrorism. In accordance with these instruments, international standards have been developed to ensure global compliance with anti-money laundering and countering the financing of terrorism (AML/CFT). The primary international standards are contained in the Financial Action Task Force's (FATF) International Standards on Combating Money Laundering and Financing Terrorism and Proliferation (FATF Recommendations).

[5] The FATF is a global standard setting body for AML/CFT, whose members have agreed to subscribe to the international standards geared towards combating these crimes.

[6] The Caribbean Financial Action Task Force (CFATF), of which Jamaica is a member, is an inter-governmental FATF-Style organization comprising countries of the Caribbean Basin who have agreed to comply with the FATF Recommendations. Its objective is to achieve effective implementation of and compliance with the FATF Recommendations. Hence, this fight is occurring in an international and regional context whereby Jamaica as part of the world community has undertaken obligations to combat money laundering, terrorist financing and other serious transnational crimes.

[7] In Jamaica, this crusade began in earnest in 1994 with the passage of the **Drug Offences (Forfeiture of Proceeds) Act, (DOFPA),** which provided that where persons were convicted of certain prescribed offences, property obtained through the commission of those offences could be forfeited and continued with the passage of the **Money Laundering Act (MLA)** 1996, which created among other tools the offence of money laundering.

[8] The **MLA** was designed to assist with taking the profit out of crime and to enable Jamaica to fulfil its obligations as part of an international stance against drug trafficking and other illegal activities. Jamaica was and is party to the **Vienna Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances**, which required that measures be taken to address the issue of money laundering.

[9] The **MLA** placed obligations on financial institutions to establish and maintain systems to prevent and detect money laundering. There was also an obligation to report certain transactions to the designated authority and a prohibition on the disclosure of any report. A failure to comply with the reporting requirements was an offence under the **MLA**. Attorneys-at-law were exempted from the **MLA** provisions where they accepted bona fide legal fees.

[10] The **Money Laundering Regulations** of 1997 further established the parameters for the forming of business relationships and the conduct of one-off transactions by financial institutions, with and for persons. The requirements included, record keeping and identification procedures. It also featured an offence for failing to comply with the obligations to follow the procedures set out under the regulations.

[11] In 1999, the **MLA** was further amended to include the creation of an obligation on financial institutions to report suspicious transactions. The offence of unauthorized disclosure was created but protected disclosure of the information to an Attorney-at-Law in the context of obtaining legal advice.

[12] The **Money Laundering (Financial Institutions) (Money Transfer and Remittance Agents and Agencies) Order**, 2002 declared money transfers and remittance agents and agencies as financial institutions for the purpose of **MLA.**

[13] The **MLA** was however found to be limited in its scope and operation as it only targeted proceeds mainly from offences related to drugs, firearms, trafficking or those involving fraud, dishonesty or corruption. The **DOFPA** was also similarly viewed as being too narrow in its application. The **Proceeds of Crime Act** 2007 **(POCA)** was therefore passed to repeal and replace **DOFPA** and the **MLA.** The **POCA** and all subsequent amendments and attendant Regulations and Orders consolidated the approach to targeting money laundering and the forfeiture of the proceeds of crime.

[14] Recognising that there were gaps in existing AML/CFT regimes, FATF recommended that these regimes should be extended to certain Designated Non-Financial Businesses and Professions (DNFBPs) which includes real estate dealers, casinos, accountants and attorneys-at-law, when they conduct specific types of transactions.

[15] The CFATF monitors its members' compliance with the FATF Recommendations through several measures, including mutual evaluations. Accordingly, in 2005, Jamaica underwent a mutual evaluation in the CFATF Third Round of Mutual Evaluations. However Jamaica's legal/regulatory framework was extensively criticized for failing to extend AML/CFT obligations to Designated Non-Financial Businesses and Professions (DNFBPs).

[16] Thereafter, Jamaica was moved to the second stage of Enhanced Follow Up, which made it subject to a high level mission from the CFATF and the implementation of reforms recommended in the Mutual Evaluation Report. (See paragraphs 13 and 17 of Robyn Sykes' affidavit filed on October 23, 2014). Thus, based on an assessment recommending the strengthening of the AML/CFT framework, it was determined that the FATF Recommendations needed to be extended to the relevant professions. Pursuant thereto, the **POCA** was amended in 2013.

[17] The Jamaican crusade which began in 1994, therefore belatedly arrived at the doorsteps of attorneys-at-law in 2013. The rationale for this development being that the legal profession as well as the others identified in the Orders of 2013 are viewed as professions whose members may be used as potential intermediaries in money laundering and that their exemption from the framework designed to combat money laundering constituted a significant weakness providing 'loopholes' in Jamaica's AML/CFT framework. The amendments were therefore, also a direct response to Jamaica's international commitments to ensure that its domestic policy, legal and regulatory framework for AML/CFT is effective and meets international standards.

[18] **The Proceeds of Crime Amendment Act 2013,** required financial institutions and businesses in the regulated sector to implement particular systems and processes to prevent and detect money laundering. It also introduced a 'competent authority' responsible for monitoring compliance with the obligations. The **Proceeds of Crime (Money Laundering Prevention) Regulations** 2007 as amended in 2013 also contains specific requirements for the regulated businesses to comply with.

[19] **The Proceeds of Crime (Designated Non-Financial Institution) (Attorneys-At-Law) Order, 2013** designated Attorneys-at-Law who carry out certain activities for their clients as non-financial institutions for the purposes of **POCA**, effective June 1, 2014. Similar orders were also promulgated in respect of other professionals in 2013. These include Public Accountants, Casino Operators, Gaming Machines Operators and Real Estate Dealers, by virtue of designated Non-Financial Institutions Orders of 2013.

[20] The **Proceeds of Crime (Amendment of Second Schedule to the Act) Order, 2013** made consequential amendments to other legislation, including the **Legal Profession Act (LPA)** which was amended to include

section 5 (3) (c) which requires attorneys to file a declaration indicating whether they have conducted any of the activities listed in the **2013 Order.** Also pursuant to the **Proceeds of Crime Amendment Act, 2013,** the General Legal Council (GLC) issued Anti-Money Laundering Guidance for the Legal Profession. The Canons of Professional Ethics applicable to lawyers were also amended to take account of obligations under POCA.

[21] The **POCA** Regime that applies to attorneys-at-law now therefore includes: **The Proceeds of Crime Act***,* as amended (POCA); **The Legal Profession Act** as amended (LPA); **The Proceeds of Crime (Money Laundering Prevention) Regulations 2007** as amended (the Regulations); **The Proceeds of Crime (Designated Non-Financial Institution) (Attorneys-at-law) Order 2013** (the Order), **The Legal Profession (Canons) of Professional Ethics (Amendment) Rules, 2014 (2 July, 2014)** and **The General Legal Council of Jamaica Anti-Money Laundering Guidance for the Legal Profession (The Jamaica Gazette Extraordinary of Thursday May 22, 2014, No 22A.)** (The Guidance).

[22] The Jamaican Bar Association has consistently emphasized that the Bar and its members do not condone money laundering or the facilitation of any crime. However they maintain that the Regime is unconstitutional as it fails to take account of the unique role that lawyers play in the administration of justice and in the protection of the fundamental rights of all those who come under the protection of the law. The Bar Association therefore brought this claim challenging the constitutionality of the application of aspects of the Regime to Attorneys-at-law.

[23] An interlocutory injunction was granted by Sykes J on November 4, 2014 suspending the operation of the Regime as it relates to attorneys-at-law law. On January 13, 2015 the order was varied extending the injunction, pending the outcome of this constitutional claim.

THE CLAIM

[24] Pursuant to their contention that the Regime is unconstitutional the Jamaican Bar Association on October 13, 2014 filed a claim seeking the following declarations, orders and relief:

1. A declaration that application of the Proceeds of Crime to attorneys-at-law is inconsistent with the position of attorneys- at-law in the Jamaican Society and the integral and essential role played by attorneys-at-law in the proper administration of justice and maintenance of the rule of law;

2. A declaration that the treatment of attorneys-at-law as financial intermediaries demonstrates a fundamental lack of understanding of the services provided by attorneys-at-law, is unconstitutional and a threat to the security and liberty of attorneys-at-law and their clients;

3. A declaration that the information required under the Proceeds of Crime Act and the consequential amendments including to the Legal Profession Act insofar as it must be passed to agents of the State, including, but not limited to, the Financial Investigation Division, breaches confidentially, attorney client privilege and legal professional privilege without any safeguards that may be justified in a free and democratic society;

4. A declaration that the law office searches and seizures proposed under the Proceeds of Crime Act and its regulations and all consequential legislation including the Legal Profession Act and rules, regulations and guidance thereunder is, or are likely to be, unlawful;

5. A declaration that provisions of the Proceeds of Crime Act the Regulations thereunder and Order made pursuant thereto are unconstitutional insofar as they apply to the practice of attorneys-at-law.

6. A declaration that the obligations imposed on attorneys-at-law under the Proceeds of Crime Act, the Regulations Order and the amendment to the Legal Profession Act and

the regulations and Guidance pursuant thereto insofar as they relate to the practice, of and as attorneys-at-law are unconstitutional being in contravention of Section 13(3) (a) and 13 (3)(j) of the Charter;

7. A declaration that the duties and obligations imposed on attorneys-at-law as a consequence of the Proceeds of Crime Act and the Regulations, Order and the Legal Profession Act and consequential regulations are unconstitutional as infringing the duties of attorneys to their clients as well as established law of professional conduct to their clients;

8. A declaration that the regime imposed by the Proceeds of Crime Act and Regulations which requires attorneys-at-law to keep records pursuant to Regulation 7 which can be used for the purposes of investigation and the institution of criminal prosecution charges against their clients is in breach of their duty of confidentiality to their client and creates a conflict of interest and is consequently unconstitutional;

9. A declaration that the duty imposed on attorneys-at-law to report suspicious transactions which are not defined in the regime is in breach of the duty of attorneys-at-law to their clients to make such disclosure thereby breaching the principle of confidentiality in the relationship of attorney/client and a conflict of interest which is unconstitutional being in breach of Section 7 of the Charter of Rights;

10. A declaration that Sections 94 and 95 of Proceeds of Crime Act insofar as it is made applicable to attorneys-at-law and insofar as these sections purport to maintain and/or apply legal professional privilege and /or legal advice privilege and confidentiality are unclear, uncertain and ambiguous and consequently incapable of application and therefore void;

11. A declaration that Section 5(3C) of the Legal Profession Act (Canons) of Professional Ethics) (Amendment) Rules, 2014 (2 July 2014) and the General Legal Council of Jamaica, Anti- Money Laundering Guidance for the Legal Profession (22May 2014) are unconstitutional;

12. A stay of the implementation of Proceeds of Crime Act, Regulations and Guidance issued thereunder and in particular 5(3C) of the Legal Profession Act insofar as they require attorneys to establish systems, programmes policies, procedures and controls for the purpose of detecting money laundering and/or to consult with 2nd Defendant for the purpose of carrying out its functions under the Proceeds of Crime Act (MLP) Regulations;

13. An injunction restraining the defendants by themselves their servants and/ or agents from requiring attorneys-at-law from implementing and/or enforcing the compliance and reporting obligations under the Proceeds of Crime Act (MLP) Regulations;

14. Costs, and

15. Such further and/or other relief as this Honourable Court deems just.

THE AFFIDAVIT EVIDENCE

[25] The parties each offered affidavit evidence in support of their positions. Mr Robin Sykes former General Counsel Bank of Jamaica and now Chief Technical Director of the Financial Investigations Division on behalf of the 1st defendant explained that the failure to meet international standards would expose Jamaica to varying levels of international sanctions and countermeasures which include but are not limited to: requiring financial institutions to apply specific elements of enhanced due diligence; limiting business relationships or financial transactions with the identified country or persons in that country and requiring increased external audit requirements for financial groups with respect to any of their branches and subsidiaries located in the country concerned. (See: paragraph 24 of Robyn Sykes' affidavit).

[26] In support of the consequences of non-compliance, he pointed out that Guyana had been the subject of a public notice issued by the CFATF

because of perceived inaction on the part of the Guyanese Government in relation to its AML/CFT framework. Pursuant thereto, member countries were called upon to take counter measures against Guyana and Guyanese financial institutions. (See: paragraphs 22 and 23 of affidavit filed on October 23, 2014).

[27] Mr. Sykes also stated that several other Caribbean islands, the United Kingdom and New Zealand have legislation that subject attorneys to AML requirements while in Canada and the United States of America, their respective Federation of Law Societies and Bar Associations have implemented provisions which address AML requirements in the attorney's practice.

[28] Mr. Sykes further indicated that the Jamaican Government in its National Security Policy-'A New Approach' notes, that money laundering, an activity which supports transnational criminal organization and local gangs, depends on facilitators, which includes attorneys. The Policy places money laundering and facilitators who launder the proceeds of crime as Tier 1 Threats. This is following a prioritisation of national security threats, with Tier 1, being the most serious. The policy is based on a Probability-Impact Matrix. The offences classified in this section are considered to be of high probability and high impact in that they represent 'clear and present danger' to the nation, and are considered to cause the greatest harm or are more likely to happen. Therefore, these threats merit top priority and active response.

[29] The affidavit of Mr. Michael Hylton QC (Chairman of the General Legal Council) filed on behalf of the 2nd defendant November 28, 2014, outlined that in respect of the constitutionality of the Regime as applicable to the activities of attorneys, the Guidance adopts a position that is in keeping with decisions turning on the European Convention on Human Rights, namely that the application of the regime to attorneys is strictly confined to

the proscribed activities and that the obligations imposed by the Regime (including the suspicious transaction reporting obligations under Part IV of POCA) are not applicable when attorneys are engaged as officers of the court in the representation of clients in criminal or civil proceedings or in giving legal advice to their clients.

[30] The claimant however does not consider the state of events locally and/ or internationally as adequate to warrant an interference with the hallowed principles which govern the attorney client relationship. Accordingly, Mr. Donovan Walker (the then President of the Jamaican Bar Association), in his affidavit filed on November 28, 2014, stated that the number of suspicious transaction reports against attorneys are infinitesimal and do not justify considerations for regulation of the type enacted by the State in the instant claim.

[31] He further states that he has looked at the International Bar Association AML global chart website and he considers the chart to be misleading and not a reliable indicator of where countries stand on the question of suspicious transaction reporting by attorneys on their clients. In particular, he notes that with Guyana, which is described in evidence on behalf of the 1st defendant as an outlier in the AML community of nations, is listed among the 35 countries considered as having AML legislation that is indirectly applicable to lawyers.

[32] He stated that the Regime will destroy the attorney client relationship. and will likely have an adverse effect upon the frank and free exchange and disclosure of information between attorneys and clients. He stated that clients want their legal affairs to remain private and confidential for legitimate commercial reasons unconnected to crime. The loss of trust and confidence would also damage and diminish the ability of persons to assert private rights which is properly done through attorneys. It also

damage public interest in the preservation of the rule of law and the administration of justice.

[33] He acknowledged that the objectives of the Government National Security Policy were laudable but stated that they did not justify the whittling away of a cornerstone of the administration of justice. He stated that attorneys in the U.S. are not covered by the U.S. AML legislation nor are there any prescribed AML obligations imposed on attorneys in New Zealand. U.S. attorneys do not have duties similar to those contained in the Regime. New Zealand and the U.S. have adopted Guidance Notes for attorneys and no sanction has been applied by the FATF to these jurisdictions for utilizing alternative approaches whereby the Bar regulates itself and attorneys are not subject to the criminal law or turned into state agents.

[34] Mr. Ian Wilkinson (Immediate Past President of the Jamaican Bar Association at the time of his affidavit) was also of the view that in the circumstances, self-regulation by the 2nd defendant was preferable. (See: affidavit filed on December 19, 2014).

[35] Mr. Walker also stated that Mr. Sykes has given no basis for concluding that the prescribed regime is in keeping with internationally accepted standards and that a large segment of the international community does not agree with the application of suspicious transaction reports to attorney/client relationships or relies solely on voluntary guidance from their respective Bar associations.

[36] He further points out that attorneys have always been bound by the long standing Canons of the Legal Profession, which prevent them from knowingly engaging or assist clients in illegal activity, and are exposed to the risk of sanctions, including, but not limited to being struck off of the roll of attorneys. In fact, the GLC has guarded jealously the reputation of the legal profession as a whole and is known for its strict treatment of

complaints against attorneys. Further, Mr. Stephen's affidavit confirms that independent of attorneys being treated as DNFIs, they are and were subject to AML laws and susceptible to suspicious transaction reports by the financial institutions. Therefore, it was not necessary to label attorneys as DNFIs as they utilize financial institutions who may make suspicious transaction reports in relation to their suspicious activities and there is more transparency in the financial system. For these reasons, there was no need to encroach on the independence of the bar, the privilege and constitutional safeguards protected by the Constitution as there are extant less intrusive means currently working.

THE ISSUES

[37] The main issues raised by the claim have been distilled as follows:

1. Whether the Regime undermines the principles of Legal Professional Privilege and/or attorney client confidentiality? (Constitutionally or otherwise)

2. Whether the Regime subjects attorneys-at-law to unconstitutional searches and seizures?

3. Whether the Regime breaches the constitutional right to privacy?

4. Whether the Regime infringes on attorneys-at-law (and/orclients) right to liberty in a manner that is unconstitutional?

5. Whether the Regime infringes the Independence of the Bar?

6. If and insofar as the Regime infringes the constitutional rights of attorneys-at-law (and/or clients) is this infringement demonstrably justified in a free and democratic society?

ACCESS TO CONSTITUTIONAL RELIEF

[38] Section 19 of the Charter provides access to the constitutional court for persons to obtain constitutional redress where breaches of fundamental rights guaranteed by the Charter are alleged. Section 19 provides:

> (1) If any person alleges that any of the provisions of this Chapter has been, is being or is likely to be contravened 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.
>
> (2) Any person authorized by law, or, with the leave of the Court, a public or civic organization, may initiate an application to the Supreme Court on behalf of persons who are entitled to apply under subsection (1) for a declaration that any legislative or executive act contravenes the provisions of this Chapter.
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> (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 orders, 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.

THE APPLICABLE TEST TO DETERMINE CONSTITUTIONALITY

Presumption of Constitutionality

[39] In the Jamaican Privy Council case of ***Hinds and Others v R*** (1975) 24 W.I.R. 326, Lord Diplock stated at 339 that:

> In considering the constitutionality of the provisions of s. 13 (1) of the Act, a court should start with the presumption that the circumstances existing in Jamaica are such that hearings in camera are reasonably required in the interests of "public safety, public order or the protection of the private lives of persons concerned in the proceedings". The presumption is rebuttable. Parliament cannot evade a constitutional restriction by a

> colourable device: Ladore v Bennett ([1939] AC 468) ([1939] AC at p 482). But in order to rebut the presumption their Lordships would have to be satisfied that no reasonable member of the Parliament who understood correctly the meaning of the relevant provisions of the Constitution could have supposed that hearings in camera were reasonably required for the protection of any of the interests referred to; or, in other words, that Parliament in so declaring was either acting in bad faith or had misinterpreted the provisions of s. 20 (4) of the Constitution under which it purported to act.

[40] Similar observations were made by the Courts of Appeal in ***Faultin v A.G. of Trinidad and Tobago*** (1978) 30 WIR 351 and ***Jamaican Bar Association v A.G. & Anor, Ernest Smith & Co. and Others v A.G. and Anor*** SCCA Nos. 96, 102 &108/ 2003 (Jud del. Dec. 14, 2007).

[41] In the latter case, Panton J.A. at paragraph 36 stated that "*it is too late in the day for the arguments of the appellants to succeed on this point. The hands of the clock may not now be turned back. This court, like the other courts in the Caribbean and Australia, embraces the principle that there is a presumption of the constitutionality of statutes."*

[42] The 1st defendant contends that the court should at the outset adopt the rebuttable presumption of constitutionality of the Regime and that in determining whether the presumption should prevail, the language of the legislation has to be carefully considered as well as Parliament's intention having regard to prevailing social conditions.

[43] The Privy Council has also consistently declared that the test for unconstitutionality in the Commonwealth Caribbean is that which is outlined in ***Hinds***—proof beyond a reasonable doubt-. (See ***Mootoo v Attorney General of Trinidad and Tobago*** (1979) 30 WIR 411, ***Grant v R*** **(**2006) 58 WIR 354 and ***Suratt v Attorney General of Trinidad and Tobago*** (2007) 71 WIR 391).

Demonstrably justified in a free and democratic society

[44] Since the firm settlement of the presumption of constitutionality test in the several authorities referred to above, there has been a 2011 amendment to the Constitution which replaced Chapter 3 on Fundamental Rights with a new Charter of Fundamental Rights and Freedoms.

[45] Section 13(2) of the Charter states:

> Subject to sections 18 and 49, and to subsections (9) and (12) of this section, and save only as demonstrably justified in a free and democratic society-
>
> (a) this Chapter guarantees the rights and freedoms set out in subsections (3) and (6) of this section and in sections 14, 15, 16 and 17; and
> (b) Parliament shall pass no law and no organ of the State shall take any action which abrogates, abridges or infringes those rights.

[46] In light of the permissible derogation from the fundamental rights stated in terms of *"save only as demonstrably justified in a free and democratic society"*, the 1st and 2nd defendants submit that the approach outlined in the Canadian case of ***R v Oakes*** [1986] 1 S.C.R. 103should be adopted to interpret the effect of those words in the Jamaican Charter. The 2nd defendant noted however that such interpretation should be subject to the specific terms of the Charter.

[47] The derogation in the Canadian Charter is worded slight differently in that section 1 states: *The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.*

[48] At pages 136 – 137 of ***Oakes*** Dickson CJ noted that the onus of proving that a limit on a guaranteed right or freedom was reasonable and demonstrably justified in a free and democratic society was on the party seeking to uphold the limitation and that the standard of proof was the civil

standard. He continued at pages 138 –140 to outline the process of establishing the justification as follows:

> To establish that a limit is reasonable and demonstrably justified in a free and democratic society, two central criteria must be satisfied. First, the objective, which the measures responsible for a limit on a Charter right or freedom are designed to serve, must be 'of sufficient importance to warrant overriding a constitutionally protected right or freedom'...The standard must be high in order to ensure that objectives which are trivial or discordant with the principles integral to a free and democratic society do not gain s. 1 protection. It is necessary, at a minimum, that an objective relate to concerns which are pressing and substantial in a free and democratic society before it can be characterized as sufficiently important.
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> Second, once a sufficiently significant objective is recognized, then the party invoking s. 1 must show that the means chosen are reasonable and demonstrably justified. This involves 'a form of proportionality test'...Although the nature of the proportionality test will vary depending on the circumstances, in each case courts will be required to balance the interests of society with those of individuals and groups. There are, in my view, three important components of a proportionality test. First, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the objective. Second, the means, even if rationally connected to the objective in this first sense, should impair "as little as possible" the right or freedom in question...Third, there must be a proportionality between the effects of the measures which are responsible for limiting the Charter right or freedom and the objective which has been identified as of "sufficient importance".
>
> "With respect to the third component, it is clear that the general effect of any measure impugned under s. 1 will be the infringement of a right or freedom guaranteed by the Charter; this is the reason why resort to s.1 is necessary. The inquiry into effects must, however, go further. A wide range of rights and freedoms are guaranteed by the Charter, and an almost infinite number of factual situations may arise in respect of these. Some limits on rights and freedoms protected by the Charter will be more serious than others in terms of the nature of the right or

> freedom violated, the extent of the violation, and the degree to which the measures which impose the limit trench upon the integral principles of a free and democratic society. Even if an objective is of sufficient importance, and the first two elements of the proportionality test are satisfied, it is still possible that, because of the severity of the deleterious effects of a measure on individuals or groups, the measure will not be justified by the purposes it is intended to serve. The more severe the deleterious effects of a measure, the more important the objective must be if the measure is to be reasonable and demonstrably justified in a free and democratic society.

[49] Sykes J in ***Gerville Williams et al v The Commissioner of Indecom et al***. [2012] JMFC Full 1 at paragraph 224 commenting on the effect of the proportionality requirements in section 1 of the Canadian Charter stated that he understood the learned Chief Justice to be saying that *"fundamental rights and freedoms can be overridden but there must be a proportionate relationship between the objective, the measure and the effects of the measure."*

[50] The claimant however submits that the proportionality test was not applicable to Jamaica given the absence of the words *"within the reasonable limits prescribed by law"* from the Jamaican Charter.

[51] As noted in ***Gerville Williams*** whether, given the passage of a new Charter, the ***Oakes*** formulation or a version thereof will need to replace the pre-existing standard presumption of constitutionality test, is yet to be definitively decided in this jurisdiction. As in ***Gerville Williams*** therefore, the approach of this court will be to start from the presumption of constitutionality, but in light of the clear similarities between the Canadian and Jamaican Charters, to also examine whether or not the impugned aspects of the Regime satisfy the ***Oakes*** test of constitutionality.

[52] While it is true that the Jamaican Charter does not contain the words *"within the reasonable limits prescribed by law"* it would seem that the very concept of demonstrably justifiability would of necessity embrace some

notion of proportionality. Once rights are not absolute there has to be some exercise involving balancing any limitation of, or derogation from such rights, against the reason(s) for the interference. Inherent in that exercise must be a consideration of the issue of proportionality.

[53] Before proceeding to deal with the substantive issues identified it will be useful to consider the appropriate approach in determining the limitations on rights permitted by the derogation clause in section 13 (2) of the Charter. The claimant referred the court to the article **Limiting Rights** by Andrew S Butler[1] in which he examined how a similar derogation clause in section 5 of the **New Zealand Bill of Rights Act** 1990 should be interpreted. He noted at page 541 that limitation on rights could involve either "definitional balancing" or "*ad hoc* balancing". He explained that *'definitional balancing would involve reading limitations into the definition of the right set out'* while *'ad hoc balancing would require the court to define the rights broadly "without reference to competing values or other considerations", with questions as to the reasonableness of limitations on those broad rights being determined separately...'*

[54] Two of the reasons Butler preferred the *ad hoc* balancing approach were:

i) that the two stage process where the broad right was outlined and then the reasonableness of any limitations were considered, *"comports well with the allocation of burdens of proof...It naturally results in the plaintiff having to indicate that a prima facie interference with a ...right or freedom has occurred ('he or she who alleges bears the burden of proving"), while at the second stage the onus shifts to the State to "demonstrably" justify the limits it has placed on that right or freedom.";* and

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[1] Available at: http://www.victoria.ac.nz/law/research/publications/vuwlr/prev-issues/pdf/vol-33-2002/issues-3-4/butler.pdf

ii) it "ensures clearer, more transparent analysis, very important where difficult social policy issues are involved..."

[55] The approach recommended by Butler commends itself to the court and will be adopted in determining whether or not any acknowledged or proven limitation of, or derogation from, any right or freedom is demonstrably justified.

[56] This approach is also compatible with that advanced by the 2nd defendant relying on the case of ***Retrofit v Posts & Telecommunications Corp.*** [1996] L.R.C. 489 (Zimbabwe) in which Gaby CJ indicated that the methodology for determining whether an abrogation or restriction of a fundamental right was permissible in a democratic state involved the consideration of the following questions:

a) is the legislative objective sufficiently important to justifying limiting the fundamental right?
b) if so, are the measures designed to meet the legislative objective rationally connected to it and are not arbitrary, unfair or based on unreasonable considerations? and
c) are the means used to impair the right or freedom no more than is necessary to accomplish such objective?

ISSUE 1: WHETHER THE REGIME UNDERMINES THE PRINCIPLES OF LEGAL PROFESSIONAL PRIVILEGE (LPP) AND/OR ATTORNEY CLIENT CONFIDENTIALITY

[57] The claimant contends that the Regime is unconstitutional as it completely destroys the relationship of attorney and client insofar as it affects confidential information, LPP, the liberty interest of attorneys and the independence of the Bar. The issues of the liberty interest of attorneys and clients and the independence of the Bar will be dealt with under separate headings. Under this heading the questions relating to LPP and confidentiality will be addressed.

[58] The claimant submits that LPP while not expressly stated in the Charter is implicit where section 16(6) makes express provision for the right to legal representation. Reference was made to the case of ***Regina (Morgan Grenfell & Co. Ltd.) v Special Commissioner of Income Tax and another*** [2003]1 AC 563 at paragraph 7 where Lord Hoffmann pointed out that:

> [legal professional privilege] is a fundamental human right long established in the common law. It is a necessary corollary of the right of any person to obtain skilled advice about the law. Such advice cannot be effectively obtained unless the client is able to put all the facts before the adviser without fear that they may afterwards be disclosed and used to his prejudice.

[59] The claimant also notes that Sykes J in ***Jamaican Bar Association v Attorney General and General Legal Council*** at paragraphs 18 – 22 and 55at the interlocutory stage of this matter recognized the constitutional character of LPP. At paragraph 18 he stated: -

> 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.

[60] In supporting the constitutional nature of LPP the claimant also relies on dicta from Lord Scott in ***Three Rivers District Council and others v***

Governor and Company of the Bank of England (No.6) [2004] 3 W.L.R. 1274at paragraphs 24 – 28.

[61] Having emphasized the fundamental nature of the right to LPP, the claimant contends that LPP is breached by provisions of POCA which apply to attorneys-at-law engaged in the designated activities listed in the Order, which therefore made those provisions unconstitutional. It was also argued that LPP is a part of the right to privacy of attorneys and clients enshrined in the Charter whose broader right is also breached by the impugned provisions.(See Section 13(3)(j) of the Charter).

[62] The claimant also argues that the Regime breaches attorney/client confidentiality which engages the rights in sections 13(3)(j)(ii) and (iii) of the Charter. These, they submit, are similar to the rights included in Article 8 of the European Convention of Human Rights, which protects the right to respect for private and family life, home and correspondence.

[63] The 1st defendant submits that the challenge to the constitutionality of the Regime is without merit and that it ignores the adequacy of protection afforded by the Regime's recognition of LPP. They contend that LPP has not been violated or abrogated by POCA and that the arguments which have been put forward by the claimant cannot be a basis for contending that POCA breaches constitutional rights and should not apply to attorneys. Furthermore they assert that privileged circumstances cover the provision of information for the purpose of legal advice to a client or a representative of a client or the provision of information, in connection with legal proceedings or contemplated legal proceedings. They have further outlined that privileged circumstances do not cover the exception at common law, that is, where information is communicated or given with the intention of furthering a criminal purpose. This is to the extent that, even where disclosure of suspicious transactions is required, it is because there is actually knowledge or belief or reasonable grounds for such knowledge or

belief,that a client has an intention to further a criminal purpose. It is their firm position that the Act therefore respects LPP as defined and understood under the common law and protected by the Charter.

[64] The 2nd defendant supports this position and reiterates that LPP does not apply to all communications made to an attorney or to all documents in his possession. Privilege and confidentiality from any duty of disclosure are confined to communications and documents made for the purpose of actual or contemplated legal proceedings; or for the purpose of obtaining legal advice and this privilege does not extend to protect communications made for the purpose of committing a crime or fraud. They contend that POCA expressly recognizes and preserves the right to LPP and the examination process as illustrated by the Guidance is done with the appropriate limits.

[65] The 1st and 2nd defendants have not disagreed that LPP is a fundamental right protected by the Charter. The constitutionality of LPP was also acknowledged in ***Lavallee Rackel & Heintz v Canada (Attorney General) (Consolidated)*** (2002) SCC 61.Arbour J held that the privilege is protected under section 8 of the Charter as part of a client's fundamental right to privacy. In that case the Court relied on the constitutional character of privilege, in determining a claim for privilege over documents seized from a lawyer's office, under a search warrant, because it allowed for the loss of privilege without the client's knowledge or consent. Arbour J. found that a client has a reasonable expectation of privacy in privileged communications under s. 8 of the Charter.

[66] We agree that LPP is a fundamental right enjoyed by all citizens and that although it is not expressly stated in the Charter, it is implicit in section 16(6)(c)which makes express provision for the right to legal representation and is also enshrined in the privacy rights protected in Section 13(3) (j) of the Charter. It is indisputable that there is a constitutional guarantee of the

fundamental rights and freedoms enshrined in the Charter, including those highlighted by the claimant, and that none can be abridged, abrogated or infringed unless it is demonstrably justified in a free and democratic society.

[67] The Charter both directly and indirectly recognises the importance of access to legal services and legal representation. Section 14 (2) of the Charter gives an arrested or detained person the right to communicate with and retain an attorney-at- law and section 16 (6) (c) entitles a person charged to obtain legal representation of his choice. Section 16 (1) and (2) guarantee the right, if charged, to be tried before an independent and impartial court and in the civil jurisdiction to have one's civil rights or obligations determined by an independent and impartial court.

[68] Implicit in these provisions is the right to access to skilled legal advice and assistance which in itself requires an atmosphere of candour so that attorneys can be properly briefed to provide the best advice to the client in the given circumstances. Accordingly LPP has been placed before this court by the claimant as being in need of protection from a perceived overreaching and trespassing on its bounds, by the POCA Regim*e.*

Overview of Legal Profession Privilege

[69] LPP is a closely guarded right essential for the proper operation of the administration of justice. It guards against disclosure by an attorney-at-law of information subject to privilege that he holds on behalf of his client. It assists in the administration of justice as it provides rules that seek to guarantee fair procedure, protection of the right against self-incrimination and a fair trial. LPP enables and encourages clients to make full disclosure to their Attorneys-at-law in order to obtain the best advice and be provided with the best representation. An attorney-at-law can only provide the best legal advice if he gets full instructions from his client.

[70] LPP does not extend to everything an attorney-at-law has a duty to keep confidential. Within the confidential material held by a lawyer, LPP attaches to those communications which fall either under advice privilege or under actual or contemplated litigation privilege. (See: ***Balabel v Air India*** [1988] 1 Ch 317).

[71] The pre-requisite for a communication between an attorney and a client to enjoy the protection of LPP is that the communication must occur within a relevant legal context. (See: ***Balabel v Air India***.) LPP does not attach unless there is the relevant legal context. It does not attach to cover up or permit refusal to disclose a crime, fraud or iniquity. It remains true that LPP is kept and should be kept as near to absolute as possible. In the circumstances of this claim it is necessary to evaluate the contention that LPP has been breached in the context of the law on privilege in relation to the relevant provisions of POCA and the Charter.

[72] There is no disputing the fundamentality of LPP and there can be no question that it is for the benefit of anyone who seeks legal advice from attorneys. The policy governing LPP has been outlined in several cases. In ***R (Morgan Grenfell and Co. Ltd) v Special Commissioner of Income Tax and Another***, Lord Hoffman at paragraph30 stated that "*the policy of LPP requires that the client should be secure in the knowledge that protected documents and information will not be disclosed at all."*

[73] LPP is a principle of law, and a fundamental human right, which protects the right of a person, to seek counsel from his lawyer in the knowledge that his communication will not be revealed unless he gives his consent.***(***See: ***Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission*** [2002] HCA 49)

[74] In **the *Jamaican Bar Association v The Attorney General and the General Legal Council*,** Sykes J stated at para. 12 that -

> [T]he privilege allows all citizens and non-citizens of Jamaica to seek legal advice or legal representation so that he or she can organize 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.

Further at paragraph 22, His Lordship enunciated that –

> [T]here 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.

[75] Long before Sykes J made those observations, the House of Lords laid out guidance on this issue in ***R v Derby Magistrates' Court, Ex parte B,*** [1996] AC 487. In that judgment, Lord Taylor of Gosforth, C.J at paragraph 41 stated:

> [T]hat a document protected by privilege continues to be protected so long as the privilege is not waived by the client: once privileged, always privileged. It also goes against the view that the privilege is the same whether the documents are sought for the purpose of civil or criminal proceedings, and whether by the prosecution or the defence, and that the refusal of the client to waive his privilege, for whatever reason, or for no reason, cannot be questioned or investigated by the court.

At paragraph 69 it was enunciated that –

> [B]ut the principle remains the same; and that principle is that a client must be free to consult his legal advisers without fear of his communications being revealed. Reg. v. Cox and Railton (1884) 14 Q.B.D. 153, provides a well-recognised exception. Otherwise the rule is absolute. Once the privilege is established, the lawyer's mouth is "shut for ever".

and at paragraph 58 -

> The principle which runs through all these cases, and the many other cases which were cited, is that a man must be able to

> consult his lawyer in confidence, since otherwise he might hold back half the truth. The client must be sure that what he tells his lawyer in confidence will never be revealed without his consent. LPP is thus much more than an ordinary rule of evidence, limited in its application to the facts of a particular case. It is a fundamental condition on which the administration of justice as a whole rests." (**Emphasis added**).

[76] Similarly, the authority of ***Ventouris v Mountain*** [1991] 1 WLR 607, [1991] 3 All ER 472 aptly captures the essence of privilege and declares that it is in the interests of the state which provides the court system and its judges at taxpayers' expense that legal advisers should be able to encourage strong cases and discourage weak cases. LPP allows for this as it encourages candour which assists with the quick resolution of matters. Bingham L.J. opined that. *"It is the protection of confidential communications between client and legal adviser which lies at the heart of legal professional privilege".*

[77] There can be no doubt as to the importance of the principle of LPP. In ***Three Rivers District Council and others v Governor and Company of the Bank of England (No. 6)*****;** the question on appeal was whether the communications between the Bank of England and its solicitors relating to the content and preparation of an overarching statement submitted on behalf of the bank to the inquiry qualified for legal advice privilege. Lord Scott considering ***Balabel v Air India*** **and** ***B and Others and Russell McVeagh McKenzie Bartleet & Co. v Auckland District Law Society and Gary J. Judd*** [2003] UKPC 38 opined that:

> *1.* Legal advice privilege arises out of a relationship of confidence between lawyer and client. Unless the communication or document for which privilege is sought is a confidential one, there can be no question of legal advice privilege arising. The confidential character of the communication or document is not by itself enough to enable privilege to be claimed but is an essential requirement.

> *2.* If a communication or document qualifies for legal professional privilege, the privilege is absolute. It cannot be overridden by some supposedly greater public interest. It can be waived by the person, the client entitled to it and it can be overridden by statute… but it is otherwise absolute.
>
> *3.* Legal advice privilege gives the person entitled to it the right to decline, to disclose or to allow to be disclosed the confidential communication or document in question.
>
> *4.* Legal advice privilege has an undoubted relationship with litigation privilege. Legal advice is frequently sought or given in connection with current or contemplated litigation. But it may equally well be sought or given in circumstances and for purposes that have nothing to do with litigation.

[78] The position in paragraph 2 of the quotation which refers to privilege being absolute is not a position taken by some authorities. The Canadian Courts have stated that despite its importance, solicitor-client privilege is not absolute. It is subject to exceptions in certain circumstances. Nevertheless, the privilege "must be as close to absolute as possible to ensure public confidence and retain relevance. As such, it will yield only in certain clearly defined circumstances, and does not involve a balancing of interests on a case-by-case basis**.** ***R v McClure*** [2001]1. S.C. R 445 paragraphs 33-34; Major J.; ***Lavallee*****,** paragraph 36, Arbour J**.** The Court has described the privilege as "near-absolute". ***Blank v. Canada (Minister of Justice)*** 2006 SCC 39 paragraph 26, Fish J**.**

[79] In the Canadian cases of ***Solosky v Queen*** [1980] 1 S.C.R. 821 and ***Smith v Jones*** [1999] 1 S.C.R. 455, a limited public safety exception to attorney-client privilege was recognised. In ***Solosky v Queen*****,** an inmate at a penitentiary brought proceedings for a declaration that his correspondence with his lawyer should be treated as privileged. It was

held that with appropriate safeguards, the privilege should give way to "*the public interest in maintaining the safety and security of a penal institution, its staff, and its inmates."*

[80] In ***Smith v Jones***, a psychiatrist was retained to conduct an assessment of an accused charged with the aggravated sexual assault of a prostitute, the psychiatrist was of the view that the accused was a serious danger to other prostitutes and eventually applied for permission to disclose the information. It was accepted that this application should be treated as a request for an exception to lawyer-and-client on the grounds of the "public safety exception."

[81] In ***R v McClure,*** the Court held that in limited circumstances an individual's privilege should yield to an accused's right to make full answer and defence to a criminal charge. Major J, for the Court formally declared the privilege to be a principle of fundamental justice under section 7 of the *Charter*. The Court adopted a two-stage "innocence at stake" test, allowing the privilege to be infringed "only where core issues going to the guilt of the accused are involved and there is a genuine risk of a wrongful conviction". ***In Oxfordshire County Council v M*** [1994] Fam 151the exception made was described as a countervailing policy consideration, in wardship proceedings, where the interests of the child was considered to be paramount.

[82] In ***Balabel v Air India****, at page 324(C),* Taylor, L.J. stated that *"it is common ground that the basic principle justifying legal professional privilege arises from the public interest requiring full and frank exchange of confidence between solicitor and client to enable the latter to receive necessary legal advice."*

[83] In ***B and Others v Auckland District Law Society*****,** the main issue was whether the law society was entitled by virtue of the Law Practitioners Act

to require the firm to produce privileged documents for the purpose of an inquiry into allegations of professional misconduct. Lord Millet stated at paragraph 44 that**:**

> [S]ome principles are well established and were confirmed by Lord Taylor CJ in **R v Derby Magistrates' Court, Ex p B** at p 503G-H. First, the privilege remains after the occasion for it has passed: unless waived "once privileged, always privileged". Secondly, the privilege is the same whether the documents are sought for the purpose of civil or criminal proceedings and whether by the prosecution or the defence. Thirdly, the refusal of the claimant to waive his privilege for any reason or none cannot be questioned or investigated by the Court. Fourthly, save in cases where the privileged communication is itself the means of carrying out a fraud, the privilege is absolute. Once the privilege is established, the lawyer's mouth is "shut for ever": (see Wilson v Rastall (1792) 4 Durn & E 753 at p 759 per Buller J).

[84] His Lordship then affirmed at paragraph 45 that:

> [I]t is, of course, well established that the privilege belongs to the client and not to his lawyer, and that it may not be waived by the lawyer without his client's consent. But the privilege is available to the client whether he is a layman or a lawyer; even a lawyer – perhaps especially a lawyer – has need of the services of another lawyer if he becomes personally embroiled in legal proceedings

[85] In ***Bowman v Fels*** [2005] EWCA Civ. 226, the Court observed at paragraph 74 that *"…access to legal advice on a private and confidential basis is also a fundamental principle not lightly to be interfered with. This is so both in the criminal law sphere … but also in the context of advice sought for civil law purposes."*The Court continued at paragraph 78 as follows:

> *So far as UK domestic law is concerned, it is elementary that when a lawyer is advising a client or acting for him in litigation, he may not disclose to a third party any information about his client's affairs without his express or implied consent –*

[86] From the above mentioned authorities, the significant and unique nature of LPP is pellucid. It is one of the central tenets of the attorney-client relationship and it has evolved as a matter of public policy, primarily that, persons should be able to consult their attorneys, and in colloquial terms "lay all their cards on the table" free from the fear of any revealing of confidences, so that they can obtain sound and accurate legal advice, in effectively addressing their legal affairs. Such a principle is almost absolute and rarely balanced or measured against any competing public interest. Once it attaches to a document, it is protected from disclosure to and by anyone, except with the client's consent. It would seem then that all information subjected to and protected by LPP is, (subject to the client's consent) out of the reach of everyone, including the state unless it is demonstrably justified in a free and democratic society. It cannot be forcibly discovered or disclosed and is inadmissible in court. The attorney acts as a gatekeeper and is ethically bound to protect the privileged information which belongs to the client. In fact an attorney is under a professional obligation to assert the privilege until it is waived by the Client. (See: ***R v Central Criminal Court Ex. p. Francis & Francis*** [1989] 1A.C. 346 at 381.)

[87] Privilege is therefore a right to resist the compulsory disclosure of information. At paragraph 47 of the judgment of the court in ***Jamaican Bar Association & Anor; Ernest Smith & Co. and Others v A.G. and Anor,*** Panton J.A. referred with approval to the dictum of the High Court of Australia in **The Daniels *Corporation International Pty Ltd v Australian Competition and Consumer Commission***, which is as follows:

> At paragraph 9, Gleeson, CJ, Gaudron, Gummow and Hayne JJ expressed themselves thus:
>
> > It is now settled that legal professional privilege is a rule of substantive law which may be availed of by a person to

> resist the giving of information or the production of documents which would reveal communications between a client and his or her lawyer made for the dominant purpose of giving or obtaining legal advice or the provision of legal services, including representation in legal proceedings.

At paragraph 43, McHugh, J said:

> Courts do not construe legislation as abolishing, suspending or adversely affecting rights, freedoms and immunities that the courts have recognized as fundamental unless the legislation does so in unambiguous terms. In construing legislation, the courts begin with the presumption that the legislature does not interfere with these fundamental rights, freedoms and immunities unless it makes its intention to do so unmistakably clear.

And at paragraph 44, McHugh, J said further:

> Australian courts have classified legal professional privilege as a fundamental right or immunity. Accordingly, they hold that a legislature will be taken to have abolished the privilege only when the legislative provision has done so expressly or by necessary implication....The immunity embodies a substantive legal right.

[88] LPP does not attach to communications given or received with the intention of furthering a criminal purpose or where a crime, fraud or iniquity has been committed. The provisions in the Act of exempting from privilege, instances where the communication is with the intention of furthering a criminal purpose is the position at common law and supported by such cases as ***R v Cox and Railton*** (1884) 14 Q.B.D. 153 and ***London Borough of Brent v Kane*** [2014] EWHC 4564. ***In R v Cox and Railton,*** cited in this regard by the 1st and 2nd defendants the two defendants were indicted for conspiracy with intent to defraud Henry Munster. Prior thereto, on the 9th of April, 1881, the two defendants entered into a partnership in the business of newspaper proprietors with respect to a newspaper. In February, 1882, Mr. Munster brought an action against Railton for a libel which appeared in that paper. On the 24th of

June, 1882, the action ended in a verdict for the plaintifff or 40*s.* and costs as between solicitor and client. The costs were taxed on the 18th of August. On the 20th execution was issued against Railton for the amount. The sheriff was met by a bill of sale from Railton to Cox, dated the 12th of August, 1882, and withdrew. An interpleader action to test the validity of the bill of sale was tried on the 15th of January, 1883. At that action the deed of partnership of the 9th of April, 1881, was produced, bearing upon it an indorsement purporting to be a memorandum of dissolution of partnership dated the 3rd of January, 1882.

[89] The case for the prosecution was, that the bill of sale was a fraudulent bill of sale of the partnership assets, entered into between Railton and Cox while they were partners, for the purpose of depriving Mr. Munster of the fruits of his judgment, and that the memorandum of dissolution of partnership was indorsed on the deed, not on the 2nd of January, 1882, when it bore date, but subsequent to Mr. Munster's judgment. In order to prove this case, Mr. Goodman, a solicitor, who was consulted by the defendants regarding the property being seized, after the verdict was given but before it was executed, was called. There was a serious question as to the admissibility of the evidence of a solicitor. The question then was, whether communication is privileged if a client applies to a legal adviser for advice intended to facilitate or to guide the client in the commission of a crime or fraud, the legal adviser being ignorant of the purpose for which his advice is wanted.

[90] The Court found that no such privilege existed. On pages 165-166 it observed that:

> If it did, the result would be that a man intending to commit treason or murder might safely take legal advice for the purpose of enabling himself to do so with impunity, and that the solicitor to whom the application was made would not be at liberty to give information against his client for the purpose of frustrating his

> criminal purpose. Consequences so monstrous reduce to an absurdity any principle or rule in which they are involved.

[91] The Court later stated at page 167 that:

> The reason on which the rule is said to rest cannot include the case of communications, criminal in themselves, or intended to further any criminal purpose, for the protection of such communications cannot possibly be otherwise than injurious to the interests of justice, and to those of the administration of justice. Nor do such communications fall within the terms of the rule. A communication in furtherance of a criminal purpose does not come into the ordinary scope of professional employment

[92] The ratio of ***London Borough of Brent v Kane*** is also instructive. This case concerned an alleged transaction at an under value entered into by an elderly man with dementia (Mr Kane) who was receiving care from his local council. The council alleged, in summary, that Mr Kane's sons had taken a transfer of a 50% interest in a property he owned in an attempt to avoid charges for his care, which was a breach of the relevant social services legislation as well as a transaction defrauding creditors under section 423 of the Insolvency Act 1986.

[93] The council sued Mr. Kane and his sons in relation to the undercharged care contributions. In the proceedings, the claimant applied for disclosure of documents held by the defendants' solicitors, including legal advice, relating to the relevant transactions. Although such documents would ordinarily attract privilege, the claimant contended that privilege did not apply because of the fraud/iniquity exception. The alleged purpose of the advice was to structure the transactions in a way that shifted the burden of Mr Kane's care onto the public purse while enabling the sons to take the assets. This purpose, the claimant argued, was sufficiently iniquitous to require disclosure of the documents. The court ordered disclosure, finding that the iniquity exception applied.

[94] The case of ***Minter v Priest*** [1930] AC 558 is also helpful. This case concerns the question of whether conversations between a solicitor and his client relating to the business of obtaining a loan for the deposit on the purchase of real estate were privileged from disclosure. Mr. Priest, a solicitor was approached by one Mr. Simpson a potential purchaser, as well as a Mr. Taylor. The premises to be purchased was owned by Mr. Minter. Mr. Simpson's intention was to borrow money from Mr. Priest in order to execute the purchase. During the course of the interview, it is alleged that Mr. Priest defamed Mr. Minter. On hearing of Mr. Priest's defamatory comments, Mr. Minter sued for defamation.

[95] In answering the question of whether conversations between a solicitor and his client relating to the business of obtaining a loan for the deposit on the purchase of real estate were privileged from disclosure, the Court of Appeal upheld the claim to privilege, their decision was on the basis that what transpired at an interview between a client and a solicitor acting in his professional capacity and within the ordinary scope of his business as a solicitor falls within the realm of privilege. However, the House of Lords was otherwise persuaded. The Court of Appeal's decision was reversed on the ground that the respondent was not acting as a solicitor at the relevant time but that instead he was traversing on a malicious scheme from which he was to profit jointly with the proposed purchasers.

[96] Sykes J in his analysis of ***Minter v Priest*** in the ***Jamaican Bar Association v Attorney General & GLC*** highlighted the many nuances associated with the principle of LPP and the many complications that may occur when one seeks to determine if LPP applies. Whilst it is agreed that the subject matter of LPP can at times prove complicated, in the types of activities listed in the Order, engagement in which would make Attorneys DNFIs, the relationship between the solicitor and client in most instances would not be occurring in a relevant legal context and hence LPP would not apply. This especially given the way the law in relation to

LPP has developed in the years since ***Minter v Priest*** was decided given the expanding role of the solicitor/attorney outside of his traditional role of providing legal advice and legal representation. This will be explored in more detail below.

[97] Before leaving ***Minter v Priest*** however the court finds instructive the oral submissions of Mr. Allan Wood Q.C. where he pointed out that the actual ratio of ***Minter v Priest*** is that communication between the solicitor and the prospective purchaser of Mr. Minter's property was not protected by privilege. Counsel cited the majority judgment of Lord Buckmaster with whom all the other Law Lords concurred and highlighted that the subject communication had been shared with the solicitor who had ulterior motives, that is, he had made a counter proposal involving a malicious scheme from which he was to profit jointly with the proposed purchaser and hence he was participating in a crime.

[98] Therefore an essential detail that Sykes J omitted to address in his analysis was that at the time of the exchange, the defendant solicitor had stepped outside the boundaries of the solicitor – client relationship and was engaged in a crime which took the communication sought to be protected outside of the realm of LPP. The boundaries of LPP were therefore not fully delineated without a consideration of the crime/fraud exception and the relevant legal context.

[99] The 2nd defendant at paragraph 66 of its submissions, quoting paragraph 16 of the Guidance, made clear that where criminal conduct is involved LPP does not apply. Paragraph 16 reads, "*The attorney should however be mindful that LPP… cannot be relied on to shelter an attorney who participates in criminal conduct, nor can LPP be relied on by a client where advice is sought in respect of the commission of an unlawful act."*

[100] The purpose of outlining the law in relation to LPP is to illustrate that*:*

I. Privilege is a fundamental right;

II. Privilege does not automatically apply in relation to all communications between the lawyer and the client;

III. For the protection to apply there must be a relevant legal context;

IV. The purpose of the communication must be legal advice; or

V. Communication in relation to contemplated or actual legal proceedings;

VI. Privilege is ousted or does not apply where there is crime, fraud, iniquity or intention to further a criminal purpose;

VII. That although privilege is to be kept as absolute as possible it can in limited circumstances give way to other policy considerations although not on an ad hoc basis.

[101] It is against this background that the claimant's assertion that LPP has been destroyed or generally undermined by the Regime, thereby infringing the constitution must be considered. In particular we will consider the claimant's contention that the Regime infringes sections 13 (3) (j) and16 (6) (c) of the Charter.

The Relevant Legal Context

[102] In order for the claimant to succeed on this aspect of the claim there must at the very least be shown some infringement of the privacy rights enshrined in section 13 (3) (j) and the right to legal representation enshrined in section 16 (6) (c) of the constitution. As it relates to section 16 (6) (c) the case of ***S v Switzerland*** (1992) 14 E.H.R.R. 670 at paragraph 48 is of value. This case highlights that the right to consult a lawyer brings with it a right to confidentiality of legal communications.

However, this only relates to “contemplated proceedings”, and thus protects litigation privilege and not legal advice privilege. The reasoning indicates that the right in section 16 (6) (c) does not accrue where litigation is not in progress or in contemplation and as such the right would not be engaged in circumstances where there is no relevant legal context or even where there might be purely legal advice. This is an important distinction as section 16 (6) (c) provides a person with the right to legal representation of his choice and if this cannot be afforded, to reasonable assistance to obtain the same as is required in the interest of justice.

[103] In order to show infringement of section 13 (3) (j) (ii) and (iii) of the Charter, the claimant has to show that the Regime has undermined the right to LPP and or confidentiality. The starting point is to establish that LPP applies to the activities engaged under the Regime. If LPP applies, then the next step is to assess the provisions of the Regime to evaluate the claim of breach. If there is any breach, it is then necessary to consider whether this amounts to an interference with the constitutionally protected right of privacy and whether any such interference is demonstrably justified in a free and democratic society.

[104] The cases and reasoning above indicate that not all communications between a lawyer and client are necessarily subject to LPP. The prerequisite consideration as to whether LPP is attached to communications between an attorney and client is whether there is in existence a ‘relevant legal context’. In order to benefit from legal advice privilege, although communication does not need to contain actual legal advice or an express request for such advice to qualify as being privileged it must be within a relevant legal context. In general terms, so long as there is a relevant legal context, LPP will cover communications which form part of the ordinary flow of information and instructions between lawyer and client relating to the matter on which the lawyer is instructed. The first question for the court’s analysis is ‘are the activities in

the Order such that, communication between attorney and client for the purpose of these transactions, within a relevant legal context?'(See: ***Balabel and Three Rivers No.6)***

[105] The 2nd defendant provides an insightful answer to the question posed by submitting that it is only to the extent that activities of the lawyer engage in the State's due process obligations that justify the existence of LPP and the special protection afforded to lawyers. Therefore there can be no justification for protection where the attorney steps out of the traditional role of legal adviser and simply acts as agent in the client's business which has no connection to the administration of justice or the provision of legal advice.

[106] Equally, there can be no justification for affording protection where the activities of the attorney engaged in the regulated sector are the same as other professionals such as the banker in handling client money or the accountant in creating companies to provide tax shelters or the real estate agent in dealing with real estate. These activities do not engage any role of the attorney in the administration of justice.

[107] The 2nddefendant continues further to assert that the extension of POCA to attorneys in Jamaica is strictly confined to attorneys who engage in the enumerated activities set out in the Minister's Order and is not applicable to activities taken in the course of the representation of clients in criminal or civil proceedings or giving legal advice.

[108] The relevant legal context will differ depending on the nature of the transaction. As Lord Scott said in ***Three Rivers No 6***,*"if a solicitor becomes the client's 'man of business', and some solicitors do, responsible for advising the client on all matters of business, including investment policy, finance policy and other business matters, the advice may lack a relevant legal context."* In a dispute as to privilege if it is not at

first obvious, the judge should ask whether the advice relates to the rights, liabilities, obligations or remedies of the client under private or public law.

[109] If it does not, then there would be no relevant legal context, and so no legal advice privilege or litigation privilege. If it does, then the question is whether the occasion on which the communication took place, and the purpose for which it took place, were such as to make it reasonable to expect the privilege to apply.(See: ***Three Rivers No 6****)*. Following from and being guided by this decision, the test for legal advice privilege was restated and expanded by the High Court of New Zealand in ***The Commerce Commission v Bay of Plenty Electricity Limited, Wellington Registry*** CIV 2001-485-917, Wild J, 13 February 2006, as follows: (a) Does the advice have a "relevant legal context?" Does the advice relate to the rights, liabilities, obligations or remedies of the client under either private or public law? If not, then legal advice privilege would not apply to any communications or documents in relation to that advice. (b) Objectively assessed, is it reasonable to expect the privilege to apply? If the advice does meet step one of the test then, on an objective assessment having regard to the policy underlying the justification for legal advice privilege, is the occasion on which the communication takes place and is the purpose for which it takes place such as to make it reasonable to expect the privilege to apply?

[110] The protection of LPP is a right enjoyed in the lawyer/client relationship as a consequence of its importance in the delivery of and the administration of justice. The protection is within the sphere of the lawyer/client relationship in relation to the unique role played by lawyers in advancing their client's cause in the context of the administration of justice. There is no doubt that some lawyers sometimes operate outside of this framework and carry on activities that are equally carried on by other professionals or businesses. Those lawyers at that time are in a similar position to these other professions, such as bankers, accountants and real estate agents.

The clients of these other professions do not benefit from LPP, as the nature of the activities do not fall within the administration of justice and therefore, there would be no valid rationale for its application. (***Prudential Plc v Commissioner of Income Tax*** [2013] UK SC 1).

[111] The claimant at paragraphs 24 and 25 of its submissions expresses the view that Attorneys-at-law are quite unlike banks and other financial institutions. Banks and other financial institutions have two primary concerns, namely, making money for their shareholders and clients. In the pursuit of this endeavour, the largest financial institutions internationally have been found guilty and fined for huge violations of the law. Attorneys-at-law, on the other hand, have a special relationship with the administration of justice and are subject to discipline in connection with the performance of their professional duties. Professional misconduct with the potential for striking off is the primary consequence of improper conduct by attorneys-at-law. In this connection their position is far different from financial institutions and other professional bodies.

[112] At paragraph 35, the claimant continued that *"The uniqueness of the special relationship between attorney and client is underscored by the case of* ***Prudential Plc and Prudential (Gibraltar Ltd.) and Special Commissioner of Income Tax and Phillip Pandolflo****, at paragraph 51 in which the court held that attorney/client privilege would not be extended to accountants even in a case where accountants were giving tax advice."*

[113] The decision in ***Prudential,*** in the context of the issues before this court, is an indication that the UK Supreme Court was unwilling to extend the bounds of LPP outside of its traditional parameters. In this case, the UK Supreme Court confirmed by a 5–2 majority, that legal advice privilege remains restricted to legal advice of lawyers only. The issue arose in relation to a claim for judicial review by Prudential PLC that had

challenged notices served by HM Revenue & Customs seeking disclosure of advice from Prudential's tax accountants. Prudential argued that the clients of accountants in receipt of tax law advice should be able to rely on legal advice privilege and that it was not necessary that the advice be provided by a lawyer. In the view of the majority it was clear that legal advice privilege does not extend beyond lawyers, and that to change the position now, would lead to uncertainty as to the scope of legal advice privilege.

[114] This case does not concern matters where lawyers are involved in transactions and/or are in receipt of information outside of privileged circumstances. Privileged circumstances relate to the traditional role in the administration of justice, of giving legal advice as well as those for actual or contemplated legal proceedings. The distinction made by the claimant, in principle, overlooks the narrow and subtle point that the difference lies in the 'special relationship of attorneys ***within the administration of justice'***. Hence for activities which, by and large are shared with other professionals, and do not engage attorneys–at–law in their role in the administration of justice, there is no justification for them to be treated differently. An accountant's role is not similarly engaged in the administration of justice. His tax law advice is always subject to authoritative legal and procedural guidance by a lawyer, in circumstances which are privileged. The accountant, regardless of the advice given, is never engaged in the administration of justice as an attorney-at-law providing legal advice.

[115] In ***Balabel* v Air India,** the issue in the case was whether LPP extended only to communication seeking or conveying legal advice; or extended to all that passes between an attorney and his client on matters within the ordinary business of an attorney. The claimants sought discovery of a number of documents. These were (1) communications between the defendant and its attorney, other than those seeking or giving legal advice

(2) drafts, papers, attendance notes and memorandums of the defendant's attorney in relation to the propose new under lease (3) internal communications of the defendant other than those seeking advice from their legal advisors. The defendant's attorneys asserted LPP and did not disclose the documents.

[116] The Master upheld the defendant's claim of privilege that the document received in a transaction does not have to specifically refer to legal advice to attract LPP. The claimant appealed. On appeal some of the specified documents were ordered to be disclosed. The defendant then appealed to the Court of Appeal. The Court had to consider whether the Judge was correct or whether the privilege extended to all communications between the lawyer and client on matters within the ordinary business conducted within an attorney/client relationship. At paragraph F, page 323, Taylor L.J. in giving Judgment quoted and endorsed the conclusion of the Judge as follows:

> The (defendant) in my judgment[is] entitled to withhold all communications which seek or convey advice, even though parts of them may contain matters of facts or statements which in themselves would not be protected. On the other hand, documents which simply record information or transactions, with or without instructions to carry them into execution, or which record meetings at which people were present are not privileged.

[117] After reviewing some earlier authorities and noting that there was a divergence of judicial authorities, Taylor L. J stated at page 331:

> [I]t follows from this analysis that those dicta in the decided cases which appear to extend privilege without limit to all solicitor and client communication upon matters within the ordinary business of a solicitor and referable to that relationship are too wide. It may be that the broad terms used in the earlier cases reflect the restricted range of solicitor's activities at the time. Their role then would have been confined for the most part to that of lawyers and would not have extended to business adviser or man of affairs. To speak therefore of matters "within the ordinary business of a solicitor'

> would in practice usually have meant the giving of advice and assistance of a specifically legal nature. But the range of assistance given by solicitors to their client and of activities carried out on their behalf has greatly broadened in recent times and is still developing. Hence the need to re-examine the scope of legal professional privilege and keep it within justifiable bounds". (Emphasis added).

[118] These words spoken by Taylor L.J. in 1988, are even more apt some almost 30 years later. Taylor L. J. recognised the changing times and the changing role of the attorney, which takes him/her out of the province of justification for LPP to be bestowed on all his transactions and the need to discriminate according to the activity. The traditional imperatives, which accorded the protection, although still relevant in relation to the core of an attorney's business, are irrelevant for most of the activities listed in the Order. This is in accord with the conclusion of the Court of Appeal in ***Balabel*** **v Air India** that the protection afforded by LPP was as a result of the necessity for legal advice to be requested and obtained in confidence for the purpose of such advice and for the free flow of communication within this context. As this is the justification for LPP, it only attaches to written and oral communication, made confidentially and for the purpose of obtaining legal advice.

[119] There are very few exceptions to the position that the DNFI activities listed in the Order are outside of a relevant legal context. These relate to activities, enumerated as part of item (v) in the Order that is, that of creating, operating or managing a legal person or legal arrangement (such as a trust or settlement). The creating operating or managing a legal arrangement such as a trust or settlement might in fact require non-contentious legal proceedings to formalise them. Another example is illustrated by the GLC in its Guidance (See: paragraph 15) *"for example non-contentious legal proceedings for the administering of estates of deceased persons would come within the activities designated in the Order as such proceedings have as its purpose the creation of*

arrangements in respect of property or other assets which will not be the subject of thorough judicial examination to ensure that there is no illicitly obtained property that is being dealt with by such arrangements."

[120] These activities are likely to include legal advice as to rights and liabilities as well as litigation advice. In following the principles of ***Balabel* v Air India** and ***Three Rivers No. 6*** and the tests set therein, the cloak of privilege would attach to these transactions. However, as mentioned above, communication for the furthering of a criminal purpose is exempt from privilege and is particularly apt in this context, where privileged circumstances may apply in relation to suspicious transaction reports. This will be considered further below. The purpose of starting with an examination of the 'relevant legal context' is to identify the extent to which LPP is at stake as a result of the Regime and to also assess the intention of Parliament in this regard. The fact that the activities chosen are those that do not usually engage the cloak of privilege shows clearly the intention of Parliament in relation to the protection of LPP. Furthermore, if one considers the aim of the legislation then it is quite clear that a legal arrangement in relation to a 'trusts' or 'settlement' or the 'administering of estates' are the very type of activities vulnerable to money laundering, although they may involve communication in apparent privileged circumstances.

[121] The 2nd defendant sought to advise attorneys as to the nature of the activities covered by the Order and also made these distinctions clear in paragraph 15 of its Guidance as follows:

> Where an attorney does not act in any of the activities comprehended in the DNFI Order, that attorney will not be a DNFI for the purposes of POCA. Further where the attorney is a DNFI, professional activities in transactions other than those designated in the DNFI Order are not within the scope of POCA (MLP) Regulations and those regulations are not applicable to such activities. Accordingly, as a general rule participation in litigation

> and other forms of dispute resolution by an attorney and the giving of legal advice are not professional activities coming within the scope of the DNFI Order. Activities carried on by an attorney normal course of litigation will not be within the DNFI Order. Similarly where litigation results in the order of a court for the payment, transfer or distribution of money, property or assets or for the regulation, management or winding up of a company or other entity, the attorney's continued participation in such transaction will not come within the ambit of the DNFI Order.

[122] In this context, we make reference to Sykes J's, example at paragraph 39 of his interlocutory judgment in this matter: -

> 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?

[123] Seemingly, Sykes J's example is based on the first section of paragraph 14 (article 14) of the Guidance where it states "*accordingly, the terms in the DNFI Order are 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 designated in the DNFI Order from the time that the attorney is first engaged or consulted by or on behalf of a client".*

[124] In relation to the example cited by Sykes J, in such a situation privilege would indeed apply as Grandpa has prima facie sought legal advice. The appropriate assessment in this context is whether the communication was within a relevant legal context, the material questions are (a) Does the

advice have a "relevant legal context?" Does the advice relate to the rights, liabilities, obligations or remedies of the client under either private or public law? See: ***Balabel v Air India*** discussed in the foregoing. The boundaries are then delineated by privilege circumstances/ the relevant legal context. It therefore follows that as Grandpa was requesting legal advice his communication to his attorney would be subject to legal advice privilege and his attorney would not be acting in a purely transactional relationship and would be wearing his "legal spectacles". See: ***Three Rivers No. 6.*** It is difficult to see how the attorney could be classified as being involved in the transaction itself when all he did was to offer legal advice to Grandpa, acting in his traditional role as an attorney.

[125] Whether applying the test in ***Balabel*** or the expanded test outlined in ***The Commerce Commission v Bay of Plenty Electricity Limited, Wellington Registry***, it is apparent that in general the specified regulated activities of lawyers designated as DNFI's fall outside the ambit of LPP. There is in the circumstances of these activities, generally no advice that would be required that relates to rights, liabilities, obligations or remedies in the realm of private or public law. The activities are devoid of the concept of the 'administration of justice' and are activities, the performance of which is also enjoyed by other groups. If the relevant legal context materializes during a transaction and the nature of the relationship changes to include legal advice, it attracts LPP and would be exempt from disclosure under the Regime, unless of course it falls under 'with the intention to further a criminal purpose proviso in the Act (See: Section 94(8) of POCA).

[126] It is true that, as outlined by Sykes J in the interlocutory hearing in this matter, it is sometimes difficult to determine whether information is privileged. (See: ***Jamaican Bar Association v Attorney General& General Legal Council*** paragraph 179.) However, this is more so where the activity in question falls within the traditional relationship of

attorney/client. In our respectful view Sykes J did not draw a sufficient distinction between the different roles played by attorneys nor did he address the increasing need to differentiate and keep legal advice privilege within justifiable bounds as the dictum of Taylor L.J. indicates in ***Balabel v Air India*****.**

[127] What however amounts to "justifiable bounds" has however changed over time. In***Three Rivers*** **No. 6**, the House of Lords endorsed the Court of Appeal's view in ***Balabel v Air India****,* that *"legal advice is not confined to telling the client the law; it must include advice as to what should prudently and sensibly be done in a relevant legal context*" per Lord Taylor at page 330.

[128] The case of ***Property Alliance Group Ltd v Royal Bank of Scotland*** [2015] EWHC 3187 concerned the scope of legal advice privilege in the context of investigations. This involved a situation where lawyers provided factual briefings as well as advice on legal right, liabilities and obligations in the context of regulatory investigations. There was a dispute as to the disclosure of certain documents as the custodian claimed privilege. Snowden J was tasked with determining this dispute. The question for him was whether, in the context of these documents being made in relation to meetings, circulating of memoranda and updates to the Bank on the status of investigations; and advice to the Bank on the next steps, were privileged although prima facie they appeared to be merely factual exchanges.

[129] The Court endorsed the test set out in ***Balabel v Air India*** and later applied in ***Three Rivers*** **No. 6**, that legal advice is not confined to telling the client the law but includes what should prudently and sensibly be done in a 'relevant legal context.' It was found that where a client is facing regulatory investigation on multi-jurisdictional fronts which could have serious consequences in terms of fines or large regulatory penalties, there

is clearly a “relevant legal context.” In order to attract privilege the relevant factual communications must be part of the continuum aimed at keeping both parties informed so that legal advice may be sought and provided. The factual briefings were pertinent to the relevant legal context. It is clear from the dicta in this case that a relevant legal context is likely to be involved, where there is a legal risk to a client.

[130] The case also illustrates the point that lawyers are able to give privileged factual briefings on commercial or non-legal matters, provided they are ultimately for the purpose of allowing them to better advise upon legal rights, liabilities and obligations in the wider related legal context. It also supports the proposition that if the purpose of the retainer is to seek business or commercial advice rather than legal advice, there is no relevant legal context. Therefore, lawyers must be retained for their expertise in law. The underlying purpose must be to seek or provide legal advice in confidence.

[131] In relation to the activities in the Order, a useful and rudimentary test is the one suggested in ***Three Rivers No. 6***, which asked whether a lawyer would need to wear his “legal spectacles” to advise on the matter in question. If the answer is no, then there would be no “relevant legal context” and privilege would not apply. The concept of LPP has been and remains closely tied to the administration of justice and the duty of an attorney to the court. There will be no privilege if a communication is between a lawyer and client for purely business and or financially related transactions.

[132] It follows from the foregoing that it is the acknowledged established limits to LPP which will assist the court to identify the extent of any interference with LPP and the privacy rights enshrined in sec 13 (3) (j) (i) and (ii) of the Charter. It is this court’s view that the activities listed in the Order are not generally transactions within a relevant legal context as described in

Balabel v Air India, and therefore are not accorded the protection of LPP. In the few instances where a relevant legal context exists, the exemption from privilege in relation to communications with the intention of furthering a criminal purpose will almost invariably apply to the disclosure of suspicious transactions imposed by the Regime. Consequently, although the spectre of LPP looms large from the perspective of the claimant, analysis reveals that it plays an insignificant role. This is so as it will only be in rare circumstances that LPP attaches to communications in relation to transactions concerning activities captured within the Order.

Suspicious Transaction Reports and Legal Professional Privilege

[133] It is the claimant's contention that the duty imposed on attorneys-at-law to report suspicious transactions and obtain and keep the required client information in relation to those reports breaches their duty to their clients and creates a conflict of interest between attorney and client. Additionally, it is the claimant's submission that the reporting regime creates a situation of divided loyalty and loses sight of the fiduciary role and capacity of attorneys with regard to their clients unlike other professions or businesses in the regulated sector. It is also their view that the right to privacy is infringed and that the attorneys duty of confidentiality and the principles of LPP have been undermined by the Regime. It is convenient to deal here, with the issue of LPP and the constitutional right to privacy as they relate to suspicious transaction reports.

[134] It is the view of the 1st defendant that the Regime has placed a positive duty of disclosure upon attorneys in circumstances that were already provided for at common law. They have remained resolute in their assertion that privilege does not cover communication which furthers a criminal purpose at common law and that equally, privilege does not attach under the Regime. However they do appear to have tacitly accepted that there has been an interference with the constitutional

privacy rights of attorneys and their clients as a result of the imposition of the suspicious reporting disclosure obligations. The 1st defendant while not expressly conceding put it this way, "*Suspicious Transaction Reports can be considered an infringement of section 13(3) (j) of the constitution in so far as it protects privacy of communication".* (See: paragraph 174 of the 1st defendant's submissions).

[135] The claimant contends that in so doing the 1st defendant has failed to also accept as a matter of course, that this would also be a breach of an attorney's right to "private life", which includes activities of 'a professional and business nature' as indicated in the case ***Michaud v France*** (Application no. 12323/11) and that the 1st defendant did not deal with the 'prohibition from search of the person and property' and also 'protection of privacy of property. It is their contention that the 1st defendant has not addressed all the aspects of section 13(3) (j) of the Charter. We do not agree with the claimant. Whilst it is true that an implied or tacit acceptance that the suspicious reporting disclosure obligations may prima facie interfere with privacy rights; then it follows that any of the disclosure obligations imposed by the Regime invariably will have the same effect; it does not follow that there is an interference with the right of protection from seizure and search, which is a distinct and separate provision under section 13(3)(j). In fact the 1st defendant addressed this provision in a fulsome way, in their submissions.

[136] For the 2nd defendant, implicit in their submissions, is that the concern of the 'Suspicious Transaction Reporting' disclosure obligations is that they have interfered with the attorneys' duty of undivided loyalty to the client and therefore it was for the court to ultimately decide if the balance struck is justified in a free and democratic society. They concluded that *'...a justifiable balance has been struck by the disclosure regime under Part V of the Act*'. They gave detailed attention to the application of privilege and confidentiality in the context of suspicious transaction reporting,

concluding that privilege and the duty of confidentiality were left intact by the Regime.

[137] The provisions for suspicious transaction reports by attorneys are to be found in sections 94 and 95. Sections 94(1) & (2) of POCA provide as follows –

> (1) The provisions of the Fourth Schedule shall have disclosure by effect, for the purposes of this Part, determining what is-
>
> (a) a business in the regulated sector;
>
> (b) a supervisory authority.
>
> (2) A person commits an offence if-
>
> (a) that person knows or believes, or has reasonable grounds for knowing or believing, that another person has engaged in a transaction that could constitute or be related to money laundering;
>
> (b) the information or matter on which the knowledge or belief is based or which gives reasonable grounds for such knowledge or belief, came to him in the course of a business in the regulated sector; and
>
> (c) the person does not make the required disclosure as soon as is reasonably practicable, and in any event within fifteen days, after the information or other matter comes to him.

[138] The 2nd Defendant in paragraph 16 of its Anti-money laundering Guidance to the legal profession advised in the context of suspicious reports thus:

> **Legal Professional Privilege**
>
> 16. LPP is a cardinal legal right available to clients of attorneys and LPP is generally preserved and available under POCA. LPP encompasses legal advice privilege which protects from disclosure to any third party communications passing between a client and the attorney for the purpose of giving or receiving legal advice. LPP also includes litigation privilege which protects from disclosure to any third party documents or communications made

> in any pending or contemplated legal proceedings whether criminal or civil. LPP can only be waived by the attorney's client.
>
> The attorney should however be mindful that LPP and any duty of confidentiality cannot be relied on to shelter an attorney who participates in criminal conduct, nor can LPP be relied on by a client where advice is sought in respect of the commission of an unlawful act. Section 94(8) of POCA expressly excludes from the protection of privileged circumstances, information or any other matter that is communicated or given with the intention of furthering a criminal purpose.

[139] This advice accords with case law and the canons of the profession. It is against this background that the relevant provisions of POCA must be considered. It may be observed from section 94 that the offence is not one of strict liability, as a person commits an offence if he knows, believes or has reasonable grounds for knowing or believing that a transaction could constitute or be related to money laundering and it came to him in the course of a business in the regulated sector and he fails to make the requisite disclosure to a nominated officer (the person nominated in his firm to receive disclosures) or the designated authority (Chief Technical Director of the FID). (See: Section 94(4)). He is not guilty of an offence if amongst other things, being an attorney, the information or matter came to him in privileged circumstances (See: Section 94(5b)). That is if the information came to the attorney from i) a client or a representative of the client, in connection with the giving by the attorney-at-law of legal advice to the client; or ii) a person or a representative of a person seeking legal advice from the attorney-at-law; or iii) a person in connection with legal proceedings or contemplated legal proceedings (See: Section 94 (8)).

[140] However, this defence does not apply to information or other matter that is communicated or given with the intention of furthering a criminal purpose. (See: The proviso to section 94(8)). The legislation has thus codified the long established exception to LPP at common law.

[141] Section 95 provides for the reporting obligations of the nominated officer. He commits an offence if he knows, believes or has reasonable grounds

for knowing or believing that a person has engaged in a transaction that could constitute or be related to money laundering by virtue of information that came to him pursuant to a disclosure made under section 94 and he fails without reasonable excuse, to make the required disclosure to the FID.

[142] The reporting obligations are to be considered in the context of the objective of the legislation which is to prevent money laundering and to close the gaps through which this can be facilitated. The claimant contends that suspicious transaction reports by attorneys are an egregious violation of section 13(3)(j) of the Charter. Cleary, the level of any violation or interference is inextricably linked to the nature of the reports required to be made as well as the level of protection afforded to LPP and confidentiality.

[143] POCA creates an obligation to report prior to the implementation or even the agreement to implement or execute a transaction. There is also the additional fact that there is unlikely to be a relevant legal context. This is significant as in these circumstances an attorney's communication is not covered by privilege because of the type of activity. In addition, even if the activity comes within a relevant legal context or privileged circumstances, an attorney who knows or believes or has reasonable grounds for knowing or believing that the proposed transaction constitutes or relates to money laundering and nevertheless proceeds cannot then rely on the LPP that would normally be afforded to his client.

[144] The case of ***Barclays Bank PLC and Others v Eustice and Others*** [1995]1 WLR 1238 is instructive. The overarching principle emanating from this case is that LPP does not apply in an Attorney/client communication which smacks of "iniquity". However, before disclosure is ordered there should be a strong prima facie case of criminal or fraudulent conduct. At page 1248 paragraph G Schiemann L.J. outlined that -

> It is desirable that persons should be able to go to their legal advisers knowing that they can talk frankly and receive professional advice knowing that what each party has said to the other will not be revealed to third parties.

In adopting the words of Bingham L.J. in ***Ventouris v Mountain***, at page 611, His Lordship added that –

> [W]ithout the consent of the client and in the absence of iniquity or dispute between client and solicitor, no inquiry may be made into or disclosure made of any instructions which the client gave the Solicitor or any advice the Solicitor gave the client, whether in writing or orally.

At page 1249 paragraph B His Lordship highlighted that –

> It will be noted that in the last sentence Bingham L.J. referred to "absence of iniquity". In so doing he was recognising the effect of a line of cases which have established that advice sought or given for the purpose of effecting iniquity is not privileged.

[145] This is a clear exposition of the Law and is support for the proposition that communication between an attorney and his client raised to the level of 'knowledge or belief' or 'having reasonable grounds for knowing or believing', (Section 94 (2)), that a person has engaged in a transaction constituting or relating to money laundering is not protected by LPP. (See Sections 94 (5) (b) & the proviso to Section 94 (8)).

[146] However, in the event, that the transaction has been concluded and it is of a criminal or fraudulent nature and in respect of which a client seeks advice in relation to actual or contemplated proceedings or to ascertain his legal position, the role of the attorney becomes one to which LPP is attached and the provisions of section 94(5)(b) become relevant. (See: ***R v Derby Magistrates' Court, Ex parte B***). This is at the heart of privilege. There is no blurring of lines here. LPP applies in these situations and case law is replete with the definition and scope of privilege, some referred to herein.

[147] **In *B and Others v Auckland District Law Society,*** at paragraph 48, Lord Millett made it clear that privileged communication is beyond interference of any kind. It is not disclosable unless the communication is the means of committing a fraud or crime. Lord Millett criticised the approach of the Court of Appeal of New Zealand which took a balancing of interest approach; balancing the interest between protecting and upholding the claim to privilege against facilitating investigators. Lord Millet found this to be unworkable in the circumstances as despite the laudable objectives of the investigators, LPP was inviolable, except where there is the crime fraud exception.

[148] In ***R v Lavallee*****,** it was expressed that all information protected by privilege is out of the reach of the state and cannot forcibly be discovered or disclosed. It follows that if the communication is not subject to LPP, the information is not out of the reach of the state and can be forcibly discovered. Thus if the suspicious transaction reports that are being required by the state are of information or communication not subject to LPP, the state can, if this is reasonable, require its disclosure.

The Mens Rea Safeguard

[149] Apart from the fact that the circumstances that require a suspicious transaction report to be made are unlikely to be generated in a relevant legal context, in Jamaica the high mens rea requirement provides an additional safeguard. Jamaican regulated attorneys are required to make suspicious transaction reports, in relation to clients**,** for which it is known or believed or there is reasonable grounds for knowing or believing that such a person has engaged in a transaction that could constitute or be related to money laundering.(See: Section 94(2)(a)).

[150] This is a higher test than that prescribed in the United Kingdom for attorneys under similar provisions. The United Kingdom requires

'knowledge' or mere 'suspicion'. As the 2nd defendant submits, the description of 'suspicious transaction reports' is a misnomer in Jamaica, as the requirement is for more than mere 'suspicion' before the obligation to report is engaged.(See: paragraph 61 of the 2nd defendant's submissions) Also the higher threshold '*mens rea'* in the Jamaican Regime, has to be viewed in the context of the definition given under POCA for money laundering (See: Section 91(1) (b)) and criminal property (See: Section 91(1) (a)).

[151] The United Kingdom Regime regulates attorneys when engaged in specified activities and is similar to the Jamaican provisions, as the activities specified are also outside of the bounds of the usual legal representation of a client or in giving legal advice.

[152] The similarity and the differences between the United Kingdom Regime and the Jamaican Regime are worthy of note. Section 330 of the United Kingdom **Proceeds of Crime Act** requires disclosure by persons in the regulated sector, which like Jamaica includes specified attorneys. It provides as follows:

> (1) A person commits an offence if each of the following three conditions is satisfied.
>
> (2) The first condition is that he—
>
> (a) knows or **suspects**, or
>
> (b) has reasonable grounds for knowing or **suspecting**, that another person is engaged in money laundering.
>
> (3)The second condition is that the information or other matter—
>
> (a) on which his knowledge or **suspicion** is based, or
>
> (b) which gives reasonable grounds for such knowledge or **suspicion** came to him in the course of a business in the regulated sector**. (Emphasis added).**

[153] It is evident from the section that in respect to disclosure of suspicious transactions in the regulated sector in the United Kingdom, attorneys must disclose these if they have 'knowledge' or 'suspicion' or 'reasonable grounds for 'knowledge or suspicion'. As in the Jamaican context, the terms for the mental elements in the offence are not defined in the statute and they are therefore given their ordinary meaning and reflect the guidance provided by case law and the meanings ascribed in every day usage. Both in the United Kingdom and the Jamaican context 'knowledge' is a mental element which case law indicates means 'actual knowledge' See: ***Baden Delvaux v Societe Genera****l* (1993) 1 WLR 509 at paragraph 250.

[154] The 2nd defendant's submissions addressed the definition of suspicion at paragraph 72 in reliance on the case of ***R v DaSilva*** [2007] 1 WLR 303. In this case in the context of money laundering the meaning of "suspecting" (and "suspect" and its affiliates) were considered and the Court made it clear that in the absence of judicial authority, the dictionary definition is a good starting point for the meaning of words. The Court stated that "suspect" means that a person thinks there is a more than fanciful possibility that the relevant facts exist; a vague feeling of unease would not suffice. Longmore LJ sought to provide general guidance as to its definition in these words:

> It seems to us that the essential element in the word ' suspect' and its affiliates in this context is that the defendant must think that there is a possibility which is more than fanciful that the relevant facts exists . A vague feeling of unease would not suffice." In R v Hall 81, CRIM APP R 206 CA, the issue under consideration was suspect. The court explained it as "I suspect that these goods are stolen but it may be on the other hand that they are not".

[155] Therefore, in the United Kingdom context there is no minimum requirement for there to be something concrete based on the circumstances or specific facts but only a level of satisfaction below the

standard of belief but not speculation. This is what amounts to 'suspicion'. The UK also has the *mens rea* of 'reasonable grounds to suspect'. This is the second minimum level *mens rea* of their offence. Where there is a requirement of suspicion based on reasonable grounds there must be factual circumstances from which an honest and reasonable person doing the same activity/transaction would have become suspicious, to pass the objective test of 'reasonable'. In relation to the test for the relevant *mens rea*, see ***R v Pace*** [2014 1 WLR 2867 at 2877, ***R v Edward Hall*** [1995] 81 Cr App R 360 at 324.

[156] The minimum *mens rea* test in Jamaica is knowledge or belief or reasonable grounds for knowing or believing. In ***Re The Assets Recovery Agency*** [2015] UK PC1 Lord Hughes at paragraph 19 dealt with the test of reasonable grounds for believing as follows-

> Reasonable grounds for believing a primary fact, such as that the person under investigation has benefited from his criminal conduct, or has committed a money laundering offence, do not involve proving that he has done such a thing, whether to the criminal or civil standard of proof. The test is concerned not with proof but the existence of grounds (reasons) for believing (thinking) something, and with the reasonableness of those grounds. Debate about the standard of proof required, such as was to some extent conducted in the courts below, is inappropriate because the test does not ask for the primary fact to be proved. It only asks for the applicant to show that it is believed to exist, and that there are objectively reasonable grounds for that belief. Nor is it helpful to attempt to expand on what is meant by reasonable grounds for belief, by substituting for 'reasonable grounds' some different expression such as 'strong grounds' or 'good arguable case'. There is no need to improve upon the clear words of the statute, which employs a concept which is very frequently encountered in the law and imposes a well-understood objective standard, of which the judge is the arbiter. Reasonable belief in the presence of stolen goods in premises was the historic test for the grant of a search warrant at common law: see *Chic*

> *Fashions (West Wales) Ltd v Jones [1968] 2QB 299,* per Lord Denning at 308. The same test is made the condition for the exercise of several police powers under sections 50B, 50E and 50F of the Constabulary Force Act 1935, just as it is typically the condition for English powers of arrest (see section 24(2) Police and Criminal Evidence Act 1984). Nor is its use confined to matters of criminal procedure: see for example section 2(1) of the Misrepresentation Act 1967, establishing a right to damages in civil claims arising out of contracts.

[157] Also concerning *mens rea* the Guidance in this regard at paragraph 24.4 is that:

> [D]efining reasonable grounds for belief involves a two-tiered test with both a subjective and an objective component. First, it must be shown that the person had an actual belief. The concept of belief is essentially something short of knowledge, it is the state of mind of someone who is not certain that the property is illicit but who says to himself that there is no other reasonable conclusion in the circumstances. The other aspect of this test is reasonableness, in that it must also be shown that the grounds on which the person acted must have been sufficient to induce in a reasonable person the requisite belief.

[158] In Jamaica, Parliament has intentionally included in the provisions a minimum higher mental element relating to the obligation to make a disclosure. This has placed attorneys in the regulated sector in Jamaica, in a better position than those in the United Kingdom and is an additional safeguard to protect LPP. The lower the threshold for *mens rea,* the more reports will be made and with there being attendant a higher risk of breaching LPP as the information required o trigger disclosure would meet a lower standard.

[159] Attorney-at-law Mr. Donovan Walker, President of the Jamaican Bar Association at the time of the filing of these proceedings, in his affidavit filed on behalf of the claimant on the 28th day of November 2014 indicated that the requirement to make suspicious transaction reports creates

several issues among which is what he calls the lack of a standardized definition of what is sufficiently suspicious to require a report. According to Mr Walker it is left to the subjective opinion of each attorney to determine what gives rise to the need to file a suspicious transaction report and this may result in inadvertent breaches and possible disclosures of client information.

[160] However, the statute does not require an attorney to be 'suspicious' but to have 'knowledge' or 'belief' and these must be based on reasonable grounds; thus containing a subjective and an objective element. The statute cannot be expected to do any more than make clear the level of *mens rea* required before a report is made. The definition of money laundering (See: Section 91(b) POCA) and criminal property (See: Section 91(a) POCA) should also assist an attorney in determining whether he has 'knowledge' or 'belief' and or 'reasonable grounds' for the same.

[161] This high mental element and the type of activity involved, as well as the definitions provided, as stated earlier, makes negligible the likelihood of inadvertent breaches and possible disclosure of client information protected by LPP. In any event in adopting the words of the court in ***Michaud v France, (Application No. 12323/11***) at para. 97:

> [T]he notion of "suspicions" is a matter of common sense...that, an informed group such as lawyers can scarcely claim that they do not understand it...

[162] If the notion of 'suspicion' is a matter of common sense then *a fortiori*, notions of knowledge and belief that the activity is or may constitute or be related to money laundering, are even more a matter of "*common sense...that an informed group such as lawyers can scarcely claim that they do not understand...*", especially considering the definitions of money laundering and criminal property under the POCA. The Guidance also contains examples of what would clearly amount to suspicious

transactions. Further as the GLC indicates in the Guidance, if further details or a more comprehensive understanding is required, then the attorney is at liberty to seek further assistance from the GLC or from a senior member of the Bar Association with greater knowledge and experience. This will be particularly helpful for a sole practitioner who is not likely to have the assistance of a nominated officer in his/ her office.

[163] In view of the foregoing, the occasions when an attorney would be uncertain as to when he knows or believes that a suspicious transaction report is necessary, it seems is likely to be rare. In any event if such an issue arises, any dispute will invariably centre around whether the necessary threshold was met for reporting and not as to whether LPP applies. LPP would apply where a client is seeking legal advice in relation to the substantive offence. It would not generally relate to the activities listed in the Order. Should the designated authority require information pertaining to documents held by an attorney relative to what it considers should have been the subject of a suspicious transaction report, those documents are disclosable with the cooperation of the attorney or if there is a dispute as to privilege by an application to the court.

[164] In the case of ***Michaud v France,*** the European Court of Human Rights was required to consider whether the duty imposed on members of the legal profession to report suspicious transactions interfered with Article 8 of the European Convention on Human Rights. The Court therefore assessed the provisions of the European money laundering directives, article 8 of the European Convention on Human Rights and the importance of the confidentiality of lawyer-client relations and of LPP.

[165] The ECHR Directives adopted in France placed an obligation on lawyers to “report suspicions”, when acting in similar activities specified in the Jamaican Regime. Similar to Jamaica, it was provided that when acting as legal counsel or in the context of judicial proceedings lawyers were

exempt from making these reports. The Court found that there was an interference with an Attorney's right to 'private' life and right to respect of communication. The Court however found that there was no substantial interference with LPP. This limited interference with LPP was found to exist in the European situation where 'suspicion' was enough to trigger a report.

[166] On our analysis where a STR is required to be made LPP would either not apply or be ousted based on the nature of the circumstances which would point to the operation of the crime exception. In any event even if the analysis in ***Michaud*** is correct and filing of STRs would constitute some minimal breach, in the Jamaican context where the *mens rea* standard is higher any breach, which is not admitted, would be even more minimal.

[167] Another interesting European position in relation to the obligation of attorneys to make suspicious transaction reports can be found in the ***Opinion Of Advocate General Poiares Maduro,*** delivered On 14 December 2006, where the question was whether it was consistent with Community law and with the fundamental principles which it guarantees to impose on lawyers, an obligation to inform the competent authorities of any fact of which they became aware and which might be an indication of money laundering.

[168] Advocate General Maduro concluded that Articles 2a(5) and 6 of Council Directive 91/308/EEC of 10 June 1991 on prevention of the use of the financial system for the purpose of money laundering, as amended by Directive 2001/97/EC of the European Parliament and of the Council of 4 December 2001, were valid provided that they are interpreted, in accordance with the 17th recital in the preamble to that directive and in observance of the fundamental right to protection of lawyers professional secrecy. Therefore there must be exemptions from any obligation to report

information obtained before, during or after judicial proceedings or in the course of providing legal advice.

[169] Sykes, J's view at paragraph 34 of the ***Jamaican Bar Association v Attorney General & General Legal Council*****,** that '*merely to say that information or advice is covered by or not covered by LPP is deceptive simplicity'* is indeed true.' However the designated activities in the case at Bar are firstly generally outside of the relevant legal context. In so far as the character of an activity may change, into a relevant legal context, the spectre of LPP may be revived and even loom large, but is automatically lowered due to the nature of the information that is required to be disclosed, in relation to suspicious transaction reports. Whether it is seen as an exception to privilege or that the protection does not attach, the result is the same.

[170] Suspicious transaction reports are very unlikely to generate dispute as to whether privilege applies under the Regime, given that even in the relevant legal context, there is no LPP protection when the information/communication is with the intention of furthering a criminal purpose or where there is crime, fraud or iniquity.

[171] The issue will not generally be the need to sift to determine the presence or absence of privilege. The issue is moreso likely to involve the sifting of information or the details of communication to determine whether it should have caused an attorney to know or have reasonable grounds to believe that the client has engaged in a transaction that could constitute or be related to money laundering. It is however agreed that in the relevant legal context "in one conversation parts may be privileged and parts not so protected**.** ***Descôteaux v. Mierzwinski*** 141 DLR (3d) 590, paragraph 34. However, this makes little difference to the issue of privilege in relation to the Regime because of the aforementioned reasons.

[172] POCA aims to capture potential laundering of money obtained from ill-gotten means before it can be integrated into the financial system. Reports are therefore required at the pre-implementation stage in relation to these activities. There is a clear demarcation between a client seeking to implement or execute a transaction and one who is seeking legal advice as to a criminal offence that he has committed. Again analysis reveals that LPP does not loom as large in the Regime, as is being contended and contemplated by the claimant. Nevertheless, privacy rights might be infringed as the obligations impact on free communication between lawyer and client. The issue of confidentiality in the context of suspicious transaction reports and privacy rights will therefore be considered below.

ISSUE 2: WHETHER THE REGIME SUBJECTS ATTORNEYS-AT-LAW TO UNCONSTITUTIONAL SEARCHES AND SEIZURES?

[173] The impugned provisions in respect of the right of persons to protection from unconstitutional search and seizure are in respect of section 91A(2)(c) and (d) of POCA and the exercise of supervisory powers by the 2nd defendant, contained in paragraph 10(d) of the Guidance to attorneys. The alleged infringements of the constitutional provisions of section 13 (3) (j) (i) touch and concern examination and inspection of certain documents containing information held by an attorney in relation to his client and which the 2nd defendant and the designated authority (the Chief Technical Director of the FID) may make a request to access under Regulation 14 (4).

[174] Section 13 (3) (j) of the Charter provides as follows:

> the right of everyone to
>
> i) protection from search of the person and property;

ii) respect for and protection of private and family life, and privacy of the home; and

iii) protection of privacy of other property and of communication.

[175] Section 91A(2)(c) provides that a competent authority:

> may examine and take copies of information or documents in the possession or control of any of the businesses concerned, and relating to the operations of that business.
>
> may share information, pertaining to any examination conducted by it under this section, with another competent authority, a supervisory authority or the designated authority, or an authority in another jurisdiction exercising functions analogous to those of any of the aforementioned authorities-
>
> i. other than information which is protected from disclosure under this Act or any other law; and
> ii. subject to any terms, conditions or undertakings which it thinks fit in order to prevent disclosure of the kind referred to in subparagraph (i) and secure against the compromising or obstruction of any investigation in relation to an offence under this Part or any other law;

[176] Paragraph 10(d) of the Guidance provides that the Competent Authority is empowered to:

> examine and take copies of information or documents in the possession or control of any attorney relating to the operations of that attorney.

Submissions

[177] The claimant contends that the powers of the 2nd defendant as contained in paragraph 10(d) of the Guidance breaches the right of attorneys–at–law to protection from search of their property and their rights to privacy of property and of communication as provided for in section 13(3)(j).

[178] The claimant maintains that the power given to the 2nd defendant to examine and take copies of information or documents in the possession or

control of an attorney coupled with the requirement that attorneys must demonstrate their compliance or face the possibility of being imprisoned or be disbarred are prima facie evidence of a breach of section 13 (3) (j) and 13(3) (a) and that the stated entry is warrantless and without lawful authority. It was their further contention that there is no legal authority other than POCA that sanctions entry onto an attorney's premises by the 2nd defendant for the purposes of examining clients' files and engaging in what they term as a warrantless search.

[179] The 1st defendant contends that the argument that the examination by the Competent Authority would constitute warrantless searches is a mistaken view. As the GLC is a professional regulatory body, different considerations would apply to the examinations it carries out.

[180] The 2nd defendant submits that it has advanced no claim to having a power to enter and search or take possession of documents in an attorney's office without a prior judicial warrant and that is not its understanding of the powers conferred on it as a Competent Authority. The statutory provisions can and should be construed so as to conform to this position. The Guidance contains no provisions which assert a power of search and seizure without a warrant. Further, the Guidance would in any event be subject to judicial review.

[181] The 2nd defendant also submits that in respect of entry, search and seizure, the Jamaican legislation should be construed as preserving the fundamental rights as it contains no express provision to the contrary. Further, the examination procedures set out in the Guidance do not infringe the provisions of s. 13(3)(j) of the Charter.

Evidence

[182] On behalf of the claimant, Mr. Donovan Walker (the then President of the Jamaica Bar Association) in his affidavit filed on November 28, 2014,

avers that the issue relating to the infringement of LPP by the Regime is exacerbated by the provisions for warrantless searches and he believes that he has an obligation to inform his clients re the examination and taking of their files and secure instructions in relation to any aspect of the matter re a claim for privilege. The imposition that attorneys should pay the cost of the examination is an unacceptable burden imposed by the Regime.

[183] Mr. Michael Hylton QC (Chairman of the GLC), on the behalf of the 2nd defendant, in his affidavit filed on November 28, 2014, states that the inspection is carried out by the GLC after notice is given to the attorney and the Guidance sets out the detail of the inspection process, with the focus being to evaluate the attorneys' compliance with the obligations imposed by the regime. Such examinations by the GLC are not searches of attorneys' offices.

[184] The claimant holds the view that the 2nd defendant will be engaged in a search and seizure exercise on its visit to the office of an attorney. The 2nd defendant however maintains that it does not have search and seizure powers and that its mandate is to monitor compliance of attorneys by conducting inspections and examinations on notice. It is therefore important to consider the powers of the 2nd defendant.

[185] Section 91A (1) outlines that the 2nd defendant's responsibility is confined to ensuring that attorneys, carrying out the designated activities prescribed by the Order operate in compliance with the Act and its' Regulations. As illustrated above, section 91A (2) (c), provides the specific power pursuant to which the 2nd defendant may enter an attorney's office. It should be noted that the provision uses the phrase "examine and take copies".

The Powers of the 2nd defendant in respect of Examinations/ Inspections

[186] The POCA does not provide for search of the attorneys' offices by the Competent Authority. As indicated it refers to "examine" and "take copies" The 2nd defendant's Guidance also refers to "examine" and "take copies". The entry is by Notice as outlined in the Guidance.

[187] As there are no express provisions giving power to the GLC to enter and search, it is necessary to consider whether such a power arises by necessary implication when construing section 91A (2). No such power is implied; to hold otherwise would be to put the construction in conflict with the Constitution. This would be contrary to the principle of legality and statutory interpretation, particularly in the context of a claim of unconstitutionality. One of the tenets of the principle of legality is that where a statute is silent as to how a power is to be exercised then, it is to be presumed that the statutory power will be exercised in keeping with the respect for the fundamental rights set out in the constitution Therefore the presumption is that the GLC in exercising its statutory mandate will act in a manner which accords with rather than derogates from the fundamental rights enshrined in the Constitution. It is implied that its power is to be exercised in accordance with the principles of natural justice and fair procedures. It is also to be presumed that adherence to the principle of legality was the intention of Parliament when it granted powers to Competent Authorities. See: ***R v Secretary of State for the Law Department ex parte Simms*** [2000] 2 AC 115; ***R (Edison) v Central Valuation Office*** [2003] UKHL 20 and ***R (Morgan Grenfell and Co Ltd. v Special Commissioner of Income Tax.***

[188] There is therefore nothing expressed or implied in POCA or the Guidance that can be interpreted as the 2nddefendant being empowered to 'search and seize'. POCA has not given the 2nd defendant coercive powers, neither has it taken these unto itself. In the event that the 2nd defendant is of the view that an attorney is not compliant, it will consider whether to

take disciplinary action or make a report to the relevant authority. Therein lies its power.

[189] In pursuance of its supervisory function the 2nd defendant's Guidance indicates at paragraph 48 what this will entail. It administers four types of examinations, namely, routine biennial examinations, follow-up examinations, random examinations and special examinations. Public accountants or chartered accountants holding a valid practising certificate from the Public Accountancy Board under the Public Accountancy Act are authorised by the GLC to conduct examinations on its behalf. Routine examinations will be conducted by such an accountant selected by the Attorney in keeping with paragraph 49 and who is independent of the attorney. Follow up, random and special examinations will be conducted by GLC personnel or agents.

[190] Paragraph 49 of the Guidance outlines that Routine examinations are carried out once every 2 years. It seeks inter-alia to test and evaluate compliance with applicable AML/CFT laws with a focus on procedures and policies in respect of: cash transactions; internal reporting procedures in respect of suspicious transactions; procedures regarding employment and training of staff to ensure AML/CFT compliance; a system of independent audits to ensure AML/CFT programmes, policies and procedures are being implemented; appointment, role and responsibilities of the Nominated Officer; customer due diligence policies and procedures including more rigorous requirements for high risk clients and transactions (enhanced due diligence policies and procedures); the maintenance of records of client identification and verification of identification; and the maintenance of records of complex, unusual or large transactions or unusual patterns of transactions pursuant to section 94(4) of the POCA. It is only where the routine examination shows an adverse rating that a follow-up examination will be scheduled

[191] According to the Guidance, the follow-up examinations are conducted for the purpose of addressing any inadequacies identified in the routine examination. This follow-up examination will be conducted by prior notice within ninety (90) days of the completed evaluation of the examination form for the routine examination. The procedure at the follow-up examination is that the examiner will discuss with the attorney the deficiencies noted in the routine examination, the steps which the attorney will take to remedy these deficiencies and the timeline for remedying them. The examiner will assess the progress of the agreed steps and if this is satisfactory, a report to this effect will be provided and there will be no further visit in respect of these issues.

[192] It is expected that the deficiencies as agreed in the follow-up examination would be addressed by the attorney. However should this not be so, the procedure to be followed by the 2nd defendant includes requiring the Attorney to address the deficiencies within a specified time. If a subsequent examination still reveals deficiencies, the GLC will determine whether legal or disciplinary action is to be pursued. The 2nd defendant has also reserved the power, upon giving two (2) weeks' notice in writing to the Nominated Officer, (or sole practitioner) to conduct a random examination.

[193] In addition, special examinations will be conducted, upon reasonable notice, in circumstances where the 2nd defendant has cause to be concerned about the compliance of the relevant attorney with relevant AML/CFT law and where it has cause to believe that the attorney is providing designated activities but has declared otherwise in the annual declaration required under section 5(3C) of the Legal Profession Act. The Guidance outlines that the 2nd defendant shall determine what period of time is reasonable. The special examination may, at the discretion of the 2nd defendant, be either a full examination or one focused only on a specific issue.

[194] In ***Canada (Attorney General) v. Federation of Law Societies***, the Law Societies asserted that sections 62-64 of their **Proceeds of Crime (Money Laundering) and Terrorist Financing Act**, violated section 8 of the Charter, by authorizing state agents (FINTRAC) to conduct warrantless searches of lawyers' offices at any reasonable time. They also, took the position that, in addition to being unconstitutional, the Regime was unnecessary because members of the legal profession are bound by strict ethical codes, bylaws and regulations, imposed by the law societies.

[195] With respect to the issue of self-regulation the Chamber Judge found that "the Law Societies have developed rules to regulate the conduct of lawyers, which ensure that the goal of deterring criminals from employing lawyers is met and which strikes the appropriate balance with Canada's constitutional structure. In this context, the impugned provisions constitute an unjustifiable infringement of sections 7 & 8 of the Charter." ***Federation of Law Societies of Canada v Canada (Attorney General)*** 2011 BCSC 1270 (para. 15). The Judge found that there was merit in this argument. She continued further at paragraphs 22- 27 and 29 – 33:

> [22] The petitioner developed a similar model rule in 2004 (the "No Cash Rule"). The No Cash Rule prohibits receipt of cash in an aggregate amount of $7,500 or more in respect of any one matter where the lawyer is engaged on behalf of a client in respect of receiving or paying funds; purchasing or selling securities, real property or business assets or entities; or transferring funds or securities by any means. There are exceptions where a lawyer receives or accepts cash from a financial institution or public body, a peace officer, a law enforcement agency or other Crown agent acting in his or her official capacity, or pursuant to a court order or to pay a fine or penalty. The No Cash Rule allows a lawyer to accept or receive an amount of $7,500 or more in cash for professional fees, disbursements, expenses or bail. Any refund greater than $1,000 out of such money must be made in cash.

[23] The No Cash Rule is intended to augment long-standing law society rules prohibiting lawyers from engaging in illegal activity by preventing lawyers from being unwittingly involved in money laundering and terrorist financing, while maintaining the long-standing principles underlying the solicitor-client relationship. It has been adopted by all of the petitioner's member law societies except Québec. It is expected that relevant rules will come into force shortly in Québec.

[24] In 2008, the petitioner adopted a model rule on client identification and verification (the "Client ID Rule"). It has been adopted by all member law societies, except for Québec, where it is expected that the relevant rules will come into force shortly. It should be noted that **s. 43** of the **Notaries Act**, **R.S.Q. c. N-3**, already requires notaries to undertake certain procedures concerning the verification of identity of parties.

[25] The Client ID Rule has two basic requirements. First, lawyers must identify all clients who retain them to provide legal services by recording basic information, such as the client's name, address, telephone number and occupation (for an individual) or business activities (for a corporation or other entity). There are certain exceptions for in-house counsel, duty counsel and agents of lawyers who have already fulfilled the requirements of the rule.

[26] Second, when lawyers provide legal services in respect of the receiving, paying or transferring of funds, the Client ID Rule imposes additional requirements to verify client identity. This requires lawyers to obtain independent source documents such as a driver's licence, birth certificate, passport or other government-issued identification that verifies the client's identity.

[27] There are certain exceptions from the verification requirements. For example, when a lawyer is required to verify the identity of a client who is not physically present, the Client ID Rule provides that the lawyer must obtain an attestation from an agent who has seen the client's identification. Lawyers are required to retain verification records for the duration of the lawyer-client relationship and for at least six years following the completion of the retainer.

[29] The law societies have taken steps over the past few years to educate their members about the No Cash Rule and the Client ID Rule. The law societies have adopted two primary means to

ensure that lawyers comply with law society rules; namely, annual reports and audits.

[30] Many of the law societies' annual reports which their members are to file reports that have specific questions concerning compliance with the No Cash Rule and the Client ID Rule. The evidence is that the law societies follow up on any reported non-compliance with the rules in order to determine the details of the non-compliance, educate the member about the rule, prevent repeated non-compliance and, where appropriate, refer the member to the disciplinary process.

[31] The law societies also audit their members' practices. In some jurisdictions, the law society staff performs the audit function, while in other jurisdictions the audit is performed by independent auditors. Most audit programs target law practices that are deemed to be at risk of non-compliance with law society rules, which is based on factors such as an indication or prior history of non-compliance, areas of practice, or years of call. Additionally, many law societies randomly audit law practices with the goal of auditing every practice in the jurisdiction over a given period. That period ranges between two and seven years, depending on the law society. Auditors in all programs specifically check for compliance with the No Cash Rule and the Client ID Rule.

[32] Auditors have full and unrestricted access to all of the lawyer's books, records and files, including confidential information. There is evidence that the experience with audits indicates they are very likely to identify and address any breaches of law society rules.

[33] In addition to annual reports and audits, law societies learn of potential breaches of their rules from member self-reporting and complaints from other members, clients and the public. All of the law societies have disciplinary procedures which may impose consequences when a rule breach is uncovered. There are numerous potential consequences from a reprimand to disbarment, with a variety of intermediate consequences. A primary goal of disciplinary proceedings is remedial; namely to address the problem that caused the breach, and ensure the lawyer takes steps to prevent recurrence. Specific and general deterrence are also significant factors.

[196] Therefore the first point of note is that the Law Societies had in effect some similar rules required by the Regime. These rules allowed for effective measures to be taken by attorneys to avoid being wittingly or unwittingly used for money laundering activities. They were detailed and applied to all attorneys and allowed for random audits without prior notice. Auditors were able to access all files including those containing confidential material or matters subject to LPP. The Law Societies, the equivalent of the 2nd defendant, access, inspect and examine client records to ensure compliance.

[197] In Canada, there was no contention that the Law Societies' access and inspections were 'warrantless searches' and no issue was taken alleging that their access to documents amounted to breach of privilege and or confidentiality. The fact that the Law Societies were the regulatory/supervisory bodies appeared to have, quite naturally, given them implicit authority.

[198] The fact that in Jamaica the access is by the professional regulatory body of the claimant and not a direct entry by state agents is a significant factor taken into account by the court as a safeguard that balances the objectives of the Regime to combat money laundering and terrorist financing against the need to minimise or alleviate the risk of breach of LPP. The purpose of the inspections will be to monitor compliance and not to obtain information that might indicate or provide evidence regarding persons suspected of money laundering. This is unlike the purposes of the FINTRAC search in the Canadian model. Even where public accountants are appointed and authorized by the GLC to do routine examinations, this would involve similar functions as when they audit attorneys' accounts, a process which respects and preserves LPP. At paragraph 68 of ***Canada (Attorney General) v FLSC***, the Supreme Court made it clear that different considerations apply to regulatory powers, than powers in support of criminal investigations that require warrants for search.

[199] The self-regulation by attorneys found favour with the Canadian Court and almost made redundant the obligations imposed by their regime. Therefore one of the reasons the Chamber Judge, the Court of Appeal and Supreme Court found that their regime as it applied to lawyers was unjustified and unnecessary, was that adequate AML Law Society rules were in place.

[200] The claimant has indicated that it is open to self-regulation and that this would be preferred to being subject to the impugned provisions of the Regime. It has challenged many of the impositions in relation to client identification and related matters as being onerous, both administratively and financially. The fact is however in Jamaica the legal profession has no AML/CFT rules other than those contained in POCA; and the challenges by the claimant raise doubt as to whether the required co-operation for self-regulation without the support of the Regime could be easily achieved. The current situation is therefore before the court for review as to its constitutionality.

[201] It is noted that the Canadian Law society Rules are similar to those employed under the Regime which the 2nd defendant composed of attorneys who are the guardians of the standards of the legal profession is appointed to regulate. It is also against this back-drop that the decision of the Canadian Supreme Court should be viewed, whilst taking into account that standards of self-regulation by themselves cannot be the determinant of the constitutionality of legislative provisions. See ***Canada (Attorney General) v FLSC*** at paragraph 108.

[202] In the Supreme Court of Canada in relation to the search and seizure regime created by the legislation, the FLSC argued that the power of employees of the Financial Transactions and Reports Analysis Centre of Canada ("FINTRAC"), (a similar organisation to our Financial Investigation Division) to enter a law firm and require the handover or copying of any

client information, without any warrant or other court-sanctioned authorization was in breach of section 8 of The **Canadian Charter of Rights** which guarantees protection from unreasonable search and seizure.

[203] It was Canada's submission that the search powers given by the legislation in sections 62 and 63 were regulatory rather than criminal in nature, and therefore warrantless searches were not unreasonable. The Supreme Court however found that the procedures authorized by the regime, (warrantless searches of law offices that permitted forced entry at any reasonable time which provided access to privileged information), were unreasonable and did not satisfy the constitutional principles governing such searches set out by the Court in ***Lavallee.***

[204] There were therefore similar issues in ***Canada (Attorney General) v FLSC*** as in ***Lavallee*** concerning powers to search lawyers' offices and the legislative regimes put in place to protect and determine a claim of solicitor-client privilege, though in ***Lavallee*** the powers of search were pursuant to a warrant. In ***Lavallee*** a warrant was obtained to search a law firm for correspondence, estate files, trust records and other documents concerning an individual suspected of money laundering and being in possession of proceeds of crime. A claim of solicitor – client privilege was asserted when the search team sought to execute the warrant, therefore requiring the procedures set out in section 488.1 of the Canadian Criminal code to be followed.

[205] Accordingly the documents were sealed in envelopes by the search team, taken and left in the custody of the Police. A day later an application was made by the law firm for a judicial determination of whether or not any of the documents were privileged. Subsequently the law firm also filed a motion, alleging that section 488.1 was unconstitutional because its legislative deficiencies risked breaching LPP. These deficiencies included:

(i) the absence or inaction of a solicitor at the time of search would prevent the assertion of privilege; (ii) the requirement to name the client whose privilege is being threatened in order to engage the sealing of that client's documents; (iii) absence of a mandatory requirement to notify the client that his/her documents are to be turned over to the authorities; (iv) strict time limits that required the client or solicitor to apply for the determination of privilege in respect of seized documents, within 14 days of the search and seizure.

[206] The time limit could not be extended by the court. Only the Crown could consent to an extension; (v) if the applicant did not meet the 14 day time limit and the Attorney General did not consent to an extension, the judge was obliged to order that the seized documents be turned over to the prosecution. The prosecution could then break the seal and view the contents of the documents, thus breaching any privilege that may have existed; (vi) the Attorney General could, in circumstances where the judge believes it would be of substantial assistance, allow the Attorney General to inspect the documents in pursuit of the determination of privilege. This permitted exposure of what could be privileged documents, before a decision was made as to whether or not they were privileged. The Court found these deficiencies were fatal to section 488.1. They constituted significant impairment of attorneys and client's rights, went beyond the bounds of constitutional limits, and were not demonstrably justified in a free and democratic society.

[207] Section 64 of the **Proceeds of Crime (Money Laundering) and Terrorist Financing Act** while similar to section 488.1 of the Canadian Criminal Code had two notable enhancements in the attempt to properly protect privilege. Under section 64: 1) after a claim of privilege it was the lawyer who did the sealing and securing of the files and 2) the official conducting the search was not to examine or make copies of a document in the possession of a non-lawyer who contended that a claim of solicitor-client

privilege may be made by a lawyer, without giving the person a reasonable opportunity to contact that lawyer.

[208] Despite these enhancements the Supreme Court following the ***Lavallee*** standard found that solicitor-client privilege was also breached in ***Canada (Attorney General) v FLSC*** given the nature of the regime. This in a context where the procedures for notifying the client of the need to claim privilege were inadequate, and the time-table and mechanism for the determination of privilege which harboured most of the defects condemned in ***Lavallee,*** left solicitor-client privilege tottering on the edge of vulnerability.

[209] A critical comparison of the aspects of the Jamaican Regime that grant access to attorney's offices with the search provisions struck down in ***Canada (Attorney General) v FLSC,*** should prove a useful guide to the determination of the cogency or otherwise of the claimant's assertions that the "search" aspects of the Regime are patently unconstitutional.

[210] The cumulative deficiencies in the Canadian provisions, made it manifest that their regime did not accord with the principles of fundamental justice, as contained in their constitutional framework. Given the manifest deficiencies, the decision of the Supreme Court was inevitable.

[211] By contrast in respect of the Jamaican Regime it is clear that in the monitoring of compliance POCA expressly excludes from disclosure client information and advice that is protected by LPP. (See section 91A (3)). The GLC has no power of search. Examinations are by prior Notice and conducted by the professional regulatory body rather than by state agents. Therefore, the right to privilege is not taken away but protected by the GLC's inspections, as the examinations and verifications conducted would be in respect of material which an attorney would have had opportunity prior to the examination or inspection, to claim privilege through pre-

sorting of clients' files based on the GLC's recommendation of that approach in the Guidance. The material claimed as privileged would be non-disclosable and beyond the reach of the GLC in monitoring compliance. In the Jamaican context therefore, the nature of the Regime and the recommendation by the GLC for the lawyer to only make available what is not privileged material obviates the risk to LPP.

[212] There should therefore be no danger that privilege would be breached by the inspections and therefore no need to advise the client of any potential breach. If however, for whatever reason there is a need to assert privilege, as stated earlier, an attorney is under a professional obligation to do so. See: ***R v Central Criminal Court Ex p. Francis & Francis***. As indicated however it is not expected that the records inspected will include information subject to LPP. A 'potential breach' of privilege is not envisaged. Therefore once the Regime is properly applied, it can readily be seen that the imperative to contact the client to have the client involved in any assertion of their right to privilege, would not arise. Consequently, there would also be no need for the exercise of judicial discretion in relation to the determination of privilege, in respect of the inspections and examinations to be conducted by, or on behalf of the 2nd defendant.

[213] Based on the foregoing, we find that the concern that LPP is left vulnerable, eroded or breached as a result of the power granted to the GLC under the Regime to inspect and examine documents in the possession of attorneys classified as DNFIs has not been established.

The Sharing of Information With Other Competent Authorities

[214] Another issue which concerns privilege are the concerns raised by Sykes J at ***paragraph 26 of Jamaica Bar Association v Attorney General & GLC*** that: –

> 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.

[215] It is true that section 91 A (2) (d) of POCA allows the GLC as Competent Authority to share the information it has examined with any other Competent Authority whether located in Jamaica or overseas. There is no mechanism for judicial scrutiny or scrutiny by an independent third party. This is the situation with regard to all Competent Authorities that regulate DFNIs. Sharing of information is one of the key aims of international cooperation contained in international treaties and schemes aimed at combating money laundering, terrorist financing and organised crime. The key consideration we find is whether or not the information that may be shared could be subject to LPP in a context where there is no opportunity to challenge its disclosure prior to it being shared. However, as the attorney is given an opportunity to sort the information and should only hand over for examination and copying, material that is not subject to LPP, that danger should be averted.

ISSUE 3: WHETHER THE REGIME BREACHES THE CONSTITUTIONAL RIGHT TO PRIVACY?

[216] It has been discussed above that LPP does not apply to all information given or received, by an attorney in relation to his client. This also applies to confidentiality. Privilege and confidentiality are separate and distinct. In order for privilege to arise, confidentiality must first arise. However, information can be confidential, yet not privileged. If communication is not privileged then it follows that any constitutional right in relation to the protection of LPP would not be breached. However, the right to privacy may nevertheless be infringed where compulsory disclosure of information is required by the Regime; this is so, whether the information is subject to the duty of confidentiality or not.

[217] The claimant contends that an attorney should not be required to disclose by way of a report, information received which gives rise to a belief or knowledge that a client has engaged in an transaction that could constitute or be related to money laundering. They also contend that information obtained and recorded by Attorneys about their clients should not be required to be disclosed to the 2nd defendant or the State. They argue that it is a breach of privilege and confidentiality. Having found that there is no breach of privilege, we are here concerned with non-privileged information, including that subject to confidentiality.

[218] The 2nd defendant's access to the information contained in the documents made and retained by attorneys is to purely transactional and identification records. The purpose of accessing them is to monitor compliance. It is true that these are records that without more, represent confidential communication between an attorney and his client and therefore engage section 13 (3) (j) (ii) & (iii) of the Charter.

[219] It is of course a part of the function of a lawyer that he will be told secrets and be given confidential information by his client. It is also essential to his role that he keeps these secrets and confidences. This is necessary for the relationship of trust between them, without which the functioning of the relationship would be greatly undermined. "*Confidentiality is therefore a primary and fundamental right and duty of the lawyer. The rule of professional secrecy is designed, from that point of view, as an obligation of discretion forming part of the ethics of a profession". (*See: paragraph 37 ***-Ordes Des Barreaux).***

[220] At common law, where information is received in a situation where the recipient knows or ought to know that the information is confidential and therefore is not to be disclosed to others, that information is protected by law and any unauthorised disclosure of that information, by whatever means, can be sued upon.

[221] This broad statement of confidentiality being a primary right and duty of the lawyer is of course subject to exceptions. Policy dictates this; and although such exceptions must be strictly limited and confined, some are necessary for the practical requirements for order and fairness as well as the pursuit of justice. This is universally recognized in Canons of Ethics for the Legal Profession. Hence the Jamaican, Legal Profession (Canons of Professional Ethics) Rules, Canon 4t in its original form stated as follows: "(t) An Attorney shall not knowingly- (i) reveal a confidence or secret of his client, or (ii) use a confidence or secret of his client- (1) to the client's disadvantage; or (2) to his own advantage; or (3) to the advantage of any other person unless in any case it is done with the consent of the client after full disclosure. ***Provided however, that an Attorney may reveal confidences or secrets necessary to establish or collect his fee or to defend himself or his employees or associates against an accusation of wrongful conduct.*** *(Emphasis added).*

[222] It is clear that the duty of confidentiality and secrecy is subject to the proviso above which allows for a breach of the duty in certain circumstances. The duty is therefore not absolute. In fact there is an implicit exception at common-law. Attorneys are not entitled or duty bound to keep client's secrets or confidences where these involve the commission of a crime or matters concerning the furthering of a criminal purpose. It is in this vein that the POCA Regime has sought to make an exception, in order to deal with the mischief of money laundering.

[223] However, the right to privacy is a fundamental human right that is protected by section 13 (3) (j) of the Jamaican Charter which guarantee the right of everyone to the protections in sections 13(3) (j) (ii) &(iii). These are as follows-

> Section 13(3) (j)
>
> (ii) respect for and protection of private and family life, and privacy of the home; and
>
> (iii) protection of privacy of other property and of communication;

[224] In ***R v Genest*** 1989 1 S.C.R. 59, the Court recognised the fundamental nature of the right to privacy as a basic human right and endorsed the following:

> The privacy of a man's home and the security and integrity of his person and property have long been recognised as basic human rights, enjoying both an impressive history and a firm footing in most constitutional documents and international instruments.

[225] ***R v Tessling*** [2004] 3 S.C.R. 432, is Canadian authority for the proposition that the protection of an individual from unreasonable searches and seizures by virtue of section 8 of the Canadian Charter, provides constitutional protection to the right to privacy. It is only in this provision that the right to privacy is reflected in the Canadian

Charter. In Jamaica the constitutional right to privacy of private life and of communication are expressly stated in sections 13 (3) (j) (ii) and (iii) and are therefore discrete and distinct from the search and seizure provisions of section 13 (3) (j) (i) of the Charter. This is a reflection of the significance of these rights. In fact section 13 (3) (j) (iii) protects the right to make private and autonomous decisions, which includes the right to choose whether to communicate information in one's possession to another.

[226] Hence in ***Aubry v Editors Vice-Versa*** [1987] 1 S.C.R. 591, the Supreme Court of Canada in considering the right to privacy protected by the Quebec Charter of Human Rights and Freedoms and at paragraph 52, highlighted the fact that the right to privacy guarantees "*a sphere of individual autonomy for all decisions relative to choices that are of a fundamentally private or inherently personal nature".*

[227] It follows that attorneys-at-law and their clients are entitled to the freedom to engage in private and personal communications without fear that the nature of those communications will be forced to be revealed. This has nothing at all to do with LPP, which has been separately considered above. It is a right of every individual. Protection of the right to privacy is consistent with the underlying values of the Charter. These are freedom, human dignity, liberty, autonomy and democracy. (See: ***R v Big M Drug Mart Ltd***. 1985 1 S.C. R. 295 at 336 – 337; ***Blencoe v British Columbia (Human Rights Commission)*** [2000] 2.S.C.R. 307 at paragraphs 76-78.

[228] The POCA Regime has imposed disclosure obligations on attorneys-at-law which takes away their free choice. It requires them to reveal information about their clients thus interfering with their right to decide the information to be revealed, if any, subject to the consent of their clients and of course LPP. This right includes the duty of confidentiality. But even outside the duty of confidentiality, an individual has the right to decide,

which, if any information he will disclose. The loss of confidentiality in communication due for example to crime or fraud is different from having a choice as to the information that one discloses. In effect, the loss of confidentiality in those circumstances removes the duty of non-disclosure but one is still at liberty to withold the said information in the absence of any pre-existing legal requirement of disclosure.

[229] Attorneys are now compelled to report suspicious transactions; to record and disclose information to the 2nd defendant, including the obligation to file declarations (See: Section 5 (3) (C) of the Legal Profession Act (1971)) and to make the records obtained and retained available to the designated authority (FID) and competent authority (2nd defendant). (See: Regulation 14(4)).

[230] The implication of this new duty to make and maintain records (See: Regulation 6(1)(a); and to have them available for inspection for at least 7 years (See: Regulation 14(5) (a); and to make them available to the state if required (See: Regulation 14(4), without doubt interferes with the attorney's duty of confidentiality resulting in an infringement of his right to privacy. The freedom protected by the Charter (Section 13(3) (j) (ii)) as to the right to the unfettered choice, (except for confidentiality, LPP and pre-existing legal obligations), of an individual to choose whether or not to reveal information in his possession is decidedly breached by these new disclosure provisions.

[231] The right to determine what information is shared was considered by the Canadian Supreme Court in ***R v Duarte*** [1990] S.C.R. 30 at pages 53 -54. A quotation from ***Duarte*** was cited with approval in ***R v Mills*** [1999] 3 S.TC.R. 668 at paragraph 80, as follows:

> It has long been recognised that this freedom not to be compelled to share our confidences with others is the very hallmark of a free society. Yates J., in **Miller v Taylor** (1769) 4 Burr.2303 at p.2379,

> 98 E.R. 201 at page 242: It is certain every man has a right to keep his own sentiments, if he pleases: he has certainly a right to judge whether he will make them publicly or commit them only to the sight of his friend.

[232] The 1st defendant, following the European decisions of ***Michaud*** and the ***Opinion of the Advocate General Poiares Maduro*** (a ruling consistent with ***Michaud***), tacitly conceded that *"the requirement for attorneys to make suspicious transaction reports can be considered an infringement of section 13 3(j) of the constitution, in so far as it protects privacy of communication."* The 1st defendant therefore took the view that *there is a need to consider whether the infringement is demonstrably justified in a free and democratic society*.

[233] The claimant maintains that confidentiality in the context of legal advice privilege would be consistent with Article 8 of the European Convention of Human Rights which provides that one has a right to respect for his private and family life, his home and his correspondence which is somewhat similar to section 13(3)(j)(ii) and (iii) of the Charter. We respectfully agree.

[234] The obligation placed on attorneys to report their suspicions means that they are expected to divulge personal information about their clients – which fall within the scope of section 13 (3) (j) (ii) of the Charter. Similarly, section 13(3)(j) (iii)protects the confidentiality of "private communications" (see ***Frerot v. France***, no. 70204/01, § 53, 12 June 2007). In requiring attorneys to make suspicious transaction reports of information concerning their client obtained from exchanges with the client makes this an interference with the attorney's right to respect for their communication. As indicated above, this is also true of the disclosure obligations under the Regime to make information recorded available to the 2nd defendant and the designated authority.

[235] The disclosure obligations also constitute an interference with an attorney's right to respect for his "private life", which includes activities of a professional or business nature (See: ***Niemietz v. Germany***, 16 December 1992, § 29, Series A no. 251-B).

[236] In our opinion, the obligation to report suspicious transactions amounts to a "continuing interference" with the attorney's rights under section 13(3) (j) (ii) & (iii) of the Charter. Included in these rights and enshrined in these provisions are the attorney's right to his private life and to respect for the privacy of his professional communications with his clients. These interferences violate the Charter unless they are demonstrably justified in a free and democratic society.

[237] The extent of the interference becomes relevant. There is no substantial interference when one considers that the obligation to make disclosures, generally occurs in the realm of non-privileged circumstances/a non-relevant legal context where attorneys are not usually engaged in the role of providing legal advice or representing a client in actual or contemplated litigation proceedings. Furthermore the obligation only arises in a relevant legal context where the attorney knows or believes or has reasonable grounds for knowing or believing that the client has engaged in a transaction that could constitute or be related to money laundering. It also has to be taken into account that the attorney's duty of confidentiality in respect of his client does not extend to the sort of information contained in a suspicious transaction report. The infringement of the privacy rights by the Regime has to be balanced against these factors in evaluating the extent of any interference.

[238] It should be noted that an attorney is an officer of the Court. He has duties to the Court that requires him to be trustworthy, honest and law abiding. He is an integral part of the system of the administration of justice. He cannot be party to a criminal transaction. He becomes so, if he

has knowledge or belief or reasonable grounds for such knowledge or belief contemplated by section 94(2) (b) and nevertheless assists the client in carrying out the transaction without having followed the reporting and consent requirements of the Regime. This is another factor for consideration when evaluating the level of interference.

[239] An attorney is ethically obliged to assist and not to hinder or obstruct the system of justice in which he plays such an integral part. An attorney's duty is first to the Court. This point is well made in ***Rondel v Worsley*** [1969] 1 AC 191. This case reiterates the dictates of the Canons of the legal profession. The appellant had obtained the services of the respondent, a barrister, to defend him. He alleged that the respondent had been negligent in the conduct of his defence. In considering the immunity of barristers acting in court, Lord Morris of Borth-y-Gest said -

> [I]t would be a retrograde development if an advocate were under pressure unwarrantably to subordinate his duty to the Court to his duty to the client. While, of course, any refusal to depart at the behest of the client from accepted standards of propriety and honest advocacy would not be held to be negligence, yet if non-success in an action might be blamed upon the advocate he would often be induced, as a matter of caution, to embark on a line of questions or to call a witness or witnesses, though his own personal unfettered judgment would have led him to consider such a course to be unwise.

Lord Reid opined that -

> Every counsel has a duty to his client fearlessly to raise every issue, advance every argument, and ask every question, however distasteful, which he thinks will help his client's case. But, as an officer of the Court concerned in the administration of justice, he has an overriding duty to the Court, to the standards of his profession, and to the public, which may and often does lead to a conflict with his client's wishes or with what the client thinks are his personal interests. Counsel must not mislead the Court, he must not lend himself to casting aspersions on the other party or witnesses for which there is no sufficient basis in the information

> in his possession, he must not with-hold authorities or documents which may tell against his clients but which the law or the standards of his profession require him to produce. And by so acting he may well incur the displeasure or worse of his client so that if the case is lost, his client would or might seek legal redress if that were open to him.

[240] This passage from Lord Reid makes it clear that the attorney's duty to his client is not his first duty. It is subject to ethical considerations and his duty to the Court. The duty of an attorney is firstly to uphold the law. This may at times put him in an apparent conflict with his client; but where there is a clear understanding of his role, obligations and ethical constraints, there is no conflict; in fact there is no divided loyalty, where a client has shown an intention to use the services of the Attorney for a criminal purpose.

[241] In support of the POCA Regime, Canon (iv) (t) was amended by virtue of the **Legal Profession (Canons) of Professional Ethics Amendment) Rules, 2014** (2 July, 2014) to include the disclosure requirements of the POCA provisions as exceptions to the attorney's duty of confidence. This was further reinforced by paragraph 17 of the Guidance as follows:

> 17. **Confidentiality**
>
> In addition to maintaining the client's right of LPP, an attorney also owes a duty of confidentiality to his client but this is subject to the attorney's legal obligations under POCA. The Legal Profession Canons of Professional Ethics Rules at paragraph IV (t) (iii) to (v) inclusive[2] sets out the following exceptions to the attorney's duty of confidentiality, making it permissible for the attorney to disclose to the appropriate authority a client confidence in the following circumstances-
>
> 1. in accordance with the provisions of POCA and any Regulations made under that Act;

As amended in 2014

2. in accordance with the provisions of the TPA(Terrorism Prevention Act) and any regulations made under that Act; or
3. where the attorney is required by law to disclose knowledge of all material facts relating to a serious offence that has been committed.

[242] Section 137 of POCA also provides protection to an Attorney from being sued for breach of confidence in respect of disclosing of information to the 2nd Defendant, another competent authority or the designated Authority and also general protection from proceedings brought in respect of acts done in good faith in carrying out the provisions of POCA.

[243] Mr. Donovan Walker, in his affidavit on behalf of the claimant filed the 28th November 2014, outlined that the principles of fiduciary duty and confidentiality facilitate an atmosphere of candour between him and clients and contribute to and inspire public confidence in the legal profession. He does however accept that an exception is that, these principles cannot be used to assist a client to commit a legal wrong or a crime. This concession strikes at the heart of the issues in this claim and indicates the reason why some of the positions relied on by the claimant cannot be sustained.

[244] It is his evidence that as an attorney, he also has duties of candour and honesty, the duty to hold in strict confidence all information concerning the business and affairs of his client acquired during the course of the attorney-client relationship; the duty not to disclose his client or former client's information to their disadvantage or to a third party without their consent; the duty to avoid conflict of interest which is grounded in the duty of undivided loyalty; and the duty to preserve LPP. Pursuant to the duty of candour and honesty, he has the obligation to advise clients of the effect of the Regime.

[245] An Attorney has no duty to keep communications relating to the criminal intent of his client in confidence. In fact should he continue with a transaction knowing or believing that it was of a criminal nature then he would be complicit and by that fact become a participant in the criminal enterprise. As stated by the 2nd Defendant *if an Attorney owed a duty to hold the information in confidence, the attorney could no longer properly be regarded an officer of the court, in the real sense of that term. The duty to keep in confidence and assist the client's criminality would become paramount to any duty owed by the attorney as an officer of the court engaged in the administration of justice. That is not the law; privilege and the duty of undivided loyalty do not provide any justification to an attorney in assisting a client to pursue an illegal transaction. Nor can the attorney simply turn a blind eye.* These submissions succinctly encapsulate the views of the court and the principles at common law.

Tipping off and Privacy Rights

[246] The tipping off provision as provided for by section 97 of POCA is as follows:

A person commits an offence if-

> (a) knowing or having reasonable grounds to believe that a disclosure falling within section 100 has been made, he makes a disclosure which is likely to prejudice any investigation that might be conducted following the first mentioned disclosure; or
>
> (b) knowing or having reasonable grounds to believe that the enforcing authority is acting or proposing to act in connection with a money laundering investigation which is being, or about to be, conducted, he discloses

information or any other matter relating to the investigation to any other person.

[247] In the context of the attorney/client relationship, this section in itself amounts to a breach of the privacy rights provided for under section 13(3) (j) (ii) & (iii) of the Charter. The effect of the section is that the attorney is unable to communicate frankly and is restrained by the provisions. Section 97 has expressly placed certain limitations on the information that an attorney may divulge to his client and this in itself amounts to an infringement of his right to private and family life and privacy of communication. See section 13 (3) (j) (ii) and (iii) of the Charter

The Annual Declaration of Activities

[248] The claimant submitted that the information required under the POCA and the consequential amendments including to the LPA insofar as it must be passed to agents of the state, including, but not limited to, the financial investigation division, breaches, inter alia, confidentiality without any safeguards that may be justified in a free and democratic society. The 2nd Defendant, pursuant to section 5(3C) of the LPA, as amended, promulgated the Legal Profession (Annual Declaration of Activities), Regulation 2014 which requires all attorneys–at–law holding a practicing certificate pursuant to Section 5 of the Act, to make a declaration on or before the 31st day of January of each calendar year indicating whether in the preceding year they have engaged in any of the activities set out in the DNFI Order. It also provides that no practicing certificate shall be issued to any attorney –at–law so long as the declaration in respect of that attorney–at– law as prescribed by the Regulation has not been filed with the 2nd defendant. **Canon I** was also amended by the insertion of a paragraph which provided that- an attorney shall file with the Council such declarations as are required by section 5(3C) of the Act.

[249] The court is of the view that the requirement to make such a disclosure to the 2nd defendant interferes with an attorney's right to respect for and protection of private and family life and the protection of privacy of communications. The attorney is mandated to comply with the disclosure as a practicing certificate will not be issued to an attorney who has not filed a declaration with the 2nd defendant. The attorney is obliged to disclose information, which may be confidential and that he wishes to keep private. Further, failure to comply is a breach of the Canon, for which he could face professional sanctions. Consequently, to the extent that the attorney is forced to disclose what may be confidential information in the declaration to the 2nd defendant, there is an infringement of the attorneys privacy rights under section 13 (3) (j) (ii) and (iii) of the Charter.

[250] Recognising that there are justifiable limits to the duty of confidentiality, by **The Legal Profession (Canon of Professional Ethics) (Amendment) Rules 2014**, Canon 4 was amended by deleting the proviso to paragraph t and replacing it with the following:

> Provided that an Attorney may reveal confidences or secrets in the following circumstances: (i) where it is necessary to collect his fees; (ii) to defend himself or his employees or associates against an accusation against wrongful conduct; (iii**) in accordance with the provisions of the Proceeds of Crime Act and any regulations made under that Act; (iv) in accordance with the provisions of the Terrorism Prevention Act and any Regulations made under that Act; or (v) where the Attorney is required by law to disclose knowledge of all material facts relating to a serious offence that has been committed. (Emphasis added)**

[251] There is an understandably and legitimately high expectation in our society, that there will be privacy in communication between an attorney and his client. Such expectation is borne out of the inherently contractual nature of the attorney/client relationship, together, with the established tenets of LPP and confidentiality. It is therefore without doubt that as far

as possible, legitimate expectations should be met and established tenets adhered to; unless there are extremely good reasons to hold otherwise. Any exception must be grounded in law and cannot be imposed arbitrarily by Parliament without regard to the Charter. The court must in its oversight, aim to protect confidentiality of communication and ensure that legislative provisions do not interfere with confidence, other than in very limited circumstances, and only where it is shown that it is demonstrably justified in a free and democratic society.

[252] The 1st defendant submits that the decisions of the ECHR provide some guidance on the scope of rights. Article 8 of the European Convention provides that:

> 1. Everyone has the right to respect for his private and family life, his home and correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as in accordance with the law and is necessary in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protecting of rights and freedoms of others.

[253] A consideration of paragraph 2 clearly reveals some of the factors this Court is obliged to consider in evaluating whether any interference is demonstrably justified. In applying the principles of ***Michaud***, it is clear that the importance of attorney/client confidentiality has to be weighed against the society's interest in the combating of money laundering and thus the enhancing of the investigative and law enforcement protocols to achieve that aim. It also has to be weighed against the fact that the recording and maintaining of records are generally required outside of privileged circumstances due to the nature of the activities for which they are required.

[254] Although this court finds that the principles of LPP have not been breached by the power given to the GLC to inspect and examine documents it finds that insofar as an attorney is required to disclose information obtained as a result of exchanges between him and his client the Regime has interfered with his right to respect for and protection of his private life and the right to protection of privacy of communication enshrined under sections 13 (3) (j) ii) & (iii). Whether this interference is demonstrably justified in a free and democratic society will be considered below.

ISSUE 4: WHETHER THE REGIME INFRINGES ON ATTORNEYS-AT-LAW (AND CLIENTS) CONSTITUTIONAL RIGHT TO LIBERTY?

The Claimant's Submissions

[255] The claimant submits that there is no legal authority other than the POCA for the2nd defendant GLC, the Competent Authority to enter onto the premises of attorneys-at-law to conduct inspections and examinations. Attorneys-at-law are required to demonstrate compliance or face imprisonment or disbarment. The claimant contends that these imposed obligations are prima facie infringements of sections 13(3)(a) (right to liberty)and (j) (right to protection from search of property, privacy and of communication) of the Charter and therefore unconstitutional.

[256] The claimant maintains that the entry of the GLC would be warrantless and devoid of lawful authority. They rely o*n* ***Lavellee*** where section 8 of the Canadian Charter is the equivalent of section 13 (3) (j) of the Charter to submit that the standard for a warrantless search is stricter where the context is criminal not regulatory.

[257] Further the claimant argues that the GLC would be looking at privileged and confidential information and would have authority under section 91A of the POCA to examine and take copies of that information. This

information could in turn be used to prosecute the attorney-at-law and/or client with the prospect of potential imprisonment, if there was a conviction. Therefore this warrantless search power also had implications for the right to liberty for both attorneys-at-law and clients based on information that could be gleaned or documents uplifted during the search. See ***Canada (Attorney General) v FLSC*** where section 7 of the Canadian Charter, which the claimant submits as being the equivalent of section 13 (3) (a) of the Charter, was held to have been breached by such a warrantless search. It was conceded by the Attorney General in that case[3] that the search and seizure provisions of their Act infringed privilege.The Court found also that the searches were such as to infringe solicitor - client privilege in the absence of prior authorization, or where there was inadequate judicial authorization.[4]

[258] The claimant also submits thatJamaica's Regime has no provision affording privilege holders a genuine opportunity to enforce the protection of their confidential communications to their attorneys-at-law as there is:-

a) no requirement for notice to the client whose potentially privileged communications with his or her lawyer the state could secure;

b) no opportunity for the client (<u>as opposed to the lawyer in whose possession it may be</u>), or some independent entity to assert privilege; and

c) no opportunity for a judge to refuse the communication of privileged documents in the absence of a challenge to the communication.

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3 *Ibid* - Paragraphs 32 – 35

4 *Ibid* – Paragraphs 36 – 57

[259] The claimant additionally submits that under the Regime there is no requirement that before a law office examination, the authorities must satisfy a judicial officer that there exists no other reasonable alternative to the search. These defects make the search provisions unreasonable, and contrary to the Constitution.

The Submissions of the 1st Defendant

[260] The 1st defendant contends that the POCA legislation is lawful and does not infringe section 13(3)(a) of the Charter because an attorney-at-law cannot be deprived of his/her liberty and security except in accordance with the provisions of the legislation, that is, in the execution of a sentence of a court after conviction. Counsel relied on jurisprudence from the European Court of Human Rights related to Article 5 of the European Convention on Human Rights given that it is similar to section 13(3)(a) of our Constitution and on which there is no guidance from local courts. (See: **European Court of Human Rights, Guide on Article 5 of the European Convention on Human Rights** (the Guide)*;* ***Engel and Others v Netherlands***; and ***Guzzardi v Italy***.)The 1st defendant also submits that since there was no infringement of section 13(3)(a) there was no need to determine whether or not the infringement fell within the general derogation, that is whether it is demonstrably justified in a free and democratic society.

[261] The 1st defendant further submits that it was an inaccurate assertion that section 7 of the Canadian Charter and section 13(3)(a) of the Charter are identical as the phrase “principles of fundamental justice” is not used in and should not be read into the Charter. (However, it should be noted that in submissions in reply the claimant indicates that their submission was never that the sections were identical but that they were equivalent.) The 1st defendant therefore contends that the decisions of the Canadian courts offers no useful guidance in determining whether POCA infringes s.

13(3)(a) of the Charter as the phrase "principles of fundamental justice" is used in the Canadian Charter to dictate how any deprivation of, or impairment of liberty could be effected, whereas section 13(3)(a) does not provide such a mechanism.

[262] Counsel cited a number of authorities which explained the phrase "principles of fundamental justice". ***In Re B.C. Motor Vehicle Act*** [1985] 2 SCR 486 which described where principles of fundamental justice are to be found; **The Canadian Charter of Rights Decisions Digest** which describes how case law outlines how a principle of fundamental justice develops; and ***Canada (Attorney General) v FLSC*** which has classified solicitor-client privilege, independence of the bar and commitment of attorneys to their clients as principles of fundamental justice.

[263] Given counsel's submission of the non-applicability of the concept of the "principles of fundamental justice", the 1st defendant maintains that the consideration that should be given to whether s. 13(3)(a) of the Constitution has been infringed, is whether the impugned laws are arbitrary in their application, lack legal certainty and are disproportionate regarding deprivation of liberty. It was also argued that ***Canada (Attorney General) v FLSC*** must also be distinguished from this case as it was noted by the Canadian Court that the rules of professional governing bodies already provided effective and constitutional AML/CFT regimes in relation to lawyers, law firms and notaries across Canada. Jamaica's professional bodies the GLC and JAMBAR have no such rules in place, only Guidance from the GLC which is now the subject of this case.

The Submissions of the Claimant in Reply

[264] In reply the claimant argues that the submissions on behalf of the 1st defendant failed to consider the effect of section 19 (1), the redress clause of the Charter, or Article 34 of the European Convention which provided

claimants access to the courts. Pursuant to section 19 (1) the likelihood of an attorney-at-law being imprisoned by virtue of the sanction provisions would trigger a breach of the Charter. Similarly under Article 34 of the European Convention a claimant would have access if he could show that he was required to "modify his conduct or risk being prosecuted, or if he is a member of a class of people who risk being directly affected by the legislation."[5]

[265] The claimant contends that the 1st defendant had conceded that the provisions in relation to suspicious transaction reports and examination and production of documents affect the liberty interest of attorneys-at-law, as the penalty to be imposed for a breach of these unconstitutional provisions includes imprisonment. However the focus of the 1st defendant was on the right not to be deprived of liberty, except in the execution of a sentence of a court, which is a separate and distinct right from the right to liberty which was the claimant's focus.

The Liberty Interests of Attorneys-at-Law

[266] Section 13(3)(a) of the Charter guarantees a person's *"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."* No local jurisprudence being available on the interpretation of that section, it is appropriate as the 1st defendant submits, to have recourse to jurisprudence from the European Court of Human Rights interpreting Article 5 of the **European Convention on Human Rights** which is similar to section 13(3)(a). Article 5 states:

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[5]Paragraph 51 Michaud v France

> Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law.

[267] Article 5 (1) lists the situations in which a person can be deprived of their liberty and security. In particular at (a) it provides, *"the lawful detention of a person after conviction by a competent court"*.

[268] The **European Court of Human Rights, Guide on Article 5 of the European Convention on Human Rights** is useful for determining the scope, nature and content of the right to liberty and security. Referencing its own decision in ***Engel and Others v Netherlands*** Application nos. 5100/71; 5101/71; 5102/71; 5354/72; 5370/72 at page 5 the Guide states:

> Article 5 contemplates the physical liberty of the person; its aim is to ensure that no one should be deprived of that liberty in arbitrary fashion. It is not concerned with mere restrictions on liberty of movement, which are governed by Article 2 of Protocol No. 4.

[269] The Guide also provides in paragraph 20 that *'… the right to liberty and security is of the highest importance in a "democratic society" within the meaning of the Convention'*.

[270] In ***Guzzardi v Italy*** App No. 7367/76 the applicant had been acquitted of kidnapping by his national court. He was thereafter made the subject of a special supervision order which placed restrictions on him including limiting where he could live and work. He contested the order seeking its variation or cancellation.

[271] In pronouncing on the meaning of the right to liberty the Court stated at paragraphs 92 - 93 that:

> [T]he "right to liberty", paragraph 1 of Article 5 (art. 5-1) is contemplating the physical liberty of the person; its aim is to ensure that no one should be dispossessed of this liberty in an arbitrary

> fashion. As was pointed out by those appearing before the Court, the paragraph is not concerned with mere restrictions on liberty of movement; such restrictions are governed by Article 2 of Protocol No. 4 (P4-2) which has not been ratified by Italy. In order to determine whether someone has been "deprived of his liberty" within the meaning of Article 5 (art. 5), the starting point must be his concrete situation and account must be taken of a whole range of criteria such as the type, duration, effects and manner of implementation of the measure in question. The difference between deprivation of and restriction upon liberty is nonetheless merely one of degree or intensity, and not one of nature or substance. Although the process of classification into one or other of these categories sometimes proves to be no easy task in that some borderline cases are a matter of pure opinion, the Court cannot avoid making the selection upon which the applicability or inapplicability of Article 5 (art. 5) depends.

[272] The Court therefore held that the right to liberty related to physical liberty but that deprivation of liberty was not limited to detention after arrest or conviction. It was therefore noted in ***Guzzardi's*** case as well as in ***Secretary of State for the Home Department v JJ and Others*** [2007] UKHL 45 that Article 5 is engaged for example in the context of compulsory residence orders and control orders that impose curfews. There must however be a sufficiently stringent core element of confinement for the right to be engaged in these types of situations.

[273] Turning to the Jamaican situation, by virtue of the POCA as amended in 2013, if an attorney-at-law is convicted of failing to make a suspicious transaction report (ss.94 & 95) or tipping off a client (s. 97), he or she could be imprisoned for a term not exceeding a year if convicted in the parish court or for a term not exceeding ten years (s. 98 of POCA), if convicted in the circuit court.

[274] Additionally, an attorney-at-law who fails to abide by certain regulations may be imprisoned for a term not exceeding twelve months in the parish court and a term not exceeding twenty years in the circuit court. These regulations address: identification procedures and transaction verification

procedures (regs. 7 & 11); record keeping procedures (reg. 14); procedures of internal control and communication (reg. 15); taking of appropriate measures from time to time to make the employees whose duties include the handling of relevant financial business aware of the relevant provisions and procedures under POCA and its regulations (reg.6(1)(b); and training employees in recognizing and handling transactions carried out by or on behalf of persons who appear to be engaged in money laundering (reg. 6(1)(c).

[275] Further, attorneys-at-law could also face imprisonment if they: fail to comply with the procedures for managing electronic fund transfers (reg. 9); and fail to apply the accepted standards of compliance in any overseas branch of the firm, excepting that where there is a difference in standards between Jamaica and the other jurisdiction, the branch of the firm is to comply with the higher required standard (reg. 18). An attorney-at-law, if convicted pursuant to regs. 9 and 18, could be imprisoned for a term not exceeding twelve months in the parish court.

[276] Considering the above analysis, there is no doubt that the Regime engages the attorney-at-law's liberty interests where the lawyer engages in any of the six (6) prescribed activities under the 2013 Order, as failure to comply with the relevant statutory provisions and regulations constitute offences for which the attorney-at-law, if convicted, may be imprisoned.

[277] The wording of the provisions and regulations which constitute offences for which an attorney-at-law is liable to imprisonment, indicate that it is on conviction, (and by necessary implication only on conviction), that the attorney-at-law may be subjected to that penalty. The 1st defendant strongly submits that if an attorney-at-law is imprisoned, by virtue of the execution of the sentence of a court, following his or her conviction, that does not constitute deprivation of liberty which infringes the constitution given that section 13(3)(a) of the Charter expressly makes the right to

liberty subject to liberty being curtailed after due process of law. Therefore to the extent that the Regime contemplates the observance of due process of law, before conviction and imprisonment it would be constitutional.

[278] The fundamental importance of deprivation of liberty only being sanctioned after due process is well expressed in the Guidance where it states at paragraph 26 that:

> [W]here deprivation of liberty is concerned it is particularly important that the general principle of legal certainty be satisfied. It is therefore essential that the conditions for deprivation of liberty under domestic law be clearly defined and that the law itself be foreseeable in its application, so that it meets the standard of "lawfulness" set by the Convention, a standard which requires that all law be sufficiently precise to allow the person – if need be, with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail.

[279] The Guidance also provides at paragraph 42 that "*…the term 'conviction' signifies both a finding of guilt, and the imposition of a penalty or other measure involving the deprivation of liberty."*

[280] The Claimant however maintains that the 1st defendant's submissions sidestepped the main focus of the claimant's submissions. The contention was that the 1st defendant concentrated on the *right not to be deprived of liberty, except in the execution of a sentence of a court*, rather than the *right to liberty* which is a separate and distinct right that was the claimant's focus. The claimant argues that the very threat of imprisonment engaged the liberty interests of the attorneys-at-law. This was based on dicta from the case of ***Canada (Attorney General) v FLSC*** which interpreted the Canadian Charter and the wording of the redress clause under the Jamaican Charter whereby a claimant could seek redress not only for a breach but also for a likely breach of a fundamental right.

[281] Sections 1, 7 and 8 of the Canadian Charter read as follows:

> 1. The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.
>
> 7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.
>
> 8. Everyone has the right to be secure against unreasonable search or seizure.

[282] At all three levels in the ***Canada (Attorney General) v FLSC*** case, the Court held that the attorney's liberty interests were engaged. This as section 74 of the impugned Act **(Proceeds of Crime (Money laundering) and Terrorist Financing Act)** provided that breach of certain obligations under that Act or regulations made thereunder, would render the attorneys liable to imprisonment. At paragraph 91 of the judgment of the Chambers Judge it was stated that, *"The threat of imprisonment under s. 74 constitutes a clear deprivation of liberty: R v D.B. at para 38; Re B.C. Motor Vehicle Act, [1985] 2 S.C.R. 486 at paragraph 74".*

[283] The authority for the view embraced by the Court of Appeal in ***Canada (Attorney General) v FLSC*** [6]**,**(and relied on by the claimant), that the threat of imprisonment as distinct from actual imprisonment constitutes a deprivation of liberty, stems from the second listed case ***Re B.C. Motor Vehicle Act.*** It was also relied on in ***R v D.B***. In ***Re B.C. Motor Vehicle Act*** the B.C. Motor Vehicle Act provided for minimum periods of imprisonment for the offence of driving on a highway or industrial road without a valid driver's licence or with a licence under suspension. Section 94(2) of the POCA, moreover, provided that this offence was one of

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[6] Please see paragraphs 87-90 of the case.

absolute liability in which guilt was established by the proof of driving, whether or not the driver knew of the prohibition or suspension.

[284] In determining whether or not section 94 (2) was in breach of section 7 of the Charter it was held *inter alia* that 1) a law with the potential of convicting a person who really has done nothing wrong offends the principles of fundamental justice and violates a person's right to liberty under s. 7 of the *Charter* if imprisonment is available as a penalty. 2) On any definition of the term "fundamental justice", the imposition of minimum imprisonment for an offence which may be committed unknowingly and without intent and for which no defence can be made deprives or may deprive of liberty and offends the principles of fundamental justice. 3) Section 1 of the *Charter* permits reasonable limits to be placed on the citizen's s. 7 right provided the limits are "prescribed by law" and can be demonstrably justified in a free and democratic society. If these limits are not imposed in accordance with the principles of fundamental justice, however, they can be neither reasonable nor justified under s. 1. The phrase "except in accordance with the principles of fundamental justice" restricts the government's power to impose limits under s. 1. A limit imposed on the s. 7 right in accordance with the principles of fundamental justice must still meet the tests in s. 1. 4) Mandatory imprisonment for an absolute liability offence committed unknowingly and unwittingly and after the exercise of due diligence is excessive and inhumane. Such sanction offends the principles of fundamental justice embodied in our penal system and accordingly is inconsistent with s. 7 of the *Charter*.

[285] On the facts of ***Re B.C. Motor Vehicle Act*** it is clear why the threat of imprisonment by itself was a breach of the right to liberty given the inappropriate availability of the penalty of imprisonment, which could be visited on morally innocent defendants. The section 7 right to liberty qualified by the principles of fundamental justice was clearly breached. The court held that imprisonment should not have been available at all in

those circumstances. Clearly therefore the threat of imprisonment constituted a breach of the right to liberty.

[286] It is an argument which however should not be automatically transferred to other situations such as the case at hand, especially if the "principles of fundamental justice qualification", as per the submissions of the 1st defendant, should not be incorporated into the Charter. There is a two-fold danger that would spring from automatic transference. Firstly, there is a danger that the argument assumes in the negative that which is sought to be determined — whether or not particular aspects of the legislation are constitutional. If the relevant sections are held to be unconstitutional then it follows that the threat of imprisonment under those provisions would be unconstitutional. Secondly, wholesale adoption of the argument without allowing for the differences between the wording of the Canadian and Jamaican Charters could lead to a conclusion unsupported by the Jamaican Charter and the impugned legislation.

[287] The acid test concerning the relevance to Jamaica of the Canadian jurisprudence on this point is whether the "principles of fundamental justice" have any application to Jamaica, as in Canada they qualify the protected right not to be deprived of "life, liberty and security of the person" and operate to set the parameters of that right. (See ***Re B. C. Motor Vehicle Act,*** page487).

[288] In ***Re B.C. Motor Vehicle Act*** at page 487, the Court outlined the process by which "principles of fundamental justice" were distilled and recognised. At page 487 the Court said:

> The principles of fundamental justice are to be found in the basic tenets and principles not only of our judicial process but also of the other components of our legal system. These principles are not limited to procedural guarantees, although many are of that nature. Whether any given principle may be said to be a principle of fundamental justice within the meaning of s. 7 must rest on an

> analysis of the nature, sources, rationale and essential role of that principle within the judicial process and in our evolving legal system. The words "principles of fundamental justice", therefore, cannot be given any exhaustive content or simple enumerative definition but will take on concrete meaning as the courts address alleged violations of s. 7.

[289] Case law outlined in **The Canadian Charter of Rights Decisions Digest** describes the process by which principles become “principles of fundamental justice”. At paragraph 6.A it states:

> Jurisprudence on s. 7 has established that a "principle of fundamental justice" must fulfill three criteria. First, it must be a legal principle. This serves two purposes. First, it "provides meaningful content for the s. 7 guarantee"; second, it avoids the "adjudication of policy matters”. Second, there must be sufficient consensus that the alleged principle is "vital or fundamental to our societal notion of justice". The principles of fundamental justice are the shared assumptions upon which our system of justice is grounded. They find their meaning in the cases and traditions that have long detailed the basic norms for how the state deals with its citizens. Society views them as essential to the administration of justice. Third, the alleged principle must be capable of being identified with precision and applied to situations in a manner that yields predictable results.

[290] This third principle is vital. While in ***Canada (Attorney General) v FLSC*** at the Supreme Court level the majority held that the lawyer’s duty of commitment to the client’s cause was a principle of fundamental justice, the learned Chief Justice and Moldaver J disagreed with that classification and said that:

> this “principle” lacks sufficient certainty to constitute a principle of fundamental justice: see R. v. Malmo-Levine, 2003 SCC 74, [2003] 3 S.C.R. 571, at para. 113. The lawyer’s commitment to the client’s interest will vary with the nature of the retainer between the lawyer and client, as well as with other circumstances. It does not, in our respectful opinion, provide a workable constitutional standard.

[291] It should be noted that there is a substantial body of case law including the case of ***Canada (Attorney General) v FLSC*** in which solicitor-client privilege, independence of the bar and commitment of attorneys to their clients have been classified as principles of fundamental justice. It is however critical to the analysis being conducted to understand the effect of these principles of fundamental justice on the rights to which they relate.

[292] In this regard it is useful to return to additional dicta from ***Re B.C. Motor Vehicle Act.*** The effect of the phrase “principles of fundamental justice” was explained at pages 487 and 489where it was stated:

> That phrase is not a protected right but a qualifier to the protected right not to be deprived of "life, liberty and security of the person"; its function is to set the parameters of that right. Interpretation of the term must be with reference to the protected rights but not so as to frustrate or stultify them. An interpretation equating "fundamental justice" with "natural justice" would not only be wrong, in that it would strip the protected interests of most of their content, but also would be inconsistent with the affirmative purposive expression of those rights.
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> The phrase "in accordance with the principles of fundamental justice" is not a qualification on the right to life, liberty and security of the person in the sense that it limits or modifies that right or defines its parameters. Rather it protects the right against deprivation or impairment unless such deprivation or impairment is effected in accordance with the principles of fundamental justice.

[293] It is against that background that the court must consider the fact that the Supreme Court in the ***Canada (Attorney General) v FLSC*** case found that the impugned provisions limited the liberty interests of attorneys in a way that was not in accordance with the principle of justice in relation to the lawyer’s duty of commitment to the client’s cause.

[294] Cromwell J writing for the majority stated at paragraph 1, that:

> Lawyers must keep their clients' confidences and act with commitment to serving and protecting their clients' legitimate interests. Both of these duties are essential to the due administration of justice. However, some provisions of Canada's anti-money laundering and anti-terrorist financing legislation are repugnant to these duties. They require lawyers, on pain of imprisonment, to obtain and retain information that is not necessary for ethical legal representation and provide inadequate protection for the client's confidences subject to solicitor-client privilege. I agree with the British Columbia courts that these provisions are therefore unconstitutional. They unjustifiably limit the right to be free of unreasonable searches and seizures under s. 8 of the Canadian Charter of Rights and Freedoms and the right under s. 7 of the Charter not to be deprived of liberty otherwise than in accordance with the principles of fundamental justice.

[295] In assessing the Canadian regime, the court considered the fact that the profession had developed practice standards relating to the subjects addressed by the regime. At paragraph 108 he stated that:

> Professional ethical standards such as these cannot dictate to Parliament what the public interest requires or set the constitutional parameters for legislation. But these ethical standards do provide evidence of a strong consensus in the profession as to what ethical practice in relation to these issues requires. Viewed in this light, the legislation requires lawyers to gather and retain considerably more information than the profession thinks is needed for ethical and effective client representation. This, coupled with the inadequate protection of solicitor client privilege, undermines the lawyer's ability to comply with his or her duty of commitment to the client's cause. *The lawyer is required to create and preserve records which are not required for ethical and effective representation. The lawyer is required to do this in the knowledge that any solicitor-client confidences contained in these records are not adequately protected against searches and seizures authorized by the scheme. This may, in the lawyer's correctly formed opinion, be contrary to the client's legitimate interests and therefore these duties imposed by the scheme may directly conflict with the lawyer's duty of committed representation*. (Emphasis added)

[296] The Canadian regime also prescribed imprisonment as penalty for the attorney's failure to comply with the search provisions, which permitted searches to be conducted by FINTRAC, a government entity. By contrast as has already been discussed earlier in this judgment pursuant to the Jamaican provisions,(examinations are administered by the GLC and it authorizes Accountants to conduct the routine examinations on its behalf) examinations and inspections are to be conducted by and under the authority of the 2nd defendant who are regulators of the legal profession and sensitive to the special relationship shared between attorney-at-law and client. Further, the penalty for non-compliance with directives of the 2nd defendant is a fine in the Parish or Circuit Courts or possible disciplinary action.[7]

[297] It is manifest that the decision in ***Canada (Attorney General) v FLSC*** that there was unconstitutional interference with attorneys' liberty interests was premised on an interpretation of their Charter of Rights where the right to liberty is protected from deprivation or impairment unless such deprivation or impairment is effected in accordance with the principles of fundamental justice. In the Supreme Court's view, the deprivation prescribed under the regime, compromised the lawyers commitment to his client's cause, which is a principle of fundamental justice. The court also found that the existing guidelines issued by the law societies in relation to the matters which the regime sought to address, had already adequately provided a mechanism to deal with those matters.

[298] Having closely considered the submissions and the case law, we agree with the submissions of the 1st defendant that the Canadian jurisprudence on section 7 of the Canadian Charter cannot be directly applied to the interpretation of section 13 (3) (a) of the Jamaican Charter. It would be

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[7] See s. 91A (5) and (6) of POCA

erroneous to read into section 13(3)(a) of the Charter the concept of "principles of fundamental justice" which would add another qualifier to that provision, that was not intended by the framers of the revised Chapter III of the Charter. The Canadian Charter uses "principles of fundamental justice" to dictate how any deprivation of, or impairment of liberty can be effected, whereas section 13(3)(a) of the Charter does not provide such a mechanism. I agree that the consideration that should be given to whether section 13(3)(a) of the Charter has been infringed is whether the impugned laws are arbitrary in their application, lack legal certainty and are disproportionate regarding deprivation of liberty, as earlier discussed.

[299] Therefore the cases relied on by the claimant in relation to this point can be distinguished and in particular given the peculiar circumstances of ***Re B. C. Motor Vehicle Act*** in respect of the Jamaican provisions in question, one cannot use the threat of imprisonment under those provisions to deem them unconstitutional. If it can legitimately and independently be found that the obligations generated and the offences created in support of those obligations by the impugned provisions are appropriate and the requirements of due process in proof of their breach are adequate, then there would be no basis on which to declare those provisions unconstitutional. The discussions in relation to the Regimes protection of LPP and its minimal interference in respect of confidentiality and privacy show that the impugned provisions which prescribe a penalty that may include imprisonment for breach of aspects of the Regime are in accord with section 13(3)(a) of the Charter and hence are constitutional.

[300] We therefore find that there is no arbitrary or unjustified deprivation of liberty occasioned by the Regime. Although the attorney-at-law's liberty is imperiled, there is no infringement of the constitutional entitlement to liberty as any deprivation of that liberty would fall squarely within the provided exception in section 13 (3) (a). It would only be deprivation after a conviction and sentence following due process. The enforcement of the

Regime is therefore not arbitrary and is based on legal certainty. The impugned provisions therefore do not infringe the attorney-at law's constitutional liberty interests.

The Liberty interests of Clients

[301] In ***FLSC v Canada (Attorney General)***, the judge at first instance found that the impugned provisions put both lawyers' and clients' liberty interests in jeopardy. At paragraph 142, Gerow J. stated:

> [I]t is apparent that the underlying purpose of the record keeping and record retention provisions of the Regime, as it applies to lawyers and legal firms, is to advance the criminal law interest of deterring, detecting, investigating and prosecuting crimes committed by lawyers' clients by having lawyers create a paper trail that can be used to prosecute their clients. That underlying purpose clearly puts clients' liberty interests at stake.

[302] In the Court of Appeal, Hinkson J.A. (who wrote for a majority of the court) held that the clients' liberty interests are engaged because the provisions facilitate access to confidential information that may be disclosed to law enforcement for any purpose including pursuing criminal charges. At paragraphs 88-90, he reasoned that:

> [88] …As previously mentioned, I am satisfied that the Regime potentially facilitates state access to information which is prima facie the subject of solicitor-client confidentiality. While the Regime offers some protection for the disclosure of privileged information through s. 64 of the Act, confidential client information which is not found to be privileged has no such protection. In my opinion, much of this information could be directly relevant to the prosecution of criminal charges against a client, conviction for which would carry the threat of imprisonment.
>
> [89] For example, lawyers who effect financial transactions for clients of $3,000 or more are required to create and keep a "receipt of funds record", which contains, inter alia, the client's name, address and occupation (or nature of business if the client is an entity); the number and type of, and name on, any account that is affected by the transaction; the amount and currency of

> the funds received; the purpose and details of the transaction, including other persons or entities involved; and the means by which the funds, if cash, are received, such as by armoured car, in person, or by mail. This information may then be obtained by the FINTRAC through a warrantless search of the lawyer's office and disclosed to law enforcement agencies.
>
> [90] I have already rejected Canada's contention that information obtained and disclosed by the FINTRAC to a law enforcement agency can only be used for the purpose of ensuring lawyer compliance with Part 1 of the Act. This position is simply not supported by the plain meaning of s. 65 of the Act. Thus in my opinion, confidential client information obtained by the FINTRAC may be disclosed to law enforcement for the purpose of ensuring lawyer compliance with the Regime. It may then be used by the law enforcement agency for any purpose, including pursuing a criminal charge against the client.

[303] That position was however by no means unanimous. Frankel J.A. with whom Garson J.A. concurred, while agreeing with Hinkson J.A. on everything else, was of the view that, *"While the liberty interest of an individual client would be engaged if and when that client is charged with an offence punishable by imprisonment, I am unable to accept that it is engaged by a requirement imposed on a third-party to create and maintain records that might later assist in an investigation giving rise to that charge or be used as evidence in support of that charge." (See: paragraph 163)*

[304] At paragraph 165 he continued:

> If requiring a lawyer to keep a record relating to a financial transaction of a client engages the client's liberty interest, then it logically follows that requiring a stock broker or financial advisor to file a suspicious-transaction report with respect to a client's activities engages that client's liberty interest. In other words, every provision of the Act imposing a record-keeping or reporting requirement that could result in the FINTRAC disclosing information to law enforcement would engage the liberty interest of the person in respect of whom the record or report was made.

[305] Frankel J.A. was of the view that the uncertainty as to whether or not the records would actually be used to launch or support a prosecution made the connection too indirect to say that the client's liberty interest was imperiled.

[306] The Supreme Court did not decide the point, finding it unnecessary to do so, though Cromwell J did observe that both the first instance judge and the majority of the Court of Appeal held that the liberty interest of clients was engaged.

[307] He further observed that it had not been suggested that the s. 7 analysis would be different in relation to clients' as compared to lawyers' liberty interests. The Supreme Court of Canada accepted categorically that it was indisputable that the provisions engaged the liberty interests of lawyers. In the circumstances, this court considers that having regard to Cromwell J's observations and the primary focus of the section 7 analysis on the lawyers' duty of commitment to their clients' causes, it may very well have been that had the Supreme Court directed its mind to a consideration of whether the liberty interests of clients were engaged, it would have agreed with the courts below.

[308] In light of the analysis conducted in respect of the liberty interest of attorneys-at-law in which it was concluded that the interest related to the physical deprivation of liberty and not just to the threat of imprisonment, it would seem to follow that the Regime engages clients' liberty interest but does not infringe it in a manner that is unconstitutional, given that any proceedings against a client which leads to the deprivation of liberty, would be in accordance with the exception contained within s. 13(3)(a) of the Charter. Further given the fact that the Charter does not contain the phrase "principles of fundamental justice" and we have held that the right to liberty does not apply to the threat of imprisonment, we are more attracted by the opinion of the minority in the Court of Appeal in ***Canada***

(Attorney General) v FLSC who held that the liberty interest of clients would not be engaged by the record keeping requirements imposed upon attorneys-at-law as the connection between such record keeping and any potential eventual prosecution was too uncertain and indirect.

ISSUE 5: WHETHER THE REGIME INFRINGES THE INDEPENDENCE OF THE BAR?

The Evidence

[309] All parties produced affidavit evidence touching on this issue. Some of that evidence has already been outlined in other sections of this judgment and should be considered in conjunction with the evidence that will now be reviewed, as the backdrop against which the various submissions were made.

[310] Mr. Donovan Walker (President of the claimant Jamaican Bar Association at the time of swearing his affidavits) averred, on behalf of the claimant, that the regime interfered to an unacceptable degree with the independence of the bar. He stated that apart from attorneys being treated as DNFIs, they are and were subject to AML laws and susceptible to suspicious transaction reports made by financial institutions they utilized which would be sufficient to capture suspicious activities in which they or their clients may be involved. Thus it was unnecessary to designate attorneys as DNFIs which encroached on the independence of the bar, as there are less intrusive means currently working.

[311] Mr. Wilkinson (immediate Past President of the claimant Jamaican Bar Association at the time of swearing his affidavit) also for the claimant in his affidavit stated that it was irrelevant that the Minister of National Security had made similar orders regarding other classes of persons as those categories of persons do not have the same relationship with their clients as attorneys have with theirs and the issues relating to maintaining an

independent Bar and an independent Judiciary do not arise in relation to them. These he stated are issues vital to the administration of justice.

[312] Mr. Robyn Sykes (Chief Technical Director of the FID and former General Counsel for the Bank of Jamaica), on behalf of the 1st defendant stated that there were several other countries that had passed legislation that subjected attorneys to AML requirements and that the Regime, if properly applied, should serve to deter and assist in the detection of money laundering and other financial crimes.

[313] Mr. Albert Stephens (Principal Director of the FID) on behalf of the 1st defendant noted that the legal profession is considered to be in the high risk category for money laundering by virtue of the nature of their interaction with individuals and their activities in treating with clients' funds under their control. He stated that, as an integral part of Jamaica's AML efforts, persons registered with the General Legal Council (GLC) as attorneys should be required to become a part of the reporting entities under POCA. Furthermore, that the number of Suspicious Transaction Reports (STRs) filed relating to members of the profession warranted closer regulation. He also stated that the level of regulation prescribed in the Orders under POCA avoids conflict with the principles of LPP and in general must be held in balance with the equally important requirements of national security and the urgent need to combat money laundering not only here in Jamaica but also in the international community.

[314] On behalf of the second defendant, Mr. Michael Hylton Q.C. (Chairman of the 2nd defendant GLC) stated at paragraph 40 of his affidavit as follows:

> [I]n respect of the constitutionality of the regime as applicable to the activities of attorneys the Guidance adopts a position that is in keeping with decisions turning on the European Convention on Human Rights, namely that the application of the regime to attorneys is strictly confined to the prescribed activities and that the obligations imposed by the regime (including the suspicious

> transaction reporting obligations under Part IV of POCA) are not applicable when attorneys are engaged as officers of the Court in the representation of clients in criminal or civil proceedings or in giving legal advice to their clients.

The Submissions

[315] The claimant contends that the independence of the bar is a principle of fundamental justice which includes the attorney's duty of commitment to the client's cause; an enduring principle that is essential to the integrity of the administration of justice.

[316] The claimant argues that independence of the Bar is fundamental to the way in which the legal system ought to operate and is an element of the rule of law essential to the constitution of a modern democracy. Further that it is no less important than an independent judiciary, since the cornerstone of an independent judiciary is an independent bar. (See **The Role of an Independent Legal Profession in Safe Guarding Ethical Governance and Accountability** by Colin Nichols QC, Journal of Commonwealth Lawyers Association (April, 2006) Volume 5 No.1; ***Paul Diamond v Guy Mansfield QC, David Etherton QC, Richard Price QC and Neil Mallon*** [2006] EWHC 3290**,** ***Canada (Attorney General) v. Federation of Law Societies*** and ***Jamaican Bar Association v Attorney General and General Legal Council.*** The claimant further contends that the application of POCA to attorneys is inconsistent with the integral and essential role played by attorneys in the proper administration of justice and maintenance of the rule of law.

[317] The claimant maintains that the Regime violates sections 13 (3) (a), 13 (j) and 16 of the Jamaican Charter in a manner that fails to conform to the principle of the independence of the Bar. It also submits that the constitutional right to due process and a fair hearing within a reasonable time by an independent and impartial court established by law as provided for by sections 13 (3) (r), 14 (2) (d) and section 16 (1) and (2) is

egregiously violated by the Regime since attorneys appearing before the court have been transformed into agents of the state by virtue of the recording and reporting provisions.

[318] The claimant submits that in so far as the AML regime applies to attorneys and their clients, it completely destroys the attorney-client relationship to the extent that among other things it affects the independence of the Bar. The Regime enables the government to obtain information from attorneys about their clients without regard for the unique role of lawyers in society which is integral to an independent judiciary and their duty of loyalty to their clients.

[319] The claimant argues that the Regime affects attorneys, their clients and the rule of law in so far as it impacts attorneys' duty of loyalty to their clients and their ability to freely take instructions and give advice to their clients. Further, by requiring attorneys to pass information in a subjective manner to the government while continuing to act for their clients pursuant to sections 94 and 97 of POCA, that creates a situation of divided loyalty and ignores the fact that attorneys operate in a fiduciary role and capacity with their clients, unlike persons in the other regulated professions or businesses. The Regime has had the effect of turning the attorney into an agent against his client and is unconstitutional. Similar legislation was struck or read down by the Supreme Court of Canada as violating the attorneys' duty of commitment to the client's cause. See (***Canada (Attorney General) v. FLSC***)

[320] The first defendant submits in response that the challenge to the constitutionality of the Regime is without merit. Organized crime depends on facilitators who include lawyers and the risk of attorneys being used as intermediaries for money laundering, justified extending the Regime to incorporate attorneys.

[321] The 2nd defendant asserts that the courts have recognized the need for the establishment of statutory regimes which apply to persons and institutions which are in a position to facilitate the laundering of money and the authorities are overwhelmingly in favour of the extension of these regulatory regimes to the legal profession. ***Canada (Attorney General) v FLSC.***

[322] The 2nd defendant therefore argues that the Order of the Minister and the Guidance promulgated by the GLC are compatible with the Charter of Fundamental Rights and Freedoms and are justified in a free and democratic society. Further, that the Regime is also compatible with proper and ethical standards for the legal profession and is required in the public interest to combat the undoubted vice of money laundering.

[323] In submissions outlined previously, but worth repeating in the context of this issue, the 2nd defendant maintains that it is only to the extent that activities of the lawyer engage the State's due process obligations that the existence of LPP and the special protection afforded to lawyers are justified. There can be no justification for special protection where the attorney steps out of the traditional role of legal adviser and simply acts as agent in the client's business which has no connection to the administration of justice or the provision of legal advice. Equally the 2nd defendant argues, there can be no justification for affording protection where the activities of the attorney conducted in the regulated sector are the same as carried out by other professionals such as the banker handling clients' money, the accountant creating companies to provide tax shelters, or the real estate agent dealing with property transactions. These activities do not engage any role of the attorney in the administration of justice.

[324] The 2nd defendant acknowledges that the state should not impose obligations on attorneys that interfere with their duty of commitment to

advancing their clients' legitimate interests. However it contends that the established commitment to the client's cause relates to the representation of the client in criminal or civil proceedings and the giving of legal advice whether in connection to such proceedings or generally in respect to non-litigious business where advice is sought as to what should prudently and sensibly be done in a relevant legal context. This is the basis of the fundamental rights in question. It was emphasized that the extension of POCA to attorneys in Jamaica is strictly confined to those who engage in the enumerated activities set out in the Order and is not applicable to actions taken in the course of the representation of clients in criminal or civil proceedings or in the giving of legal advice.

[325] Further as also previously outlined, the 2nd defendant submits that LPP and confidentiality which protect information from disclosure, are confined to communications and documents made for the purpose of actual or contemplated legal proceedings or for the purposes of obtaining legal advice and this privilege does not extend to protect communications made for the purpose of committing a crime or fraud.

[326] The attorney has no duty to keep communications relating to fraud in confidence and further if he were to proceed, the attorney would become an accomplice to the fraud. Therefore the 2nd defendant argues, if the attorney owed a duty to hold the information in confidence, the attorney could no longer properly be regarded as an officer of the court in the real sense of that phrase, as the duty to keep in confidence and assist the client's criminality would supersede any duty owed by the attorney as an officer of the court engaged in the administration of justice. That the 2nd defendant submits is not the law; LPP and the duty of undivided loyalty do not provide any justification for an attorney assisting a client to pursue an illegal transaction.

Discussion and Analysis

The Scope and effect of the principle of the independence of the Bar

[327] In ***Canada (Attorney General) v. Federation of Law Societies,*** Cromwell J speaking for the majority of the Supreme Court of Canada, outlined at paragraph 77 that there were two versions of the principle of the independence of the bar; a broad version, which is that *"lawyers are free from incursions from any source, including from public authorities"*, and a narrow version that:

> [B]oils down to the proposition that the state cannot impose duties on lawyers that interfere with their duty of commitment to advancing their clients' legitimate interests. In my view, the narrower principle is the one that is most relevant to this case: the central contention is that this scheme substantially interferes with the lawyers' duty of commitment to their clients' cause because it imposes duties on lawyers to the state to act in ways that are contrary to their clients' legitimate interests and may, in effect, turn lawyers into state agents for that purpose.

[328] He continued at paragraph 83 - 84 as follows:

> [83] The question now is whether another central dimension of the solicitor-client relationship — the lawyer's duty of commitment to the client's cause — also requires some measure of constitutional protection against government intrusion. In my view it does, for many of the same reasons that support constitutional protection for solicitor-client privilege. "The law is a complex web of interests, relationships and rules. The integrity of the administration of justice depends upon the unique role of the solicitor who provides legal advice to clients within this complex system": *McClure*, at para. 2. These words, written in the context of solicitor-client privilege, are equally apt to describe the centrality to the administration of justice of the lawyer's duty of commitment to the client's cause. A client must be able to place "unrestricted and unbounded confidence" in his or her lawyer; that confidence which is at the core of the solicitor-client relationship is a part of the legal system itself, not merely ancillary to it: *Smith v. Jones*, [1999] 1 S.C.R. 455, at para. 45, citing with approval, *Anderson v. Bank of British Columbia* (1876), 2 Ch. D. 644 (C.A.); *McClure*.

> The lawyer's duty of commitment to the client's cause, along with the protection of the client's confidences, is central to the lawyer's role in the administration of justice.
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> [84] We should, in my view, recognize as a principle of fundamental justice that the state cannot impose duties on lawyers that undermine their duty of commitment to their clients' causes. Subject to justification being established, it follows that the state cannot deprive someone of life, liberty or security of the person otherwise than in accordance with this principle.

[329] It is however worthy of note that while agreeing with the outcome, the minority of the Supreme Court McLachin CJ and Moldaver J disagreed with the majority view that the lawyer's commitment to the client's cause was a principle worthy of elevation to a constitutional right. Their view was that the statutory regime was unconstitutional because of its infringement of solicitor – client privilege. At paragraphs 119 – 120 they stated:

> [119] However, we respectfully disagree with the approach taken by our colleague in his analysis of s. 7 of the *Charter*. To the extent that the s. 7 interests of the lawyer are engaged, we do not share our colleague's view that the principle of fundamental justice that would be offended is the lawyer's commitment to the client's cause. In our view, this "principle" lacks sufficient certainty to constitute a principle of fundamental justice: see *R. v. Malmo-Levine*, 2003 SCC 74, [2003] 3 S.C.R. 571, at para. 113. The lawyer's commitment to the client's interest will vary with the nature of the retainer between the lawyer and client, as well as with other circumstances. **It does not, in our respectful opinion, provide a workable constitutional standard.**
>
> [120] Rather, we are inclined to the view that the s. 7 analysis would be better resolved relying on the principle of fundamental justice which recognizes that the lawyer is required to keep the client's confidences — solicitor-client privilege. This duty, as our colleague explains in his discussion of s. 8, has already been recognized as a constitutional norm. We note that in applying the norm of commitment to the client's cause, our colleague relies on breach of solicitor-client privilege. In our view, breach of this principle is sufficient to establish that the potential deprivation of liberty would violate s. 7. (Emphasis added)

[330] The view of the minority that they thought the decision in relation to section 7 should have been based on solicitor – client privilege and their observation in paragraph 120 that in applying what the majority found to be the constitutional norm of commitment to the client's cause, reliance was placed by Cromwell J on breach of solicitor-client privilege, we find to be telling. Given the fact that the Jamaican Charter does not contain the concept of "principles of fundamental justice" there would be no basis to hold in the Jamaican context that "commitment to the client's cause" is a constitutional right. This is even more so given the minority's views. Though not a constitutional norm, commitment to the client's cause is nevertheless an important concept which informs the duty attorneys have to their clients. To that extent we agree with the submission of the 2nd defendant that it is the limits to LPP which delimit the duty to the client's cause.

[331] As has been demonstrated in previous sections of this judgment the deficiencies suffered by the Canadian regime reviewed in ***Canada (Attorney General) v FLSC*** that imperiled solicitor-client privilege do not apply to the Jamaican Regime. In summary: 1) Under the Jamaican Regime the duties to report, record and retain material only arise when lawyers are engaged in the six activities listed in the Order, communication in relation to which are unlikely to attract LPP. However if privilege attaches in the Jamaican context POCA expressly protects LPP. This is unlike the situation in Canada where the duty to record and retain was much wider and would necessarily relate to some activities which attracted privilege; 2) Access to recorded information is given to the 2nd defendant, the body charged with maintaining professional standards for lawyers and not to an investigative agency. 3) Access in the Jamaican Regime is on Notice and not pursuant to a search warrant. 4) Further, the 2nd defendant has issued Guidance advising attorneys to sort their files prior to inspections which are to be carried out, to ensure that no

privileged material is handed over or disclosed. 5) Any dispute as to LPP that may arise can be settled by application to the court.

[332] Any such application would not suffer from the unconstitutional strictures contained in section 488.1 of the **Canadian Criminal Code** and section 64 of the **Proceeds of Crime (Money Laundering) and Terrorist Financing Act.** Included in the reasons why those sections were struck down was i) the strict time limits within which the application to determine privilege should be made, ii) the automatic loss of any privilege if the application was not made within time; and iii) the fact that they contained a provision permitting the court to request the Attorney General to view the sealed documents to assist in the process of determining privilege, and action which in itself would breach any privilege that attached.

[333] It is useful at this point to revisit the case of ***Balabel v Air India*** previously reviewed. It highlighted that the expanding role of lawyers meant that some solicitor - client activities or transactions could not properly benefit from the protection of LPP. At page 331 H Taylor LJ stated:

> It follows from this analysis that those dicta in the decided cases which appear to extend privilege without limit to all solicitor and client communication upon matters within the ordinary business of a solicitor and referable to that relationship are too wide. It may be that the broad terms used in the earlier cases reflect the restricted range of solicitors' activities at the time. Their role then would have been confined for the most part to that of lawyer and would not have extended to business adviser or man of affairs. To speak therefore of matters "within the ordinary business of a solicitor" would in practice usually have meant the giving of advice and assistance of a specifically legal nature. But the range of assistance given by solicitors to their clients and of activities carried out on their behalf has greatly broadened in recent times and is still developing. Hence the need to re-examine the scope of legal professional privilege and keep it within justifiable bounds.

[334] The words of Taylor LJ need to be carefully considered. Other professionals designated as DFNIs such as Public Accountants owe their

clients a duty of confidentiality. However they do not enjoy the benefit of LPP. Where therefore the attorney goes outside of the role of legal adviser and acts as the clients agent in transactions which do not involve the seeking or giving of legal advice and do not engage the administration of justice no privilege would attach attracting a consideration of commitment to the client's cause.

[335] We also accept that the traditional commitment to the client's cause relates to situations where the client is being represented in criminal or civil proceedings or receiving legal advice in relation to those proceedings or to non-litigious transactions in a relevant legal context. This role of the lawyer is essential for securing the fundamental rights to liberty (s. 14) and due process (s. 16) provided by the Charter.

[336] This approach is in keeping with the decision in ***Michaud v France*** where in assessing the proportionality of the interference with lawyers activities occasioned by AML reporting requirements it was noted at paragraphs 126 – 127 that they were limited to financial and property transactions and did not affect the lawyers role of defending clients. It was also noted that reports were not being sent straight to Tracfin, their designated authority, but to the President of the Bar Council of the *Conseil d'Etat* and the Court of Cassation or the chairman of the Bar of which the lawyer is a member. In the Jamaican context the filtering process is through the nominated officer in a firm, or especially for the sole practitioner, through seeking legal advice from the Jamaican Bar Association or the telephone/email hotline facility which the GLC had established to offer advice. This facility had to be discontinued after the injunction was granted at the interlocutory stage of this matter, but would be expected to resume if the injunction is lifted. Where an attorney finds it necessary or desirable, that attorney could, independently of these avenues, seek legal advice concerning whether or not a suspicious transaction report should be filed.

[337] Decisions from the United Kingdom and Europe are also instructive on this point given that the Jamaican legislative scheme bears similarity to their regimes which are linked to specified activities rather than the Canadian model where its regime was not limited to specific activities but was applicable to all lawyers, (including legal counsel handling client funds in the course of the representation of a client in criminal or civil proceedings), when receiving or giving instructions to pay funds except in relation to funds received or paid in respect of professional fees, disbursements and expenses or securing bail.

[338] ***Bowman v Fels*** which dealt with the general duly of disclosure in section 328 of the UK POCA (similar to section 93 of POCA) held that section 328 was not intended to cover or affect the ordinary conduct of litigation by legal professionals, which included any step taken in litigation from the issue of proceedings and the securing of injunctive relief or a freezing order up to its final disposal by judgment. The role of LPP in enhancing the administration of justice was therefore recognised and protected in that decision.

[339] The courts have also recognized that it is consistent to impose reporting obligations on attorneys, in so far as that information excludes privileged communications. (See: ***Orde Des Barreaux, Case C-305/05*** [2006] EUECJ, del. December 14, 2006.)

[340] The claimant submitted that by requiring attorneys to pass information in a subjective manner to the government while continuing to act for their clients, creates a situation of divided loyalty. In the consent scheme established under the Regime, (see sections 94, 95 and 99 of POCA and paragraph 28.3 of the Guidance), where a client instruction is received prior to a transaction or activity taking place, or arrangements being put in place, and there are grounds for knowledge or belief that the transaction or the property involved, may relate to money laundering, a report must be

made to the FID, in the prescribed form, and consent sought to proceed with that transaction or activity. The court accepts the submission of the 2nd defendant that as an officer of the court the attorney has no obligation to assist the client in what he believes to be an illegal transaction.

[341] In the context of a banker customer relationship it was held in ***Shah v HSBC Private Bank*** [2012] EWHC 1283 (QB) that while consent was being awaited there was an implied term which permitted the bank to decline to carry out the client's instructions. Similar reasoning would apply to an attorney awaiting consent to proceed. Further it was stated in ***K v National Westminster Bank*** [2007] 1 WLR 389 that if the law made carrying out the client's mandate illegal then there could be no breach of duty to decline to perform the contract unless and until the impediment was removed. It is on the basis of that reasoning that the Guidance at paragraph 23.6 recommends that while awaiting consent, the attorney should not proceed but may advise the client that he is carrying out the necessary due diligence.

[342] Also as discussed under the section dealing with LPP the high *mens rea* threshold that needs to be achieved before the obligation to file a suspicious transaction report is triggered, *"knowledge or reasonable grounds to believe"*, is an additional safeguard not found in other statutory regimes such as in the UK where the standard is that of suspicion.

[343] We accordingly agree with the submissions of the 2nd defendant that given the high threshold in the Jamaican POCA as regards when the duty arises to make suspicious transaction reports, *"there can be no loyalty or protection of privilege or confidence to shield communications made in the course of the money laundering transaction or to prevent disclosure to the law enforcement agency."*

[344] The claimant raised a concern that they were made into state agents by virtue of the Regime which required them to collect and retain information which may later be passed to or accessed by the state and this has created a conflict of interest. This concern featured prominently in the reasoning of Cromwell J in ***Canada (Attorney General) v FLSC.*** At paragraphs 107 – 112 he stated:

> [107] The scheme requires lawyers to make and retain records that the profession does not think are necessary for effective and ethical representation of clients. The Federation's *Model Rule on Client Identification and Verification Requirements* (online), which has been adopted by all law societies in Canada, contains a number of verification and record keeping provisions similar to the requirements of the Act and Regulations. However, the Model Rule is narrower in scope. A few illustrative examples will make this point. The Model Rule does not impose verification requirements when the lawyer is engaged in or gives instructions in respect of an electronic funds transfer: r. 4. The lawyer is not always required to identify the third party when engaged in or giving instructions in respect of a funds transfer, as r. 6 provides that this should be done "where appropriate". There is no obligation under the Model Rule to establish an internal compliance program, as is required under s. 9.6 of the Act. As a final example, the Model Rule contains no equivalent of the scheme's obligation to produce and retain a "receipt of funds record" under s. 33.4 of the Regulations.
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> [108] Professional ethical standards such as these cannot dictate to Parliament what the public interest requires or set the constitutional parameters for legislation. But these ethical standards do provide evidence of a strong consensus in the profession as to what ethical practice in relation to these issues requires. Viewed in this light, the legislation requires lawyers to gather and retain considerably more information than the profession thinks is needed for ethical and effective client representation. This, coupled with the inadequate protection of solicitor-client privilege, undermines the lawyer's ability to comply with his or her duty of commitment to the client's cause. The lawyer is required to create and preserve records which are not required for ethical and effective representation. The lawyer is required to do this in the knowledge that any solicitor-client

confidences contained in these records are not adequately protected against searches and seizures authorized by the scheme. This may, in the lawyer's correctly formed opinion, be contrary to the client's legitimate interests and therefore these duties imposed by the scheme may directly conflict with the lawyer's duty of committed representation.

[109] I also conclude that a reasonable and informed person, thinking the matter through, would perceive that these provisions in combination significantly undermine the capacity of lawyers to provide committed representation. The reasonable and well-informed client would see his or her lawyer being required by the state to collect and retain information that, in the view of the legal profession, is not required for effective and ethical representation and with respect to which there are inadequate protections for solicitor-client privilege. Clients would thus reasonably perceive that lawyers were, at least in part, acting on behalf of the state in collecting and retaining this information in circumstances in which privileged information might well be disclosed to the state without the client's consent. This would reduce confidence to an unacceptable degree in the lawyer's ability to provide committed representation.

[110] I conclude that the scheme taken as a whole limits the liberty of lawyers in a manner that is not in accordance with the principle of fundamental justice relating to the lawyer's duty of committed representation.

[111] I emphasize, however, that this holding does not place lawyers above the law. It is only when the state's imposition of duties on lawyers undermines, in fact or in the perception of a reasonable person, the lawyer's ability to comply with his or her duty of commitment to the client's cause that there will be a departure from what is required by this principle of fundamental justice.

[112] In light of my holding in relation to s. 8 of the *Charter*, the scheme requires significant modification in order to comply with the requirements of the right to be free from unreasonable searches and seizures. Given that there are a number of ways in which the scheme could be made compliant with s. 8, I do not want to venture into speculation about how a modified scheme could appropriately respond to the requirements of s. 7. However, it seems to me that if, for example, the scheme were to provide

> the required constitutional protections for solicitor-client privilege as well as meaningful derivative use immunity of the required records for the purposes of prosecuting clients, it would be much harder to see how it would interfere with the lawyer's duty of commitment to the client's cause.

[345] Despite the observation made by Cromwell J that the Canadian regime went beyond the requirements of the Canadian Model Rule, only regulations[8] which were particularly offensive in that they threatened solicitor-client privilege or were unnecessarily onerous and unreasonable as they related to lawyers were struck down. These were regulations 33.3, 33.4, 59.4 and 11.1. He however also acknowledged that an appropriate scheme protective of constitutional rights could be developed that did not breach the right to protection against unreasonable search and seizure and also secured the right to liberty.

[346] Regulation 33.3 made legal counsel subject to Part 1 of the Act (verification and record keeping requirements) when receiving or paying funds or giving instructions to pay funds (other than those received or paid in respect of professional fees, disbursements, expenses or bail or when doing so on behalf of their employer).

[347] Regulation 33.4 required every legal counsel and every legal firm when engaged in an activity described in section 33.3, to keep records of the receipt of funds record in respect of every amount of $3,000 or more that they received in the course of a single transaction, unless the amount is received from a financial entity or a public body; and where the receipt of funds record is in respect of a client that is a corporation, a copy of the part of official corporate records that contains any provision relating to the power to bind the corporation in respect of transactions with the legal

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[8] The regulations were contained in The Proceeds of Crime (Money Laundering) and Terrorist Financing Regulations SOR/2002-184

counsel or legal firm. Records were to be kept for at least five years and handed to FINTRAC within 30 days of request.

[348] Regulation 59.4, subject to certain exceptions, required every legal counsel and every legal firm in respect of a transaction for which a record was required to be kept under section 33.4; to ascertain the identity of every person who conducted the transaction; to confirm the existence of and ascertain the name and address of every corporation on whose behalf the transaction is conducted and the names of the corporation's directors; and to confirm the existence of every entity, other than a corporation, on whose behalf the transaction was conducted.

[349] Regulation 11.1 as it applied to legal counsel or legal firms required to confirm the existence of an entity imposed very onerous obligations: in the case of a corporation information as to the names of all directors and the names and addresses of all shareholders who held at least a set percentage of shares; in the case of a trust, the names and addresses of all trustees and all known beneficiaries and settlors of the trust; in the case of an entity other than a corporation or trust the same information; and in all cases, information establishing the ownership, control and structure of the entity. Further the lawyer was required to ensure accuracy of the information obtained and if the accuracy could not be confirmed special measures had to be undertaken and detailed and extensive investigations had to be conducted to ascertain the name of the most senior managing officer of the company and the true nature and character of the entity.

[350] The important thing to note about all these regulations is that the Canadian regime unlike the Jamaican regime had a much wider scope. Thus the identification, verification and record keeping provisions could apply in respect of transactions which attracted solicitor-client privilege. That coupled with the fact that there were extensive search powers which inadequately protected privilege meant that solicitor-client privilege could

easily have been breached giving the state access to privileged information, in a context where if the attorneys failed to comply they would be guilty of criminal offences. Hence Cromwell J's conclusion at paragraph 114 that the limitation on the lawyers rights were not demonstrably justified as it was *"the combination of the inadequate protection of solicitor-client privilege and the information gathering and retention aspects of the scheme that result in the s. 7 violation."*

[351] Further at paragraph 116 dealing with disposition of the matter he stated that, *"To summarize, I conclude that the search provisions of the Act infringe s. 8 of the Charter and that the information gathering and retention provisions, in combination with the search provisions, infringe s. 7 of the Charter."* Therefore it is clear that the spectre of the inadequate protection of privilege that would affect the attorneys ability to effectively represent their clients legal interests permeated Cromwell J's reasons and influenced the finding that the Canadian regime compromised the attorneys' commitment to their clients' cause.

[352] The Jamaican Regime however does not suffer from those deficiencies. The 2nd defendant has no search powers. LPP is properly protected in that the attorney is advised by the 2nd defendant to only make available non-privileged records for inspection. Interestingly the Canadian Model Rule and the identification, verification and record keeping provisions under the Regime are quite similar though they are a bit more extensive under the Regime. Also though Cromwell J at paragraph 107 noted that the Canadian regime went further than the Model Rule and gave some examples, it is only in respect of regulation 33.4 that obligations were struck down. Therefore the additional verification requirements for electronic funds transfers beyond what was contained in the Model Rule, and the requirement to develop internal compliance procedures which were not contained in the Model Rule, were not held to be unconstitutional even though they went beyond what the Law Societies had in place.

[353] In fact Cromwell J acknowledged the importance of having lawyers subject to an AML/CFT regime and recognised that standards set by professional bodies are not the test for constitutionality of legislation. At paragraph 113 he stated:

> The information gathering and record retention provisions of this scheme serve important public purposes. They help to ensure that lawyers take significant steps so that when they act as financial intermediaries, they are not assisting money laundering or terrorist financing. The scheme also serves the purpose of requiring lawyers to be able to demonstrate to the competent authorities that this is the case. In order to pursue these objectives, Parliament is entitled, within proper limits which I have outlined, to impose obligations beyond those which the legal profession considers essential to effective and ethical representation. Lawyers have a duty to give and clients are entitled to receive committed legal representation as well as to have their privileged communications with their lawyer protected. Clients are not, however, entitled to make unwitting accomplices of their lawyers let alone enlist them in the service of their unlawful ends.

[354] Notwithstanding this clear statement of law and principle one of the concerns of the claimant is the extent to which law enforcement may be able to access the retained information. Under section 91 A (2) (d) of POCA the 2nd defendant may share non-privileged information pertaining to any examination with another Competent Authority, Supervisory Authority or Designated Authority. The 2nd defendant however remains regulatory and monitoring body.

[355] The Regulations however also speak to access to information recorded and retained by attorneys. Regulation 14 (4) of the Regulations provides that, *"In relation to all relevant financial business a record shall be kept of each transaction, in such manner and form as shall facilitate the reconstruction of transactions and the provision of information to the designated authority or competent authority as may be required under any provision of the Act, these Regulations, or any other enactment"*

[356] Under section 105 POCA an appropriate officer may apply to the court for a disclosure order where *"a person specified in the application is subject to a forfeiture investigation or a money laundering investigation, or that property specified in the application is subject to a civil recovery investigation."* Section 107 POCA gives the Court power to grant an order for entry in support of the disclosure order. However the important thing is that for the designated authority to gain access to retained information, unless it is handed over by the 2nd defendant, (which has stated that its function is not to support investigation of offences), there would have to be judicial scrutiny and sanction and courts are well aware that search powers in relation to a lawyers' office should be only be used when there is no other appropriate less intrusive method of obtaining the information. See for example ***Jamaican Bar Association v A.G. & Anor, Ernest Smith & Co. and Others v A.G. and Anor.*** Critically also section 108 (1) (a) indicates that in complying with a disclosure order, information subject to LPP is not required to be produced or allowed to be accessed.

[357] The situation therefore seems to be that if material that has been collected falls within "proper limits" as suggested by Cromwell J and is not subject to LPP, if, in appropriate circumstances, the court were to sanction access to that material the duty to have collected and retained it could not properly be viewed as a breach of the attorney's commitment to the clients cause. Being within proper limits would also mean that any concern about lawyers being state agents compromising the right to independent counsel and to a fair trial would not arise. The nature of the information sought to be obtained in Jamaica and the safeguards inherent in the Regime mean that any material collected by the 2nd defendant would be within proper limits.

[358] We are therefore of the view that the disclosure, identification, verification and retention requirements of the Regime are within proper limits. The Regime satisfies the objectives of the legislation without breaching the

constitutional rights of attorneys or their clients and without causing attorneys to be in breach of their commitment to their clients' cause.

ISSUE 6: WHETHER ANY INFRINGEMENT OF THE REGIME IS DEMONSTRABLY JUSTIFIED IN A FREE AND DEMOCRATIC SOCIETY?

[359] The rights guaranteed by section 13 of the Charter are not absolute. When assessing an apparent derogation caused by a statute, using the ***Hinds*** test, the starting point is always the presumption of constitutionality and that the legislation is reasonably required. The new Charter however has incorporated the terminology "demonstrably justified" as a measure to determine constitutionality when a breach of a fundamental right is alleged. In ***R v Oakes*** which explained how the test should be applied the Supreme Court of Canada outlined that a claimant merely needs to show that prima facie, the statute infringes one or more of the fundamental rights provided for under the Constitution and upon the alleged infringement being established, the defendant must show that the infringement is demonstrably justified in order for the impugned legislation or action to be upheld as constitutional.

[360] We have found, as has been submitted by the claimant, that the Charter rights to privacy of attorneys, members of the claimant association, under sections 13 (3) (j) (ii) *(protection of private life which includes professional life)* and (iii) *(protection of communication),* have in fact been interfered with. Following the test in ***Oakes***, in order to establish that a limit is reasonable and demonstrably justified in a free and democratic society, two central criteria must be satisfied. First, the objective, which the measures responsible for a limit on a Charter right or freedom are designed to serve, must be of sufficient importance to warrant overriding a constitutionally protected right or freedom. It is necessary, at a minimum, that an objective relate to concerns which are pressing and substantial in

a free and democratic society before it can be characterized as sufficiently important.

[361] Second, once a sufficiently significant objective is recognized, then the defendant must show that the means chosen are reasonable and demonstrably justified. This is aptly referred to as a form of proportionality test, which has three elements. Firstly, the measures adopted must be carefully designed to achieve the objective in question, that is, not arbitrary, unfair or based on irrational considerations but rationally connected to the objective. Secondly, if this first element is satisfied, the means, should impair as little as possible the right or freedom in question. Thirdly, there must be a proportionality between the effects of the measures which are responsible for limiting the Charter right or freedom and the objective which has been identified as of sufficient importance.

[362] As it relates to the first criterion, we are of the view that the objective to be served is of sufficient importance such as to warrant the infringement. The evidence on behalf of the 1st defendant makes it clear that money laundering perpetuates high levels of criminal activities which negatively impacts national development and cripples our standing in the international community. The fact that the government thought it prudent to include money laundering and facilitators who launder the proceeds of crime as Tier 1 Threats in the National Security Policy reinforces the gravity of the situation.

[363] The fact that the Regime only imposes obligations on attorneys when they engage in six distinct activities, clearly illustrates that the objective of the Regime is not to arbitrarily interfere with attorneys rights but rather to effectively address, a critical social concern. Therefore, it goes no further than is necessary.

[364] Pursuant to the Guidance issued by the 2nd defendant, the inspection and examination of the attorney's office will be conducted on notice and by or under the authority of the 2nd defendant. It also offer directives which should be implemented so as to safeguard against inadvertent breaches or disclosure of privileged information. Further, the information which may be passed to the designated authority does not touch and concern privileged information, and may in many instances, not be protected by confidentiality because it falls within the ambit of furthering a criminal purpose. In our view, these directives are the strongest evidence that the means employed, pursuant to the objective, minimally impairs the right to privacy.

[365] Finally, this court is acutely aware of the implication of the Regime for attorneys. It imposes obligations previously unknown to the legal profession, and has infringed their privacy interests. When juxtaposed with the objective, the question is whether the infringement is proportionate? Bearing in mind the reality that wittingly or unwittingly attorneys are one group of professionals by the nature of the services they offer who are likely to be targeted to facilitate money laundering, the Regime is indeed an appropriate and adequate and proportionate response to the national and international fight against money laundering. It is in these circumstances, that we have found that the infringement of attorneys privacy rights represents minimal interference and is demonstrably justified.

THE NATURE OF THE DECLARATIONS SOUGHT

[366] The 2nd defendant essentially contends that the several declarations sought by the claimant are academic, generalized, non-specific and indefinite. It was asserted that declaratory relief should not be vague and hypothetical but address clear legal issues as to the powers, rights and obligations of the parties. Therefore it is important that the language and

scope of declarations sought are precise. (See: ***Chief Constable of North Wales Police v. Evans*** [1982] 1 W.L.R.1185; ***Aberdeen Development Co. v. Mackie, Ramsay and Taylor*** 1977 S.L.T.177).

[367] It was also submitted that the court has to consider the usefulness and appropriateness of particular declarations in relation to the respective parties and accordingly, where a declaration is in respect of the legislative functions of Parliament or the executive functions of the Minister, the GLC should not be included in the claim. (See: ***Cheney v. Murphy*** (1948) 117 L.J.R.1301.) Furthermore, it was contended that the court cannot properly grant a declaration which would have the effect of legitimizing action which is against the criminal law or the ethical standards of the profession. (See: ***Melstron v. Garner*** [1970] 1 W.L.R.603.)

[368] The claimant in reply argued that the 2nd defendant's submission that there was a sudden abandonment of reliefs sought without any application for amendment, was incorrect as it was not amending its claim. It was further submitted that in any event the 2nd defendant knew the case it had to meet and responded accordingly. The claimant also relied on section 19 (3) of the Constitution and rule 56.15(3) of the Civil Procedure Rules (CPR) to maintain that the court had the power to grant the Orders sought.

[369] The court notes that although the claimant did not file an amended fixed date claim form or make an oral application to amend, by virtue of its Reply, it sought to guide the court in respect of "refined" declarations that could be made. It is also clear that the 2nd defendant was able to meet the issues raised by the claimant. Further it is also accepted that the court is empowered by section 19 (3) of the Constitution and rule 56.15(3) of the CPR to grant any relief that appears to be justified on the claim.

[370] However, in light of the decision that we have reached and the outcome that it dictates, it is unnecessary to make a determination on the state of the declarations or to consider whether or not it would be appropriate to invoke the powers under section 19 (3) or rule 56.

CONCLUSION AND DISPOSITION

[371] Having given full consideration to this matter the court has determined that the application of the Regime to Attorneys-at-law is not inconsistent with their position and role in the proper administration of justice, and the maintenance of the rule of law. This is grounded in the fact that the obligations of Attorneys-at-law under the Regime are limited to activities which do not usually engage their roles of giving legal advice or providing representation in relation to actual or contemplated litigation. Consequently designation of attorneys as DNFIs does not engage or compromise their traditional duties or role.

[372] This court further finds that, although the liberty interests of attorneys (and clients) are engaged by the obligations under the Regime, any deprivation of liberty pursuant to the Regime would be subject to the due process of law provided for under the Charter, and accordingly the liberty interests of Attorneys and client are not infringed thereby.

[373] This court also finds that while the 2nddefendant is empowered by POCA, to examine and take copies of information or documents in the possession or control of the attorney; there is no authorization to search and seize. The entry into an attorney's office is by Notice with permission and the process of examination is dependent on the attorney's co-operation. The Attorney is able to assert a claim for privilege prior to any inspection or examination and therefore, LPP is safeguarded. In view of the fact that the examination and inspection are conducted by the 2nd Defendant, the regulatory body for attorneys, the monitoring of compliance by the 2nd

Defendant is an additional safeguard against the breach of LPP and not an unlawful intrusion.

[374] We find that LPP is protected and preserved by the Regime, and that the provisions and measures which guarantee this protection are sufficiently clear and certain. As is well established and agreed, LPP does not protect communications to an attorney, made with a view to further a criminal, fraudulent or iniquitous intention but protects communications made in the relevant legal context for the dominant purpose of legal advice or in those circumstances, where litigation is contemplated or pursued. The Regime explicitly recognizes this and protects LPP.

[375] The Attorney's duties to his client are well established. However, those duties *qua* attorney-at-law are primarily engaged where attorneys are acting in their traditional role which involves the administration of justice. The Regime does not prohibit attorneys from loyally and properly representing their clients but it has created a framework wherein attorneys may not simply turn a blind eye where they have reasonable grounds for knowing or believing that another person has engaged in a transaction that could constitute or be related to money laundering. It should further be borne in mind that an attorney does not owe his client a duty of confidentiality or undivided loyalty where that client has consulted the attorney for an illicit purpose. In light of the circumstances contemplated by the Regime, the legitimate duties of attorneys to their clients are not compromised.

[376] Undoubtedly the declaration of annual activities that is to be made to the 2nd defendant indicating whether or not any attorney has engaged in any of the activities listed in the Order within the past year; and the obligations to disclose STRs to the designated authority; the prohibition against tipping off; and the disclosure of records to the competent authority and

possibly the designated authority, interfere with attorney's rights to privacy of communications and to their private lives.

[377] However, as is evident from an assessment of the law including the Constitution and the provisions of the Regime, such interference is not substantial and is proportionate given the objectives of the Regime to combat money laundering and terrorist financing. The Regime includes sufficient safeguards to ensure only minimal impairment of these rights is occasioned in the pursuit of these undoubtedly important objectives. Accordingly even those aspects of the Regime which affect privacy rights are demonstrably justified in a free and democratic society.

Williams J

ORDER

[378] In the circumstances therefore, (as was announced on April 21, 2017), we have found that the declarations, stay and injunction sought in the Claimants FDCF should not be granted, as we have concluded that the Regime is constitutional.

[379] No Order as to costs.