



SUPREME COURT OF CANADA

CITATION: Canada (Attorney General) v. Federation of Law
Societies of Canada, 2015 SCC 7

DATE: 20150213
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BETWEEN:

Attorney General of Canada
Appellant
and
Federation of Law Societies of Canada
Respondent
- and -

**Criminal Lawyers' Association (Ontario), Canadian Civil Liberties Association,
Law Society of British Columbia, Canadian Bar Association, Advocates' Society,
Barreau du Québec and Chambre des notaires du Québec**
Interveners

CORAM: McLachlin C.J. and LeBel, Abella, Cromwell, Moldaver, Karakatsanis and
Wagner JJ.

REASONS FOR JUDGMENT: Cromwell J. (LeBel, Abella, Karakatsanis and Wagner JJ.
(paras. 1 to 117) concurring)

PARTIALLY CONCURRING JOINT REASONS: McLachlin C.J. and Moldaver J.

(paras. 118 to 121)

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CANADA (A.G.) v. FEDERATION OF LAW SOCIETIES

Attorney General of Canada

Appellant

v.

Federation of Law Societies of Canada

Respondent

and

**Criminal Lawyers' Association (Ontario),
Canadian Civil Liberties Association,
Law Society of British Columbia,
Canadian Bar Association,
Advocates' Society,
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Interveners

**Indexed as: Canada (Attorney General) v. Federation of Law Societies of
Canada**

2015 SCC 7

File No.: 35399.

2014: May 13; 2015: February 13.

Present: McLachlin C.J. and LeBel, Abella, Cromwell, Moldaver, Karakatsanis and
Wagner JJ.

Constitutional law — Charter of Rights — Right to liberty — Fundamental justice — Search and seizure — Solicitor-client privilege — Lawyer's duty of commitment to client's cause — Whether Canada's anti-money laundering and anti-terrorist financing legislation, as it applies to legal profession, infringes right to be free of unreasonable searches and seizures — Whether legislation infringes right not to be deprived of liberty otherwise than in accordance with principles of fundamental justice — If so, whether infringements justifiable — Canadian Charter of Rights and Freedoms, ss. 1, 7, 8 — Proceeds of Crime (Money Laundering) and Terrorist Financing Act, S.C. 2000, c. 17, ss. 5(i), 5(j), 62, 63, 63.1, 64 — Proceeds of Crime (Money Laundering) and Terrorist Financing Regulations, SOR/2002-184, ss. 11.1, 33.3, 33.4, 33.5, 59.4.

To reduce the risk that financial intermediaries may facilitate money laundering or terrorist financing, the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*, S.C. 2000, c. 17, and the *Proceeds of Crime (Money Laundering) and Terrorist Financing Regulations*, SOR/2002-184, impose duties on financial intermediaries, including advocates and notaries in Quebec and barristers and solicitors in all other provinces. The legislation requires financial intermediaries to collect, record and retain material, including information verifying the identity of those on whose behalf they pay or receive money. It puts in place an agency to oversee compliance, the Financial Transactions and Reports Analysis Centre of

Canada, and allows that agency to search for and seize that material. It imposes fines and penal consequences for non-compliance. Sections 5(i) and (j) of the Act make professions specified in the Regulations subject to the record keeping and verification requirements. Section 33.3 of the Regulations makes legal counsel subject to the Act when receiving or paying funds or giving instructions to pay funds other than in respect of professional fees, disbursements, expenses or bail or when doing so on behalf of their employer. Sections 33.4 and 33.5 of the Regulations impose recording keeping requirements. Section 59.4 of the Regulations imposes identification requirements. Section 11.1 of the Regulations sets out the information that must be collected and retained in the course of verifying identity. Sections 62, 63 and 63.1 of the Act provide for search and seizure powers. Section 64 provides limitations on the search and seizure powers in relation to material for which solicitor-client privilege is claimed.

The Federation of Law Societies commenced a constitutional challenge to the legislation as it applies to the legal profession. The application judge of the Supreme Court of British Columbia held that the challenged provisions violate s. 7 of the *Charter* and the infringement is not saved under s. 1 of the *Charter*. She did not address whether the provisions infringe s. 8 of the *Charter*. She read down ss. 5(i), 5(j), 62, 63 and 63.1 of the Act and s. 11.1 of the Regulations to exclude legal counsel and legal firms. She struck down s. 64 of the Act and ss. 33.3, 33.4, 33.5, and 59.4 of the Regulations. The British Columbia Court of Appeal dismissed an appeal.

Held: The appeal should be allowed in part. That part of the application judge's order declaring that ss. 5(i) and 5(j) of the Act are inconsistent with the Constitution of Canada and are of no force and effect to the extent that the reference in those subsections to "persons and entities" includes legal counsel and law firms should be set aside. Sections 5(i) and (j) should be struck from that part of the application judge's order declaring that ss. 5(i), (j), 62, 63, 63.1 of the Act are read down to exclude legal counsel and law firms from the operation of those sections. The appeal should otherwise be dismissed.

Per LeBel, Abella, **Cromwell**, Karakatsanis and Wagner JJ.: Sections 5(i) and 5(j) of the Act simply authorize the making of regulations and do not on their own infringe the *Charter*.

Sections 62, 63 and 63.1 of the Act, to the extent that they apply to documents in the possession of legal counsel and legal firms, and s. 64 of the Act infringe s. 8 of the *Charter*. These provisions have a predominantly criminal law character rather than an administrative law character. They facilitate detecting and deterring criminal offences, and investigating and prosecuting criminal offences. There are penal sanctions for non-compliance. These provisions authorize sweeping searches of law offices which inherently risks breaching solicitor-client privilege. The expectation of privacy in solicitor-client privileged communications is invariably high regardless of the context and nothing about the regulatory context of the Act or the fact that a regulatory agency undertakes the searches diminishes that expectation. The

principles governing searches of law offices set out in *Lavallee, Rackel & Heintz v. Canada (Attorney General)*, 2002 SCC 61, [2002] 3 S.C.R. 209, apply and these provisions do not comply with those standards. Solicitor-client privilege must remain as close to absolute as possible. There must be a stringent norm to ensure protection and legislative provisions must interfere with the privilege no more than absolutely necessary. These provisions wrongly transfer the burden of protecting solicitor-client privilege to lawyers. Nothing requires notice to clients and a client may not be aware that his or her privilege is threatened. There is no protocol for independent legal intervention when it is not feasible to notify a client. A judge has no discretion to assess a claim of privilege on his or her own motion. Unless the search is of a lawyer's home office, nothing requires prior judicial authorization. Searches are not contingent upon proof that there are no reasonable alternatives. The provisions allow warrantless searches, which are presumptively unreasonable. Examining and copying documents proceeds until privilege is asserted — an approach that greatly elevates the risk of a breach of privilege. Claiming privilege requires revealing a client's name and address even though this information may be subject to privilege. The search powers in ss. 62, 63 and 63.1 as applied to lawyers, along with the inadequate protection of solicitor-client privilege provided by s. 64, constitute a very significant limitation of the right to be free of unreasonable searches and seizures.

Section 11.1 of the Regulations, to the extent that it applies to legal counsel and legal firms, and the other provisions of the Regulations in issue in this appeal infringe s. 7 of the *Charter*. The liberty interests of lawyers are infringed

because lawyers are liable to imprisonment if they do not comply with the requirements of the Act and Regulations. It is not necessary to determine whether the liberty interests of clients are infringed.

It should be recognized as a principle of fundamental justice that the state cannot impose duties on lawyers that undermine their duty of commitment to their clients' causes. Principles of fundamental justice have three characteristics. They must be a legal principle; there must be significant societal consensus that they are fundamental to the way in which the legal system ought fairly to operate; and, they must be sufficiently precise so as to yield a manageable standard against which to measure deprivations of life, liberty or security of the person. The lawyer's duty of commitment to the client's cause meets this test. First, it is a normative legal principle and a basic tenet of our legal system. It has been recognized as a distinct element of a lawyer's broader common law duty of loyalty. Second, jurisprudence demonstrates that the principle is sufficiently precise to provide a workable standard. It does not countenance a lawyer's involvement in, or facilitation of, illegal activities and it is consistent with a lawyer taking appropriate steps to ensure that his or her services are not used for improper ends. Third, there is overwhelming evidence of a strong and wide-spread consensus concerning the fundamental importance in democratic states of protection against state interference with the lawyer's commitment to his or her client's cause. The duty is fundamental to the solicitor-client relationship and how the state and the citizen interact in legal matters. The lawyer's duty of commitment to the

client's cause is essential to maintaining confidence in the integrity of the administration of justice.

Subject to justification, the state cannot impose obligations on lawyers that undermine their compliance with the duty, either in fact or in the perception of a reasonable person. The legal profession has developed practice standards relating to the subjects addressed by the Act and Regulations that are narrower in scope. Although these standards cannot set the constitutional parameters for legislation, they are 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 a lawyer's ability to comply with the duty of commitment to the client's cause. The lawyer is required to create and preserve records not required for ethical and effective representation, in the knowledge that solicitor-client confidences contained in these records are not adequately protected against searches and seizures authorized by the legislation. A reasonable and informed person, thinking the matter through, would perceive that these provisions are inconsistent with the lawyer's duty of commitment to the client's cause. 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.

The infringements of ss. 7 and 8 of the *Charter* are not justified under s. 1 of the *Charter*. Sections 62, 63, 63.1 and 64 of the Act fail the minimal impairment test. There are other less drastic means to pursue the objectives of combating money laundering and terrorist financing. The provisions of the Regulations in issue in this appeal fail the proportionality test.

Per McLachlin C.J. and Moldaver J.: There is agreement with Cromwell J.'s reasons insofar as they relate to s. 8 of the *Charter*. However, to the extent that the s. 7 interests of the lawyer are engaged, the lawyer's duty of commitment to the client's cause lacks sufficient certainty to constitute a principle of fundamental justice. The lawyer's commitment does not provide a workable constitutional standard because it will vary with the nature of the retainer and other circumstances. Solicitor-client privilege has already been recognized as a constitutional norm and breach of this principle of fundamental justice is sufficient to establish the potential deprivation of liberty that violates s. 7 of the *Charter*.

Cases Cited

By Cromwell J.

Applied: *Lavallee, Rackel & Heintz v. Canada (Attorney General)*, 2002 SCC 61, [2002] 3 S.C.R. 209; *Schachter v. Canada*, [1992] 2 S.C.R. 679; *R. v. Marmo-Levine*, 2003 SCC 74, [2003] 3 S.C.R. 571; **referred to:** *Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research, Restrictive*

Trade Practices Commission), [1990] 1 S.C.R. 425; *R. v. Fitzpatrick*, [1995] 4 S.C.R. 154; *R. v. Oakes*, [1986] 1 S.C.R. 103; *R. v. Kokesch*, [1990] 3 S.C.R. 3; *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, 2000 SCC 69, [2000] 2 S.C.R. 1120; *Canada (Attorney General) v. Bedford*, 2013 SCC 72, [2013] 3 S.C.R. 1101; *Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44, [2000] 2 S.C.R. 307; *R. v. Rodgers*, 2006 SCC 15, [2006] 1 S.C.R. 554; *R. v. Mills*, [1999] 3 S.C.R. 668; *Canadian National Railway Co. v. McKercher LLP*, 2013 SCC 39, [2013] 2 S.C.R. 649; *R. v. Gruenke*, [1991] 3 S.C.R. 263; *R. v. McClure*, 2001 SCC 14, [2001] 1 S.C.R. 445; *Smith v. Jones*, [1999] 1 S.C.R. 455; *Anderson v. Bank of British Columbia (1876)*, 2 Ch. D. 644; *Finney v. Barreau du Québec*, 2004 SCC 36, [2004] 2 S.C.R. 17; *R. v. D.B.*, 2008 SCC 25, [2008] 2 S.C.R. 3; *R. v. Anderson*, 2014 SCC 41, [2014] 2 S.C.R. 167; *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486; *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*, 2004 SCC 4, [2004] 1 S.C.R. 76; *R. v. Neil*, 2002 SCC 70, [2002] 3 S.C.R. 631; *Rodriguez v. British Columbia (Attorney General)*, [1993] 3 S.C.R. 519; *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143; *Attorney General of Canada v. Law Society of British Columbia*, [1982] 2 S.C.R. 307; *Pearlman v. Manitoba Law Society Judicial Committee*, [1991] 2 S.C.R. 869.

By McLachlin C.J. and Moldaver J.

Referred to: *R. v. Malmö-Levine*, 2003 SCC 74, [2003] 3 S.C.R. 571.

Statutes and Regulations Cited

Canadian Charter of Rights and Freedoms, ss. 1, 7, 8.

Criminal Code, R.S.C. 1985, c. C-46, ss. 83.02, 83.03, 462.31, 488.1.

Proceeds of Crime (Money Laundering) and Terrorist Financing Act, S.C. 2000, c. 17, ss. 2 “legal counsel”, 3, Part 1, 5(i), (j), 6, 6.1, 7, 9, 9.1, 9.6, 10.1, 11, 62, 63, 63.1, 64, 65, 65.1, 74.

Proceeds of Crime (Money Laundering) and Terrorist Financing Regulations, SOR/2002-184, ss. 1(2) “funds”, “receipt of funds record”, 11.1, 33.3, 33.4, 33.5, 59.4, 64, 64.1, 65, 66, 66.1, 67, 68, 69, 70.

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APPEAL from a judgment of the British Columbia Court of Appeal
(Finch C.J.B.C. and Frankel, Neilson, Garson and Hinkson JJ.A.), 2013 BCCA 147,

41 B.C.L.R. (5th) 283, 335 B.C.A.C. 243, 573 W.A.C. 243, 359 D.L.R. (4th) 1, 48 Admin. L.R. (5th) 181, 297 C.C.C. (3d) 429, 2 C.R. (7th) 324, 278 C.R.R. (2d) 273, [2013] 5 W.W.R. 1, [2013] B.C.J. No. 632 (QL), 2013 CarswellBC 812 (WL Can.), affirming a decision of Gerow J., 2011 BCSC 1270, 25 B.C.L.R. (5th) 265, 339 D.L.R. (4th) 48, 48 Admin. L.R. (5th) 285, 89 C.R. (6th) 80, 244 C.R.R. (2d) 129, [2012] 2 W.W.R. 758, [2011] B.C.J. No. 1779 (QL), 2011 CarswellBC 2436 (WL Can.). Appeal allowed in part.

Christopher Rupar and Jan Brongers, for the appellant.

John J. L. Hunter, Q.C., and *Roy W. Millen*, for the respondent.

Michal Fairburn and Justin Safayeni, for the intervener the Criminal Lawyers' Association (Ontario).

Mahmud Jamal, David Rankin and Pierre-Alexandre Henri, for the intervener the Canadian Civil Liberties Association.

Leonard T. Doust, Q.C., and *Michael A. Feder*, for the intervener the Law Society of British Columbia.

Craig A. B. Ferris and Laura Bevan, for the intervener the Canadian Bar Association.

Paul D. Stern and *Robert A. Centa*, for the intervener the Advocates' Society.

Raymond Doray and *Loïc Berdnikoff*, for the interveners Barreau du Québec and Chambre des notaires du Québec.

The judgment of LeBel, Abella, Cromwell, Karakatsanis and Wagner JJ. was delivered by

CROMWELL J. —

I. Introduction

[1] 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.

II. Overview and Background

A. *Overview*

[2] There is a risk that financial intermediaries — those who handle funds on behalf of others — may facilitate money laundering or terrorist financing. To reduce that risk, Canada's anti-money laundering and anti-terrorist financing legislation imposes duties on financial intermediaries, including lawyers, accountants, life insurance brokers, securities dealers and others. They must collect information in order to verify the identity of those on whose behalf they pay or receive money, keep records of the transactions, and establish internal programs to ensure compliance. The legislation also subjects financial intermediaries, including lawyers, to searches and seizures of the material that they are required to collect, record and retain.

[3] Lawyers object to these provisions and the Federation of Law Societies of Canada, supported by several interveners, challenges them on constitutional grounds. The Federation says that the scheme makes

lawyers unwilling state agents. They are required to obtain and retain information about their clients. They must do this within a scheme that authorizes unreasonable searches and seizures and provides inadequate protections for solicitor-client privilege. This, the Federation argues, turns law offices into archives for use by the police and prosecution. The provisions therefore violate both s. 7 and s. 8 of the *Charter*.

[4] The British Columbia courts agreed with the Federation that the provisions violate s. 7 of the *Charter* but they did not address the s. 8 challenge.

[5] The Attorney General of Canada appeals and the Chief Justice has stated constitutional questions which I have reproduced at the conclusion of my reasons. The issues raised by the appeal and my resolution of them are as follows.

1. Do the provisions infringe the s. 8 *Charter* right to be free of unreasonable searches and seizures?

[6] In my opinion, the search provisions in the legislation do not provide the constitutionally required protection for solicitor-client privilege and, as a result, infringe the s. 8 *Charter* right to be free of unreasonable searches and seizures.

2(a). With respect to s. 7 of the *Charter*, do the provisions limit lawyers' and/or clients' right to liberty?

[7] The provisions limit the liberty interests of lawyers. It is not necessary to decide whether clients' liberty interests are also engaged.

2(b). Is that limitation in accordance with the principles of fundamental justice in relation to (i) solicitor-client privilege or (ii) the independence of the bar?

[8] The provisions, taken as a whole, interfere with the lawyer's duty of commitment to the client's cause, which, I conclude, is a principle of fundamental justice. Given my conclusion concerning s. 8, there is no need to conduct a separate analysis relating to the proposed principle of fundamental justice relating to solicitor-client privilege.

3. Are any limitations of rights under ss. 7 or 8 demonstrably justified as required by s. 1 of the *Charter*?

[9] The Attorney General failed to demonstrate that these limitations of *Charter* rights are demonstrably justified in a free and democratic society and they are therefore not saved by s. 1 of the *Charter*.

B. *The Legislation*

[10] The legislative scheme out of which this appeal arises is complex and a good grasp of how its provisions affect lawyers and clients is necessary in order to understand the issues on appeal.

[11] Laundering the proceeds of crime and financing terrorist activity are serious crimes: *Criminal Code*, R.S.C. 1985, c. C-46, ss. 462.31, 83.02 and 83.03. The *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*, S.C. 2000, c. 17, seeks to detect and deter these crimes and to facilitate their investigation and prosecution: s. 3. The Act pursues these objectives in three main ways: by establishing record keeping and client identification standards, by requiring reporting from financial intermediaries, and by putting in place an agency to oversee compliance — the Financial Transactions and Reports Analysis Centre of Canada (“FINTRAC”).

[12] Regulations made under the Act particularize how the legislative scheme applies to legal counsel: the *Proceeds of Crime (Money Laundering) and Terrorist Financing Regulations*, SOR/2002-184. The Act defines “legal counsel” to mean an advocate or a notary in the province of Quebec and in every other province a barrister or solicitor: s. 2. I will use the term “lawyer” to refer to all legal professionals who are subject to the regime. The relevant provisions of the Act and the

Regulations are set out in the Appendix. The rationale for requiring lawyers to comply with client identification and record keeping requirements, according to the Attorney General's submissions, is to deter illicit transactions and, if such transactions occur, to help establish a paper trail that, with the proper judicial authorization, could be accessed by law enforcement: A.F., at para. 17. The record keeping requirements deter illicit transactions in at least two ways. They help ensure that lawyers do not become unwitting dupes of clients who wish to use them to facilitate illicit transactions and make it harder for clients to engage in such activities through their lawyers.

[13] Here is an overview of the most relevant provisions of the Act and Regulations affecting lawyers.

(1) Gathering Information to Verify Identity

[14] Turning first to verification, the Act requires lawyers to identify persons and entities on whose behalf they act as financial intermediaries: s. 6.1; Regulations, s. 33.3. In summary, a lawyer must verify the identity of persons or entities on whose behalf the lawyer receives or pays funds other than in respect of professional fees, disbursements, expenses or bail. There are detailed rules about how to do this verification upon receipt of \$3,000 or more. Briefly, verification requires presentation of government-issued documents. Individuals must

present proof of identity such as passports or drivers' licences. In the case of corporations, the lawyer must obtain the corporation's name and address, as well as the names of its directors, by means of a record that confirms the corporation's existence: Regulations, s. 65. Other entities, such as partnerships, are identified by records confirming their existence: Regulations, ss. 33.3, 33.4, 59.4 and 64 to 67.

[15] This verification scheme also requires lawyers to collect information which varies according to whether the transaction is being conducted on behalf of a person, a corporation or some other entity: Regulations, s. 11.1. For a corporation, this includes the names of all directors and the names and addresses of certain shareholders: Regulations, s. 11.1(1)(a). With respect to trusts, the names and addresses of all trustees, beneficiaries and settlors are required: Regulations, s. 11.1(1)(b). The lawyer must obtain "information establishing the ownership, control and structure of the entity": Regulations, s. 11.1(1)(d). The lawyer is required to ensure accuracy of the information obtained (Regulations, s. 11.1(3)), and if he or she is unable to either obtain or confirm the information sought, he or she will be subject to other requirements: Regulations, s. 11.1(4).

(2) Record Keeping

[16] Section 33.4 of the Regulations provides that a “receipt of funds record” must be created by a lawyer when \$3,000 or more in funds are received in a transaction, unless the amount is received from a financial entity or public body. (“Funds” include cash, currency or securities, or negotiable instruments or other financial instruments, in any form: Regulations, s. 1(2).) The information required in the “receipt of funds record” includes the name, address, date of birth, and nature of the principal business or occupation of the person or entity from whom the amount is received; the date of the transaction; the number of any account that is affected by the transaction; the type of that account; the name of the account holder and the currency in which the transaction is conducted; the purpose and details of the transaction; the manner in which the funds were delivered if they were delivered in cash (armoured car, in person, by mail, etc.); and the amount and currency of funds received: Regulations, s. 1(2). Some information does not have to be included where the funds are received from another lawyer’s trust account: Regulations, s. 33.5. Section 33.4 also requires, where the person or entity is a corporation, the lawyer to keep a copy of corporate records relating to the power to bind a corporation in respect of transactions with the lawyer.

[17] The records must be kept for at least five years after the completion of the transaction (Regulations, ss. 68 and 69) and the

Regulations mandate that they can be produced to FINTRAC within 30 days of a request: s. 70.

(3) Search and Seizure

[18] FINTRAC has broad access to the information which lawyers (and others) are required to collect, record and retain. Section 62(1) of the Act authorizes FINTRAC to “examine the records and inquire into the business and affairs” of any lawyer. This includes the power to search through computers (s. 62(1)(b)) and to print or copy records (s. 62(1)(c)). Section 63.1 empowers FINTRAC to make requests for information to lawyers and obliges lawyers to comply.

[19] There are some protections for solicitor-client privilege. Lawyers, when they are providing legal services, are not subject to the reporting requirements that apply to other professions: Act, s. 10.1. Nothing in the Act requires legal counsel to disclose any communication subject to solicitor-client privilege: s. 11. Most significantly, s. 64 of the Act sets up a procedure to protect against disclosure of privileged material in the course of a search. It provides that where a lawyer claims a document in his or her possession is subject to solicitor-client privilege it cannot be examined or copied. However, this provision requires the lawyer to seal, identify and retain the document and to claim privilege in court within 14 days. FINTRAC has the authority under the regime to

disclose to law enforcement information of which it becomes aware under the search provisions if it suspects that it would be relevant to investigating or prosecuting an offence arising out of a contravention of the verification or record keeping obligations: Act, s. 65. Under very recently amended provisions, law enforcement may only use this information as evidence of a contravention of the verification, retention and reporting obligations in Part 1 of the Act or for purposes related to compliance with those provisions: s. 65(3). Finally, s. 65.1 of the Act allows FINTRAC to disclose information to foreign state agencies analogous to FINTRAC for the purposes of ensuring compliance with verification and record keeping obligations.

(4) The Challenged Provisions

[20] It will be helpful to list and describe the provisions that are challenged. The provisions fall into two groups, those relating to verifying identity and record keeping and those relating to search and seizure.

[21] Sections 5(i) and 5(j) of the Act make the professions specified in the Regulations subject to the verification and record keeping requirements in Part 1 of the Act. Section 33.3 of the Regulations make legal counsel subject to Part 1 of the Act 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). Section 33.4 of the Regulations sets out the recording keeping requirements. Section 33.5 of the Regulations relaxes these requirements where funds are received from the trust account of a legal firm or legal counsel. Section 59.4 of the Regulations imposes the identification requirements. Section 11.1 of the Regulations sets out the information that must be collected and retained in the course of verifying identity.

[22] Sections 62, 63 and 63.1 of the Act provide for search and seizure powers. Section 64 provides limitations on the search and seizure powers in relation to material for which solicitor-client privilege is claimed.

C. Judicial History

The Proceedings

Background

[23] Lawyers first became subject to the Act in 2001 when they were required to report to FINTRAC “suspicious transactions” involving their clients: s. 7. The Federation, as well as several law societies, launched constitutional challenges to the Act as a result. In 2002, the Attorney General reached an agreement with the Federation to facilitate the constitutional challenges by way of a national “binding test case”

before the courts in British Columbia. Interlocutory injunctions currently preclude the Act from applying to lawyers. As a result, none of the regime's anti-money laundering requirements have been enforced against lawyers pending the outcome of the case. In the interim, the Federation has encouraged Canadian provincial and territorial law societies to adopt rules prohibiting lawyers from conducting large cash transactions and requiring client identification, verification, and record keeping measures when lawyers effect certain financial transactions on behalf of clients.

[24] The Attorney General contends that these measures are insufficient to combat money laundering and terrorist financing. He argues that criminal sanctions are needed to back up these requirements in the case of non-compliance and that leaving enforcement to the law societies risks a lack of uniformity.

*British Columbia Supreme Court, 2011 BCSC 1270, 25
B.C.L.R. (5th) 265 (Gerow J.)*

[25] The application judge held that the challenged provisions are contrary to s. 7 of the *Charter*. She concluded that both lawyers' and clients' liberty interests are engaged by the Act because it places both lawyers and their clients in jeopardy of potential incarceration. She was of the view that solicitor-client privilege is a principle of fundamental justice and that the recording and retention requirements are contrary to this

principle because they “result in having lawyers’ offices turned into archives for the use of the prosecution” (para. 144).

[26] Turning to whether this *Charter* infringement could be justified under s. 1, the judge concluded that the means chosen were not proportionate to the objectives because regulation of lawyers by law societies already provides effective and constitutional anti-money laundering and anti-terrorist financing regimes. She found no proof that there is a rational connection between the legislative objective and the infringement of s. 7, that the statutory regime interferes as little as possible with s. 7 rights, or that the salutary effects of the measures outweigh their deleterious effects.

[27] As a remedy, the application judge read down ss. 5(i), 5(j), 62, 63 and 63.1 of the Act and s. 11.1 of the Regulations to exclude legal counsel and legal firms, and struck down s. 64 of the Act and ss. 33.3, 33.4, 33.5 and 59.4(1) of the Regulations.

British Columbia Court of Appeal, 2013 BCCA 147, 41 B.C.L.R. (5th) 283 (Hinkson J.A., Finch C.J.B.C. and Neilson J.A. Concurring; Concurring in the Result, Frankel J.A., Garson J.A. Concurring)

[28] The Court of Appeal unanimously held that the obligations imposed on lawyers by the provisions breach s. 7 of the *Charter* and that

they are not saved by s. 1. Although the court found that the provisions sufficiently protect solicitor-client privilege, it concluded that “independence of the Bar” is a principle of fundamental justice and that the provisions are not consistent with it. The Court of Appeal held that legal advisors are placed in an unacceptable conflict of interest between clients’ interests, the state’s interests, and their own liberty interests, and that the provisions turn some lawyers into agents of the state.

[29] On the question of whether clients’ liberty interests are engaged by the provisions, the Court of Appeal divided. Hinkson J.A. (as he then was) (writing for a majority of the court on this point) 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. Frankel J.A. (Garson J.A. concurring) held that clients’ liberty interests are not engaged by these provisions because the causal connection between the provisions and any potential loss of clients’ liberty is too remote.

[30] The Court of Appeal unanimously held that the limitation of s. 7 rights was not justified under s. 1 of the *Charter* because the Attorney General failed to prove that the provisions are minimally impairing. The rules of the professional governing bodies already provide effective and

constitutional anti-money laundering and anti-terrorist financing regimes in relation to lawyers, law firms and notaries across Canada.

III. Analysis

A. *Do the Provisions Infringe Section 8 of the Charter?*

Introduction

[31] The issue here is whether the search and production provisions of the scheme infringe the right to be free from unreasonable searches and seizures guaranteed by s. 8 of the *Charter*. The relevant provisions are these. Section 62 provides that a person authorized by the Director of FINTRAC may enter premises other than a dwelling-house, examine the records required under the Act and, for that purpose, use any computer system and reproduce any record. There is no warrant requirement. Section 63 gives the same powers with respect to rooms in a dwelling-house which the authorized person reasonably believes are being used to carry on a business, profession or activity which is subject to the Act, but a warrant is required. This provision implicates lawyers who have home offices. Section 63.1 permits the authorized person to serve a notice that requires the person or entity which is the subject of the inspection to provide information relevant to the administration of the Act in the form of electronic data, a printout or other intelligible output. Finally, s. 64

provides some protection of solicitor-client privilege in the course of exercising these powers.

[32] The Attorney General concedes that s. 62 and s. 63.1 authorize searches and seizures within the meaning of s. 8. It is self-evident that the same must be said about s. 63. These provisions do not simply require production of a particular type of document but permit an authorized person to “examine the records and inquire into the business and affairs of any person or entity [subject to the Act] for the purpose of ensuring compliance with Part 1” (s. 62(1)), as well as to make and take away copies (s. 62(1)(c)).

[33] Neither of the British Columbia courts addressed the s. 8 issue, but I have found it helpful to address it first. This is the better approach to considering the constitutionality of the law office inspection provisions, in my view. If these procedures constitute unjustified and unreasonable searches and seizures, they are unconstitutional by virtue of s. 8 and there is no need to undertake an independent s. 7 analysis depending on a proposed principle of fundamental justice in relation to solicitor-client privilege: *Lavallee, Rackel & Heintz v. Canada (Attorney General)*, 2002 SCC 61, [2002] 3 S.C.R. 209, at paras. 34-35.

[34] The Federation says that these provisions violate s. 8 of the *Charter*, mainly because they permit the search of law offices in ways that

are not consistent with the principles set out by the Court in *Lavallee*. The Attorney General, on the other hand, argues that the searches and seizures authorized by the scheme are reasonable: they relate to a limited class of documents for a narrow, regulatory purpose and there are appropriate safeguards to protect solicitor-client privilege.

[35] I respectfully do not accept the Attorney General's position. The regime authorizes sweeping law office searches which inherently risk breaching solicitor-client privilege. It does so in a criminal law setting and for criminal law purposes. In my view, the constitutional principles governing these searches are set out in the Court's decision in *Lavallee*, and this scheme does not comply with them.

Protection of Solicitor-Client Privilege

[36] A law office search power is unreasonable unless it provides a high level of protection for material subject to solicitor-client privilege: *Lavallee*. The Attorney General submits, however, that *Lavallee* does not dictate the outcome here: the Court in that case was only considering the question of what safeguards are constitutionally required in situations where law enforcement officials are seeking evidence of criminal wrongdoing, not as here, in connection with an administrative law regulatory compliance regime.

[37] I accept, of course, that when a search provision is part of a regulatory scheme, the target's reasonable expectation of privacy may be reduced: *Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research, Restrictive Trade Practices Commission)*, [1990] 1 S.C.R. 425, at p. 507; *R. v. Fitzpatrick*, [1995] 4 S.C.R. 154, at para. 49. However, I do not accept the Attorney General's contention that this scheme may be properly characterized as "an administrative law regulatory compliance regime": A.F., at para. 111. Its purposes, as stated in the Act and indeed as described by the Attorney General in his submissions, are to detect and deter the criminal offences of money laundering and terrorist financing and to facilitate the investigation and prosecution of these serious offences: s. 3(a). The regime imposes penal sanctions on lawyers for non-compliance. It therefore has a predominantly criminal law character and its regulatory aspects serve criminal law purposes.

[38] I also accept that, as Arbour J. noted in *Lavallee*, "the need for the full protection of the privilege is activated" in the context of a criminal investigation: para. 23. However, the reasonable expectation of privacy in relation to communications subject to solicitor-client privilege is invariably high, regardless of the context. The main driver of that elevated expectation of privacy is the specially protected nature of the solicitor-client relationship, not the context in which the state seeks to intrude into

that specially protected zone. I do not accept the proposition that there is a reduced expectation of privacy in relation to solicitor-client privileged communication when a FINTRAC official searches a law office rather than when a police officer does so in the course of investigating a possible criminal offence. While Arbour J. placed her analysis in the context of criminal investigations (see, e.g., paras. 25 and 49), her reasons, as have many others before and since, strongly affirmed the fundamental importance of solicitor-client privilege. As Arbour J. put it:

It is critical to emphasize here that all information protected by the solicitor-client privilege is out of reach for the state. . . . [A]ny privileged information acquired by the state without the consent of the privilege holder is information that the state is not entitled to as a rule of fundamental justice. [Emphasis added; para. 24.]

[39] I see no basis for thinking that solicitor-client communications should be more vulnerable to non-consensual disclosure in the course of a search and seizure by FINTRAC officials than they would be in the course of any other search by other law enforcement authorities.

[40] The Attorney General submits that the information here is sought in aid of monitoring the lawyer's activities, not the client's and that there is protection against derivative use. But these factors are entitled to little weight here. As discussed earlier, the overriding purposes of this scheme are the prevention and detection of serious, criminal offences. It

has little in common with, for example, the competition legislation at issue in *Thomson Newspapers* or the fisheries legislation in *Fitzpatrick*. Moreover, I do not accept the Attorney General's submission that the broad scope of this search power is somehow limited by what the "regulator" is "interested in reviewing": A.F., at para. 107. The Act on its face purports to give the authorized person licence to troll through vast amounts of information in the possession of lawyers. As the intervener Criminal Lawyers' Association fairly put it, the Act gives authorized persons the power "to roam at large within law offices, and . . . to examine and seize any record or data found therein": *factum*, at para. 23. The exercise of these powers in relation to records in possession of lawyers creates a very high risk that solicitor-client privilege will be lost.

[41] In short, there is nothing about the regulatory context here or the interests of the regulator which in any way take this regime out of the field of criminal law or diminish in any way the very high reasonable expectation of privacy in relation to material subject to solicitor-client privilege. In my view, the *Lavallee* standard applies to this regime.

[42] The *Lavallee* analysis does not assume, of course, that all records found in the possession of a lawyer are subject to privilege and I do not approach this case on the basis that all the materials that lawyers are required to obtain and retain by the Act are privileged. The *Lavallee*

standard aims to prevent the significant risk that some privileged material will be among the records in a lawyer's office examined and seized pursuant to a search warrant. Similarly, in this case, there is a significant risk that at least some privileged material will be found among the documents that are the subject of the search powers in the Act.

The *Lavallee* Principles

[43] *Lavallee* and its two companion appeals concerned the constitutionality of s. 488.1 of the *Criminal Code*. That section sets out a procedure to be followed when an officer acting under the authority of any Act of Parliament is “about to examine, copy or seize a document in the possession of a lawyer who claims that a named client of his has a solicitor-client privilege” in respect of it. The Court concluded that the section was unconstitutional because it suffered from a number of deficiencies in relation to the constitutional level of protection required by s. 8 in relation to solicitor-client privilege.

[44] The core principle of the decision is that solicitor-client privilege “must remain as close to absolute as possible if it is to retain relevance”: *Lavallee*, at para. 36. This means that there must be a “stringent” norm to ensure its protection, such that any legislative provisions that interfere with the privilege more than “absolutely necessary” will be found to be unreasonable: para. 36.

[45] *Lavallee* is an important authority because of the similarity of the schemes set up to protect solicitor-client privilege under s. 488.1 of the *Code*, which was in issue in that case, and s. 64 of the Act, which is in issue here. Section 64 of the Act, like s. 488.1, is engaged at the point at which the official is “about to examine” material “in the possession” of a lawyer. Under both provisions, the protective scheme applies at the point that the lawyer asserts that a “named client” (or in the case of s. 64, a “named client or former client”) “has a solicitor-client privilege” in respect of the material sought. Once that claim is made, the material is sealed and preserved. (The mechanics of this part of the two schemes differ; under the *Code*, the official seals the documents and places the sealed package in possession of the sheriff for safekeeping, while under the Act, the lawyer does the sealing and safekeeping.)

[46] Both schemes require the official to give a reasonable opportunity for a claim of solicitor-client privilege to be made before examining or copying the material. Section 64(9.1) of the Act enhances this protection somewhat by providing that the official is not to examine or make copies of a document in the possession of a non-lawyer who contends that a claim of solicitor-client privilege may be made by a lawyer without giving the person a reasonable opportunity to contact that lawyer.

[47] The processes under the two schemes for judicial determination of the privilege issue are also similar. Under both schemes, the lawyer may apply within 14 days to have a judge decide whether the material is privileged. If no application is made, the Attorney General may apply to a judge for an order directing the custodian of the material to deliver it to the official. Under both schemes, any material that the judge finds to be subject to solicitor-client privilege remains so. In the absence of an application, however, the judge is obliged to direct the material to be turned over to the official.

[48] To return to *Lavallee*, the Court identified specific constitutional infirmities in s. 488.1, all flowing from the fact that it failed to address directly the entitlement that the privilege holder, the client, should have to protect the privilege. The absence of provisions requiring notice to the holder of the privilege meant the client may not even be aware that his or her privilege is threatened: para. 40. This fundamental difficulty identified in s. 488.1 in *Lavallee* is not meaningfully addressed by s. 64.

[49] The Court in *Lavallee* found that two further constitutional infirmities resulted from this. The first was that the scheme wrongly transferred the burden of protecting the privilege from the state to the lawyer. This was so because under the scheme only the lawyer could

assert the privilege and the client did not have to be given notice: para. 40. Where notification was not feasible, there ought at least to be some independent legal intervention, for instance in the form of notification and involvement of the relevant Law Society: para. 41. As Arbour J. explained:

. . . since the right of the state to access this information is, in law, conditional on the consent of the privilege holder, all efforts to notify that person, or an appropriate surrogate such as the Law Society, must be put in place in order for the section to conform to s. 8 of the *Charter*. [para. 42]

[50] Section 64 suffers from similar defects. The initial claim of privilege may only be made by legal counsel, as was the case under s. 488.1. While under s. 64, legal counsel is required to provide the client's last known address to enable the official to "endeavour to advise the client of the claim of privilege", there is no requirement for notice to the client, who is the holder of the privilege, and no protocol for independent legal intervention where it is not feasible to notify the client. Moreover, as we shall see, the lawyer's obligation to identify the client in order to claim the privilege is also problematic.

[51] A second constitutional failing identified in *Lavallee* relates to what happens when a claim of privilege has been made to the official, but no application to court has been made by the client or the lawyer. In those circumstances, the judge is required on the application of the Attorney

General to order the lawyer to make the material available to the official.

As Arbour J. explained:

. . . this mandatory disclosure of potentially privileged information, in a case where the court has been alerted to the possibility of privilege by the fact that the documents were sealed at the point of search, cannot be said to minimally impair the privilege. It amounts to an unjustifiable vindication of form over substance, and it creates a real possibility that the state may obtain privileged information that a court could very well have recognized as such. [para. 43]

[52] Section 64(6) similarly denies discretion to the judge to assess the claim of privilege on his or her own motion and therefore has the same constitutional failing.

[53] The Court in *Lavallee* also set out a number of general principles that govern the legality of law office searches designed in part to guide the legislative options that Parliament may wish to address. These general principles, while not a checklist, were intended “to reflect the present-day constitutional imperatives for the protection of solicitor-client privilege”: para. 49. Two of these general principles are particularly relevant here.

[54] One of these principles is that, before searching a law office, the authorities must satisfy a judicial officer that there exists no other reasonable alternative to the search. Sections 62 and 63.1 do not require

prior judicial authorization, let alone impose a statutory requirement that there be no other reasonable alternative. However, s. 63 is less problematic in this respect. It requires judicial pre-authorization to search a lawyer's home office, including demonstration that entry into the dwelling-house is necessary for any purpose that relates to ensuring compliance with Part 1 of the Act.

[55] A second general principle in *Lavallee* is that “all documents in possession of a lawyer must be sealed before being examined or removed from the lawyer's possession” unless otherwise specifically authorized by a warrant: para. 49. In contrast, under s. 64, examining and copying in a law office by the official stops only at the point at which a claim of solicitor-client privilege is asserted by a lawyer on behalf of a named client. Thus, examining and copying proceeds until there is a specific assertion of privilege — an approach that greatly elevates the risk that privileged material will be examined. Moreover, the name of the client may itself be (although is not always) subject to solicitor-client privilege: para. 28. In a situation in which it is, the Act requires the lawyer to breach that privilege in order to claim the privilege attaching to the material sought by the official. The same, in my view, may be said about the obligation of the lawyer under s. 64(10) to provide the authorities with the latest known address for the client.

[56] *Lavallee* concerned law office searches that were judicially pre-authorized and therefore addressed a scheme that was, in that respect, different from the scheme that is in issue here. Warrantless searches, such as those permitted under this scheme, are presumptively unreasonable. Moreover, the judicial pre-authorization requirement is, in itself, an important protection against improper search and seizure of privileged material. However, I do not foreclose the possibility that Parliament could devise a constitutionally compliant inspection regime without a judicial pre-authorization requirement.

Summary

[57] In my view, the search powers in ss. 62, 63 and 63.1 as applied to lawyers, along with the inadequate protection of solicitor-client privilege provided by s. 64, constitute a very significant limitation of the right to be free of unreasonable searches and seizures guaranteed by s. 8 of the *Charter*.

Is the Limitation Justified Under Section 1?

[58] Section 1 of the *Charter* “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”. In order for a limitation to be justified, it must serve and be a proportionate response to a

pressing and substantial objective: *R. v. Oakes*, [1986] 1 S.C.R. 103, at pp. 138-39. The government has a difficult task in seeking to uphold as reasonable provisions, such as those in issue here, which have been found to authorize unreasonable searches: *Lavallee*, at para. 46; *R. v. Kokesch*, [1990] 3 S.C.R. 3, at pp. 18-19.

[59] I accept, of course, that the objectives of combating money laundering and terrorist financing are pressing and substantial as both the application judge and the Court of Appeal held.

[60] With respect to the proportionality analysis, the appellant has the burden of proving that (i) the objective is rationally connected to the limit; (ii) the limit impairs the right as little as possible; and (iii) there is proportionality between the effects of the limitation of the *Charter* right and the objective. The rational connection does not impose a particularly onerous threshold: *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, 2000 SCC 69, [2000] 2 S.C.R. 1120, at para. 228. There is a logical and direct link between, on one hand, the combating of money laundering and terrorist financing (in which lawyers may unbeknownst to them be participating) and, on the other, governmental supervision through searches conducted at law offices.

[61] In my view, however, the justification fails the minimal impairment test. There are other less drastic means of pursuing the same

identified objectives. The Court has previously outlined the sorts of protections that are required in order to meet the constitutional standard of protection for solicitor-client privilege: *Lavallee*.

[62] I am therefore of the view that s. 64, and to the extent that they operate in relation to lawyers' offices, ss. 62, 63 and 63.1 of the Act, cannot be justified.

Remedy

[63] With respect to ss. 62, 63 and 63.1, I would follow the example of the application judge and read those provisions down to exclude legal counsel and legal firms from the scope of their operation.

[64] The correct approach to s. 64 is more controversial. The Attorney General submits that the appropriate remedy is to read into s. 64 the requirements that would render these provisions constitutionally sound. I cannot accept this approach, however.

[65] The Attorney General's argument rests on the premise that s. 64 (as it now stands) can only violate s. 8 to a "very limited extent": A.F., at para. 116. This is not the case in my respectful view, for the reasons I have developed at length earlier. Moreover, "reading in" as a constitutional remedy is generally not appropriate when there is a variety

of options that would render the provision constitutional: see *Schachter v. Canada*, [1992] 2 S.C.R 679, at pp. 705-7. In this case, there is such a variety of legislative approaches available. As Arbour J. said in *Lavallee*, at para. 48:

The need to ensure that privilege holders are given a genuine opportunity to enforce the protection of their confidential communications to their lawyers, at the time when they need the protection of the law the most, cannot easily be met by a judicial redrafting of the provision. Neither can the need to ensure that the courts are given enough flexibility and discretion to remain the protectors of constitutional rights and the guardians of the law. In my view, the process for seizing documents in the possession of a lawyer is indeed a delicate matter, which presents some procedural options that are best left to Parliament.

[66] Applying this reasoning, reading in is not appropriate to remedy the constitutional defects of s. 64.

Conclusion

[67] I would declare that s. 64 is of no force or effect and that ss. 62, 63 and 63.1 should be read down so that they do not apply to documents in the possession of legal counsel or in law office premises.

[68] I add this. The issues that would arise in the event of a challenge to professional regulatory schemes are not before us in this case.

Different considerations would come into play in relation to regulatory audits of lawyers conducted on behalf of lawyers' professional governing bodies. The regulatory schemes in which the professional governing bodies operate in Canada serve a different purpose from the Act and Regulations and generally contain much stricter measures to protect solicitor-client privilege.

B. *Do the Provisions Violate Section 7 of the Charter?*

[69] There are two steps to the analysis under s. 7 of the *Charter*. The first is to determine whether the challenged provisions limit the right to life, liberty or security of the person. If they do, the analysis moves to the second step of determining whether that limitation is in accordance with the principles of fundamental justice: *Canada (Attorney General) v. Bedford*, 2013 SCC 72, [2013] 3 S.C.R. 1101, at para. 57; *Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44, [2000] 2 S.C.R. 307, at para. 47.

[70] The Attorney General maintains that there is no s. 7 violation here, but I respectfully disagree. These provisions limit the liberty of lawyers in a way that is not in accordance with the principle of fundamental justice in relation to the lawyer's duty of commitment to the client's cause.

Do the Provisions Limit Lawyers' and/or Clients' Right to
Life, Liberty or Security of the Person?

[71] There is no dispute that these provisions engage the liberty interests of lawyers. If lawyers do not comply with the Act's requirements, they are liable to prosecution and imprisonment. Section 74 provides that the failure to comply with certain provisions of the Act (including the search provisions) can lead to the imposition of a fine of up to \$500,000 or imprisonment of up to five years, or both. This includes failure to comply with ss. 6 and 6.1 of the Act, which set out the general verification and record keeping obligations. It also includes the failure of persons in charge of law offices subject to searches to give FINTRAC "all reasonable assistance" during a search conducted under the authority of s. 62, as well as the failure to comply with a request for documents made by FINTRAC under s. 63.1.

[72] Both the application judge and a majority of the Court of Appeal found that this regime also limited the liberty of clients. However, I do not find it necessary to decide this point. I have already concluded that lawyers' liberty interests are engaged by the challenged provisions and it has not been suggested that the s. 7 analysis would be different in relation to clients' as compared to lawyers' liberty interests.

Is the Limitation Contrary to the Principle of Fundamental
Justice in Relation to Solicitor-Client Privilege?

[73] I have already concluded that the search provisions of the Act offend the s. 8 right to be free from unreasonable searches and seizures and that they are unconstitutional and of no force and effect as they apply to records in the possession of lawyers. This conclusion makes it unnecessary to undertake an independent s. 7 analysis based on a principle of fundamental justice in relation to solicitor-client privilege in this case: see, e.g., *Lavallee* at para. 34; *R. v. Rodgers*, 2006 SCC 15, [2006] 1 S.C.R. 554, at para. 23; and *R. v. Mills*, [1999] 3 S.C.R. 668, at para. 88.

Is the Limitation Contrary to the Principle of Fundamental
Justice Relating to the Independence of the Bar?

The Court of Appeal's Decision

[74] The Court of Appeal found that the limitation of lawyers' liberty interests was not in accordance with what it concluded was a principle of fundamental justice in relation to the independence of the bar. While the Court of Appeal at times expressed the principle of the independence of the bar in very broad terms, the crux of its reasoning rested on much narrower grounds. The legislation, the court found, constituted state interference with the lawyer's duty of loyalty to the client: it places the lawyer in a conflict of interest because

. . . the legal advisor must choose to conform to the *Act* and to the *Regulations* and thus, at the very least, be in breach of his

or her duty of loyalty acting both for the client and for the State or, in order to respect his or her obligations to the client, expose himself or herself to prosecution . . . they are forced not only to keep but also to create archives for the State.

. . . the Regime imposes conflicting interests and corresponding obligations on the lawyer, regarding clients' interests, state interests, and Lawyers' liberty interests. [paras. 122-23]

Positions of the Parties and Overview

[75] The Federation, supported by several interveners, maintains that the independence of the bar is a principle of fundamental justice and that the scheme is contrary to that principle in two respects. First, the scheme directly interferes with how lawyers deliver legal services to clients because it requires lawyers, by threat of imprisonment, to prepare records of the clients' activities, relationships and details of their transactions as part of a regime whose overall purpose is predominantly criminal. This, it is argued, is direct government intervention in the way in which the lawyer delivers legal services. Second, the lawyer is required to retain that information so the lawyer's office, as the Federation puts it, becomes an archive for the use of the prosecution. This undermines the trust between lawyer and client that is and must be at the foundation of the solicitor-client relationship. The argument goes that the lawyer is being conscripted against his or her clients by being required to obtain

information from a client that is not required in order to provide legal services and to act as a government repository for that information.

[76] As I understand these submissions, there are really two versions of the principle that are being advanced, a broad one and a narrow one.

[77] According to the broad version, the independence of the bar means that lawyers “are free from incursions from any source, including from public authorities”: Court of Appeal reasons, at para. 113. The narrower, more focused version, is anchored in concern about state interference with the lawyer’s commitment to the client’s cause. This narrower version, as I see it, boils 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.

[78] The Attorney General submits that there is no principle of fundamental justice in relation to the independence of the bar. He argues

that the Court of Appeal's broad definition of the independence of the bar essentially places lawyers above the law. The principle of the independence of the bar does not meet any of the three requirements that must be met by a principle of fundamental justice. While an important state interest, the independence of the bar is not a legal principle. There is no broad societal consensus concerning the existence of this principle and it cannot be identified with sufficient precision. The independence of the bar, says the Attorney General, does not describe a justiciable standard.

[79] The Attorney General submits that even if the independence of the bar is a principle of fundamental justice, the scheme is consistent with it. The Court of Appeal was wrong to conclude that the scheme has the effect of turning at least some lawyers into state agents. This conclusion, argues the Attorney General, is based on the Court of Appeal's misinterpretation of the nature of the obligations imposed on lawyers to maintain financial records, the extent to which FINTRAC can access these records through a compliance audit, and the prohibition on derivative use of these records provided by s. 65 of the Act. The Attorney General notes that lawyers are exempted from the Act's reporting requirements that apply to accountants and other professionals who act as financial intermediaries.

[80] In my view, there is considerable merit in the Attorney General's submissions considered in relation to the broad notion of the independence of the bar asserted by the Federation. However, I do not for the purposes of this appeal have to finally determine that point. The narrower understanding of the independence of the bar which relates it to the lawyer's duty of commitment to the client's cause is the aspect of the lawyer's special duty to his or her client that is most relevant to this appeal.

[81] The duty of lawyers to avoid conflicting interests is at the heart of both the general legal framework defining the fiduciary duties of lawyers to their clients and of the ethical principles governing lawyers' professional conduct. This duty aims to avoid two types of risks of harm to clients: the risk of misuse of confidential information and the risk of impairment of the lawyer's representation of the client (see, e.g., *Canadian National Railway Co. v. McKercher LLP*, 2013 SCC 39, [2013] 2 S.C.R. 649, at para. 23).

[82] The Court has recognized that aspects of these fiduciary and ethical duties have a constitutional dimension. I have already discussed at length one important example. The centrality to the administration of justice of preventing misuse of the client's confidential information, reflected in solicitor-client privilege, led the Court to conclude that the

privilege required constitutional protection in the context of law office searches and seizures: see *Lavallee*. Solicitor-client privilege is “essential to the effective operation of the legal system”: *R. v. Gruenke*, [1991] 3 S.C.R. 263, at p. 289. As Major J. put it in *R. v. McClure*, 2001 SCC 14, [2001] 1 S.C.R. 445, at para. 31: “The important relationship between a client and his or her lawyer stretches beyond the parties and is integral to the workings of the legal system itself” (emphasis added).

[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.

[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.

[85] The analysis leading me to this conclusion addresses three questions: (1) How do we recognize a principle of fundamental justice? (2) Is the principle of commitment to the client's cause such a principle? (3) If so, is the limitation on lawyers' liberty in this legislative scheme in accordance with that principle?

[86] Before addressing those questions, I should make clear what is *not* in issue. While the Court of Appeal and the Federation place great stress on independence of the bar as it relates to self-regulation of the legal profession, I do not find it necessary or desirable in this appeal to address the extent, if at all, to which self-regulation of the legal profession is a principle of fundamental justice. As LeBel J. pointed out in *Finney v.*

Barreau du Québec, 2004 SCC 36, [2004] 2 S.C.R. 17, self-regulation is certainly *the means* by which legislatures have chosen in this country to protect the independence of the bar: para. 1. But we do not have to decide here whether that legislative choice is in any respect constitutionally required. Nor does the appeal require us to consider whether other constitutional protections may exist in relation to the place of lawyers in the administration of justice.

Recognizing Principles of Fundamental Justice

[87] Principles of fundamental justice have three characteristics. They must be legal principles, there must be “significant societal consensus” that they are “fundamental to the way in which the legal system ought fairly to operate” and they must be sufficiently precise so as “to yield a manageable standard against which to measure deprivations of life, liberty or security of the person”: *R. v. Malmo-Levine*, 2003 SCC 74, [2003] 3 S.C.R. 571, at para. 113, per Gonthier and Binnie JJ.; *R. v. D.B.*, 2008 SCC 25, [2008] 2 S.C.R. 3, at para. 46, per Abella J.; *R. v. Anderson*, 2014 SCC 41, [2014] 2 S.C.R. 167, at para. 29, per Moldaver J.

Is the Duty of Commitment to the Client’s Cause Such a Principle?

Legal Principle and Sufficient Precision

[88] These two elements of the test are conveniently treated together.

[89] Turning first to the definition of a legal principle, the distinction is between, on one hand, a description of “an important state interest” and “the realm of general public policy” and, on the other, a “normative ‘legal’ principle” and “the basic tenets of our legal system”: see *Malmo-Levine*, at paras. 112 and 114; *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486, at p. 503. Some examples help flesh out this distinction.

[90] The “harm principle”, unsuccessfully advanced as a principle of fundamental justice in *Malmo-Levine*, was Mill’s theory to the effect that “the only purpose for which power can be rightfully exercised over any member of a civilised community, against his will, is to prevent harm to others”: J. S. Mill, *On Liberty and Considerations on Representative Government* (1946), at p. 8. However, the “best interests of the child” principle and the presumption of reduced moral culpability of young persons were found to be legal principles because they were not legal generalizations, but rather recognized legal principles in both domestic and international law: see *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*, 2004 SCC 4, [2004] 1 S.C.R. 76, at para. 9. Their manifestation in various legal instruments, coupled with

their longstanding use by various legal institutions, qualified them as legal principles: *ibid.*; see also *D.B.*, at paras. 47-60.

[91] An important indicator that a proposed rule or principle is a legal principle is that it is used as a rule or test in common law, statutory law or international law. The duty of commitment to the client's cause has been recognized by the Court as a distinct element of the broader common law duty of loyalty and thus unquestionably is a legal principle: *McKercher*, at paras. 19 and 43-44; *R. v. Neil*, 2002 SCC 70, [2002] 3 S.C.R. 631, at para. 19.

[92] While this standard is far from self-applying, it has proven to be sufficiently precise to enable the courts to apply it in widely divergent fact situations: see, e.g., *McKercher*, at paras. 43-44 and 55-56; *Neil*, at para. 19. This body of jurisprudence demonstrates that this principle of commitment to the client's cause is sufficiently precise to provide a workable standard in that it can be applied in a manner that provides guidance as to the appropriate result: *Rodriguez v. British Columbia (Attorney General)*, [1993] 3 S.C.R. 519, at pp. 590-91, per Sopinka J.; *Canadian Foundation for Children, Youth and the Law*, at para. 11, per McLachlin C.J.; H. Stewart, *Fundamental Justice: Section 7 of the Canadian Charter of Rights and Freedoms* (2012), at p. 108.

[93] Of course the duty of commitment to the client's cause must not be confused with being the client's dupe or accomplice. It does not countenance a lawyer's involvement in, or facilitation of, a client's illegal activities. Committed representation does not, for example, permit let alone require a lawyer to assert claims that he or she knows are unfounded or to present evidence that he or she knows to be false or to help the client to commit a crime. The duty is perfectly consistent with the lawyer taking appropriate steps with a view to ensuring that his or her services are not being used for improper ends.

[94] I conclude that the lawyer's duty of commitment to the client's cause is well entrenched as a sufficiently precise legal principle and therefore satisfies the first and the third requirements of a principle of fundamental justice.

Sufficient Consensus That the Duty Is Fundamental

[95] Principles of fundamental justice find their "meaning in the cases and traditions that have long detailed the basic norms for how the state deals with its citizens": *Canadian Foundation for Children, Youth and the Law*, at para. 8, per McLachlin C.J. The duty of commitment to the client's cause is fundamental to how the state and the citizen interact in legal matters.

[96] Clients — and the broader public — must justifiably feel confident that lawyers are committed to serving their clients' legitimate interests free of other obligations that might interfere with that duty. Otherwise, the lawyer's ability to do so may be compromised and the trust and confidence necessary for the solicitor-client relationship may be undermined. This duty of commitment to the client's cause is an enduring principle that is essential to the integrity of the administration of justice. In *Neil*, the Court underlined the fundamental importance of the duty of loyalty to the administration of justice. The duty of commitment to the client's cause is an essential component of that broader fiduciary obligation. On behalf of the Court, Binnie J. emphasized the ancient pedigree of the duty and wrote that it endures "because it is essential to the integrity of the administration of justice and it is of high public importance that public confidence in that integrity be maintained": para. 12 (emphasis added). This unequivocal and recent affirmation seems to me to demonstrate that the duty of commitment to the client's cause is both generally accepted and fundamental to the administration of justice as we understand it.

[97] The duty of commitment to the client's cause is thus not only concerned with justice for individual clients but is also deemed essential to maintaining public confidence in the administration of justice. Public confidence depends not only on fact but also on reasonable perception. It

follows that we must be concerned not only with whether the duty is in fact interfered with but also with the perception of a reasonable person, fully apprised of the relevant circumstances and having thought the matter through. The fundamentality of this duty of commitment is supported by many more general and broadly expressed pronouncements about the central importance to the legal system of lawyers being free from government interference in discharging their duties to their clients. In *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143, McIntyre J. put it this way:

. . . in the absence of an independent legal profession, skilled and qualified to play its part in the administration of justice and the judicial process, the whole legal system would be in a parlous state. [p. 187]

[98] In *Attorney General of Canada v. Law Society of British Columbia*, [1982] 2 S.C.R. 307, Estey J. wrote:

The independence of the Bar from the state in all its pervasive manifestations is one of the hallmarks of a free society. Consequently, regulation of these members of the law profession by the state must, so far as by human ingenuity it can be so designed, be free from state interference, in the political sense, with the delivery of services to the individual citizens in the state, particularly in fields of public and criminal law. The public interest in a free society knows no area more sensitive than the independence, impartiality and availability to the general public of the members of the Bar and through those members, legal advice and services generally. [Emphasis added; pp. 335-36.]

[99] Similarly, in *Pearlman v. Manitoba Law Society Judicial Committee*, [1991] 2 S.C.R. 869, the Court took up the theme in these words:

Stress was rightly laid on the high value that free societies have placed historically on . . . an independent bar, free to represent citizens without fear or favour in the protection of individual rights and civil liberties against incursions from any source, including the state. [p. 887]

(Citing the Ministry of the Attorney General of Ontario, *The Reports of the Professional Organizations Committee* (1980), at p. 26.)

[100] In *Finney*, the Court said this:

An independent bar composed of lawyers who are free of influence by public authorities is an important component of the fundamental legal framework of Canadian society. [Emphasis added; para. 1.]

[101] Various international bodies have also broadly affirmed the fundamental importance of preventing state interference with legal representation. The *Basic Principles on the Role of Lawyers* adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders state that “adequate protection of the human rights and fundamental freedoms to which all persons are entitled . . . requires that all persons have effective access to legal services provided by an independent legal profession”: U.N. Doc. A/CONF.144/28/Rev.1 (1991),

at p. 119. Similarly, the Council of Bars and Law Societies of Europe's *Charter of Core Principles of the European Legal Profession* emphasizes lawyers' "freedom . . . to pursue the client's case", including it as the first of 10 "core principles" (online). The International Bar Association's *International Principles on Conduct for the Legal Profession*, adopted in 2011, also emphasize committed client representation as the first principle governing lawyers' conduct: "A lawyer shall maintain independence and be afforded the protection such independence offers in giving clients unbiased advice and representation" (p. 5 (online)).

[102] I conclude that there is overwhelming evidence of a strong and widespread consensus concerning the fundamental importance in democratic states of protection against state interference with the lawyer's commitment to his or her client's cause.

[103] The duty of commitment to the client's cause ensures that "divided loyalty does not cause the lawyer to 'soft peddle' his or her [representation]" and prevents the solicitor-client relationship from being undermined: *Neil*, at para. 19; *McKercher*, at paras. 43-44. In the context of state action engaging s. 7 of the *Charter*, this means at least that (subject to justification) the state cannot impose duties on lawyers that undermine the lawyer's compliance with that duty, either in fact or in the perception of a reasonable person, fully apprised of all of the relevant

circumstances and having thought the matter through. The paradigm case of such interference would be state-imposed duties on lawyers that conflict with or otherwise undermine compliance with the lawyer's duty of commitment to serving the client's legitimate interests.

Is the Scheme Consistent With This Principle?

[104] The scheme limits lawyers' liberty by punishing with imprisonment the failure to comply with its requirements. Is this limitation of liberty in accordance with the principle of fundamental justice in relation to the lawyer's duty of committed representation? In other words, does this regime impose duties on lawyers, the performance of which in fact or in the perception of a reasonable person, undermine the lawyers' ability to comply with the duty of commitment to the clients' cause?

[105] To answer this question, we must look at the scheme as a whole and in light of my conclusion that the search aspects of the scheme inadequately protect solicitor-client privilege.

[106] The profession has developed practice standards relating to the subjects addressed by the scheme. The profession's own activity in this area recognizes that lawyers should take care that they not unknowingly assist in, or turn a blind eye to, money laundering or terrorism financing.

These professional standards also underline the point that the lawyer's duty of commitment to the client's cause cannot extend to in any way furthering the client's unlawful purposes.

[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.

[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.

[113] 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.

Justification

[114] I agree with the conclusion reached by the application judge and the Court of Appeal (which was unanimous on this point) that the scheme fails the proportionality test under s. 1 and is therefore not a limitation that is demonstrably justified in a free and democratic society. My conclusion is based on my view that it is 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.

(4) Conclusion

[115] I would agree with the application judge's decision that ss. 33.3, 33.4, 33.5, and 59.4 of the Regulations are of no force and effect and that s. 11.1 of the Regulations should be read down so that it does not apply to documents in the possession of legal counsel or in law office premises.

IV. Disposition

[116] 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*. Sections 5(i) and 5(j) of the Act provide that Part 1 of the Act applies to persons and entities described in the Regulations and, in my view, do not on their own infringe either s. 7 or s. 8 of the *Charter*.

[117] I would allow the appeal in part with costs of the appeal and the proceedings below to the Federation. I would set aside that part of the application judge's order declaring that ss. 5(i) and 5(j) of the Act are inconsistent with the Constitution of Canada and are of no force and effect to the extent that the reference in those subsections to "persons and entities" includes legal counsel and law firms. I would strike ss. 5(i) and (j) from that part of her order declaring that ss. 5(i), (j), 62, 63, 63.1 of the Act are read down to exclude legal counsel and law firms from the operation of those sections. I would otherwise dismiss the appeal and answer the constitutional questions as follows:

1. Do ss. 5(i), 5(j), 62, 63, 63.1 or 64 of the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*, S.C. 2000, c. 17, infringe s. 7 of the *Canadian Charter of Rights and Freedoms*?

Answer: With respect to ss. 62, 63, 63.1 and 64 of the Act, it is not necessary to answer this question given the answer to

question 5. With respect to ss. 5(i) and 5(j) of the Act, the answer is no.

2. If so, is the infringement a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society under s. 1 of the *Canadian Charter of Rights and Freedoms*?

Answer: It is not necessary to answer this question.

3. Do ss. 11.1, 33.3, 33.4 or 59.4 of the *Proceeds of Crime (Money Laundering) and Terrorist Financing Regulations*, SOR/2002-184, infringe s. 7 of the *Canadian Charter of Rights and Freedoms*?

Answer: With respect to s. 11.1 of the Regulations, to the extent that it applies to legal counsel and legal firms, the answer is yes. With respect to ss. 33.3, 33.4 and 59.4 of the Regulations, the answer is yes.

4. If so, is the infringement a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society under s. 1 of the *Canadian Charter of Rights and Freedoms*?

Answer: No.

5. Do ss. 5(i), 5(j), 62, 63, 63.1 or 64 of the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*, S.C. 2000, c. 17, infringe s. 8 of the *Canadian Charter of Rights and Freedoms*?

Answer: To the extent that ss. 62, 63 and 63.1 of the Act apply to documents in the possession of legal counsel and legal firms, the answer is yes. With respect to s. 64, the answer is yes. With respect to ss. 5(i) and 5(j) the answer is no.

6. If so, is the infringement a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society under s. 1 of the *Canadian Charter of Rights and Freedoms*?

Answer: No.

7. Do ss. 11.1, 33.3, 33.4 or 59.4 of the *Proceeds of Crime (Money Laundering) and Terrorist Financing Regulations*, SOR/2002-184, infringe s. 8 of the *Canadian Charter of Rights and Freedoms*?

Answer: No.

8. If so, is the infringement a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society under s. 1 of the *Canadian Charter of Rights and Freedoms*?

Answer: It is not necessary to answer this question.

APPENDIX

Proceeds of Crime (Money Laundering) and Terrorist Financing Act, S.C. 2000, c. 17

2. The definitions in this section apply in this Act.

...

“legal counsel” means, in Quebec, an advocate or a notary and, in any other province, a barrister or solicitor. [am. S.C. 2010, c. 12, s. 1862, eff. June 18, 2014]

...

3. The object of this Act is

(a) to implement specific measures to detect and deter money laundering and the financing of terrorist activities and to facilitate the investigation and prosecution of money laundering offences and terrorist activity financing offences, including

(i) establishing record keeping and client identification requirements for financial services providers and other persons or entities that engage in businesses, professions or activities that are susceptible to being used for money laundering or the financing of terrorist activities,

(ii) requiring the reporting of suspicious financial transactions and of cross-border movements of currency and monetary instruments, and

(iii) establishing an agency that is responsible for ensuring compliance with Parts 1 and 1.1 and for dealing with reported and other information;

(b) to respond to the threat posed by organized crime by providing law enforcement officials with the information they need to deprive criminals of the proceeds of their criminal activities, while ensuring that appropriate safeguards are put in place to protect the privacy of persons with respect to personal information about themselves;

(c) to assist in fulfilling Canada's international commitments to participate in the fight against transnational crime, particularly money laundering, and the fight against terrorist activity; and

(d) to enhance Canada's capacity to take targeted measures to protect its financial system and to facilitate Canada's efforts to mitigate the risk that its financial system could be used as a vehicle for money laundering and the financing of terrorist activities. [am. S.C. 2010, c. 12, s. 1863, eff. June 18, 2014; am. S.C. 2014, c. 20, s. 255, eff. June 19, 2014]

5. This Part applies to the following persons and entities:

...

(i) persons and entities engaged in a business, profession or activity described in regulations made under paragraph 73(1)(a);

(j) persons and entities engaged in a business or profession described in regulations made under paragraph 73(1)(b), while carrying out the activities described in the regulations;

...

6. Every person or entity referred to in section 5 shall keep and retain prescribed records in accordance with the regulations.

6.1 Every person or entity referred to in section 5 shall verify, in the prescribed circumstances and in accordance with the regulations, the identity of any person or entity.

7. Subject to section 10.1, every person or entity referred to in section 5 shall report to the Centre, in the prescribed form and manner, every financial transaction that occurs or that is attempted in the course of their activities and in respect of which there are reasonable grounds to suspect that

(a) the transaction is related to the commission or the attempted commission of a money laundering offence; or

(b) the transaction is related to the commission or the attempted commission of a terrorist activity financing offence.

9. (1) Subject to section 10.1, every person or entity referred to in section 5 shall report to the Centre, in the prescribed form and manner,

(a) any financial transaction, or any financial transaction within a class of financial transactions, specified in a directive issued under Part 1.1 that occurs or that is attempted in the course of their activities; and

(b) any prescribed financial transaction that occurs in the course of their activities.

(2) Subsection (1) does not apply to prescribed persons or entities, or prescribed classes of persons or entities, in respect of prescribed transactions, classes of transactions, clients or classes of clients, if the prescribed conditions are met.

(3) Every person or entity referred to in section 5 shall establish and maintain a list, in the prescribed form and manner, of their clients in respect of whom a report would have been required under subsection (1) were it not for subsection (2). However, a person or an entity may choose to report a client's transactions under subsection (1) instead of maintaining the list in respect of that client. [am. S.C. 2010, c. 12, s. 1864, eff. June 18, 2014]

9.1 Subject to section 9, every person or entity that is required to make a report to the Centre under an Act of Parliament or any regulations under it shall make it in the form and manner prescribed under this Act for a report under that Act.

9.6 (1) Every person or entity referred to in section 5 shall establish and implement, in accordance with the regulations, a program intended to ensure their compliance with this Part and Part 1.1.

(2) The program shall include the development and application of policies and procedures for the person or entity to assess, in the course of their activities, the risk of a money laundering offence or a terrorist activity financing offence.

(3) If the person or entity considers that the risk referred to in subsection (2) is high, the person or entity shall take prescribed special measures for identifying clients, keeping records and monitoring financial transactions in respect of the activities that pose the high risk. [am. S.C. 2010, c. 12, s. 1865, eff. June 18, 2014]

10.1 Sections 7 and 9 do not apply to persons or entities referred to in paragraph 5(i) or (j) who are, as the case may be, legal counsel or legal firms, when they are providing legal services.

62. (1) An authorized person may, from time to time, examine the records and inquire into the business and affairs of any person or entity referred to in section 5 for the purpose of ensuring compliance with Part 1 or 1.1, and for that purpose may

(a) at any reasonable time, enter any premises, other than a dwelling-house, in which the authorized person believes, on reasonable grounds, that there are records relevant to ensuring compliance with Part 1 or 1.1;

(b) use or cause to be used any computer system or data processing system in the premises to examine any data contained in or available to the system;

(c) reproduce any record, or cause it to be reproduced from the data, in the form of a printout or other intelligible output and remove the printout or other output for examination or copying; and

(d) use or cause to be used any copying equipment in the premises to make copies of any record.

(2) The owner or person in charge of premises referred to in subsection (1) and every person found there shall give the authorized person all reasonable assistance to enable them to carry out their responsibilities and shall furnish them with any information with respect to the administration of Part 1 or 1.1 or the regulations under it that they may reasonably require. [am. S.C. 2010, c. 12, s. 1882, eff. June 18, 2014]

63. (1) If the premises referred to in subsection 62(1) is a dwelling-house, the authorized person may not enter it without the consent of the occupant except under the authority of a warrant issued under subsection (2).

(2) A justice of the peace may issue a warrant authorizing the authorized person to enter a dwelling-house, subject to any conditions that may be specified in the warrant, if on *ex parte* application the justice is satisfied by information on oath that

(a) there are reasonable grounds to believe that there are in the premises records relevant to ensuring compliance with Part 1 or 1.1;

(b) entry to the dwelling-house is necessary for any purpose that relates to ensuring compliance with Part 1 or 1.1; and

(c) entry to the dwelling-house has been refused or there are reasonable grounds for believing that entry will be refused.

(3) For greater certainty, an authorized person who enters a dwelling-house under authority of a warrant may enter only a room or part of a room in which the person believes on reasonable grounds that a person or an entity referred to in section 5 is carrying on its business, profession or activity. [am. S.C. 2010, c. 12, s. 1882, eff. June 18, 2014]

63.1 (1) For an examination under subsection 62(1), an authorized person may also serve notice to require that the person or entity provide, at the place and in accordance with the time and manner stipulated in the notice, any document or other information relevant to the administration of Part 1 or 1.1 in the form of electronic data, a printout or other intelligible output.

(2) The person or entity on whom the notice is served shall provide, in accordance with the notice, the documents or other information with respect to the administration of Part 1 or 1.1 that the authorized person may reasonably require. [am. S.C. 2010, c. 12, s. 1882, eff. June 18, 2014]

64. (1) In this section, “judge” means a judge of a superior court having jurisdiction in the province where the matter arises or a judge of the Federal Court.

(2) If an authorized person acting under section 62, 63 or 63.1 is about to examine or copy a document in the possession of a legal counsel who claims that a named client or former client of the legal counsel has a solicitor-client privilege in respect of the document, the authorized person shall not examine or make copies of the document.

(3) A legal counsel who claims privilege under subsection (2) shall

(a) place the document, together with any other document in respect of which the legal counsel at the same time makes the same claim on behalf of the same client, in a package and suitably seal and identify the package or, if the authorized person and the legal counsel agree, allow the pages of the document to be initialed and numbered or otherwise suitably identified; and

(b) retain it and ensure that it is preserved until it is produced to a judge as required under this section and an order is issued under this section in respect of the document.

(4) If a document has been retained under subsection (3), the client or the legal counsel on behalf of the client may

(a) within 14 days after the day the document was begun to be so retained, apply, on three days notice of motion to the Deputy Attorney General of Canada, to a judge for an order

(i) fixing a day, not later than 21 days after the date of the order, and a place for the determination of the question whether the client has solicitor-client privilege in respect of the document, and

(ii) requiring the production of the document to the judge at that time and place;

(b) serve a copy of the order on the Deputy Attorney General of Canada; and

(c) if the client or legal counsel has served a copy of the order under paragraph (b), apply at the appointed time and place for an order determining the question.

(5) An application under paragraph (4)(c) shall be heard in private and, on the application, the judge

(a) may, if the judge considers it necessary to determine the question, inspect the document and, if the judge does so, the judge shall ensure that it is repackaged and resealed;

(b) shall decide the question summarily and

(i) if the judge is of the opinion that the client has a solicitor-client privilege in respect of the document, order the release of the document to the legal counsel, or

(ii) if the judge is of the opinion that the client does not have a solicitor-client privilege in respect of the document, order that the legal counsel

make the document available for examination or copying by the authorized person; and

(c) at the same time as making an order under paragraph (b), deliver concise reasons that identify the document without divulging the details of it.

(6) If a document is being retained under subsection (3) and a judge, on the application of the Attorney General of Canada, is satisfied that no application has been made under paragraph (4)(a) or that after having made that application no further application has been made under paragraph (4)(c), the judge shall order that the legal counsel make the document available for examination or copying by the authorized person.

(7) If the judge to whom an application has been made under paragraph (4)(a) cannot act or continue to act in the application under paragraph (4)(c) for any reason, the application under paragraph (4)(c) may be made to another judge.

(8) No costs may be awarded on the disposition of an application under this section.

(9) The authorized person shall not examine or make copies of any document without giving a reasonable opportunity for a claim of solicitor-client privilege to be made under subsection (2).

(9.1) The authorized person shall not examine or make copies of a document in the possession of a person, not being a legal counsel, who contends that a claim of solicitor-client privilege may be made in respect of the document by a legal counsel, without giving that person a reasonable opportunity to contact that legal counsel to enable a claim of solicitor-client privilege to be made.

(10) If a legal counsel has made a claim that a named client or former client of the legal counsel has a solicitor-client privilege in respect of a document, the legal counsel shall at the same time communicate to the authorized person the client's latest known address so that the authorized person may endeavour to advise the client of the claim of privilege that has been made on their behalf and may by doing so give the client an opportunity, if it is practicable within the time limited by this section, to waive the privilege before the matter is to be decided by a judge.

65. (1) The Centre may disclose to the appropriate law enforcement agencies any information of which it becomes aware under subsection (4) or section 62, 63 or 63.1 and that it suspects on reasonable grounds would be relevant to investigating or prosecuting an offence under this Act arising out of a contravention of Part 1 or 1.1.

(2) For the purpose of ensuring compliance with Part 1 or 1.1, the Centre may disclose to or receive from any agency or body that regulates or supervises persons or entities to whom Part 1 or 1.1 applies information relating to the compliance of those persons or entities with that Part.

(3) Any information disclosed by the Centre under subsection (1) may be used by an agency referred to in that subsection only as evidence of a contravention of Part 1 or 1.1, and any information disclosed by the Centre under subsection (2) may be used by an agency or body referred to in subsection (2) only for purposes relating to compliance with Part 1 or 1.1.

(4) For the purpose of ensuring compliance with Parts 1 and 1.1, the Centre shall receive information voluntarily provided to it by a person or entity — other than an agency or body referred to in subsection (2) — relating to the compliance with Part 1 or 1.1 of persons or entities referred to in section 5. [am. S.C. 2010, c. 12, s. 1882, eff. June 18, 2014; am. S.C. 2014, c. 20, s. 287, eff. June 19, 2014]

65.1 (1) The Centre may enter into an agreement or arrangement, in writing, with an institution or agency of a foreign state that has powers and duties, similar to those of the Centre, with respect to verifying compliance with requirements to identify persons or entities, keep and retain records or make reports, or with an international organization made up of such institutions or agencies and established by the governments of states, that stipulates

(a) that the Centre and the institution, agency or organization may exchange information about the compliance of persons and entities with those requirements and about the assessment of risk related to their compliance;

(b) that the information may only be used for purposes relevant to ensuring compliance with the requirements and to assessing risk related to compliance; and

(c) that the information will be treated in a confidential manner and not be further disclosed without the express consent of the Centre.

(2) The Centre may, in accordance with the agreement or arrangement, provide the institution, agency or organization with information referred to in the agreement or arrangement.

(3) When the Centre receives information from an institution, agency or organization under an agreement or arrangement, the Centre may provide it with an evaluation of whether the information is useful to the Centre.

1. . . .

(2) The following definitions apply in these Regulations.

. . .

“receipt of funds record” means, in respect of a transaction in which an amount of funds is received, a record that contains the following information:

(a) if the information is not readily obtainable from other records that the recipient keeps and retains under these Regulations, the name of the person or entity from whom the amount is in fact received and

(i) where the amount is received from a person, their address and date of birth and the nature of their principal business or their occupation, and

(ii) where the amount is received from an entity, their address and the nature of their principal business;

(b) the date of the transaction;

(c) the number of any account that is affected by the transaction, and the type of that account, the full name of the person or entity that is the account holder and the currency in which the transaction is conducted;

(d) the purpose and details of the transaction, including other persons or entities involved and the type and form of the transaction;

(e) if the funds are received in cash, whether the cash is received by armoured car, in person, by mail or in any other way; and

(f) the amount and currency of the funds received.

11.1 (1) Every financial entity or securities dealer that is required to confirm the existence of an entity in accordance with these Regulations when it opens an account in respect of that entity, every life insurance company, life insurance broker or agent or legal counsel or legal firm that is required to confirm the existence of an entity in accordance with these Regulations and every money services business that is required to confirm the existence of an entity in accordance with these Regulations when it enters into an ongoing electronic funds transfer, fund remittance or foreign exchange service agreement with that entity, or a service agreement for the issuance or redemption of money orders, traveller’s cheques or other similar negotiable instruments, shall, at the time the existence of the entity is confirmed, obtain the following information:

(a) in the case of a corporation, the names of all directors of the corporation and the names and addresses of all persons who own or control, directly or indirectly, 25 per cent or more of the shares of the corporation;

(b) in the case of a trust, the names and addresses of all trustees and all known beneficiaries and settlors of the trust;

(c) in the case of an entity other than a corporation or trust, the names and addresses of all persons who own or control, directly or indirectly, 25 per cent or more of the entity; and

(d) in all cases, information establishing the ownership, control and structure of the entity.

(2) Every person or entity that is subject to subsection (1) shall take reasonable measures to confirm the accuracy of the information obtained under that subsection.

(3) The person or entity shall keep a record that sets out the information obtained and the measures taken to confirm the accuracy of that information.

(4) If the person or entity is not able to obtain the information referred to in subsection (1) or to confirm that information in accordance with subsection (2), the person or entity shall

(a) take reasonable measures to ascertain the identity of the most senior managing officer of the entity; and

(b) treat that entity as high risk for the purpose of subsection 9.6(3) of the Act and apply the prescribed special measures in accordance with section 71.1 of these Regulations.

(5) If the entity, the existence of which is being confirmed by a person or entity under subsection (1), is a not-for-profit organization, the person or entity shall determine, and keep a record that sets out, whether that entity is

(a) a charity registered with the Canada Revenue Agency under the *Income Tax Act*; or

(b) an organization, other than one referred to in paragraph (a), that solicits charitable donations from the public.

(6) This section does not apply in respect of a group plan account held within a dividend reinvestment plan or a distribution reinvestment plan, including a plan that permits purchases of additional shares or units by the member with contributions other than the dividends or distributions paid by the sponsor of the

plan, if the sponsor of the plan is an entity whose shares or units are traded on a Canadian stock exchange, and that operates in a country that is a member of the Financial Action Task Force.

33.3 (1) Subject to subsection (2), every legal counsel and every legal firm is subject to Part 1 of the Act when they engage in any of the following activities on behalf of any person or entity:

(a) receiving or paying funds, other than those received or paid in respect of professional fees, disbursements, expenses or bail; or

(b) giving instructions in respect of any activity referred to in paragraph (a).

(2) Subsection (1) does not apply in respect of legal counsel when they engage in any of the activities referred to in that subsection on behalf of their employer.

33.4 Subject to subsection 62(2), every legal counsel and every legal firm shall, when engaging in an activity described in section 33.3, keep the following records:

(a) a receipt of funds record in respect of every amount of \$3,000 or more that they receive in the course of a single transaction, unless the amount is received from a financial entity or a public body; and

(b) 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 counsel or legal firm.

33.5 A legal counsel or legal firm that, in connection with a transaction, receives funds from the trust account of a legal firm or from the trust account of a legal counsel who is not acting on behalf of their employer,

(a) must keep and retain a record of that fact; and

(b) is not required to include in the receipt of funds record that is kept in respect of those funds

(i) the number and type of any account that is affected by the transaction, or

(ii) the full name of the person or entity that is the holder of the account.

59.4 (1) Subject to subsections (2) and 62(2) and section 63, every legal counsel and every legal firm shall, in respect of a transaction for which a record is required to be kept under section 33.4,

(a) in accordance with subsection 64(1), ascertain the identity of every person who conducts the transaction;

(b) in accordance with section 65, 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

(c) in accordance with section 66, confirm the existence of every entity, other than a corporation, on whose behalf the transaction is conducted.

(2) Subsection (1) does not apply in respect of a transaction for which funds are received by a legal counsel or legal firm from the trust account of a legal firm or from the trust account of a legal counsel who is not acting on behalf of their employer.

64. (1) In the cases referred to in sections 53, 53.1, 54, 55, 56, 57, 59, 59.1, 59.2, 59.3, 59.4, 59.5, 60 and 61, the identity of a person shall be ascertained, at the time referred to in subsection (2) and in accordance with subsection (3),

(a) by referring to the person's birth certificate, driver's licence, provincial health insurance card (if such use of the card is not prohibited by the applicable provincial law), passport or other similar document; or

(b) if the person is not physically present when the account is opened, the credit card application is submitted, the trust is established, the client information record is created or the transaction is conducted,

(i) by obtaining the person's name, address and date of birth and

(A) confirming that one of the following entities has identified the person in accordance with paragraph (a), namely,

(I) an entity, referred to in any of paragraphs 5(a) to (g) of the Act, that is affiliated with the entity ascertaining the identity of the person,

(II) an entity that carries on activities outside Canada similar to the activities of a person or entity referred to in any of paragraphs 5(a) to (g) of the Act and that is affiliated with the entity ascertaining the identity of the person, or

(III) an entity that is subject to the Act and is a member of the same association as the entity ascertaining the identity of the person, and

(B) verifying that the name, address and date of birth in the record kept by that affiliated entity or that entity that is a member of the same association corresponds to the information provided in accordance with these Regulations by the person, or

(ii) subject to subsection (1.3), by using one of the following combinations of the identification methods set out in Part A of Schedule 7, namely,

(A) methods 1 and 3,

(B) methods 1 and 4,

(C) methods 1 and 5,

(D) methods 2 and 3,

(E) methods 2 and 4,

(F) methods 2 and 5,

(G) methods 3 and 4, or

(H) methods 3 and 5.

(1.1) In the case referred to in paragraph 54.1(a), the identity of a person shall be ascertained by a person or entity, at the time referred to in subsection (2) and in accordance with subsection (3),

(a) by referring to the person's birth certificate, driver's licence, provincial health insurance card (if such use of the card is not prohibited by the applicable provincial law), passport or other similar document; or

(b) where the person is not physically present when the credit card application is submitted,

(i) by obtaining the person's name, address and date of birth and

(A) confirming that one of the following entities has identified the person in accordance with paragraph (a), namely,

(I) an entity, referred to in any of paragraphs 5(a) to (g) of the Act, that is affiliated with the entity ascertaining the identity of the person,

(II) an entity that carries on activities outside Canada similar to the activities of a person or entity referred to in any of paragraphs 5(a) to (g) of the Act and that is affiliated with the entity ascertaining the identity of the person, or

(III) an entity that is subject to the Act and is a member of the same association as the entity ascertaining the identity of the person, and

(B) verifying that the name, address and date of birth in the record kept by that affiliated entity or that entity that is a member of the same association corresponds to the information provided in accordance with these Regulations by the person,

(ii) subject to subsection (1.3), by using a combination of any two identification methods referred to in either Part A or Part B of Schedule 7, or

(iii) subject to subsection (1.3), where the person has no credit history in Canada and the credit limit on the card is not more than \$1,500, by using a combination of any two identification methods referred to in any of Parts A, B and C of Schedule 7.

(1.2) For the purposes of paragraphs (1)(b)(i) and (1.1)(b)(i), an entity is affiliated with another entity if one of them is wholly-owned by the other or both are wholly-owned by the same entity.

(1.21) For the purposes of subparagraphs (1)(b)(i) and (1.1)(b)(i),

(a) a financial services cooperative and each of its members that is a financial entity are considered to be members of the same association; and

(b) a credit union central and each of its members that is a financial entity are considered to be members of the same association.

(1.3) A combination of methods referred to in subparagraph (1)(b)(ii) or (1.1)(b)(ii) or (iii) shall not be relied on by a person or entity to ascertain the identity of a person unless

(a) the information obtained in respect of that person from each of the two applicable identification methods is determined by the person or entity to be consistent; and

(b) the information referred to in paragraph (a) is determined by the person or entity to be consistent with the information in respect of that person, if any, that is contained in a record kept by the person or entity under these Regulations.

(2) The identity shall be ascertained

(a) in the cases referred to in paragraph 54(1)(a), subsection 57(1) and paragraph 60(a), before any transaction other than an initial deposit is carried out on an account;

(b) in the cases referred to in section 53, paragraph 54(1)(b), subsection 59(1) and paragraphs 59.3(a), 59.4(1)(a), 59.5(a), 60(b) and 61(b), at the time of the transaction;

(b.1) in the case referred to in section 53.1, before the transaction is reported as required under section 7 of the Act;

(b.2) in the case referred to in paragraph 54.1(a), before any credit card is activated;

(c) in the cases referred to in paragraphs 55(a), (d) and (e), within 15 days after the trust company becomes the trustee;

(d) in the cases referred to in subsection 56(1) and paragraph 61(a), within 30 days after the client information record is created;

(e) in the cases referred to in paragraphs 59.1(a) and 59.2(1)(a), at the time of the transaction; and

(f) in the case referred to in subsection 62(3), at the time a contribution in respect of an individual member of the group plan is made to the plan, if

(i) the member's contribution is not made as described in paragraph 62(3)(a), or

(ii) the existence of the plan sponsor has not been confirmed in accordance with section 65 or 66.

(3) Unless otherwise specified in these Regulations, only original documents that are valid and have not expired may be referred to for the purpose of ascertaining identity in accordance with paragraph (1)(a) or (1.1)(a).

64.1 (1) A person or entity that is required to take measures to ascertain identity under subsection 64(1) or (1.1) may rely on an agent or mandatary to take the identification measures described in that subsection only if that person or entity has entered into an agreement or arrangement, in writing, with that agent or mandatary for the purposes of ascertaining identity.

(2) A person or entity that enters into an agreement or arrangement referred to in subsection (1) must obtain from the agent or mandatary the customer information obtained by the agent or mandatary under that agreement or arrangement.

65. (1) The existence of a corporation shall be confirmed and its name and address and the names of its directors shall be ascertained as of the time referred to in subsection (2), by referring to its certificate of corporate status, a record that it is required to file annually under the applicable provincial securities legislation or any other record that ascertains its existence as a corporation. The record may be in paper form or in an electronic version that is obtained from a source that is accessible to the public.

(2) The information referred to in subsection (1) shall be ascertained,

(a) in the case referred to in paragraphs 54(1)(d) and 60(e), before any transaction other than the initial deposit is carried out on the account;

(a.1) in the case referred to in paragraph 54.1(b), before any credit card is issued on the account;

(b) in the cases referred to in paragraphs 55(b) and (d), within 15 days after the trust company becomes the trustee;

(c) in the cases referred to in subsections 56(3) and 59(2) and paragraph 61(c), within 30 days after the client information record is created;

(d) in the case referred to in subsection 57(3), within 30 days after the opening of the account; and

(e) in the cases referred to in paragraphs 59.1(b), 59.2(1)(b), 59.3(b), 59.4(1)(b) and 59.5(b), within 30 days after the transaction.

(3) Where the information has been ascertained by referring to an electronic version of a record, the person or entity required to ascertain the information shall keep a record that sets out the corporation's registration number, the type of record referred to and the source of the electronic version of the record.

(4) Where the information has been ascertained by referring to a paper copy of a record, the person or entity required to ascertain the information shall retain the record or a copy of it.

66. (1) The existence of an entity, other than a corporation, shall be confirmed as of the time referred to in subsection (2), by referring to a partnership agreement, articles of association or other similar record that ascertains its

existence. The record may be in paper form or in an electronic version that is obtained from a source that is accessible to the public.

(2) The existence of the entity shall be confirmed

(a) in the case referred to in paragraphs 54(1)(e) and 60(f), before any transaction other than the initial deposit is carried out on the account;

(a.1) in the case referred to in paragraph 54.1(c), before any credit card is issued on the account;

(b) in the cases referred to in paragraphs 55(c) and (d), within 15 days after the trust company becomes the trustee;

(c) in the cases referred to in subsections 56(4) and 59(3) and paragraph 61(d), within 30 days after the client information record is created;

(d) in the case referred to in subsection 57(4), within 30 days after the account is opened; and

(e) in the cases referred to in paragraphs 59.1(c), 59.2(1)(c), 59.3(c), 59.4(1)(c) and 59.5(c), within 30 days after the transaction.

(3) Where the existence of the entity has been confirmed by referring to an electronic version of a record, the person or entity required to confirm that information shall keep a record that sets out the registration number of the entity whose existence is being confirmed, the type of record referred to and the source of the electronic version of the record.

(4) Where the existence of the entity has been confirmed by referring to a paper copy of a record, the person or entity required to confirm that information shall retain the record or a copy of it.

66.1 (1) The prescribed persons or entities for the purpose of section 9.5 of the Act are every financial entity, money services business and casino that is required to keep a record under these Regulations in respect of an electronic funds transfer referred to in subsection (2).

(2) Subject to subsection (3), the prescribed electronic funds transfers to which section 9.5 of the Act applies are those as defined in subsection 1(2), but including transfers within Canada that are SWIFT MT 103 messages.

(3) For greater certainty, subsection (2) does not apply in respect of

(a) a transfer carried out using a credit or debit card, if the recipient has an agreement with the payment service provider permitting payment by such means for the provision of goods and services;

(b) a transfer where the recipient withdraws cash from their account;

(c) a transfer carried out by means of a direct deposit or a pre-authorized debit; or

(d) a transfer carried out using cheque imaging and presentment.

67. Every person or entity that is required by these Regulations to ascertain the identity of a person in connection with a record that the person or entity has created and is required to keep under these Regulations, or a transaction that they have carried out and in respect of which they are required to keep a record under these Regulations or under section 12.1 of the *Proceeds of Crime (Money Laundering) and Terrorist Financing Suspicious Transaction Reporting Regulations*, shall set out on or in or include with that record the name of that person and

(a) if a birth certificate, driver's licence, provincial health insurance card (if such use of the card is not prohibited by the applicable provincial law), passport or any other similar record is relied on to ascertain the person's identity, the type and reference number of the record and the place where it was issued;

(b) if a confirmation of a cleared cheque from a financial entity is relied on to ascertain the person's identity, the name of the financial entity and the account number of the deposit account on which the cheque was drawn;

(c) if the person's identity is ascertained by confirming that they hold a deposit account with a financial entity, the name of the financial entity where the account is held and the number of the account and the date of the confirmation;

(d) if the person's identity is ascertained by relying on a previous confirmation of their identity by an entity that is affiliated with the entity ascertaining the identity of the person or an entity that is a member of the same association — being a central cooperative credit society as defined in section 2 of the *Cooperative Credit Associations Act* — as the entity ascertaining the identity of the person, the name of that entity and the type and reference number of the record that entity previously relied on to ascertain the person's identity;

(e) if an identification product is used to ascertain the person's identity, the name of the identification product, the name of the entity offering the product,

the search reference number and the date the product was used to ascertain the person's identity;

(f) if the person's identity is ascertained by consulting a credit file kept by an entity in respect of the person, the name of the entity and the date of the consultation;

(g) if the person's identity is ascertained from an attestation signed by a commissioner of oaths in Canada or a guarantor in Canada, the attestation;

(h) if the person's identity is ascertained by consulting an independent data source, the name of the data source, the date of the consultation and the information provided by the data source;

(i) if the person's identity is ascertained by relying on a utility invoice issued in the person's name, the invoice or a legible photocopy or electronic image of the invoice;

(j) if the person's identity is ascertained by relying on a photocopy or electronic image of a document provided by the person, that photocopy or electronic image; and

(k) if the person's identity is ascertained by relying on a deposit account statement issued in the person's name by a financial entity, a legible photocopy or electronic image of the statement.

68. Where any record is required to be kept under these Regulations, a copy of it may be kept

(a) in a machine-readable form, if a paper copy can be readily produced from it; or

(b) in an electronic form, if a paper copy can be readily produced from it and an electronic signature of the person who must sign the record in accordance with these Regulations is retained.

69. (1) Subject to subsection (2), every person or entity that is required to obtain, keep or create records under these Regulations shall retain those records for a period of at least five years following

(a) in respect of signature cards, account operating agreements, account application forms, credit card applications and records setting out the intended use of the account, the day on which the account to which they relate is closed;

(a.1) in respect of client credit files that are required to be kept under paragraph 14(i) and records that are required to be kept under paragraph 14(n), 14.1(g) or 23(1)(f), the day on which the account to which they relate is closed;

(b) in respect of client information records, certificates of corporate status, records that are required to be filed annually under the applicable provincial securities legislation or other similar records that ascertain the existence of a corporation, and records that ascertain the existence of an entity, other than a corporation, including partnership agreements and articles of association, the day on which the last business transaction is conducted;

(b.1) in respect of client credit files that are required to be kept under paragraph 30(a), records that are required to be kept under section 11.1, paragraph 14(o), subsection 15.1(2) or section 20.1 or 31, lists that are required to be kept under section 32 and records, other than client information records, that are required to be kept under that section, the day on which the last business transaction is conducted; and

(c) in respect of all other records, the day on which they were created.

(2) Where records that an individual keeps under these Regulations are the property of the individual's employer or a person or entity with which the individual is in a contractual relationship, the individual is not required to retain the records after the end of the individual's employment or contractual relationship.

70. Every record that is required to be kept under these Regulations shall be retained in such a way that it can be provided to an authorized person within 30 days after a request is made to examine it under section 62 of the Act.

Canadian Charter of Rights and Freedoms

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.

The following are the reasons delivered by

THE CHIEF JUSTICE AND MOLDAVER J. —

[118] We have read the decision of Cromwell J. and we agree with his reasons insofar as they relate to s. 8 of the *Canadian Charter of Rights and Freedoms*.

[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. Marmo-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.

[121] For these reasons, we would allow the appeal in part in accordance with the disposition of our colleague.

Appeal allowed in part with costs.

Solicitor for the appellant: Attorney General of Canada, Ottawa.

*Solicitors for the respondent: Hunter Litigation Chambers, Vancouver;
Blake, Cassels & Graydon, Vancouver.*

*Solicitors for the intervener the Criminal Lawyers' Association
(Ontario): Stockwoods, Toronto.*

Solicitors for the intervener the Canadian Civil Liberties Association: Osler, Hoskin & Harcourt, Toronto.

Solicitors for the intervener the Law Society of British Columbia: McCarthy Tétrault, Vancouver.

Solicitors for the intervener the Canadian Bar Association: Lawson Lundell, Vancouver.

Solicitors for the intervener the Advocates' Society: Stern Landesman Clark, Toronto; Paliare Roland Rosenberg Rothstein, Toronto.

Solicitors for the interveners Barreau du Québec and Chambre des notaires du Québec: Lavery, de Billy, Montréal.