## I. INTRODUCTION

1. The *Proceeds of Crime (Money Laundering) Act*, S.C. 2000, c. 17 (the "Act") has received royal assent and is being progressively implemented. Certain sections of the Act are already in force. By virtue of an Order in Council dated August 28, 2001, ss. 5, 7, 8, 10 and 11 of the Act came into force on October 28, 2001.

> P.C. 2001 – 1499, *Proceeds of Crime (Money Laundering) Act*. *Order Fixing October 28, 2001 as the Date of the Coming to Force of Certain Sections of the Act*, SI/2001-88, C. Gaz. 2001.II.2013 (the "Order in Council") – see Petition, Schedule "1", p. 3

2. Sections 5(i), 5(j) and 73 of the Act authorize the Governor in Council to make regulations subjecting certain classes of persons and entities to the provisions of the Act.

3. The *Proceeds of Crime (Money Laundering) Suspicious Transaction Reporting Regulations*, SOR/2001-317 (the "Regulations"), came into force on November 8, 2001. Section 5 of the Regulations provides that every legal counsel is subject to Part 1 of the Act, which includes ss. 5, 7, 8, 10 and 11 of the Act, when they engage in any of the following activities on behalf of any person or entity, including the giving of instructions on behalf of a person or entity:

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

(b) purchasing or selling securities, real property or business assets or entities; and

(c) transferring funds or securities by any means.

4. "Legal counsel" is defined in s. 2 of the Act as "in the Province of Quebec, an advocate or a notary and, in any other province, a barrister or solicitor".

## A. PART 1 OF THE ACT

### (i) *Reporting Suspicious Transactions*

5. The primary concern of the applicant relates to s. 7 of the Act, which came into force on October 28, 2001 by the Order in Council, and was made applicable to legal counsel as of November 8, 2001 by s. 5 of the Regulations.

6. Section 7 of the Act requires the reporting of "suspicious transactions":

> Every person or entity shall report to the [Financial Transactions and Reports Analysis] Centre, in the prescribed form and manner, every financial transaction that occurs in the course of their activities and in respect of which there are reasonable grounds to suspect that the transaction is related to the commission of a money laundering offence.

7. The "prescribed form and manner" is set out in the Regulations. Section 10 of the Regulations provides that the person shall send a report to the Centre within 30 days after first detecting a fact that constitutes reasonable grounds to suspect that a transaction is related to the commission of a money laundering offence.

8. Section 9 of the Regulations indicates that the information required to be reported to the Centre is set out in the Schedule to the Regulations as the "Suspicious Transaction Report". A Suspicious Transaction Report must include the following information (except in certain cases where the information is not applicable or the reporting person is unable to obtain the information after taking reasonable measures to do so):

(a) the type of reporting person or entity;

(b) the identification number of the place of business where the transaction occurred;

(c) the full name of the reporting person or entity;

(d) the full address of the business where the transaction occurred;

(e) the name and telephone number of a contact person;

(f) the date and time of the transaction, including the posting date if different;

(g) the purpose and details of transaction, including the type and amount of funds and other institutions or accounts that are involved;

(h) the method of the transaction;

(i) the identification number of the individual who first detected a fact respecting a suspicious transaction;

(j) complete account details, including account and branch number, type of account, full name of each account holder, date account opened and closed, and current status of account;

(k) full information on individual conducting transaction, including name, address, country of residence, personal telephone number, government identification (e.g. passport number), date of birth, occupation, employer, business telephone number and address;

(l) a detailed description of the grounds to suspect that the transaction is related to the commission of a money laundering offence; and

(m) any other action taken as a result of suspicion.

9. Neither the Act nor the Regulations specify what information legal counsel are required to refer to in formulating their grounds for suspicion regarding the transaction.

10. Section 8 of the Act prohibits legal counsel from disclosing to their clients that they have made a Suspicious Transaction Report under s. 7 of the Act, or disclosing the contents of such a report, with the intent to prejudice a criminal investigation, whether or not such an investigation has begun.

11. Section 75 of the Act creates offences for the breach of ss. 7-8 of the Act. A breach of s. 7 of the Act is punishable on indictment by a fine of up to $2,000,000 and

imprisonment for up to five years. Breach of s. 8 of the Act is punishable on indictment with imprisonment of up to two years.

**(ii) *Solicitor-client Privilege***

12. Section 11 of the Act provides that nothing in Part 1 of the Act "requires a legal counsel to disclose any information that is subject to solicitor-client privilege."

13. The scope of the privilege and its protection are not defined in the Act or Regulations. Also, the exemption from disclosing information subject to privilege may not apply to the obligation of legal counsel to record information.

## B. PART 3 OF THE ACT

14. Sections 62-65 of the Act empower persons authorized by the Director of the Centre to search persons and entities subject to Part 1 of the Act for the purpose of ensuring compliance with the recording and reporting obligations enshrined in that Part.

15. These sections are the enforcement provisions of the Act. Although they are not yet proclaimed into force, they have received royal assent, cannot be changed without parliamentary amendment, and can be brought into force at any time by Order in Council.

16. Section 62 of the Act allows an authorized person, from time to time, to examine the records and inquire into the business affairs of any person or entity referred to in s. 5 of the Act. That power permits an authorized person, without a warrant and at any reasonable time, to 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 of the Act (ss. 62(1)(a)).

17. In doing so, an authorized person may examine data on any computer system on the premises and use copy equipment to reproduce records located on the premises (ss. 62(1)(b)-62(1)(d)). Persons in the premises must assist the authorized person in carrying out his or her responsibilities and furnish her or him with any information with respect to the administration of Part 1 of the Act or its regulations that the authorized person may reasonably require (ss. 62(2)).

18. If the premises referred to in s. 62 is a dwelling-house, s. 63 of the Act empowers an authorized person to enter with the authority of a warrant issued by a justice of the peace on *ex parte* application if:

(a) there are reasonable grounds to believe that there are records in the premises relevant to ensuring compliance with Part 1 of the Act (ss. 63(2)(a));

(b) entry to the dwelling-house is necessary for any purpose that relates to ensuring compliance with Part 1 of the Act (ss. 63(2)(b)); and

(c) entry to the dwelling-house has been refused or there are reasonable grounds for believing that entry will be refused (ss. 63(2)(c)).

19. This section of the Act authorizes the entry and search of a dwelling-house under the power of a form of warrant which has been issued on the strength of grounds which are materially different from those which are the prerequisites to the general power of warranted search under the *Criminal Code*. Under the Act, an authorized person is only required to demonstrate reasonable grounds to believe that a dwelling-house contains records relevant to ensuring compliance with the Act, in circumstances where entry to the dwelling-house has either been refused or such refusal is anticipated.

20. Section 64 of the Act allows legal counsel to claim solicitor-client privilege in respect of documents which an authorized person attempts to examine or copy pursuant to ss. 62-63. If the legal counsel claims privilege with respect to a document, he or she must:

(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 initialled and numbered or otherwise suitably identified (ss. 64(3)(a));

(b) retain it and ensure that it is preserved until it is produced to a judge as required and an order is issued in respect of the document (ss. 64(3)(b)); and

(c) provide the authorized person with the name and latest known address of the client so that the authorized person may contact the client to give him or her an opportunity to waive the claim of privilege (ss. 64(10)).

21. Within 14 days of making a claim of privilege, if the client or legal counsel wish to defend that claim, they may, on three days' notice to the Deputy Attorney General of Canada apply to a judge for an order:

(a) 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 (ss. 64(4)(a)(i)), and

(b) requiring the production of the document to the judge at that time and place (ss. 64(4)(a)(ii)).

22. If neither the client nor the legal counsel make the appropriate application, a judge, on the application of the Attorney General of Canada, must order that the legal counsel make the sealed documents available to the authorized person (ss. 64(6)).

23. No costs may be awarded in regards to an application made under s. 64 of the Act (ss. 64(8).

24. Section 65 of the Act allows the Centre to disclose to law enforcement agencies any information obtained under ss. 62-63 and that the Centre suspects on reasonable grounds is evidence of a contravention of Part 1 of the Act.

## II. ISSUE

25. The issue on this application is whether the enforcement of s. 5 of the Regulations, insofar as it makes legal counsel subject to the obligations in Part 1 of the Act and potentially subjects legal counsel to searches under Part 3 of the Act, must be enjoined on an interlocutory basis pending the hearing of the Petition filed herein and the court's decision thereon.

## III. ARGUMENT

### A. INTERLOCUTORY RELIEF AGAINST THE CROWN

26. Interlocutory relief is available against the Crown in constitutional proceedings.

27. Section 22(1) of the *Crown Liability and Proceedings Act*, R.S.C. 1985, c. C-50 prohibits a court from granting an injunction or specific performance against the Crown, although a court is permitted to "make an order declaratory of the rights of the parties". Section 22(2) of that statute makes the same provision applicable to servants of the Crown.

28. The exception to this rule is where interlocutory relief is sought to prevent a violation of the constitution. Section 52(1) of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11, provides that:

> The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

29. Furthermore, s. 24(1) of the *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982*, provides that:

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

30. In combination, these provisions mean that the *Crown Liability and Proceedings Act* cannot protect the Crown from the jurisdiction of the courts to grant a remedy for a breach of the constitution.

> Robert J. Sharpe, *Injunctions and Specific Performance*, loose-leaf ed. (Aurora: Canada Law Book, 1983), updated 2000, release 8, paras. 3.1220-3.1330
> Peter Hogg and Patrick Monahan, *Liability of the Crown*, 3rd ed. (Toronto: Thomson, 2000) at p. 36

31. Where a law is alleged to be unconstitutional under the *Charter* or otherwise, a court of competent jurisdiction is entitled to grant such discretionary relief as it considers

appropriate and just in the circumstances. This authority allows the issuance of injunctive relief in constitutional cases.

> *Manitoba (Attorney General) v. Metropolitan Stores Ltd.*, [1987] 1 S.C.R. 110, 38 D.L.R. (4th) 321 (subsequent citations are to S.C.R.)
> *RJR-Macdonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311, 111 D.L.R. (4th) 385 (subsequent citations are to S.C.R.)
> *Harper v. Canada (Attorney General)*, [2000] 2 S.C.R. 764

## B. THE TEST FOR INTERLOCUTORY RELIEF

32. The two primary cases in which the Supreme Court of Canada considered the power to grant injunctive relief in constitutional cases are *Manitoba (Attorney General) v. Metropolitan Stores Ltd.* and *RJR-Macdonald Inc. v. Canada (Attorney General)*. The most recent application of the principles set out in those cases is *Harper v. Canada (Attorney General).*

> *Metropolitan Stores, supra*
> *RJR-Macdonald, supra*
> *Harper, supra*

### (i) Metropolitan Stores

33. In *Metropolitan Stores*, an employer challenged provisions of the Manitoba *Labour Relations Act* which authorized the Manitoba Labour Board to impose a first collective agreement between a newly certified union and the employer.

34. The employer also applied for an order staying the proceedings before the Board while the court considered the validity of the Act. The trial judge dismissed the application for a stay.

> *Metropolitan Stores (MTS) Ltd. v. Manitoba Food and Commercial Workers, Local 832* (1985), 36 Man. R. (2d) 152, 22 C.R.R. 156 (Q.B.)

35. The Court of Appeal allowed the appeal and granted a stay.

> *Metropolitan Stores (MTS) Ltd. v. Manitoba Food and Commercial Workers, Local 832* (1985), 37 Man. R. (2d) 181, 86 CLLC para.14,014 at 12072 (C.A.)

36. At the Supreme Court of Canada, Beetz J., writing for the court, allowed the appeal and set aside the stay issued by the Court of Appeal. Beetz J. held that the same

principles govern an application for a stay and a *Charter* case involving an application for interlocutory injunctive relief

*Metropolitan Stores* (S.C.C.), *supra* at 121

37. Beetz J. set out three steps in determining whether to grant interlocutory relief. First, he adopted the threshold set out in *American Cyanamid*, whether there is a "serious question to be tried as opposed to a frivolous or vexatious claim".

*Metropolitan Stores* (S.C.C.), *supra* at 127, citing *American Cyanamid Co. v. Ethicon Ltd.*, [1975] A.C. 396, [1975] 1 All E.R. 504 (H.L.)

38. The second test is whether the applicant who seeks the interlocutory relief would suffer irreparable harm unless the relief is granted.

*Metropolitan Stores* (S.C.C.), *supra* at 128

39. The third test is whether the balance of convenience favours the granting of the relief. At this last stage, the public interest is factored into consideration.

*Metropolitan Stores* (S.C.C.), *supra* at 129

40. In determining the consequences of granting interlocutory relief in a constitutional case, Beetz J. distinguished between "suspension" and "exemption" cases.

41. A suspension case, as the appellation implies, involves the total suspension of a law in all its effect. An exemption case involves the suspension of the application of a law in respect of a certain person or class of persons.

Sharpe, *supra* at para. 3.1310

42. Beetz J. quoted from the opinion of Linden J. in *Morgentaler v. Ackroyd*, who wrote that:

> In my view, therefore, the balance of convenience normally dictates that those who challenge the constitutional validity of laws must obey those laws pending the court's decision. If the law is eventually proclaimed unconstitutional, then it need no longer be complied with, but until that time, it must be respected and this court will not enjoin its enforcement.

*Metropolitan Stores* (S.C.C.), *supra*, at 143 , quoting *Morgentaler v. Ackroyd* (1983), 150 D.L.R. (3d) 59 at 66-68 (Ont. H.C.)

43. Beetz J. commented that Linden J. set the bar too high, "at least in exemption cases where the impugned provisions are in the nature of regulations applicable to a relatively limited number of individuals and where no significant harm would be suffered by the public" by the granting of interlocutory relief.

*Metropolitan Stores* (S.C.C.), *supra*, at 147

44. By contrast, Beetz J. stated that the public interest would carry greater weight in suspension cases, where the legislation affects a great number of people.

**(ii) *RJR-Macdonald***

45. In *RJR-Macdonald*, the three major tobacco producing companies of Canada challenged legislation prohibiting tobacco advertising and regulating the labelling of tobacco products.

46. The Quebec Superior Court held that the legislation was unconstitutional.

*RJR-Macdonald Inc. v. Canada (Attorney General)* (1991), 82 D.L.R. (4th) 449 (Que. S.C.)

47. The Court of Appeal held that the law was constitutional.

*RJR-Macdonald Inc. v. Canada (Attorney General)* (1993), 102 D.L.R. (4th) 289 (Que. C.A.)

48. At the Supreme Court of Canada, the plaintiffs sought to stay the Court of Appeal decision upholding the constitutionality of the new labelling requirements.

49. Sopinka and Cory JJ., writing for the court, applied the test laid down in *Metropolitan Stores*, *supra*. Sopinka and Cory JJ. reasoned that the threshold required to meet the first condition, whether there is a serious question to be tried, "is a low one." As long as "the application is neither vexatious nor frivolous", the court should proceed to the second and third stages of the test.

*RJR-Macdonald Inc.* (S.C.C.), *supra* at 337-338

50. At the second stage, the issue of irreparable harm, Sopinka and Cory JJ. wrote that the question is "whether a refusal to grant relief could so adversely affect the applicants'

own interests that the harm could not be remedied if the eventual decision on the merits does not accord with the result of the interlocutory application."

*RJR-Macdonald Inc.* (S.C.C.), *supra* at 341

51. The reasoning adopted by Sopinka and Cory JJ. indicates that in constitutional cases, particularly where the applicant challenges government legislation, irreparable harm is likely to be established. The focus is at the balance of convenience stage.

52. At this third stage, Sopinka and Cory JJ. reasoned that both parties may make arguments as to the appropriate public interests to be considered. The Crown is not the exclusive representative of the public interest.

*RJR-Macdonald Inc.* (S.C.C.), *supra* at 343, citing Jamie Cassels, "An Inconvenient Balance: The Injunction as a Charter Remedy," in J. Berryman, ed., *Remedies: Issues and Perspectives* (Scarborough: Carswell, 1991), p. 271

53. Sopinka and Cory JJ. also agreed with Beetz J.'s reasoning in *Metropolitan Stores* that public interest considerations are less of a concern in an exemption case than in a suspension case, because:

> the public interest is much less likely to be detrimentally affected when a discrete and limited number of applicants are exempted from the application of certain provisions of the law than when the application of the law is suspended entirely [citations omitted].

*RJR-Macdonald Inc.* (S.C.C.), *supra* at 346

54. Even in a suspension case, interlocutory relief may be available if the request for relief is sufficiently narrow that the general public interest in the continued application of the law is not affected.

*RJR-Macdonald Inc.* (S.C.C.), *supra* at 347

55. In applying the test to the facts in that case, Sopinka and Cory JJ. focused on the balance of convenience stage. They noted that the applicants sought an exemption from the labelling regulations. Properly characterized, though, it was a suspension case because the applicants sought to suspend the application of the regulations to all tobacco-producing companies in Canada. In the result, Sopinka and Cory JJ. dismissed the applications.

### (iii) Harper v. Canada

56. In *Harper v. Canada (Attorney General)*, the applicant sought a declaration that certain recently-enacted legislative provisions governing third party spending limits in a federal election were an unjustified infringement of s. 2(*b*) of the *Charter*.

*Harper, supra*

57. After the commencement of the proceedings, an election writ was issued. The applicant sought an interlocutory injunction restraining the enforcement of the spending limits pending a decision in the action.

58. The trial judge granted the injunction.

*Harper v. Canada (Attorney General),* [2000] A.J. No. 1226 (Q.B.) (QL)

59. The Court of Appeal upheld the injunction.

*Harper v. Canada (Attorney General)* (2000), 266 A.R. 262, [2000] A.J. No. 1240 (C.A.) (QL)

60. On appeal to the Supreme Court of Canada, the majority of the court stayed the injunction.

*Harper v. Canada* (S.C.C.), *supra*

61. After the election was over, the trial judge issued his reasons on the trial. He held that certain aspects of the legislation constituted an unjustified limit on s. 2(*b*) of the *Charter* and declared them to be of no force or effect.

*Harper v. Canada (Attorney General),* [2001] A.J. No. 808 (Q.B.) (QL)

62. On the issue of interlocutory relief, both the majority and minority reasons of the Supreme Court of Canada applied the three-part test set out in *Metropolitan Stores, supra* and *RJR-Macdonald, supra*.

63. At the first stage, the majority of the Court held that there was a serious issue to be tried, in part "because the constitutionality of the provisions is challenged" and the case would turn on the application of s. 1 of the *Charter*.

*Harperv. Canada* (S.C.C.), *supra* at para. 4

64. On the requirement of irreparable harm, the majority assumed that this aspect of the test was met.

*Harper v. Canada* (S.C.C.), *supra* at para. 4

65. At the balance of convenience stage, the majority of the Court noted the rule against granting the equivalent of final relief in interlocutory challenges to legislation.

*Harper v. Canada* (S.C.C.), *supra* at para. 7

66. The majority also noted that the legislation in question must be assumed to be directed to the public good and therefore its enforcement must be assumed to be in the public interest. Courts will "not lightly" issue interlocutory relief prohibiting the enforcement of a law impugned on grounds of alleged unconstitutionality, but will only do so in "clear cases".

*Harper v. Canada* (S.C.C.), *supra* at para. 10

67. In the result, the majority found that the public interest in enforcing the legislation outweighed the partial limitation on freedom of expression. Granting the injunction would give the applicant substantial success prior to the completion of the trial. The majority stayed the order issued by the trial judge.

*Harper v. Canada* (S.C.C.), *supra* at paras. 11-12

68. Major J., dissenting, would have upheld the injunction. He noted that, despite the assumption that enforcing legislation generally serves a public interest, there was no evidence demonstrating an impediment of a public interest resulting from the injunction. This was contrasted with the compelling public interest in protecting fundamental *Charter*-protected freedoms, in particular freedom of speech in the context of an election.

*Harper v. Canada* (S.C.C.), *supra* at paras. 17, 25

69. As a result, in the balance of convenience, Major J. would have found that the applicant had displaced the assumption of greater harm to the public interest from the non-enforcement of the legislation. He held that this was one of the "exceptional cases" in which a suspension of the legislation would be appropriate.

*Harper v. Canada* (S.C.C.), *supra* at paras. 24, 28

## C. APPLICATION

### (i) ***Serious Issue to be Tried***

#### (1) Part 1 of the Act

70. The applicant has raised a number of very serious issues in this proceeding. First, the application of Part 1 of the Act to legal counsel constitutes an infringement of s. 7 of the *Charter* because it compels legal counsel, on pain of imprisonment, to gather incriminating information about their clients and others and report it to the state. This infringement of the liberty interests of clients and legal counsel is not in accordance with numerous principles of fundamental justice, including:

(a) the constitutional convention of the independence of the bar;

(b) legal counsel's duty of loyalty to the client;

(c) solicitor-client privilege;

(d) legal counsel's duty to protect client confidentiality; and

(e) the privilege against self-incrimination.

71. The independence of the bar is a constitutional convention which underlies the rule of law, the independence of the judiciary and all other fundamental principles of justice. It is the hallmark of a free society, without which the whole legal system would be placed "in a parlous state."

> *LaBelle v. Law Society of Upper Canada* (2001), 52 O.R. (3d) 398 (S.C.)
> *Canada (Attorney General) v. Law Society of British Columbia*, [1982] 2 S.C.R. 307 at 335
> *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R 143 at 187-188

72. The application of Part 1 of the Act to legal counsel violates the independence of the bar by conscripting legal counsel against their clients, requiring lawyers to investigate and report on the transactions engaged in by their clients and others.

73. Legal counsel's duty of loyalty to their clients requires that legal counsel not permit their own interests to come into conflict with those of their clients. Legal counsel must have "undivided loyalty" to their clients.

> *Szarfer v. Chodos* (1986), 54 O.R. (2d) 663 at 676 (H.C.), aff'd (1988), 54 D.L.R. (4th) 383 (Ont. C.A.)
> Canadian Bar Association, *Code of Professional Conduct*, c. VI
> Law Society of British Columbia, *Professional Conduct Handbook*, c. 7
> Law Society of Alberta, *Code of Professional Conduct*, c. 6
> Law Society of Saskatchewan, *Code of Professional Conduct*, c. 6
> Law Society of Manitoba, *Code of Professional Conduct*, c. 6
> Law Society of Upper Canada, *Rules of Professional Conduct*, Rule 2
> Barreau du Québec, *Code de déontologie des avocats*, s. 3
> Chambre des notaires du Québec, *Code de déontologie des Notaires*, s. 3
> Law Society of New Brunswick, *Professional Conduct Handbook*, Rule 9
> Nova Scotia Barristers' Society, *Legal Ethics & Professional Conduct Handbook*, c. 6
> Law Society of Newfoundland, *Code of Professional Conduct*, c. V
> (Members of the law societies of Prince Edward Island, the Northwest Territories, Yukon, and Nunavut are bound by the Canadian Bar Association *Code of Professional Conduct*.)
> (For copies of the above rules, other than those of the Canadian Bar Association and the Law Society of British Columbia, see "General Rules on Confidentiality and on Conflicts", paper prepared by the Federation of Law Societies of Canada, November 6, 2001.)
> *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 at 346 (C.A.), Respondent's Authorities, tab 16

74. The application of Part 1 of the Act to legal counsel puts them in a position of immediate conflict of interest. It is impossible for legal counsel to give their clients undivided loyalty while simultaneously being required to gather and report evidence on suspicious transactions to the state without the client's knowledge.

75. Solicitor-client privilege is a principle of fundamental importance to the administration of justice, without which clients and lawyers could not engage in the frank and full disclosure that is essential to giving and receiving effective legal advice.

> *Smith v. Jones*, [1999] 1 S.C.R. 455 at 476, para. 50
> *General Accident Assurance Co. v. Chrusz, supra* at 346

76. The implementation of s. 5 of the Regulations threatens solicitor-client privilege by requiring legal counsel to divulge potentially privileged information regarding their clients in a Suspicious Transaction Report, including the name and address of the client and the grounds of suspicion. Although s. 11 of the Act provides that legal counsel are not required to disclose information subject to solicitor-client privilege, there is no definition of that term in the legislation.

77. Client confidentiality and the duty of legal counsel to protect it is a substantive rule. Legal counsel have a duty to hold in strict confidence all information acquired in the course of their professional relationships concerning the business and affairs of their clients and are prohibited from divulging such information unless expressly or impliedly authorized by their clients or required to do so. Without confidentiality, the essence of the solicitor-client relationship is destroyed.

*Descôteaux v. Mierzwinski*, [1982] 1 S.C.R. 860 at 875, Respondent's Authorities, tab 11

78. The Act provides no protection whatsoever for solicitor-client confidentiality. Rather, legal counsel will be required to breach that confidentiality every time they report a suspicious transaction.

79. The privilege against self-incrimination is a principle of fundamental justice under s. 7 of the *Charter* which protects individuals from being forced to assist in their own prosecution.

*R. v. S. (R.J.)*, [1995] 1 S.C.R. 451 at 510-512

80. Applying Part 1 of the Act to legal counsel violates this privilege by compelling legal counsel, as agents of their clients, to incriminate their clients.

81. As Sopinka and Cory JJ. stated in *RJR-Macdonald* (S.C.C.), *supra*, the applicant only needs to cross a low threshold, demonstrating that the application is neither vexatious nor frivolous. The importance of the constitutional issues set out above demonstrates that this application is neither frivolous nor vexatious.

82. In *Whitecourt Roman Catholic Separate School District No. 94 v. Alberta*, the applicants sought an interlocutory injunction to exempt their school districts from the operation of five Orders in Council until a hearing on their constitutional validity. The Orders in Council, which had not been implemented at the date of the application for interlocutory relief, were to carry out the provincial government's plans to restructure education. The applicant school districts would be dissolved and their assets would be transferred to other regional boards.

*Whitecourt Roman Catholic Separate School District No. 94 v. Alberta* (1995), 169 A.R. 195 (C.A.)

83. The Court of Appeal agreed with the conclusion of the chambers judge that the case raised a complex issue as to whether the Orders in Council would prejudicially affect Albertans' constitutional rights to denominational school instruction, and as a result there was a serious question to be tried.

*Whitecourt, supra* at paras. 23-24

84. As in *Whitecourt*, this case involves a question of whether the impugned provision of the Regulations will prejudicially affect the rights of all Canadians to an independent bar, the undivided loyalty of legal counsel, and other vital constitutional rights.

85. As in *Harper, supra*, in this case there is a real question of the constitutionality of the challenged provisions, and s. 1 of the *Charter* may be determinative.

*Harper v. Canada* (S.C.C.), *supra* at para. 4

86. The applicant submits that the low threshold of a serious issue to be tried is met in this case in regards to Part 1 of the Act.

**(2) Part 3 of the Act**

87. Section 62 of the Act, as it presently reads, provides for a warrantless search of a lawyer's office and thus authorizes a search which is *prima facie* unreasonable and in violation of s. 8 of the *Charter*.

*Hunter v. Southam Inc*., [1984] 2 S.C.R. 145

88. There is also a serious issue to be tried in regards to the validity of the application of ss. 63 and 64 of the Act to legal counsel.

89. Sections 63 and 64 of the Act are quite similar to ss. 487 and 488.1, respectively, of the *Criminal Code*.

*Criminal Code*, R.S.C. 1985, c. C-46 (the "Code") (See Appendix "B)

90. Section 487 of the Code provides that a justice of the peace may issue a warrant authorizing the search of a building, receptacle or place where there are reasonable

grounds to believe that there is in that place, *inter alia*, anything in respect of which an offence under the Code or other legislation has been or is suspected to have been committed, or other offence-related property. This provision is fairly similar to s. 63 of the Act in respect of the search of a dwelling house.

91. Section 488.1 of the Code provides a procedure whereby a lawyer may claim solicitor-client privilege. The procedure set out in this provision is substantially similar to s. 64 of the Act, but with the following primary difference:

(a) unlike ss. 64(10) of the Act, s. 488.1 of the Code does not require the lawyer to provide the searching person with the last known address of the client on behalf of whom privilege is claimed in order that the searching person may contact the client to "give the client an opportunity … to waive the privilege before the matter is to be decided by a judge."

92. This aspect of s. 64 of the Act makes it more egregious than s. 488.1 of the Code.

93. Sections 487 and 488.1 of the Code have been held to be unconstitutional and of no force or effect by the Court of Appeal for British Columbia.

*Festing v. Canada (Attorney General)*, [2000] B.C.J. No. 2278 (C.A. ) (QL)

94. The finding with respect to s. 488.1 of the Code is in accordance with those of four other appellate courts across Canada, each of which has independently found s. 488.1 to be unconstitutional.

*White, Ottenheimer & Baker v. Canada (A.G.)* (2000), 146 C.C.C. (3d) 28 (Nfld. C.A.)
*R. v. Fink* (2000), 149 C.C.C. (3d) 321 (Ont. C.A.)
*Lavallee, Rackel and Heintz v. Canada (A.G.)* (2000), 143 C.C.C. (3d) 187 (Alta C.A.)
Leave to appeal these three decisions has been granted: [2000] S.C.C.A. No. 469 (QL) (hearing set for December 13-14, 2001)
*Canada (Attorney General) v. Several Clients*, [2000] N.S.J. No. 236 (S.C.) (QL), aff'd [2000] N.S.J. 384 (C.A.) (QL)

95. In light of these decisions, particularly that of the B.C. Court of Appeal in *Festing, supra*, there is a very strong argument that ss. 63-64 of the Act are unconstitutional in their application to legal counsel.

96. On these grounds, the applicant submits that the requirement of a serious question to be tried is met in this case in respect of the application of Parts 1 and 3 of the Act to legal counsel.

**(ii) *Irreparable Harm***

**(1) Part 1 of the Act**

97. The applicant submits that the second condition, irreparable harm, is also clearly met in this case, in respect of both Parts 1 and 3 of the Act.

98. If not exempted from the operation of Part 1 of the Act, the reality is that legal counsel across Canada are agents of the state, assisting the state in the investigation of their clients regarding possible criminal offences and providing information to state authorities on such offences.

99. From the moment s. 5 of the Regulations took effect, legal counsel across the country found themselves in an irreconcilable conflict of interest with their clients, struggling to maintain an impossible balance between their duty of loyalty to their clients and their compelled duty, under serious threat to their personal liberty, to gather evidence against those same clients for the state.

100. The obligation which Part 1 of the Act imposes upon legal counsel makes it inevitable that serious breaches of fiduciary duties, including the fundamental duty of confidentiality, owed by counsel to their clients, will occur. Clients will no longer be able to rely on the legal and ethical duty of legal counsel to protect as sacrosanct all confidential information relating to the clients.

101. The privilege against self-incrimination will become moot, as information clients provide to their legal counsel might become reportable, deterring clients from properly informing their legal counsel and thus from obtaining proper legal advice.

102. The public perception of legal counsel as the defender of both their client's interests and the administration of justice will be severely damaged, as the public will be aware that legal counsel must now secretly report on their clients, as a result of this

legislation which undermines the longstanding tradition of an independent bar bound to the client in a fiduciary relationship the hallmarks of which are the duties of loyalty, trust and confidentiality.

103. An independent bar is essential to the maintenance of an independent judiciary which, in turn, is the cornerstone of the rule of law.

*B.C.G.E.U. v. British Columbia (Attorney General)*, [1988] 2 S.C.R. 214
*LaBelle v. Law Society of Upper Canada*, *supra* at 408
*Law Society v. Mangat*, 2001 SCC 67 at para. 45

104. Public confidence in the independence of the judiciary, and hence the bar, is essential to the efficacy of the administration of justice.

*R. v. Lippé*, [1991] 2 S.C.R. 114 at 140

105. Irreparable harm will be suffered by clients and the bar as a result of the implementation of the legislative scheme in Part 1 of the Act in respect of legal counsel. Legal counsel might legitimately take the position that s. 8 of the Act prohibits them from advising their clients of any report made about them. As a result, clients might never know if their right to solicitor-client confidentiality had been breached.

106. If this case takes some time to resolve, involving appeals to higher levels of court, the authorities will be able to gather vast amounts of information which could later be held to be unconstitutionally obtained. If s. 5 of the Regulations is struck down in the end, it will be impossible either to retrieve that unconstitutionally obtained information or to restore the public's confidence in the existence of an independent bar.

107. Furthermore, the relationship of loyalty and trust between legal counsel and clients, whose rights had been infringed in the meantime, will suffer lasting damage. No compensation could reverse the effects of the systemic violations of *Charter* rights that will result from the implementation of s. 5 of the Regulations.

108. In *Harper, supra*, the majority of the Supreme Court of Canada was prepared to assume that this aspect of the test was met. After its decision allowing the legislation to remain in force during the election campaign, the spending limits were later found to be

unconstitutional. The harm caused by the restriction of freedom of speech in the election campaign, through the enforcement of legislation later held invalid, could not be rectified after the election was held.

*Harper* (S.C.C.), *supra* at para. 4
*Harper* (Q.B. No. 1 & 2), *supra*

109. As Professor Cassels discussed in his article "An Inconvenient Balance: The Injunction as a Charter Remedy", it is impossible to remedy the harm done to citizens who are wrongfully denied *Charter* rights, by virtue of laws which are later held to be unconstitutional.

Cassels, *supra* at 299

110. In this case, the confidence of the public in the independence of the legal profession will be irreversibly diminished. As noted by the P.E.I Supreme Court, in granting an interim injunction restraining the respondent from prosecuting the applicant for failure to obey a milk marketing board regulation until the resolution of a constitutional challenge thereto, harm caused to reputation while proceedings progress to their final conclusion may well be irreparable.

*Re Amalgamated Dairies Ltd. and Provisional Milk Marketing Board* (1984), 14 C.C.C. (3d) 421 (P.E.I.S.C.)

111. In *Whitecourt*, *supra*, the Court of Appeal reasoned that the dissolution of the applicant boards constituted irreparable harm, even though they might later be reconstituted. The harm caused by decisions made in the meantime, and the loss of self governance, would be irreparable.

112. In this case, if interlocutory relief is denied but s. 5 of the Regulations is later found unconstitutional, decisions made by clients and legal counsel in the meantime will cause harm that can never be remedied. On this basis, the applicant submits that the requirement of irreparable harm is established in respect of Part 1 of the Act.

**(2) Part 3 of the Act**

113. The applicant submits that the same reasoning applies to ss. 62-64 of the Act.

114. The federal Cabinet could bring ss. 62-64 of the Act into force at any time, subjecting to search all persons and entities to whom Part 1 of the Act applies.

115. The applicant does not seek to enjoin Cabinet from bringing ss. 62-64 of the Act into force generally. The applicant only seeks to have s. 5 of the Regulations suspended such that, when ss. 62-64 of the Act are brought into force, legal counsel will be exempted from their application pending the hearing of the Petition.

116. If legal counsel are not exempted from ss. 62-64 of the Act, persons authorized by the Director of the Centre will be entitled to search the premises of legal counsel, without warrant, and compel legal counsel and staff to aid in such searches. The confidentiality of client information, and legal counsel's reasonable expectation of privacy in the information and documents held in their offices, will be violated.

*R. v. Beharriell* (1995), 103 C.C.C. (3d) 1 (S.C.C.)

117. Searches of the premises of legal counsel, including the computers on which information is stored, will potentially result in the disclosure and seizure of information relating to many clients, most of whom will have no connection to the "target" of the search.

*Festing, supra* at para. 37

118. Based on the decision in *Festing*, *supra* and the other cases considered by appellate courts across Canada, it is very likely that ss. 62-64 of the Act will be found to be unconstitutional.

119. If legal counsel are not exempted from ss. 62-64 of the Act but the application of those provisions to legal counsel is later found unconstitutional, the rights violations occasioned by such searches could not be compensated in damages. The state will have obtained potentially incriminating information pursuant to invalid authority. Clients will no longer be secure in the belief that the information provided to legal counsel will be free from search and seizure by the authorities, even if the client has no involvement in suspicious or large cash transactions.

120. In these circumstances, the applicant submits that it has demonstrated the existence of irreparable harm in respect of the application of Part 3 of the Act to legal counsel.

### (iii) ***Balance of Convenience***

121. This is the critical stage of the test for determining whether interlocutory relief should be granted. At this stage, the court must consider the interests of the applicant, the respondent, and the public.

122. As noted in *RJR-Macdonald* (S.C.C.), *supra*, the government does not necessarily have a monopoly on the public interest.

*RJR-Macdonald* (S.C.C.), *supra* at 343

123. Usually, the public interest must be assumed to support the enforcement of legislation, but this assumption may be overcome.

*Harper* (S.C.C.), *supra* at paras. 10, 24
*RJR-Macdonald* (S.C.C.), *supra* at 349

124. In fact, in some cases, as stated in *Whitecourt, supra*, the public interest "does not necessarily lean in favour of implementation of legislation."

*Whitecourt, supra* at para. 37

125. The applicant submits that this is one of those "clear cases" in which the balance of convenience favours the granting of interlocutory relief.

*Harper* (S.C.C.), *supra* at para. 10

### (1) The strength of the applicant's case

126. In *Harper, supra*, the majority stated that courts should "not lightly" issue interlocutory relief preventing the enforcement of a law impugned on grounds of alleged unconstitutionality.

*Harper* (S.C.C.), *supra* at para. 10

127. In *Hogan v. Newfoundland*, representatives of the Roman Catholic and Pentecostal religions challenged legislative provisions placing restrictions on the creation of uni-denominational schools as violating their constitutional rights.

*Hogan v. Newfoundland (School Boards for Ten Districts)* (1997), 149 D.L.R. (4th) 468 (S.C.)

128. The legislation was to be implemented in the coming school year, so the applicants sought an interlocutory injunction preventing the respondent school boards from closing certain existing, uni-denominational schools.

129. The court granted interlocutory relief, in part because the court found that the applicants had a greater likelihood of success at trial than the respondents.

130. In this case, the weight of the applicant's arguments against the constitutionality of the application of Part 1 of the Act to legal counsel makes this an appropriate case to issue interlocutory relief.

131. As discussed above, there is a strong argument that, by conscripting legal counsel to gather information for the purpose of incriminating their clients at the behest of the state, Part 1 of the Act violates the constitutional convention of an independent bar.

132. Part 1 of the Act makes it impossible for legal counsel to uphold their fundamental duty of undivided loyalty to their clients, by putting legal counsel into a position of conflict of interest.

133. Solicitor-client privilege, a substantive rule and a principle of fundamental importance to the administration of justice, is threatened by the reporting obligations imposed on legal counsel in Part 1 of the Act.

134. Client confidentiality, the essence of the solicitor-client relationship, is given no protection whatsoever by the legislation.

135. The privilege against self-incrimination, which is a principle of fundamental justice under s. 7 of the *Charter*, is violated by the conscription of legal counsel against their clients.

136. These arguments demonstrate the weight of the applicant's case under ss. 7 and 8 of the *Charter* in relation to Part 1 of the Act.

137. The applicant's case in relation to the unconstitutionality of the application of Part 3 of the Act to legal counsel is even stronger.

138. As discussed above, s. 62, by authorizing a warrantless search of the offices of legal counsel, is *prima facie* unconstitutional.

139. Sections 63 and 64 are more intrusive than ss. 487 and 488.1 of the *Criminal Code*, respectively, both of which have been found to be unconstitutional by the Court of Appeal for British Columbia, and the latter of which has been found unconstitutional by four other appellate courts.

*Festing, supra*
*White, supra*
*Fink, supra*
*Lavallee, supra*
*Canada v. Several Clients, supra*

140. As a result, the applicant submits that the strength of its case in respect of the unconstitutionality of the application of Parts 1 and 3 of the Act to legal counsel overcomes the principle that a court should not "lightly" issue interlocutory relief.

**(2) The interlocutory relief sought constitutes an exemption**

141. Properly characterized, this application falls squarely within the confines of the "exemption" cases referred to in *Metropolitan Stores* (S.C.C.), *supra* and *RJR-Macdonald* (S.C.C.), *supra*.

142. As discussed above, an exemption case involves exempting a certain person or class of persons from the application of a legislative scheme.

143. The applicants seek to have legal counsel exempted from the operation of Part 1 of the Act, and thereby also exempt legal counsel from search and seizure pursuant to ss. 62-64 of the Act. The remedy sought by the applicants would not affect the operation of the Act in respect of all other persons to which it otherwise applies.

144. Legal counsel represent a discrete and limited class of persons with special duties and powers which are vital to the maintenance of order in Canadian society and the due administration of the law in the interest of the whole community.

> *Andrews v. Law Society of British Columbia, supra*
> *Law Society v. Mangat, supra*
> *RJR-Macdonald Inc.* (S.C.C.), *supra*

145. Granting legal counsel a temporary exemption from the application of Part 1 of the Act accords with the special recognition given to the legal profession in matters pertaining to the administration of justice.

146. The general public interest in the continued application of the law would not be affected by the granting of such an exemption. In this sense, this case is distinct from *Harper*, *supra*, in which the applicant sought the suspension of the legislative restrictions on spending limits in respect of their entire application.

> *Harper* (S.C.C.), *supra*

147. The test for an exemption is less strenuous than that for the suspension of legislation, since allowing an exemption permits the continued application of the law in respect of others. In exemption cases, as Sopinka and Cory JJ. noted in *RJR-Macdonald, supra*, the public interest is much less likely to be detrimentally affected than in suspension cases, and therefore interlocutory relief is more likely to be available.

> *RJR-Macdonald Inc.* (S.C.C.), *supra* at 346

148. Robert Sharpe, in his text on *Injunctions and Specific Performance*, writes that:

> The exemption case exception will prove attractive particularly where the remedy can be fashioned to protect the plaintiff's constitutional claim but at the same time safeguard the general public interest in having the law applied.
>
> Sharpe, *supra* at para. 3.1320

149. That is precisely the situation here. The remedy sought by the applicants would protect the fundamental constitutional principle of an independent bar by exempting legal counsel from the operation of the legislative scheme, without adversely affecting the

public interest in the operation of the Act in respect of banks, accountants, securities dealers and all other categories of persons to which the Act applies. If the interlocutory relief is granted and the search and seizure provisions in Part 3 of the Act are brought into force before the hearing of the Petition, those provisions would apply to everyone to whom Part 1 applies, except legal counsel.

150. In *Whitecourt, supra* all of the school boards affected by the educational restructuring, other than the applicants, had voluntarily agreed to the proposed plan. The applicants therefore sought relief in the nature of an exemption from the legislative scheme. The court noted that "the relief, if given, would not frustrate the entire plan, or compromise the common good as a whole."

*Whitecourt, supra* at para. 38

151. The situation here is similar to that of the applicants in *Whitecourt*. The applicants seek an exemption only for legal counsel. That relief would not frustrate the respondent's plan or compromise the common good.

152. In *Fieldhouse v. Canada*, certain inmates at the Kent federal penitentiary, acting on behalf of all the inmates of that institution, applied to the B.C. Supreme Court for an interlocutory exemption from a newly-implemented program of random urinalysis of inmates, pending a hearing on the constitutional validity of the program.

*Fieldhouse v. Canada*, [1994] B.C.J. No. 740 (S.C.) (QL)

153. Coultas J. granted the application in respect of all of the inmates of the Kent penitentiary, reasoning that the small number individuals involved, relative to the total prison population to which the program applied nationally, had a "direct impact on the weighing of the balance of convenience and the public interest."

*Fieldhouse, supra* at para. 82

154. This application, similarly, involves only a small portion of the total number of people to whom the Act will apply, and therefore the balance of convenience favours the granting of an exemption to legal counsel.

**(3) Granting interlocutory relief will not grant the applicant final relief**

155. On of the reasons the majority at the Supreme Court of Canada in *Harper, supra* stayed the interlocutory relief granted by the trial judge was that it effectively gave the applicant the final relief he sought. Granting the interlocutory relief meant that there would be no legislated spending limits during the federal election campaign that was ongoing at the time.

156. The same problem faced the Federal Court of Appeal in *Re Attorney General of Canada and Gould*. In that case, an inmate in a federal penitentiary challenged the provisions of the *Canada Elections Act* which provided that inmates do not have the right to vote in elections.

> *Re Attorney General of Canada and Gould* (1984), 13 D.L.R. (4th) 485 (F.C.A.), aff'd [1984] 2 S.C.R. 124

157. As a federal election was imminent, the applicant sought interlocutory relief requiring that he be permitted to vote in the election. The application was denied, in part because it would have given the applicant the right to vote in the election, amounting to "a determination that [the applicant], without having had his action tried, is entitled to act and be treated as though he had already won."

> *Re Attorney General of Canada and Gould* (F.C.A.), *supra* at 490, Mahoney J.

158. In both cases, if the interlocutory relief was granted, an ultimate finding upholding the constitutionality of the legislation would be somewhat moot since, in effect, the final relief sought had already been granted. Mr. Gould's vote could not be nullified after the fact, nor could spending in the election campaign at issue in *Harper* be restricted after the election was over.

159. The situation at bar is distinguishable from these cases. In this application, granting interlocutory relief from the operation of s. 5 of the Regulations would not make the final result of the hearing of the Petition moot. If the interlocutory relief is granted but the Petition is dismissed, the respondent would merely be delayed in enforcing the Act and Regulations, and only in respect of legal counsel. Legal counsel would not have exercised a

right which could not be nullified, as would have occurred in *Harper, supra* and *Gould, supra*.

**(4) Interlocutory relief will not unduly inconvenience the respondent**

160. By contrast with the effects of the implementation of s. 5 of the Regulations, the effect of granting interim and interlocutory relief from that implementation is minimal. In fact, the applicants submit that there is little public benefit to be gained by the implementation of s. 5 of the Regulations prior to the hearing of the Petition.

161. The applicant does not challenge the operation of the legislative scheme in respect of any class of persons or entities other than legal counsel. Granting the applicant interlocutory relief will not affect the application of Part 1 of the Act, and hence the suspicious transaction reporting requirement, along with the search and seizure provisions in Part 3 of the Act, if brought into force prior to the hearing of the Petition, to a vast array of persons and entities..

162. Besides legal counsel, the Regulations make life insurance brokers and agents, money services businesses, accountants, real estate brokers and sales representatives, and every department and agent of Her Majesty in right of Canada or of a province subject to Part 1 of the Act.

Regulations, ss. 3,4,6,7 and 8

163. By virtue of s. 5 of the Act, Part 1 of the Act already applies to banks, including authorized foreign banks with respect to their business in Canada, cooperative credit societies, savings and credit unions, caisses populaires, life, foreign life and life insurance companies, companies to which the *Trust and Loan Companies Act* applies, trust companies, loan companies, securities dealers, including investment counsellors and portfolio managers, and persons engaged in the business of foreign exchange dealing.

Act, s. 5

164. Given the length of this list of persons and entities required to report suspicious transactions already, it is difficult to see what additional public benefit is derived from extending the application of Part 1 of the Act to legal counsel.

165. If legal counsel accept a large amount of cash to be held on trust, that cash will have to be deposited into a bank or other financial institution, which is subject to Part 1 of the Act and required to report any suspicious aspect of the deposit.

166. If legal counsel conduct a transaction involving real estate, the real estate broker or sales agent will be required to report any suspicious aspect of the transaction.

167. If legal counsel are involved in the sale or purchase of a business, any accountants involved in the transaction will be required to report any suspicious aspect of the transaction to the Centre.

168. It is difficult to imagine a suspicious transaction of which legal counsel would have knowledge, and of which one of the other classes of regulated persons and entities would not also have knowledge and be required to make a report.

169. That being so, although there is generally assumed to be some public benefit from the operation of legislation, in this case there is very little additional benefit achieved by applying Part 1 of the Act to legal counsel. To put it another way, the harm resulting to the assumed public interest in the operation of the legislation would be minimal.

170. The only logical reason for extending the application of Part 1 of the Act to legal counsel is to obtain from legal counsel the conclusions they make based on their knowledge of confidential and potentially privileged aspects of their clients' affairs. This purpose is the very basis on which the applicants challenge the application of the legislative scheme to legal counsel and submit that interlocutory relief is appropriate.

171. In these circumstances, in which there is little public benefit from the application of Part 1 of the Act to legal counsel, and where there is substantial public benefit from the suspension of such operation, the applicant submits that interlocutory relief is

appropriate. Such interlocutory relief would minimally infringe the legislative intention of Parliament.

**(5) Interlocutory relief is in the public interest**

172. In *RJR-Macdonald*, *supra*, Sopinka and Cory JJ. wrote that the assumption that a public benefit will result from the application of the legislation may be overcome by an applicant who can "demonstrate that the suspension of the legislation would itself provide a public benefit."

*RJR-Macdonald* (S.C.C.), *supra* at 348

173. In this case, the applicant submits that granting interlocutory relief from the operation of s. 5 of the Regulations until a full hearing on the merits of the Petition would benefit the public by preventing substantial and irreparable harm to its constitutional rights. There are numerous aspects to this harm.

174. First, as noted above, the attack on the independence of the bar which this legislation represents will irreversibly affect public confidence in the independence of the bar and in the administration of justice generally.

175. As discussed above, the efficacy of the judicial system depends on the existence of public confidence in the independence of the judiciary. The independence of the judiciary itself depends upon the independence of the bar.

*R. v. Lippé, supra* at 140
*LaBelle v. Law Society of Upper Canada, supra*

176. By conscripting legal counsel as agents of the state, and thus mandating wholesale breaches of solicitor-client confidentiality, the provisions of the Act and Regulations impugned in the Petition undermine that public confidence.

177. Once s. 5 of the Regulations is given effect, permanent damage will be done to the public's perception of the independence of the bar. The public will no longer be able to rely on the fiduciary duties of counsel to clients – the duties of loyalty, trust and

confidentiality. Absent interlocutory relief from the operation of the legislation in relation to legal counsel, a later finding of unconstitutionality will not repair that damage.

178. Second, legal counsel will be placed in the impossible position of attempting to reconcile their duties of loyalty and confidentiality to their clients with their statutory duties to obtain information from their clients in certain circumstances and secretly to report it to the authorities.

179. Third, clients – meaning potentially all Canadians who need to obtain legal advice – will suffer grave injustice, beyond mere inconvenience. Clients will no longer be assured that legal counsel will be loyal to their interests. To the contrary, legal counsel will be required to report confidential but potentially incriminating information about clients to the state. Client confidentiality and the privilege against self-incrimination will be subverted.

180. Similar violations of constitutional rights will occur if interlocutory relief is not granted and ss. 62-65 of the Act are brought into force prior to the hearing of the Petition. Clients will have no protection of their right to confidentiality in the documents held by legal counsel, even if the clients have no connection with money laundering. The reasonable expectations of legal counsel in the privacy of their documents will also be subject to violation "from time to time" by persons authorized by the Director of the Centre to conduct warrantless searches.

181. Finally, the members of the applicant are representatives of the governing bodies of all but a handful of legal counsel in Canada, all of which governing bodies have statutory duties to protect the interests of the public in the administration of justice. Upholding those duties will be virtually impossible if the operation of s. 5 of the Regulations is not temporarily suspended.

182. The provisions of the legislation which are impugned in the Petition conflict with the principles of fundamental justice, and contradict the basic regulatory regimes which the individual members of the applicant have enacted to protect the public.

183. As a result, the damage suffered by the public and the applicant, if the operation of s. 5 of the Regulations is not suspended, would not be merely financial, as in *RJR-Macdonald* (S.C.C.), *supra* and *Metropolitan Stores* (S.C.C.), *supra* but would threaten the rule of law and the administration of justice in Canada.

184. Upholding the principle of the rule of law, does not always mean that the proposed legislation ought to be implemented. In *Super Sam Red Deer v. Lethbridge*, the Alberta Court of Queen's Bench considered an application for an interlocutory injunction restraining the city from enforcing a recently amended Sunday closing by-law, pending trial on the validity of the by-law.

*Super Sam Red Deer (c.o.b. Super Sam) v. Lethbridge (City)* (1990), 104 A.R. 291 (Q.B.)

185. The city argued that the application for an injunction should be denied on the basis of the interest of the public in the rule of law. Conrad J. held that this argument was not supported by the reasoning in *Metropolitan Stores* (S.C.C.), *supra*. Rather, Conrad J. noted that Beetz J.'s judgment recognized the supremacy of the constitution, which "exists to protect and enshrine certain fundamental individual rights."

*Super Sam, supra* at para. 31

186. The purpose of the *Charter* is to constrain government action inconsistent with the rights and freedoms it protects.

*Hunter v. Southam, supra* at 156

187. That principle means that legislation and the democratic process by which it is enacted is subject to the provisions of the constitution. The rule of law does not mean that the application of every law, once enacted, must be deemed to be paramount in the public interest. The courts retain the jurisdiction to suspend the operation of laws in order to ensure that the fundamental rights protected by the constitution are given paramountcy.

*Super Sam, supra* at para. 33

188. Applying these principles to the application before this Court, the applicant submits that the public interest and the rule of law support the granting of the interlocutory relief sought.

**(6) The interlocutory relief sought would prevent harm**

189. One of the purposes of granting interlocutory relief is to prevent harm to the public pending the court's decision on the merits of the case, in effect preserving the *status quo* so the court can render a meaningful and effective judgment.

Cassels, *supra* at 298
*RJR-Macdonald* (S.C.C.), *supra* at 329

190. Granting an interlocutory order temporarily exempting legal counsel from the application of the Act would prevent harm to the public and legal counsel, preserving their constitutional rights pending the outcome of the hearing of the Petition.

191. In certain circumstances, an appropriate way to prevent harm is to preserve the *status quo* until trial, in order to avoid giving one party a remedy prior to the decision onhe merits.

*Re Attorney General of Canada and Gould, supra*

192. This principle can be usefully applied when the challenge is to legislation, the implementation of which is alleged to result in a constitutional violation.

193. For instance, in *Whitecourt, supra*, the Court of Appeal noted that the educational reforms had not yet been implemented. The dissolution of the applicant boards and transferring of their assets, the actions which the applicants alleged would prejudice constitutional rights, had not yet occurred. In that situation, the court held, the preservation of the *status quo* to prevent the alleged violation of rights was appropriate.

*Whitecourt, supra* at paras. 42-43

194. As in *Whitecourt, supra*, the principle of preserving the rights of the parties supports the granting of this application. The applicants seek to preserve the *status quo* existing prior to November 8, 2001. The respondent already has substantial powers of investigation and prosecution in relation to money laundering offences. Legal counsel are not otherwise required to obtain information from their clients for the purpose of secretly incriminating them with the authorities.

195. Denying the application would reverse the *status quo* and allow substantial invasions of the rights of clients and legal counsel, invasions which might later be found to constitute unjustified infringements of the *Charter*.

196. In *Royal Trust Corp. of Canada v. Law Society of Alberta*, the applicants sought an interlocutory injunction suspending the implementation of an amendment to the Rules of the Law Society. The amendment, which was about to come into effect, would have required lawyers in Alberta to reduce their deposits at trust companies to a limit of $60,000 per client.

*Royal Trust Corp. of Canada v. Law Society of Alberta* (1985), 36 Alta. L.R. (2d) 393 (Q.B.)

197. In granting the application, Moore C.J.Q.B. determined that the balance of convenience favoured the applicants. Moore C.J.Q.B. reasoned that:

> If the defendant is enjoined temporarily from doing something that he has not done before, the only effect of the interlocutory injunction in the event of his succeeding at the trial is to postpone the date at which he is able to embark upon a course of action which he has not previously found it necessary to undertake …

*Royal Trust Corp., supra* at para. 16

198. The applicant submits that the same principle applies to this case. As discussed above, if this court grants the interlocutory relief sought, but later finds the impugned provisions of the Act and Regulations to be constitutional, the only effect of the interlocutory order would be to postpone the application of Part 1 of the Act to legal counsel. Such a delay in respect of one class of persons and entities, where the Act already applies to numerous other categories of persons and entities, would not materially prejudice the respondent in respect of its ability to enforce the Act.

199. Preserving the right of the public to an independent bar pending the final determination of the Petition herein requires the granting of the interlocutory relief sought in this application. Absent such relief, that right will be permanently damaged pursuant to legislation which may well be found unconstitutional at a later date.

200. The words of Sopinka and Cory JJ. in *RJR-Macdonald*, *supra* sum up this application and the reason it ought to be granted:

> On one hand, courts must be sensitive to and cautious of making rulings which deprive legislation enacted by elected officials of its effect.
>
> On the other hand, the *Charter* charges the courts with the responsibility of safeguarding fundamental rights. For the courts to insist rigidly that all legislation be enforced to the letter until the moment that it is struck down as unconstitutional, might in some instances be to condone the most blatant violation of *Charter* rights. Such a practice would undermine the spirit and purpose of the *Charter* and might encourage the government to prolong unduly final resolution of the dispute.
>
> *RJR-Macdonald* (S.C.C.), *supra* at 333-334

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated this 13th day of November, 2001

Josiah Wood, Q.C.

Roy Millen

No. L013117
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN

**FEDERATION OF LAW SOCIETIES OF CANADA**

PETITIONER

AND

**ATTORNEY GENERAL OF CANADA**

RESPONDENT

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# REVISED MEMORANDUM OF ARGUMENT OF THE PETITIONER ON THE MOTION FOR INTERLOCUTORY RELIEF

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Solicitors for the Petitioner:
Blake, Cassels & Graydon LLP
Suite 2600, Bentall Centre Three
595 Burrard Street
Vancouver, B.C. V7X 1L3
Telephone: (604) 631-3300

Counsel: Josiah Wood, Q.C
Roy Millen

Solicitors for the Respondent:
The Attorney General of Canada
Justice Building
284 Wellington Street
Ottawa, ON K1A 0H8
Telephone: (613) 957-4222

Counsel: Harry Wruck, Q.C.

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